IN THE SUPREME COURT OF FLORIDA

MARTIN PUCCIO, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 86,242

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Seventeenth Judicial Circuit of Florida, In and For Broward County.

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PRELIMINARY STATEMENT

Appellant was the defendant and Appellee was the prosecution in the Seventeenth Judicial Circuit, Broward County, Florida. In the brief, the parties will be referred to as they appear before this Court. The following symbols will be used:

"R" Record on Appeal

"SR" Supplemental Record (PSI)

STATEMENT OF THE CASE

Appellant, Martin Puccio, was charged by indictment with one count of premeditated murder and one count of conspiracy to commit premeditated murder R3334. Jury selection began on September 8, 1994. Appellant was found guilty as charged of both counts R2744. The jury recommended the death penalty, 8-4 R3087. The trial court sentenced Appellant to death for the murder R3251. The trial court departed from the guidelines and sentenced Appellant to thirty years for the conspiracy charge R3251. Timely notice of appeal was filed R3811.

STATEMENT OF THE FACTS

GUILT PHASE

Tuesday, July 13, 1993, co-defendants Alice Willis, Donald Semenec and Heather Swallers drove from Palm Bay to co-defendant Lisa Connelly's house R1642. Lisa Connelly was Alice Willis's best friend and Appellant's girlfriend R1638-39. Donald Semenec was Alice Willis's current boyfriend, and the victim, Bobby Kent, was her former boyfriend

R1639. Heather Swallers testified for the state that Lisa Connelly and Alice Willis wanted to kill Bobby Kent, and they went to the home of co-defendant Derek Kaufman to obtain a firearm for that purpose R1711-1712. Alice Willis said she wanted to kill Kent because he was coming to Palm Bay to shoot her R1714.

Unable to obtain a firearm from Derek Kaufman, Lisa Connelly and Alice Willis went to Connelly's house and got Connelly's mother's gun R1714. Connelly and Willis dropped Donald Semenec and Heather Swallers off at a friend's house, while they took Kent to a remote area to kill him[1] R1714. However, Connelly and Willis returned with Kent R1714.

That evening, Kent, Lisa Connelly, Heather Swallers, Alice Willis, and Donald Semenec went to Appellant's house R1650. Swallers, Semenec, Connelly, and Appellant stood in front of Appellant's house, while Willis and Kent walked down the street R1651. Swallers testified that there was **a conversation about** "Bob needs to be killed; Bobby needs to be dead" R1652. Swallers testified that Appellant said "Bobby needed to be killed" because "[i]t would stop him from beating him up" R1652-53. Connelly agreed R1653.

Alice Willis returned and she, Connelly, Semenec and Swallers left R1654. Appellant went back inside his house R 1655. Connelly **and** Willis said they had taken Bobby Kent out to Weston that afternoon.

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[1] Kaufman had suggested the site, a remote area in Weston (R 1714).

They were going to shoot him but were afraid to fire the gun R1655. Willis, who was upset and shaky, said that Kent had raped her R1655.

Connelly snuck Willis, Swallers, and Semenec into her bedroom where they spent the night R1657. The next day (Wednesday), Lisa Connelly's cousin, co-defendant Derek Dzvirko came over. Wednesday evening, Dzvirko, Semenec, Willis, Connelly, and Swallers obtained a baseball bat from a friend of Dzvirko's R1664, Swallers said the conversation was about using the baseball bat on Bobby Kent because he raped Willis R1664-1665. Swallers also testified that Donald Semenec had a diver's knife with a long blade R1666.

After they got the baseball bat, Connelly and Willis made a phone call from the K-Mart Plaza; they then picked up Derek Kaufman, and the six of them (Dzvirko, Kaufman, Semenec, Swallers, Willis, and Connelly) went to Appellant's house R1668. Swallers did not know whether Appellant was going to be involved in the attack R1670. On the way to Appellant's, Kaufman bragged that he was the leader of a gang called the "Crazy Mother Fuckers" R1670. He had "CMF" tattooed on his arm R 1671. Swallers said Kaufman was a "real bad dude" and was intimidating at six foot three, two-hundred forty pounds. Derek Dzvirko was also big R1747.

At Appellant's house everyone got out of Willis's car R1672. There was a conversation about killing Bobby Kent R1673. Swallers testified that Appellant said that he wanted Bob Kent dead R1675. Asked whether he said why he wanted him dead, Swallers answered that Kent was wrecking

Appellant's life and "was beating him up all the time"[2] R1675. Swallers testified that at this point, the group was trying to decide who would stab Kent first R1676. Semenec said that he would do it first[3] R1676. Appellant had a pipe about a foot long and he said that he could use it to hit Kent R1678. Appellant also had a diver's knife. Appellant tossed the pipe in the trunk of his mother's car R1679. The group spent fifteen minutes talking about how they were going to kill Kent R1679.

when Kent arrived, they told him they were going to race cars R1682. Kaufman, Connelly, Dzvirko, and Appellant were in one car R1682. Kaufman hid in the car because he did not want Kent to see him R1681. Kent, Semenec, Willis, and Swallers got in Willis' car R 1682. Willis was to pretend she was getting back with Bobby Kent R1682.

When they got to the remote area in Weston, Kent and Willis walked toward a canal R1684. Kaufman sat on the hood of one car R1684. Connelly and Swallers called out for Willis, asking her to come up by the cars R1686. Willis said wait R1686. Swallers walked to Willis and Kent R1686. Swallers, Kent, and Willis were standing at the edge of the canal talking and joking around R1687.

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[2] Asked, "Do you remember anything else that Marty said [the night before the killing]?" Swallers answered, 'He told us he went over a curb one time with [Kent] in the car, and [Kent] punched him in the face or something." R1744.

[3] Swallers testified that Donald Semenec was angry with Kent because he knew that Willis said Kent raped her the night before R1750.

Swallers testified that Donald Semenec came up behind Kent and stabbed him in the back of the neck R1687. Kent said, "oh, fuck" and grabbed the back of his neck R1689. Swallers ran to Willis' s car and got in the back seat R1689. Swallers heard Kent say a couple of times "Marty, I'm sorry" R1690.

A couple of minutes later Willis got in the car, started it, and turned the lights on R1690. Derek Kaufman told her to 'shut the fucking car off" R1691. Before Willis did so, Swallers saw Kaufman, Semenec, and Appellant standing around Kent R1691. Swallers testified that this was the only time she saw Appellant at the scene R1694-1695. Dzvirko got in the car for a couple of seconds and then got out R1691.

Swallers heard Kent moaning near Willis's car R1692. Asked, "Did you see anybody around him at that time?" Swallers answered, "Derek Kaufman brought the baseball bat over." R1693. Swallers turned her head and did not see anything, but the moaning stopped R1693. Kaufman said he needed someone to help him carry the body to the water R1693. Swallers did not see whether anyone helped Kaufman R1694.

Willis, Dzvirko and Semenec got in the car with Swallers R1695. Both cars went to the beach R1696. At the beach, Appellant said he did not have the sheath to his knife R1696. Appellant, Kaufman and Willis returned to Weston to retrieve it R1696. Dzvirko, Semenec, Connelly and Swallers stayed at the beach R1697.

Connelly cleaned out the car R1698. Connelly said she could smell blood R1698. Swallers, at Lisa Connelly's suggestion, buried her shoes in the sand R1699. Semenec buried the knives R1699.

Appellant, Kaufman, and Willis returned with the sheath R1700. Someone dug up the knives and threw them in the water R1700. The seven sat and talked about an alibi R1701. The plan was that Kaufman, Semenec, and Dzvirko were never with them, and that Appellant, Willis, Swallers, and Connelly went to South Beach R1703-1704. They would say that Kent went out with a girl he worked with at Publix R1702. Kaufman threatened that if anyone turned him in he would kill them R1764.

Asked, "Did Marty make any comments while you were at the beach about what he had done to Bobby Kent?" Swallers answered, "He had said that he stabbed, I guess, in the upper chest part. In the heart or something that's all I remember him saying." R1704. However, Swallers admitted that in her statement to Detective Palmer she did not tell him about Appellant's statement R1727-1728.

After they discussed the alibi, they walked their separate ways along the beach R1705. Willis began to cry. Swallers told her not to because if they had not killed Kent he would have killed her (Willis) and her baby R1705.

The seven co-defendants left the beach R1706. After dropping Dzvirko off at his house, the rest went to Connelly's house R1706. Appellant and Connelly stayed at Connelly's, while Willis, Semenec, and

Swallers took Kaufman home R1707-1708. After they returned to Connelly's house, Appellant left R1708. Willis, Semenec, and Swallers snuck inside again and spent the night R1709.

The next day Connelly and Willis left and returned with Dzvirko and Kaufman R1709. The six of them were there until approximately 3:00 in the afternoon R1709. Willis, Semenec, and Swallers took Kaufman home and then returned to Palm **Bay** R1700.

Swallers pled guilty to conspiracy to commit first degree murder and was allowed to plead guilty to the lesser offense of second degree murder R1715. In return for her testimony, Swallers would receive a sentence of seven to fifteen years R1715.

Derek Dzvirko testified for the state that Lisa Connelly is his cousin and that he went to her house Wednesday, July 14, 1993 R1773-1774. At Connelly's house were Semenec, Willis, Connelly, and Swallers R1774-1775. Willis told Dzvirko, "I have a problem . . . We got to kill Bob" R1775. Willis said Kent tried to rape her the night before R1775. Dzvirko testified, "Everybody just kind of jumped in the conversation at one time, it **was** like, we got to get rid of him; he's making everybody's life miserable. Alice told me, he threatened to kill me and my baby if I didn't go back to him" R1775. They discussed methods of killing Bobby Kent such as poisoning, knife, bat, shooting, etc. "Things you see in movies." R1776.

About an hour later, Dzvirko went across the street to a comic book store where he spent the afternoon R1776. Semenec joined him there later R1778. The girls stopped by and said they were going to meet someone named Derek Kaufman R1778. Dzvirko told them to beep him when they got back R1778. Semenec went with the girls R1778.

Dzvirko went back to Connelly's house about 5:00 p.m.; Connelly, Willis, Semenec, and Swallers were in Connelly's bedroom R1778. They said they *were* on a three-way phone conversation with Derek Kaufman and Appellant R1779. Dzvirko and his Aunt (Lisa Connelly's mother) went out to eat R1779. When Dzvirko returned, they said they were going to pick up Kaufman R1782. They asked Dzvirko if he could get a baseball bat R1782. Dzvirko told them to stop at the comic book store so he could use the phone R1782. On the way there, Semenec pulled out a knife and asked Dzvirko if it looked sharp R1783. When the girls could not decide who would 'do it," Semenec said, "You're all pussies; 1'11 do it" R1849.

After Dzvirko obtained a bat from a friend, they picked up Kaufman R1790. Dzvirko asked Kaufman what the "CMF" tattoo on his arm stood for R1791. Kaufman said the "Crazy Mother Fucker" gang, Davie Boy Chapter R1791. Kaufman said he was a "Godfather CMF", i.e., head of the chapter R1791. Dzvirko asked where they were going R1790. One of the girls said they were going to pick up Appellant R1790. Dzvirko rolled his eyes, and Kaufman asked why R1790. Dzvirko said he did not like

Appellant R1790. Kaufman said "Don't worry about it, nothing's going to happen" R1790. Dzvirko said, 'I hope you're right" R1790.

Appellant was outside his house R1793. Kent arrived around 11:30 p.m. R1794. Appellant, Connelly, Kaufman, and Dzvirko got in one car R1794. Willis, Kent, and Swallers got in Willis's car R1795. Kaufman asked Appellant if they each knew what to do, and Appellant said yes R1799. Kaufman asked Dzvirko what he was going to do, and Dzvirko said he was not going to do anything R1800.

At the scene, Willis and Kent walked toward the canal R1802. Kaufman took the baseball bat out of the trunk R1804. Semenec had his knife R1804. Appellant showed Kaufman a pipe about a foot long and asked him if it was hard enough to knock someone out R1804. Kaufman tapped it on his hand and said it was R1804. Kaufman handed the pipe to Dzvirko and asked, "Are you sure you're not going to do nothing" R1804. Dzvirko said he was not R1804. Kaufman put the pipe back in the car R1805. Kaufman told Semenec and Swallers that the signal would be to ask if there were any alligators in the canal R1805.

when Kent and Willis walked near the canal, Semenec and Swallers approached, and Appellant followed R1806. Kaufman, Connelly, and Dzvirko stood by the cars R1807. Swallers asked if there were any alligators in the canal R1807. Dzvirko saw Semenec stab Kent in the back of the neck R1807. Semenec backed up with the knife in his hand R1807. Kent turned around and said "What the fuck is your problem" and

started toward Semenec as if to fight him R1808. When he realized he was bleeding, he looked at Appellant, said his name, at which time Appellant hit him in the abdomen with something that caused Kent to double over in pain[4] R1808. Kent said, 'No please, I'm sorry" and ran R1809. Kaufman screamed, "get him" R1809. Kaufman, Semenec, and Appellant ran after him R1809.

Dzvirko got into Willis's car with the three girls R1809. Dzvirko screamed "Go" R1810. Willis started the car and turned the lights on R1810. Dzvirko saw Kent on the ground. Kaufman had the baseball bat and stood over Kent R1810. Donald Semenec was crouching over Kent and pulling something out of Kent's chest; Dzvirko did not see what it was, but he knew that Semenec had a knife R1810, 1860-1861. Dzvirko did not see Appellant R1810. Dzvirko testified that there was no doubt in his mind that Appellant was not around Kent at this time R1859-1861. Kaufman yelled at Willis, "turn the car off; turn the lights off; we ain't done" R1810. Before Willis turned off the lights, Dzvirko saw Kaufman's hands go up with the bat, and as the lights went out Dzvirko heard a crack R1810. Dzvirko heard the swishing sound of water R1811. Willis drove forward R1811. Kaufman yelled at her to turn the car off, while Dzvirko yelled at her to go R1811.

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[4] On cross-examination, Dzvirko testified that he did not see whether Appellant had a knife when he hit Kent in the stomach, and thus could not say whether he saw Appellant stab Kent R 1867. On re-direct examination, Dzvirko testified that he did see Appellant with a knife R 1879.

Willis turned the car off R1811. Kaufman was yelling for someone to come help him finish it R1811. He yelled, "They have to finish it" several times R1811. Kaufman walked to the car and told him to help him finish R1811. Seeing what Kaufman had just done, Dzvirko did not argue with him R1812. Dzvirko got out of the car R1812. Connelly said she wanted to be with Appellant so she ran to Appellant's car R1813.

Kaufman asked for a pair of gloves, and someone handed him a pair of latex gloves R1812. Kaufman said they had to conceal the body and take Kent's wallet so he will be harder to identify R1812. Kaufman and Dzvirko carried Kent to the canal bank where Dzvirko dropped him and ran back to the car R1812. Kent was making a wheezing sound and his shirt was covered with blood Rl812.

Dzvirko got in one car along with Swallers and Semenec. Willis drove away R1813. The other car pulled along side and Kaufman yelled that they were going to the beach R1813.

At the beach, Kaufman gave the bat to Dzvirko and told him to wipe it down R1817. Kaufman asked if they had the sheath to Appellant's knife R1817. When they could not find it, Kaufman said they had to go back to the scene and get it because it was plastic and might have fingerprints on it R1817. Kaufman, Willis, and Appellant drove back to the scene R1818. Dzvirko asked Semenec if he was all right R1819. Semenec said, "Yeah, I'm all right. I had to get him. I had to get him

before he got my girl. There was no way I was going to let him kill my girl" R1819.

Kaufman, Willis, and Appellant returned with the sheath R1820. Kaufman and Semenec threw the knives in the water R1820. After that, the group got together to form an alibi R1820-1821. The story would be that Connelly, Willis, Swallers, Appellant and Semenec went to South Beach; Appellant would call Kent's father in the morning and ask for Kent R1820-1821. Kaufman threatened that if anyone mentioned his name, they would be dead before the end of the week R1831. Semenec also threatened the others; he said if he got caught, he would "blow whoever told away" R1831-1832.

Dzvirko testified that he did not hear Appellant say anything about what he had done to Kent, and did not see or hear Appellant say anything to Swallers R1873.

Willis took Dzvirko home around 3:00 a.m. R1822. At 9:00 or 10:00 a.m., Connelly called and said they wanted him to come over so they could go over the alibi R1822-1823. Willis and Connelly picked up Dzvirko. They went to the scene and saw that the body was still there R1823. Connelly and Willis attempted to erase the tread marks in the sand R1824. Afterwards, they picked up Kaufman and went to Connelly's house. Everyone from the night before was there except Appellant R1824.

Sunday, July 18, 1993, Dzvirko took Detective Illarraza to the scene where Kent's body was found R1829. Like Swallers, Dzvirko pled

guilty as charged to conspiracy to commit first degree murder and was allowed to plead to the lesser included offense of second degree murder R1829-1830. In exchange for his testimony, Dzvirko would receive a sentence between seven and twenty-two years in prison R1830.

Daniel Selove, the medical examiner, testified that he went to the scene on July 18, 1993, and saw Kent's body lying face down at the water's edge R1921. The autopsy revealed five wounds to the back area, consisting of: a stab wound to the back of the neck, an inch to two-inches deep; one to the back of the head, scalp deep; and three superficial stab wounds to the right shoulder R1932. Frontal wounds consisted of a stab wound to the left upper chest, penetrating the heart; a stab wound to the right abdomen, penetrating the intestines; two incised wounds to the throat, cutting the windpipe; a stab wound to the right arm, one to two inches deep; and a superficial cut on the left thumb tip, characteristic of a defensive type wound R1932,1938. There was blunt trauma to Kent's right scalp that may have rendered him unconscious R1952. Kent's neck was fractured R1954.

The stab wound to the heart was fatal and consciousness was lost within fifteen to thirty seconds R1945. The two slits to the throat were rapidly (minutes) fatal R1940.

Selove testified that one weapon could have caused the various stab wounds, but he could not rule out the possibility of more than one weapon R1971. The abdomen wound and heart wound are so similar that Dr.

Selove thought it likely they were made in close proximity of time R1999-2001. On cross-examination, Dr. Selove testified that Kent's neck had been sliced ("incised") not stabbed R1980.

Fred Kent, Bobby Kent's father, testified that at four a.m. Thursday morning, he received a phone call R2007. Appellant was on the line and said, 'Bobby this is Marty Puccio. You told me to call you when you get home; I'll talk to you tomorrow" R2007. Appellant hung up.

At noon, Mr. Kent went to Appellant's house to see if Bobby spent the night there R2008. Appellant appeared nervous and shaky R2008. Mr. Kent asked what happened to Bobby R2008. Appellant said he went out with a girl from Publix and that maybe the gangs got a hold of him R2008. Mr. Kent said they should report this to the police; Appellant said they should wait R2009. Mr. Kent went home and called the police R2009. Appellant arrived to help with the report R2009.

Officer Ramsey took the missing person report from Mr. Kent R 2017. Appellant told Officer Ramsey that he last saw Kent at midnight, and that Kent went out with a girl from Publix R2026. Detective Hoffman took a taped statement from Appellant on July 16, 1993 R2047. Appellant told Detective Hoffman that he last saw Kent waiting at the corner for his date R2053. Appellant went to South Beach with Semenec, Willis, Swallers, Connelly and Dzvirko R2049. Hoffman told Appellant that he had information that Kent was stabbed and his body dumped in Weston R2054-2054. Appellant denied any knowledge of that and said he feared

Kent's disappearance was gang related R2054. Appellant said that Kent was in the "Evil Nation" gang and that he has had trouble with the "Davie Boys" gang R2054-2055.

Maureen Connelly testified that she took Appellant and her daughter, Lisa Connelly, to a hotel on July 18, 1993 R2067. Ms. Connelly knew that her nephew, Derek Dzvirko, was with detectives R2067. Ms. Connelly told her daughter that she would be back the next day to take her to an attorney's office to turn herself in R2068. When she came back the next day, Ms. Connelly suggested to Appellant that he turn himself in R2068. A day or two later, Appellant did so R2069.

Thomas Lemke testified that he was a friend of Derek Kaufman's R2084. Lemke did not know Appellant and had never met him R2085-2086. Over defense objection,[5] Lemke testified that a "Marty" called and told him that Kaufman was in jail; "Marty" said he needed help in getting out of the state R2088. Lemke did not know how 'Marty" got his phone number, but said that Kaufman had given out his number before R2089. Lemke and "Marty" spoke three or four times that day. Lemke told him that he would see if he could get some money to help him out R2091. Meanwhile, Lemke spoke to Kaufman who said that it was over, and that "Marty" should turn himself in. Lemke relayed this to "Marty" R2097.

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[5] Defense counsel objected on the ground that Lemke did not know Appellant's voice (R 2086-88). Lemke testified that he had never heard this voice before (R 2101).

Michael Colletti testified that he was a friend of Derek Kaufman's R2172. July 1993 Colletti burglarized a house and stole some guns R2173. Over defense hearsay objection, Colletti testified that July 9, 1993, Kaufman told him that he wanted the guns to kill someone R2174,2180-2181. Kaufman did not say who the intended victim was, but he did say that the intended victim's best friend could give him a house to burglarize R2179. Colletti could not provide the guns because they had already been sold R2180.

Kenneth Calamusa testified that he was in jail with Appellant until August 24, 1993, and that they spoke every day R2107. According to Calamusa, Appellant told him that he took part in luring Kent out to a remote area and stabbing him R2109. Someone stabbed him in the neck, and Appellant stabbed him in the stomach R2109. When Kent ran, they ran after him R2110. They caught up to him and someone "wacked him with a baseball bat" R2110. Asked what happened after that, Calamusa answered, "Then Marty was cutting the throat, and someone else came up and told him not to do it like that, in that manner. So he plunged the knife in his neck . , . then him and two other guys picked up the body and started bring it towards the water. And one of the guys couldn't do [it], he dropped the body, he said he couldn't do it" R2111. Kaufman and Appellant threw the knives in the ocean R2111. Appellant said he did this because "Bobby used to pick on him or something in that manner" R 2111. Asked, "Did he tell you about any other plans to kill Bobby

Kent?", Calamusa answered, "Umm, something about a gun that this girl was supposed to take a gun from her mother and they were going to shoot him, but nobody could do it" R2113.

On cross-examination Calamusa testified that he has no idea how many felony convictions he has, and that he is currently on two years probation, which he hopes to terminate early R2103,2116. Calamusa claims never to have seen or heard about the case in the media R2138. Calamusa was adamant that Appellant said he stabbed Kent straight into the throat R2133.

Tommy Lee Strong testified that he was a cellmate of Appellant's for two or three weeks R2146. They started talking when Strong saw Appellant's picture in the paper R2148. Asked, "What did he tell you about the crime" Strong answered, "He told me that --umm, he committed the crime. He did it you know." R2148. Strong testified that Appellant said he ripped the knife down Kent's stomach and that he and his friends beat him with a bat R2149. On cross-examination, however, Strong testified that Dzvirko, who was also his cellmate, told him about the bat R2154. Strong testified that Appellant said he did not mean to do it and Strong believed him R2151.

Over defense objection, Detective Murray told the jury what Derek Kaufman told him July 19, 1993 R2233. Kaufman said that he and Dzvirko carried Kent's body to the water's edge R2233. Dzvirko dropped Kent and walked away R2233. Appellant then helped him put Kent's body in the

water R2233. Kaufman said that Appellant cut Kent's neck laterally and in a jabbing motion R2233.

DEFENSE CASE

Eileen Traynor testified that she introduced Lisa Connelly to Derek Kaufman on July 13, 1993 R2283. Traynor went with Connelly, Willis, Semenec, and Swallers to Kaufman's house that day to enlist Kaufman in killing Kent R2286-2287. At Connelly's house afterwards, Connelly showed Traynor her mother's gun and said she wanted to shoot Kent with it R2291.

Catherine Della Vedova testified that the night of July 13, 1993, Alice Willis and Lisa Connelly dropped off Semenec, Swallers, and Traynor at her house R2312-2313. Swallers and Semenec said Willis and Connelly were going to kill Kent R2316. However, Connelly and Willis returned with Kent R2315. Semenec said he should have gone with Willis to make sure they did it R2321. Willis showed Della Vedova the gun they were going to use R2318. During the evening, Appellant's name did not come up in reference to the plot to kill Kent R2318.

Appellant testified Kent was a bully who was physically abusive to him R2371-2374. Kent took steroids and this increasedhis rages R 2384. Swallers, Semenec, Kent, Willis, and Connelly came over to Appellant's house on July 13, 1993 R2380. Willis and Kent walked down the street to Kent's house R2386. Appellant and Connelly spoke privately about her pregnancy R2386. Connelly said they had gone out to the west end of the

county to race Willis's new car R2389. Appellant denied there was any conversation about killing Kent R2390. Appellant said Swallers appeared "spaced out" and on drugs; Appellant never expressed a desire that Kent be dead in front of Swallers or anyone else R2390

When they left, Appellant went inside R2390. Kent came over later and said that he had raped Willis because she would not "give it up" R2391-2392. Connelly called Appellant and asked if he wanted do something that night R2394. At eight p.m., Connelly called and said they were going to race Willis's car in the Weston area R2394. Appellant called Kent and told him the plans R2397. Kent said he would like to go but he warned that was "Davie Boy's" territory and to bring a weapon R2397.

Around 11:15 p.m., Connelly, Willis, Swallers, Semenec, Dzvirko, and Kaufman, who was introduced to Appellant as "Ronnie," arrived R2398. Kaufman was big and "pretty much scary looking" R2403. Kent arrived a few minutes later R2399. Pursuant to Kent's suggestion, Appellant had a diver's knife strapped to his leg which he did not try to conceal from anyone R2402. Appellant also put a pipe under the passenger's seat of his mother's car R2402.

They drove out to Weston and parked R2407. Appellant and Connelly talked R2408. Kent and Willis took a walk, and were joined at the canal's edge by Semenec and Swallers R2409. Appellant heard them joking and laughing R2409. Suddenly, Semenec lunged back and stabbed Kent in

the back of the neck R2410. Appellant thought Semenec was crazy R2410. Semenec ran back toward the car R2411. When Kent turned around, Semenec was not there R2411. Kent, who was enraged, looked at Appellant and said, "You mother fucker. I will kill you" R2411. Familiar with Kent's rages, Appellant was afraid R2411. When Kent started walking toward him, Appellant swung his knife at him from right to left R2411. Appellant did not stab him in the stomach or chest R2411. Appellant thinks he hit Kent in the hand or arm R2412. Appellant ran to his car; Kaufman and Semenec chased Kent R2412. A couple of minutes later, Kaufman and Connelly got in the car and told him to drive R2413. As Appellant drove, Kaufman told them about his gang affiliation and that if they talked he would kill them R2415.

At the beach Kaufman and Semenec threatened the group and told them the alibi R2421. At Connelly's house, Kaufman had Appellant call Kent's house and ask for Kent so it would look like he had not been with him R2422. Appellant persisted with the story to Mr. Kent and the police out of fear of Kaufman R2422.

Appellant testified that he called the number Kaufman gave him (Lemke's), but did so to see if Kaufman had been arrested R2425. Appellant denied that he asked Lemke for money R2426.

Appellant testified that he did not speak to Strong or Calamusa about his case; both of them read the newspapers, and Strong was in a cell with Dzvirko R2427-2428.

PENALTY PHASE

At the penalty phase the state relied on the evidence introduced at trial and produced no new evidence R2864.

Appellant's mother, Veronica Puccio, testified that she and her husband of thirty years, Appellant's father, have lived at 2111 North 42nd Avenue in Hollywood for eighteen years R2852. Appellant is 21 years old R2854. He has two brothers, Tony, 28, and Chris, 26 R2853.

Mrs. Puccio described Appellant as a child as a "very fun loving child. Wonderful personality. We called him our Lover Bug. He was just extremely loving and caring and fun" R2854. Appellant got good grades in school until he went to South Broward High school when he was 14 R2860. Appellant and Bobby Kent began skipping school and smoking marijuana together R2860. Once when Mrs. Puccio discovered the two of them smoking marijuana in her house, she ordered Kent to leave and he refused R2862. From then on, Kent was unwelcome at their house and she did not want Appellant hanging around him, though she was certain that he continued to do so R2862.

Over the next several years, Appellant's drug use continued, despite therapy, drug rehab, and a six-month stay at his Aunt's house in New York R2867. It finally reached the point where Appellant was admitted to the Coral Ridge Psychiatric Hospital for secure inpatient treatment R2867-2868. Appellant stayed there thirty-one days, until their insurance money ran out R2871. When he got out there was

noticeable improvement for a while R2872. Unfortunately, when Appellant started the eleventh grade, he began to deteriorate again R2874. He and Kent started sneaking out at night R2874. Mrs. Puccio testified that they tried counseling at Broward Addiction Rehabilitation Center R2878.

Dennis Day, a psychologist, evaluated Appellant at Coral Ridge Hospital in June of 1990 R2891. Appellant showed an average to high average intellectual potential that had suffered in its development R2894. Appellant was physically immature for his age, and appeared to be three years younger than he actually was R2894,2897. Appellant used marijuana from an early age R2895. His personality development was at an immature level R2895.

Dr. Day evaluated Appellant after the verdict R2896. Day saw a continuation of some of the things he had seen three years earlier R2900. Appellant had a passive/dependentpersonality; he was a follower rather than a leader R2900. Day thought it unlikely that Appellant could have committed this crime by himself, and that he was influenced by the others R2902. Day thought Appellant's rehabilitation was possible R2902.

Christopher Puccio, Appellant's older brother, testified that he and Appellant were best friends until he joined the navy when Appellant was fourteen R2917. When he got out of the navy, Appellant had changed R2920. Appellant was hanging around Kent and getting in trouble R2920.

Father Sean Mulcahy testified that he is the pastor of St. Maurice Catholic Church R2923. Father Mulcahy has had extensive contact with the Puccio family over the years. Until recently, Father Mulcahy saw Appellant at mass for 'many, many years" R2923.

Maria Rienzo testified that her family and the Puccio family were very close, and that as a boy, Appellant 'was always very good" R2925. Another close family friend, Sheila Benson described Appellant as a boy as "very loving, very affectionate, a lot of fun to be with," but in his teen years he remained immature R2942,2944-2946.

Mark Anthony Lopez, 30, testified that he is in jail for violation of probation and that Appellant is his cell mate R2948. Appellant helped Lopez with his reading skills R2949-2950. While in jail, Appellant got his GED, and is taking art classes R2950.

Anthony Puccio, 28, described his brother as generous and kind, and that this crime was totally out of character R2964-2965.

Corrections Deputy Robert Greetham testified that Appellant has had no real problem adjusting to the rules and regulations of the jail R2974. His conduct has been satisfactory, though he was disciplined once for making "buck" R2976.

Craig Tolz testified that he and Appellant were best friends until ninth grade when Appellant and Kent starting hanging around together R2978-2979. Tolz thought that Kent began to rule Appellant's life R2982. Tolz never understood why Appellant did not stand up to Kent

R2983. Tolz testified that he once saw Appellant get attacked by Kent's doberman pinscher, to Kent's amusement R2984.

Probation officer Rhoda White completed the presentence investigation R3010. She told the jury that Appellant's only criminal history was a 1992 misdemeanor marijuana conviction, for which Appellant was fined $200 R3011.

SUMMARY OF THE ARGUMENT

POINT I

The death penalty is not proportionally warranted in this case because equally culpable codefendants--DerekKaufman and Donald Semenec--received life sentences. Appellant's death sentence must be reversed.

POINT II

The trial court erred in finding that the killing was cold, calculated and premeditated because there existed a pretense of moral or legal justification. Among other things, there was evidence that Kent was a bully who was physically abusive, had been violent toward Appellant, and had raped and threatened to kill Alice Willis.

POINT III

The trial court erred in finding that the killing was especially heinous, atrocious or cruel. There was no intent to cause unnecessary and prolonged suffering.

POINT IV

The death penalty is not proportionally warranted because this case is not among the most aggravated and least mitigated cases for which the death penalty is reserved. The actions and killing of Bobby Kent were ignited by the threats and actions of Kent. Although the groups's actions were misguided and improper, the actions were not done with the pure evil intent involved in more aggravated cases. The circumstances here do not place this case among the worst of the worst for which the death penalty is reserved.

POINT V

The trial court erred in excluding the mitigating evidence that the Department of Corrections recommended that Appellant be sentenced to life imprisonment rather than death. The recommendation of the government agency charged with the responsibility of executing those condemned is highly relevant mitigating evidence that should not have been excluded from the penalty phase of the trial.

POINT VI

The trial court's instruction on the cold, calculated and premeditated instruction failed to inform the jury that each of the four elements must be present to find this aggravating circumstance. This is reversible error. Defense counsel submitted a proper instruction which was denied, and the error was not harmless.

POINT VII

Defense counsel requested the jury be instructed on the statutory mitigating circumstance of acting under extreme duress or the substantial domination of another person. The trial court erred in denying this request. There was evidence that Appellant acted under the substantial domination of Derek Kaufman.

POINT VIII

Appellant was evaluated by Dr. Day a week after the guilty verdict. The trial court erred in allowing the state to cross-examine Dr. Day about Appellant's statements. Defense counsel did not open the door to this examination. The trial court's ruling violated Appellant's fifth amendment right to remain silent.

POINT IX

After Appellant's offense date, the legislature changed the potential penalties for first degree murder to death and life imprisonment without parole. The trial court committed fundamental error in failing to instruct the jury on the life without parole option. This Court should follow Allen v. State, 821 P.2d 371 (Okl.Cr. 1991), and remand for resentencing.

POINT X

Defense counsel told the trial court that Appellant wanted to call his cell mate as a witness. The trial court incorrectly assumed that calling witnesses was a decision within Appellant's control. The trial

court erred in allowing Appellant to call a witness without conducting a Faretta inquiry.

POINT XI

The trial judge stated in his sentencing order that death was the presumed sentence when one or more aggravating circumstances are found unless outweighed by one or more mitigating circumstances. This "death presumption" violates the Eighth- Amendment. Resentencing is required.

POINT XII

The trial court erred in overruling Appellant's objection to the especially heinous, atrocious or cruel aggravating circumstance instruction because the instruction does not limit the jury's discretion in deciding what offenses are HAC.

POINT XIII

The trial court erred in overruling Appellant's objection to the requirement of "extreme" mental or emotional disturbance for mitigating circumstances because the "extreme" modifier may have led the jury to reject valid mitigating evidence of Appellant's emotional disturbance.

POINT XIV

The trial court refused to define and instruct the jury on nonstatutory mitigating circumstances. This was error because without such instructions jurors will not understand and give full weight to valid mitigating evidence.

POINT XV

Over defense objection, Detective Murray was allowed to tell the jury what Derek Kaufman told him about the killing. This was inadmissible hearsay and should not have been admitted. Defense counsel did not open the door to this testimony by pointing out a conflict between the physical evidence and Calamusa's testimony.

POINT XVI

The trial court allowed the state to introduce Derek Kaufman's out of court statements to Michael Colletti under the coconspirator hearsay exception. This was error because: 1) there was no independent evidence that Appellant was involved in the conspiracy at the time these statements were made, and, 2) there was no predicate evidence that these conversations related to the plot to kill Kent.

POINT XVII

In closing argument, the prosecutor stated that Appellant never made a statement to police. This was a comment on Appellant's post-arrest silence. The trial court erred in denying the motion for mistrial based on it.

POINT XVIII

The trial court erred in allowing Thomas Lemke to testify that a "Marty" called him seeking money and help in getting out of state. Lemke had never heard Appellant's voice before; accordingly, the state did not establish a proper predicate for this testimony.

POINT XIX

The trial court's ad-libbed explanation of reasonable doubt was fundamental error. This minimization of the reasonable doubt standard violated due process.

POINT XX

The trial court erred in denying Appellant's motion for new trial based on the newly discovered evidence of Heather Swaller's psychological report.

ARGUMENT

POINT I

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE WHERE EQUALLY CULPABLE CODEFENDANTS DID NOT RECEIVE THE DEATH PENALTY

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). Because the death penalty is a unique punishment in its finality and total rejection of rehabilitation, it has been reserved for only the worst of the worst. State v. Dixon, 283 So. 2d I, 7 (Fla. 1973). Because of its uniqueness, proportionality review of the application of the death penalty is mandated to ensure that the punishment is uniform to other individuals and cases. Tillman v. State, 591 so. 2d 167, 168 (Fla. 1991). Proportionality review includes analysis of the culpability of codefendants to eliminate the disparity of imposing the death penalty

when an equally culpable codefendant has received a lesser sentence. E.g. Slater v. State, 316 So. 2d 539 (Fla. 1975); Scott v. Dugger, 604 So. 2d 465 (Fla. 1992).

As this Court explained in Slater, defendants should not be treated differently upon the same or similar facts:

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law.

316 So. 2d at 542.[6] Disparate treatment between codefendants is appropriate when they are not equally culpable. Given the fact that equally culpable codefendants are serving life sentences, Appellant's death sentence is disparate and must be reversed.

In the present case, six friends and one outsider decided to kill Bobby Kent. In his closing statement to the jury, the prosecutor described some of the participants' roles, calling Derek Kaufman the

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[6] In Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), this Court stated:

> Based upon this record, this Court probably would have found Scott's death sentence inappropriate had Robinson's life sentence been factored into our review on direct appeal. See Slater v. State, 316 so. 2d 539 (Fla. 1975) (defendants should not be treated differently upon the same or similar f-acts).

604 So. 2d at 469.

"choreographer" of the murder, and noting that Appellant joined the group after the others hatched the plan to kill Kent:

> There is no justifiable use of deadly force in this particular case. Mr. Puccio may not have been involved with the initial core of conspirators, yes. Perhaps, Lisa Connelly is the casting director for this loosely-knit group. Perhaps, Mr. Kaufman, with the aid of Mr. Kaufman, became the choreographer how this murder is going to take place, that's what we get from Mr. Dzvirko and Ms. Swallers, both at the house and at the scene before they go out there.
>
> In any event, the evidence is clear that at some point he [Appellant] joins this conspiracy. And the evidence is also clear that he's a participant in it and that he, in fact, delivered some of the fatal wounds to Bobby Kent.

R2687. From the testimony of two of these participating friends (Heather Swallers and Derek Dzvirko) the first attempt to kill Kent was by Alice Willis and Lisa Connelly. Willis and Connelly wanted to kill Kent because they were afraid that Kent was going to kill Willis and her baby R1714.[7] Willis and Connelly contacted Derek Kaufman about acquiring a gun R1711-12. After they were unable to obtain a gun from Kaufman, they took Connelly's mother's gun R1714. Willis and Connelly lured Kent to a remote area (a site suggested by Kaufman) to kill him R1714. They were unable to go through with their plan R1655,1714. Kent would later rape Willis that night R1750. Afterward, Willis and Connelly would meet with Donald Semenec, Heather Swallers and Appellant R1651. Connelly talked to Appellant T1652. They talked about Kent needing to be killed T1652. Lisa Connelly snuck Willis, Swallers and

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[7] Kent was Willis' ex-boyfriend who had threatened to kill Willis and her baby if she did not reunite with him R1775.

Semenec into her bedroom where they stayed the night R1657. Appellant went home.

The next day Derek Dzvirko came over R1664. Willis explained that Kent had tried to rape her last night and Kent "threatened to kill me and my baby if I didn't go back to him" R1775. Willis, Connelly, Semenec, Swallers and Dzvirko discussed various methods of killing Kent such as poisoning, knife, bat, shooting, etc. R1776. Semenec had a diver's knife R1666. Dzvirko obtained a baseball bat R1664. Willis and Connelly enlisted Derek Kaufman for the killing R1668.

Later that evening, Willis, Connelly, Semenec and Swallers picked up Derek Kaufman R1790. Kaufman explained that he was the leader of a gang called the "Crazy Mother Fuckers" and displayed the "CMF" tattoo on his arm R1671,1791. Kaufman was a "Godfather CMF" R1791. At Appellant's house the group discussed who would stab Kent first R1676. Connelly volunteered R1676. Willis also volunteered R1676. Connelly said she did not want Willis to do it R1676. Semenec then said he would do it first R1676. After the group took Kent to a remote area, Semenec followed through and was the first to stab Kent R1687,1807. Appellant then followed by hitting Kent in the abdomen R1808. Kent began to run R1809. Kaufman ordered the others to get him R1809. Semenec was seen pulling something from Kent's chest[8] R1810,1860-61. Kaufman hit Kent in the head with a weighted baseball bat R1810. We then ordered

[8] Semenec had a diver's knife with a long blade (R 1665).

Dzvirko to help him throw Kent's body in the canal R1693,1812. Kaufman and Dzvirko carried the body to the canal R1812. Kaufman took Kent's wallet to make identification more difficult R1812. Kaufman directed everyone to the beach R1813. Kaufman directed Dzvirko to wipe the bat down R1817. When Kaufman realized that the sheath to the knife was missing he directed they go back to the scene R1817. Kaufman and Semenec disposed of the knives in the water R1820. The group then got together to form an alibi R1820-21. Kaufman and Semenec threatened to kill the others if they did not go along R1831-32. The next day, everyone, except for Appellant, met to discuss the coverup R1823.

This was a group effort beginning with Willis' attempt to kill Kent and ending with Kaufman's masterminding the actual killing, alibi, and coverup. The group lured Kent to a remote area under false pretenses. Kaufman arranged the plan and signalled when Semenec was to begin the attack, which Appellant joined, and which ended with Kaufman hitting Kent in the head with a baseball bat. The planned coverup and alibi by the group (except for Appellant) occurred the next day. This was a group effort and not a situation where Appellant should be singled out for death. If the culpability of the group is legitimately divisible among the individual members, Derek Kaufman and Donald Semenec are

equally, if not more, culpable than Appellant. Yet neither Kaufman nor Semenec received the death penalty.[9]

A. Derek Kaufman

It is worth repeating that the prosecutor's position below was that Derek Kaufman was the mastermind or choreographer of the plan to kill Kent R2687. Kaufman was far more culpable than any other participant. The other six participants were all close friends who had mutual reasons to kill Kent -- his threat to kill Willis and her baby R1714,1775, Kent's rape of Willis R1655,1750, and to stop Kent from beating Appellant. On the other hand, Kaufman was not a friend of the others. Kaufman was first sought out due to his ability to acquire guns. Kaufman was known as a "real bad dude" and was intimidating at six feet three and two-hundred forty pounds R1747. Kaufman participated because he was a violent person who knew about violence. As Kaufman explained, he was the head of a street gang called the "Crazy Mother Fuckers" and had his "CMF" tattoo to prove it. Kaufman's only apparent motive is that he liked to kill. Thus, Kaufman's moral culpability is far greater than any of the other group members.

Kaufman's planning and orchestrating the murder places his culpability above the others and above Appellant's culpability. Dzvirko testified that prior to getting to the remote area Kaufman was directing

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[9] Kaufman was convicted of first degree murder and Semenec was convicted of second degree murder; each was sentenced to life imprisonment R3785-86.

what was going to occur including the signalling of when the attack would begin R1805. Even after the group attacked Kent, Kaufman continued to direct the others R1809,1811. Kaufman then delivered what was probably the final blow to Kent with a baseball bat R1810. It was Kaufman who directed the disposal of the body R1812. Kaufman directed where everyone was to meet R1813 and directed the cleaning and disposal of the weapons R1817,1820. Kaufman threatened to kill the others if they did not go along with the planned alibi R1831-32. Finally the day after the killing everyone, including Kaufman but excluding Appellant, met and further discussed the alibi and coverup R1823. Kaufman was equally, if not the most, culpable codefendant

B. Donald Semenec

Semenec was involved in the conspiracy with Willis, Connelly and Swallers from the beginning. Semenec volunteered to be the initiator of the group attack of Kent R1676. Semenec followed through and initiated the attack by stabbing Kent R1687. Semenec was seen pulling the knife out of Kent's chest R1810,1860-1861. Semenec was an integral part of the planning of the killing. Semenec was in love with Alice Willis and knew Willis had been threatened and raped by Kent R1714. Semenec stated that he had to kill Kent before Kent killed Willis R1819. Semenec (along with Kaufman) threatened to kill the others if they did not go along R1831-32.

Imposition of the death penalty on Appellant is not appropriate given the conduct of the other participants who were equally culpable. Scott v. Dugger, 604 So. 2d 465 (Fla. 1992). Appellant's death sentence must be reversed. Slater, supra; Scott, supra; Curtis v. State, 21 Fla. L. weekly S442, S443 (Fla. Oct. 10, 1996). Any other result would deprive Appellant of due process and subject him to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT THE KILLING WAS COLD, CALCULATED AND PREMEDITATED

Four elements are required to be proven beyond a reasonable doubt before the "cold, calculated and premeditated" (hereinafter "CCP") aggravator can be applied. Jackson v. State, 599 so. 2d 103 (Fla. 1992). There must be (1) a careful plan to commit the murder, (2) heightened premeditation, (3) the killing must be cold in that it is the product of cool and calm reflection and (4) the killing must have no pretense of moral or legal justification. Id. In the present case the evidence did not show beyond a reasonable doubt that there was not a pretense of moral or legal justification or that the killing was cold.

Pretense of moral or legal justification

For the killing to be CCP there must be no pretense of moral or legal justification. Banda v. State, 536 So. 2d 221 (Fla. 1988).

Pretense of moral justification "is any claim of justification or excuse that, though insufficient to reduce the degree of the homicide, nevertheless rebuts the otherwise cold and calculated nature of the homicide." Id. at 225. In Banda, this Court found a pretense of moral or legal justification based on evidence that the victim was a violent person who had made threats and the defendant plotted to kill the victim "to prevent the victim from killing him":

> ... testimony of several witnesses exists on this record that the victim was a violent man and had made threats against appellant. Upon this record, we thus must hold that appellant established doubt as to the "no pretense of justification" element. The state's own theory of prosecution -- that appellant plotted to kill the victim to prevent the victim from killing him -- underscores this conclusion. Together with the uncontroverted evidence establishing the victim's violent propensities, we find that appellant acted with at least a pretense of moral or legal justification. That is, a colorable claim exists that this murder was motivated out of self-defense, albeit in a form clearly insufficient to reduce the degree of the crime.

Id. at 225. In the present case, the evidence demonstrates the same type of pretense of justification for the killing. Among other things, there was evidence that Kent was a bully who was physically abusive R2371-74, had been violent toward Appellant R1652,1675,1747, and had raped Alice Willis R1655. Kent had threatened to kill Alice Willis and her baby if she did not reunite with him R1714,1705,1775. Willis' boyfriend, Donald Semenec, reflected the group's reason for killing Kent

when he stated, "I had to get him before he got my girl. There was no way I was going to let him get my girl" R1819. As in Banda, the group plotted to kill the victim to prevent him from killing a member of their group -- Alice Willis. At the very least, as in Banda, there was "established a reasonable doubt" as to a pretense of justification and "a colorable claim exists that this murder was motivated out of self-defense [or of defense of Alice Willis] albeit in a form clearly insufficient to reduce the degree of the crime." 536 So. 2d 225. Thus, the CCP aggravator does not apply.

In addition, there is evidence to support a theory that the killing was done to stop Kent from beating Appellant R1652. Again this is another form of imperfect self-defense and constitutes a pretense of moral or legal justificationalthough clearly insufficient to constitute a valid defense or to reduce the degree of the crime. Banda, supra, at 225. Even if there are divergent interpretations as to why Kent was killed, there is still a reasonable hypothesis that the killing was done with a pretense of justification due to an improper self-defense or defense of another. Thus, CCP does not apply. Geralds v. State, 601 so. 2d 1157, 1164 (Fla. 1992) (because the evidence "regarding premeditation in this case is susceptible to these divergent interpretations, we find the State has failed to meet its burden of establishing beyond a reasonable doubt that the homicide was committed in a cold, calculated and premeditated manner").

B. Cold

Regardless of the fact that the killing may have been calculated, to qualify as CCP the killing must not have been the result of emotion. Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992) (although killing was clearly calculated, it was not the result of "calm and cool reflection" and thus not cold); Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993). For example, in Cannadv, the defendant believed that the victim, Boisvert, had raped his wife. The defendant set out to kill "the apparent cause of [his wife's] suffering" and killed Boisvert. 620 so. 2d at 170. Although Cannady suffered from other mental ailments, the main impetus of the calculated killing of Boisvert was due to the emotion caused by the rape two months earlier. This Court held that CCP did not apply because although the killing was calculated it was not cold in that it was the result of emotion and not calm and cool reflection. 620 So. 2d at 170. Likewise, in this case although the killing may have been calculated it was the product of emotions due to the rape of Willis by Kent and his further threats to kill Willis and the distress of beating Appellant. The group was acting on the emotion caused by these events. Thus, while the killing may be calculated it was not cold.

This case is unlike all cases finding CCP that have been before this Court. The group was not motivated by money, greed, or power in

killing Kent.[10] Instead, the group was acting out of fear and emotion caused by the threats and actions of Bobby Kent. While this does not excuse or justify the killing -- it takes it out of the classes of murders which fall within CCP. The CCP aggravator must be stricken.

The error cannot be deemed harmless. There were only two aggravating circumstances considered in this case. Once the aggravating circumstance of CCP is eliminated, it cannot be said beyond a reasonable doubt that the jury's recommendation, or the trial judge's decision, would be the same. In fact, this court has consistently held that one aggravating circumstance will not support a death sentence where mitigating circumstances are present. E.g. Clark v. State, 609 So. 2d 513 (Fla. 1992); McKinney v. State, 579 So. 2d 80, 85 (Fla. 1991); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Smalley v. State, 546 So. 2d 710, 723 (Fla. 1989); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Lloyd v. State, 524 So. 2d 396 (Fla. 1988).

In this case there were significant mitigating factors present. The trial court found two statutory mitigating circumstances: 1) Appellant "has no significant history of prior criminal activity. F.S. 921.141(6)(a)" R2773, and 2) the "age of the defendant at the time of

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[10] Except for Kaufman, who had no pretense of moral or legal justification, and who was sentenced to life imprisonment. See Point I, supra.

the crime. F.S. 921.141(6)(g). The defendant was twenty years old . .." R2779.[11]

The trial court also found a number of nonstatutory mitigating circumstances. Included within these was Appellant's history of drug and alcohol abuse R3787. It was recognized that Appellant had been hospitalized for drug related problems R3787.

The trial court also recognized Appellant's potential for rehabilitation as a mitigating circumstance R3788-3789. There was evidence of Appellant's potential for rehabilitation. Dr. Day testified that Appellant had the potential to be rehabilitated R2902. This court has held -- "Unquestionably, a defendant's potential for rehabilitation is a significant factor in mitigation." Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988). Also, in Holsworth v. State, 522 So. 2d 348, 354-55 (Fla. 1988), while noting that "potential for rehabilitation" was a mitigating factor this Court found that the "death penalty, unique in its finality and total rejection of the possibility of rehabilitation was intended to be applied to only the most aggravated and unmitigated of most serious crimes." Indeed, evidence relevant to the possibility of rehabilitation is deemed so important that exclusion of such evidence requires a new sentencing hearing. Simmons v. State, 419 So. 2d 316, 320 (Fla. 1982); Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987).

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[11] In addition, evidence showed that Appellant had a history of being emotionally and physically immature for his age R2894-95,2900.

The trial court also found that there was evidence that Appellant was a "good brother, son, friend, etc." R3789. This has been recognized as mitigating. See Perry v. State, 522 So. 2d 817, 821 (Fla. 1988) (fact that defendant was "kind" and "good to his family" was mitigating); Pardo v. State, 563 So. 2d 77, 79 (Fla. 1990) (trial court found "love and affection of his family" mitigating).

The trial court found as mitigating that Appellant's "prior suffering created great situational stresses leading up to the time of the homicide and that the homicide was committed for emotional reasons" R3789-90. The emotional reasons and stress could be the result of the physical and emotional abuses by Bobby Kent. Craig Tolz testified that he and Appellant were best friends until ninth grade when Appellant and Kent started hanging around together R2978-79. Tolz thought that Kent began to rule Appellant's life R2982. Tolz never understood why Appellant did not stand up to Kent R2983. Tolz testified that he once saw Appellant get attacked by Kent's doberman pinscher, to Kent's amusement R2984. Moreover, the emotions and stresses could be due to Kent's threat to kill Alice Willis and her baby or due in part to Kent's very recent rape of Willis. These events could have a cumulative emotional impact, The trial court mistakenly believed there was no caselaw to support this mitigator and thus gave it very little weight. However, "any" emotional disturbance qualifies as legitimate mitigation

and is not limited to an "extreme" disturbance. ~~Cheshire v. State,~~ 568 So. 2d 908, 912 (Fla. 1990) ("no matter what the statute says").

The trial court found that Appellant is unlikely to endanger others while serving a life sentence R3790. This is mitigating. See Correll v. Dugger, 558 So. 2d 422, 424, 425 (Fla. 1990) (state argues it was reasonable mitigation that defendant would not be a danger in the future).

There is also other mitigation existing in this case which the trial court improperly rejected. As explained in Point I, there was strong evidence that Kaufman and Semenec were equally, if not more, culpable.

The trial court recognized, or at least did not reject defense evidence, that Appellant had the capacity for hard work and other fine qualities R3791. This has been recognized as mitigating. See e.g. Maxwell v. State, 603 So. 2d 490 (Fla. 1992); ~~Whitton v. State,~~ 649 so. 2d 861, n.6 (Fla. 1994); ~~Holsworth v. State,~~ 522 So. 2d 348, 354 (Fla. 1988) (potential for productivity in prison is mitigating). There was no evidence contradicting this mitigator. However, the trial court totally rejected this as mitigation because Appellant must be sentenced to either death or life in prison R3791. This fact is present with all mitigating circumstances and does not take away from the fact that being a good worker is mitigating. The trial court utilized the wrong standard (of the fact he would be sentenced to death or life) in

rejecting Appellant's capacity for hard work as a mitigating circumstance.

There was also evidence that Appellant is religious R2923, which is mitigating. See Turner v. Dugger, 614 So. 2d 1074, 1078 (Fla. 1992). The trial court did not reject this mitigation. There is also evidence that Appellant would help others in a prison setting and thus could be productive in prison. Specifically, Mark Lopez testified that Appellant has been helping Lopez with his reading skills while in jail R2949-50. Also, Appellant got his GED while in jail R2950. This is mitigating because it shows potential for good adaptation to prison. E.g. Hnlsworth v. State, 522 So. 2d 348, 354 (Fla. 1988) (potential for productivity in prison system is mitigating); Fead v. State, 512 So. 2d 176, 177 (Fla. 1987) (could be productive in prison system).

There was evidence that Appellant had emotional problems, but received inappropriate treatment for them. Appellant abused drugs due to emotional problems. It reached a point where Appellant was admitted to the Coral Ridge Psychiatric Hospital for secure in-patient treatment R2867-68. Appellant was noticeably improved during his 31-day stay R2871-72. However, Appellant had to leave because the insurance ran out R2871. Unfortunately, Appellant's condition would later deteriorate R2874. In other words, Appellant tried to overcome his problems through secure in-patient treatment, but due to the lack of insurance was unable to receive complete treatment. This has been recognized as mitigating.

See Caruso v. State, 645 So. 2d 389, 397 (Fla. 1994) (defendant "voluntarily sought hospital treatment" for his addictions).

There was also testimony from the psychologist who evaluated Appellant that he was a follower rather than a leader R2900, and that Appellant would not have been involved in the incident but for the influence of others R2902. This clearly is a mitigating circumstance.

In addition, there was evidence that the type of violent behavior displayed was an isolated incident which was out of character for Appellant. This is strong mitigation. See Caruso v. State, 645 So. 2d 389, 397 (Fla. 1994) ("no history of violent behavior" could reasonably support a life sentence).

This crime was committed by a group and that Appellant would not and could not have committed this crime on his own. The trial court did not reject the factual predicate for this mitigator, but rejected it as being irrelevant. However, it is relevant and mitigating that Appellant would only decide to be involved in this because the group was involved. As explained above, Appellant had suffered abuse from Bobby Kent and yet had never stood up to Kent on his own R2983. Appellant would not have committed this offense without group or peer pressure R2902.

In summary the mitigating circumstances are as follows:

1. No significant history of prior criminal activity.
2. Age (20).
3. History of drug and alcohol abuse,
4. Potential for rehabilitation.
5. Good brother, son, friend, etc.

6. Prior suffering created situational stresses leading up to the time of the homicide and homicide was committed for emotional reasons.
7. Unlikely to endanger others while serving life sentence.
8. Equally culpable codefendant.
9. Capacity for hard work.
10. Religious.
11. Potential for productivity in prison.
12. Inappropriate treatment for emotional problems.
13. Follower rather than leader.
14. Violent behavior was an isolated incident.
15. Would not have committed offense without group and peer pressure.

Thus, it cannot legitimately be said that there was no mitigating evidence present in this case. Again, with the elimination of the CCP aggravator, at most only one aggravator exists in this case,[12] and this Court has consistently held that one aggravating circumstance will not support a death sentence where mitigating circumstances are present, e.g. Clark v. State, 609 So. 2d 513 (Fla. 1992); McKinney v. State, 579 so. 2d 80, 85 (Fla. 1991); Nibert v. State, 574 so. 2d 1059, 1063 (Fla. 1990); Smalley v. State, 546 So. 2d 720, 723 (Fla. 1989); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Lloyd v. State, 524 So. 2d 396 (Fla. 1988); Songer v. State, 544 so. 2d 1010, 1011 (Fla. 1980) (citations omitted).

The error of finding CCP denied Appellant due process and a fair, reliable sentencing contrary to Article I, Sections 9 and 17 of the

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[12] In Point III, infra, Appellant demonstrates that the trial court erred in finding the killing to be especially heinous, atrocious, or cruel.

Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United states Constitution.

POINT III

THE TRIAL COURT ERRED IN FINDING THAT THE KILLING WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

Any murder could be characterized as heinous, atrocious or cruel (hereinafter "HAC"). However, to avoid such an overbroad and unconstitutional application of HAC, restrictions have been placed on the HAC aggravator. It is well-settled that the especially HAC aggravator does not apply unless it is clear that the defendant intended to cause unnecessary and prolonged suffering. Eg. Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990) (hypothesis consistent with crime not "meant to be deliberately and extraordinarily painful" and thus not HAC); Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991); Cheshire v. State, 568 So. 2d 908 (Fla. 1990); Mills v. State, 476 So. 2d 172, 178 (1985); Llovd v. State, 524 So. 2d 396, 403 (Fla. 1988); Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989).

For example, in Bonifay v. State, 626 So. 2d 1310 (Fla. 1993), this Court recognized that the crime was "vile and senseless" where the victim unsuccessfully begged for his life, but held that especially HAC did not apply because the record did not demonstrate that Bonifay intended to inflict a high degree of pain or to torture the victim:

> Both Bland and Tatum testified that Bonifay told them the victim begged for his life. Bonifay, himself, said this in his tape-recorded statement as did Barth in his live testimony. Even so, we find that this murder, though vile and senseless, did not rise to one that is especially cruel, atrocious, and heinous as contemplated in our discussion of this factor in State v. Dixon, 283 so. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The record fails to demonstrate any intent by Bonifay to inflict a high degree of pain or to otherwise torture the victim. The fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find this aggravating factor absent evidence that Bonifay intended to cause the victim unnecessary and prolonged suffering. Santos v. State, 591 So. 2d 160 (Fla. 1991).

Bonifay, 626 So. 2d at 1313 (emphasis added). Likewise, in Santns v. State, 591 So. 2d 160, 163 (Fla. 1991), HAC did not apply as there was "no substantial suggestion that Santos intended to inflict a high degree of pain or otherwise torture the victim."

The facts of this case do not show an intent to cause prolonged pain and suffering. The group never intended to cause any unnecessary or prolonged suffering. Rather, the express intent was to kill Kent. In addition, there were three wounds which were rapidly fatal in nature further showing the intent to kill and not to torture R1945,1940. This Court has explained that the inflicting of potentially fatal wounds takes the killing out of being HAC:

> Likewise, there is no evidence to suggest that Shere desired to inflict a high degree of pain. Four of the wounds were potentially fatal, which

> is an indication that they tried to kill him, not torture him.

Shere v. State, 579 So. 2d 86, 96 (Fla. 1991).

Also, the nature of the attack by the group was quick and frenzied which is inconsistent with the intent to torture. In Elam v. State, 636 So. 2d 1312 (Fla. 1994) this Court struck HAC due to the quick and frenzied nature of the attack and the medical examiner's testimony showed that the victim was unconscious in less than a minute and there was no prolonged suffering or anticipation of death:

> Elam claims that the trial court erred in finding aggravating circumstances applicable here. We agree. We find the aggravating circumstances that the murder was especially heinous, atrocious, or cruel inapplicable. Although the defendant was **[illegible]** and had defensive wounds, the medical examiner testified that the attack took place in a *very* short period of time ("could have been less than a minute, maybe even half a minute), the defendant was unconscious at the end of this period, and never regained consciousness. There was no prolonged suffering or anticipation of death.

636 So. 2d at 1314 (emphasis added). Likewise, in this case the attack was quick and the medical examiner testified the victim died within 15 to 30 seconds of being stabbed in the heart R1945.

The trial court's reason for finding HAC was the conclusion that the victim must have suffered. However, as noted above, this was a quick and frenzied attack. The medical examiner testified that Kent would have died within 15 to 30 seconds of being stabbed in the heart R1945. Moreover, as explained in Teffeteller v. State, 439 So. 2d 840,

846 (Fla. 1983), the suffering of the victim is not HAC as it does not set the murder apart from the norm of capital felonies:[13]

> The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies.

In addition, there was insufficient evidence of prolonged suffering. The degree of pain could not be determined. The trial court merely surmised suffering. This Court has specifically condemned the finding of HAC based on a trial judge's assumption as to pain, even where the assumption is based on a logical inference. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983) (where degree of pain not proven by state, offense is not HAC -- "logical inferences" by trial court will not suffice where state has not proved the aggravator); King v. State, 514 so. 2d 354 (Fla. 1987) (aggravator may not be based on what might have occurred). The lack of evidence of intentional infliction of prolonged pain and suffering requires reversal of this aggravator.

The trial court improperly relied on the fact that Kent was taken to a remote location to find that he was in apprehension of being killed. Kent voluntarily went to the remote area. Kent was never

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[13] Of course, if the defendant deliberately tries to torture or inflict a high degree of pain, HAC would apply. See Cheshire v. State, 568 So. 2d 908 (Fla. 1990); Porter v. State, 564 So. 2d 1060 (Fla. 1990). But it is the intentional desisn of the perpetrator to torture or inflict pain rather than the pain itself which HAC is designed to cover. Mills v. State, 476 So. 2d 172, 178 (Fla. 1985) (whether victim lingers is pure fortuity, the intent of the wrongdoer is what needs to be examined).

placed in apprehension of any violence on the way to the area. Kent only knew of the attack as it occurred. This is not sufficient for HAC.

The error cannot be deemed harmless. There were only two aggravating circumstances considered in this case. Once the aggravating circumstance of HAC is eliminated, it cannot be said beyond a reasonable doubt that the jury's recommendation, or the trial judge's decision, would be the same. In fact, this court has consistently held that one aggravating circumstance will not support a death sentence where mitigating circumstances are present. E.g. Clark v. State, 609 So. 2d 513 (Fla. 1992); McKinney v. State, 579 So. 2d 80, 85 (Fla. 1991); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Songer v. State, 544 so. 2d 1010, 1011 (Fla. 1989); Smalley v. State, 546 So. 2d 710, 723 (Fla. 1989); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Lloyd v. State, 524 So. 2d 396 (Fla. 1988).

As explained in pages 40-46, the trial court found two statutory and five nonstatutory mitigating circumstances and there were numerous other mitigating circumstances present in this case. Thus, the death penalty is not warranted in this case.

The error of finding HAC denied Appellant due process and a fair, reliable sentencing contrary to Article I, Sections 9 and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT IV

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE

Because of the particular circumstances of the facts of this case the instant case is not among the most unmitigated cases for which the death penalty is reserved. The actions and killing of Bobby Kent were ignited by the threats and actions of Kent. Kent threatened to kill Alice Willis and her baby if she did not reunite with him. Kent also raped Willis at this time. Kent had been physically and emotionally abusive toward Appellant. When the group decided to kill Bobby Kent they were not motivated by greed, power, thrills, etc. This was not a cult or street gang. Instead, the group acted out of protection of their own. Although the groups's actions were misguided and improper in killing Kent, the actions were not done with the pure evil intent involved in more aggravated cases. The circumstances here do not place this case among the worst of the worst for which the death penalty is reserved.

In Appellant's situation the death penalty is even more inappropriate when one considers that all the other codefendants received lesser sentences than death. See point I.

As explained earlier, CCP and HAC do not properly apply in this case. See Points II & III. Absent any aggravators, as a matter of law the death penalty cannot apply. Even if only one of these two

aggravators is eliminated, the death penalty would not be warranted. E.g. McKinney v. State, 579 So. 2d 80, 81 (Fla. 1991) (with only one aggravator death penalty is not warranted unless there is virtually no mitigating evidence).

Assuming arguendo that the two aggravators are upheld, under the circumstances here the death penalty would still be disproportionate. Proportionality analysis is not based solely on the number of aggravating factors. Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) (although five aggravating factors, including prior violent felony -- death was not proportionally warranted); Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988) (death disproportionate when proportional review of two aggravating factors, including prior violent felony, against mitigating factors). Rather, proportionality review is also based on the quantity and quality of the evidence. Terry v. State, 668 so. 2d 954, 965 (Fla. 1996); Morsan v. State, 639 So. 2d 6 (Fla. 1994).

In this case there were significant mitigating factors present. The trial court found two statutory mitigating circumstances: 1) Appellant "has no significant history of prior criminal activity. F.S. 921.141(6)(a)" R2773, and 2) the "age of the defendant at the time of the crime, F.S. 921.141(6)(g). The defendant was twenty years old . .." R2779.[14] The trial court also found a number of nonstatutory mitigating

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[14] Evidence showed that Appellant had a history of being emotionally and physically immature for his age R2894-95,2900.

circumstances. Included within these was Appellant's history of drug and alcohol abuse R3787. It was recognized that Appellant had been hospitalized for drug related problems R3787.

The trial court also recognized Appellant's potential for rehabilitation as a mitigating circumstance R3788-3789. There was evidence of Appellant's potential for rehabilitation. Dr. Day testified that Appellant had the potential to be rehabilitated R2902. This court has held -- "Unquestionably, a defendant's potential for rehabilitation is a significant factor in mitigation." Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988). Also, in Holsworth v. State, 522 So. 2d 348, 354-55 (Fla. 1988), while noting that "potential for rehabilitation" was a mitigating factor this Court found that the "death penalty, unique in its finality and total rejection of the possibility of rehabilitation was intended to be applied to only the most aggravated and unmitigated of most serious crimes." Indeed, evidence relevant to the possibility of rehabilitation is deemed so important that exclusion of such evidence requires a new sentencing hearing. Simmons v. State, 419 So. 2d 316, 320 (Fla. 1982); Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987).

The trial court also found that there was evidence that Appellant was a "good brother, son, friend, etc." R3789. This has been recognized as mitigating- & Perry v. State, 522 So. 2d 817, 821 (Fla. 1988) (fact that defendant was "kind" and "good to his family" was

mitigating); Pardo v. State, 563 So. 2d 77, 79 (Fla. 1990) (trial court found "love and affection of his family" mitigating).

The trial court found as mitigating that Appellant's "prior suffering created great situational stresses leading up to the time of the homicide and that the homicide was committed for emotional reasons" R3789-90. The emotional reasons and stress could be the result of the physical and emotional abuses by Bobby Kent. Craig Tolz testified that he and Appellant were best friends until ninth grade when Appellant and Kent started hanging around together R2978-79. Tolz thought that Kent began to rule Appellant's life R2982. Tolz never understood why Appellant did not stand up to Kent R2983. Tolz testified that he once observed Appellant get attacked by Kent's doberman pinscher, to Kent's amusement R2984. Moreover, the emotions and stresses could be due to Kent's threat to kill Alice Willis and her baby or due in part to Kent's very recent rape of Willis. These events could have a cumulative emotional impact. This trial court mistakenly believed there was no caselaw to support this mitigator and thus gave it very little weight. However, "any" emotional disturbances qualifies as legitimate mitigation and is not limited to an "extreme" disturbance. Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990) ("no matter what the statute says").

The trial court found that Appellant is unlikely to endanger others while serving a life sentence R3790. This is mitigating. See Correll v. Dugger, 558 So. 2d 422, 424, 425 (Fla. 1990) (State argues it was

reasonable mitigation that defendant would not be a danger in the future).

There is also other mitigation existing in this case which the trial court improperly rejected. As explained in Point I, there was strong evidence that Kaufman and Semenec were equally culpable.

The trial court recognized, or at least did not reject defense evidence, that Appellant had the capacity for hard work and other fine qualities R3791. This has been recognized as mitigating. See e.g. Maxwell v. State, 603 So. 2d 490 (Fla. 1992); Whitton v. State, 649 So. 2d 861, note 6 (Fla. 1994); Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988) (potential for productivity in prison is mitigating). There was no evidence contradicting this mitigator. However, the trial court totally rejected this as mitigation because Appellant must be sentenced to either death or life in prison. 3791. This fact is present with all mitigating circumstances and does not take away from the fact that being a good worker is mitigating. The trial court utilized the wrong standard (of the fact he would be sentenced to death or life) in rejecting Appellant's capacity for hard work as a mitigating circumstance.

There was also evidence that Appellant is religious R2923, which is mitigating. See Turner v. Duaaer, 614 So. 2d 1074, 1078 (Fla. 1992). The trial court did not reject this mitigation. There is also evidence that Appellant would help others in a prison setting and thus could be

productive in prison. Specifically, Mark Lopez testified that Appellant has been helping Lopez with his reading skills while in jail R2949-50. Also, Appellant got his GED while in jail R2950. Such is mitigating in that it shows potential for good adaptation to prison. E.g. Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988) (potential for productivity in prison system is mitigating); Fead v. State, 512 So. 2d 176, 177 (Fla. 1987) (could be productive in prison system).

There was evidence that Appellant had emotional problems, but received inappropriate treatment for them. Appellant abused drugs due to emotional problems. It reached a point where Appellant was admitted to the Coral Ridge Psychiatric Hospital for secure in-patient treatment R2867-68. Appellant was noticeably improved during his 31-day stay R2871-72. However, Appellant had to leave because the insurance ran out R2871. Unfortunately, Appellant's condition would later deteriorate R2874. In other words, this is a situation where Appellant tried to overcome his problems through secure in-patient treatment, but due to the lack of insurance was unable to receive complete treatment. This has been recognizedas mitigating. See Caruso v. State, 645 So. 2d 389, 397 (Fla. 1994) (defendant "voluntarily sought hospital treatment" for his addictions).

There was also uncontrovertedtestimony from the psychologist that evaluated Appellant that he was a follower rather than a leader R2900, and that Appellant would not have been involved in the incident but for

the influence of others R2902. This clearly is a mitigating circumstance.

In addition, there was evidence that the type of violent behavior displayed was an isolated incident which was out of character for Appellant. This is strong mitigation. See Caruso v. State, 645 So. 2d 389, 397 (Fla. 1994) ("no history of violent behavior" could reasonably support a life sentence).

This crime was committed by a group and that Appellant would not and could not have committed this crime on his own. The trial court did not reject the factual predicate for this mitigator, but rejected it as being irrelevant. However, it is relevant and mitigating that Appellant would only decide to be involved in this because the group was involved. As explained above, Appellant suffered abuse from Bobby Kent and had never stood up to him on his own R2983. Appellant would not have committed this offense without group or peer pressure. R2902.

In summary the mitigating circumstances are as follows:

1. No significant history of prior criminal activity.
2. Age (20).
3. History of drug and alcohol abuse.
4. Potential for rehabilitation.
5. Good brother, son, friend, etc.
6. Prior suffering created situational stresses leading up to the time of the homicide and homicide was committed for emotional reasons.
7. Unlikely to endanger others while serving life sentence.
8. Equally culpable codefendant.
9. Capacity for hard work.
10. Religious.
11. Potential for productivity in prison.

12. Inappropriate treatment for emotional problems.
13. Follower rather than leader.
14. Violent behavior was an isolated incident.
15. Would not have committed this offense without group or peer pressure.

Under the totality of the circumstances of this case it cannot be said that this is one of the most aggravated and least mitigated cases for which the death penalty is reserved. Appellant's death sentence must be vacated.

POINT V

THE TRIAL COURT ERRED IN EXCLUDING THE MITIGATING EVIDENCE THAT THE DEPARTMENT OF CORRECTIONS RECOMMENDED THAT APPELLANT BE SENTENCED TO LIFE

The Department of Corrections conducted a presentence investigation SR1-31. The probation officer who completed it recommended that Appellant receive a life sentence SR19-20. Defense counsel wanted the probation officer to testify about that recommendation at the penalty phase R2934-2936. The trial court ruled such evidence inadmissible R2936. The trial court erred in excluding the mitigating evidence of the Department of Correction's life recommendation.

Fla. R. Crim. P. 3.710 provides that "In all cases in which the court has discretion as to what sentence may be imposed, the court may refer the case to the Department of Corrections for investigation." By statute, the presentence investigation must include '[a] recommendation as to disposition by the court" along with the "reasons for its recommendation." § 921.231(1)(o), Fla. Stat. Moreover, "[i]t shall be

the duty of the the department to make a written determination as to the reasons for its recommendation." Id. In the instant case, the probation officer fulfilled her statutory duty in that regard.

In a capital case, judge and jury operate as co-sentencers. Espinosa v. Florida, 112 S.Ct. 2926 (1992); Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). Therefore, both sentencers should have the benefit of the DOC's recommendation. It is an Eighth Amendment violation for a sentencer to refuse to consider or be precluded from considering any mitigating evidence. Lockett v. Ohio, 438 U.S. 586 (1978); Skipper v. South Carolina, 476 U.S. 2(1986).

The recommendation of the government agency charged with the responsibility of executing those condemned, and housing those that are not, is highly relevant mitigating evidence under Lockett. Elam v. State, 636 So. 2d 1312, 1315 (Fla. 1994) (Reducing to life noting "[t]he state itself originally concluded that the crime did not warrant the imposition of the death penalty and agreed to a plea bargain of life imprisonment until the (the defendant) himself insisted otherwise"). Accordingly, the trial court's exclusion of this highly relevant mitigating evidence was reversible error. Resentencing is required. The trial court's ruling violated Article I, sections 9, 16 and 17 of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT VI.

THE TRIAL COURT ERRED IN GIVING AN INSTRUCTION ON THE COLD, CALCULATED AND PREMEDITATED INSTRUCTION WHICH FAILED TO INFORM THE JURY THAT EACH OF THE FOUR ELEMENTS MUST BE PRESENT TO FIND THIS AGGRAVATING CIRCUMSTANCE

To find the cold, calculated and premeditated aggravating circumstance (hereinafter "CCP") four elements must be proven beyond a reasonable doubt: (I) cold; (2) calculated; (3) heightened premeditation and (4) no pretense of moral or legal justification. Walls v. State, 641 So. 2d 381, 387-388 (Fla. 1994). Appellant is entitled to have the jury instructed that all four must be found to find the CCP aggravator. Jackson v. State, 648 So. 2d 85 (Fla. 1994).

In this case the trial court attempted to give the CCP instruction promulgated by this Court in Jackson v. State, 648 So. 2d 85 (Fla. 1994).[15] While the trial court gave most of the instruction in Jackson,

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[15] The second aggravating circumstances for you to consider is that the crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

Cold means the murder was the product of calm and cool reflection.

Calculated means that the Defendant had a careful plan or prearranged design to commit the murder.

Premeditated means that the defendant exhibited a higher degree of premediaition than that which is normally required in a premeditated murder.

A pretense of moral or legal justification is any claim of justification or excuse that, though insufficient to reduce the degree of homicide,

the jury was not instructed on a key component. This Court's instruction made it clear that in order for the jury to consider CCP each of the four elements must be found:

> ... In order for you to consider this aggravating factor, you must find the murder was cold, and calculated, and premeditated, and that there was no pretense of moral or legal justification.

Jackson v. State, 648 So. 2d 85, 89 n.8 (Fla. 1994) (emphasis added).[16] In this case, the trial court erred in failing to inform the jury of such a requirement R3072-73.

The issue of the trial court failing to give a complete CCP instruction was preserved through defense counsel's submitting an instruction on CCP which made it clear that all four elements of CCP had to be found to consider CCP. Crump v. State, 654 so. 2d 545, 548 (Fla. 1995) (issue preserved by either submitting an alternative instruction or by objecting to the instruction given).[17]

The error in failing to inform the jury that each of the four elements must be found for CCP cannot be deemed harmless in this case.

> nevertheless rebuts the otherwise cold and calculated nature of the homicide.

R3073-74.

[16] In discussing that each of the elements was required this Court even emphasized such by italics in its opinion. 648 So. 2d at 89.

[17] Appellant's requested instruction on CCP, which was denied, made it clear that all four elements of CCP must be found by the jury R-3619,2825.

Although the jury could find that the killing in this case was calculated and with heightened premeditation, this Court's instruction in Jackson makes clear that finding 2 of the 4 elements will not suffice for CCP. The jury was not informed of this. Because there was very strong evidence that there was a pretense of moral or legal justification (see pages 37-38) and that the killing was not cold (see pages 39-40) the jury may have rejected CCP if they had been properly instructed that all four elements were required. Thus, the error cannot be deemed harmless. See Jackson, 648 So. 2d at 686; Kearse v. State, 662 so. 2d 677, 686 (Fla. 1995).

The error violated the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution. Appellant's sentence must be vacated.

POINT VII

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE STATUTORY MITIGATING CIRCUMSTANCE OF ACTING UNDER EXTREME DURESS OR THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON

Defense counsel requested the standard jury instruction on the statutory mitigating circumstance contained in section 921.141(7)(e): 'The defendant acted under extreme duress or under the substantial domination of another person" R3017-3021. The trial court denied this requested instruction on the ground Appellant's testimony did not support it R3020-21. This was error.

An appropiate jury instruction is required when there is any evidence in the record to support it. Stewart v. Stat., 558 So. 2d 416 (Fla. 1990); Robinson v. State, 487 So. 2d 1040 (Fla. 1986). In Robinson, this Court reversed the defendant's death sentence as a result of the trial court's refusal to instruct on statutory mitigating circumstances that the trial judge perceived to be unsupported by competent and substantial record evidence. This Court noted that while the trial judge may not have believed the mitigation testimony, others might have, and therefore it was error to refuse to instruct on them. This court further observed:

> The jury must be allowed to consider any evidence presented in mitigation, and the statutory mitigating factors help guide the jury in its consideration of a defendant's character and conduct. We therefore find that the court erred in not instructing on these two statutory mitigating circumstances. Regarding mitigating evidence and instructions, we encourage trial courts to err on the side of caution and to permit the jury to receive such, rather than being too restrictive.

Robinson, 407 So. 2d at 1043.

In the instant case, there was substantial evidence that Derek Kaufman, the intimidating leader of the "Crazy Mother Fucker" gang, was the dominating force in this murder. The prosecutor below said he was the "choreographer" of the murder R2687. Dzvirko testified that prior to getting to the remote area Kaufman was directing what was going to occur including the signalling of when the attack would begin R1805. Even after the group attacked Kent, Kaufman continued to direct the

others R1809,1811. It was Kaufman who ordered Dzvirko to help him dispose of the body R1812. Kaufman directed where everyone was to meet R1813 and directed the cleaning and disposal of the weapons R1817,1820. Kaufman threatened Appellant and the others to go along with the alibi or "They would be dead before the end of the week" R1831-32.

Because there was evidence to support the giving of the instruction on acting under extreme duress or substantial domination of another, the trial court erred in denying it. The fact that Appellant testified that Kaufman's domination of him occurred after the killing is irrelevant. In order to make a correct sentencing decision, the jury must be instructed on the law as it applies to any facet of the evidence presented to it. See Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA 1981) (trial court erred in denying intoxication instruction notwithstanding defendant's testimony that she was not intoxicated, where there was other evidence to support the instruction).

The trial court's refusal to give an applicable jury instruction violated Article I, Sections 9, 16, and 17, of the Florida Constitution, and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

POINT VIII

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO CROSS-EXAMINE DR. DAY ABOUT APPELLANT'S STATEMENTS

Dr. Day evaluated Appellant when he was a patient at the Coral Ridge Psychiatric Hospital in 1990 R2891. After the guilt phase, the trial court appointed Dr. Day to assist the defense in the penalty phase R3570. Dr. Day testified at the penalty phase that Appellant was passive, a follower rather than a leader:

> Q. Now I'm not going to ask you to get into -- did you have an opportunity to discuss what occurred in July of '93 with him?
>
> A. I did.
>
> Q. Okay. Without discussing and getting into the facts because really at this juncture they're not relevant, but could you tell us if you were able to make an evaluation from a psychological point of view as to what thought processes were occurring at that time?
>
> A. I think that one of the things I probably saw was a continuation of some of the things that had been done previously. That Martin showed qualities more of being in the passive dependant kind of mode. That he was a follower rather than a leader and in reference to probably many different situations. That at that point in time I also had no information nor impression that there was anything of a psychiatric nature that was clouding his behavior and his judgment or his functioning.

R2899-2900. Dr. Day also testified that peer and group pressure contributed to Appellant's involvement R2902-2903.

Over defense objection, the state was allowed to ask Day what Appellant told him about the facts of the crime R2908. Day testified that Appellant told him that he struck the victim with the knife R2908. Asked how many times, Day answered, "I think he said twice. Struck him once and then slashed at him once or something like that." Asked whether Appellant said how they got Kent out there, Day answered, 'No. I don't know all the particulars about that. He told me that they got him out there, but I'm not sure." R2909. Appellant said that after Kent was killed the others put him in the water R2909. Appellant told him this was Lisa Connelly's idea R2910.

Defense counsel's direct examination of Day did not open the door to the state's inquiry into Appellant's statements about the offense. Cross-examination is limited to matters opened up on direct examination and questioning designed to test the credibility of the witness. Steinhorst v. State, 412 So. 2d 332, 337 (Fla. 1982); Echols v. State, 484 So. 2d 568, 573 (Fla. 1985). Here, defense counsel told Dr. Day that he did not want to get into the facts because they were irrelevant, the jury having already found Appellant guilty. Therefore, defense counsel did not open the door to the prosecutor's cross-examination. The trial court's ruling allowing the prosecutor to cross-examine Day about Appellant's inculpatory statements was error under this Court's decisions in Lovette v. State, 636 So. 2d 1304, 1308 (Fla. 1994), and Parkin v. State, 238 So. 2d 817 (Fla. 1970). The ruling violated

Appellant's Fifth Amendment right against self-incrimination as well as the Eighth and Fourteenth Amendments to the United States Constitution. A new sentencing hearing is required.

POINT IX

THE TRIAL COURT ERRED IN FAILING TO CONSIDER LIFE WITHOUT PAROLE AS A SENTENCING OPTION AND FAILING TO INSTRUCT THE JURY ON THIS OPTION

The offense in this case took place on July 15, 1993 R3334. The Legislature amended § 775.082 (1), Fla. Stat., effective May 25, 1994 to make life without parole a penalty for first degree murder. In Re: Standard Jury Instructions In Criminal Cases, 678 So. 2d 1224 (Fla. 1996). Guilt and penalty phase took place in September 1994. The jury was instructed that the penalties it could consider are death and life without the eligibility for parole for twenty-five (25) years R3073. The jury recommended death by a vote of eight to four R3087. The trial court imposed the death penalty on July 27, 1995 R3756. The trial court committed fundamental error in failing to instruct the jury on the life with no parole option and in failing to consider this option.

The Oklahoma Court of Criminal Appeals faced a similar issue. Oklahoma had a system where the two penalties for first degree murder were death and life in prison with the possibility of parole. The legislature changed the penalties to add the option of life without parole. The court held that it was reversible error to fail to consider the life with no parole option in trials and penalty phases conducted

after the effective date of the statute, even though the offense was committed prior to the effective date of the statute:

> There is no question that in this case consideration of the life without parole sentence is a retroactive application of a punitive statute. However, our analysis may not stop here. In order to affirm the trial court's refusal to consider this punishment, we must also find that imposition of the sentence could have disadvantaged Appellant by subjecting him to a harsher punishment than was available at the time he committed his crimes. While we will not speculate as to the comparative drawbacks between a life in prison without chance of parole and the actual imposition of the death penalty, we believe that **any** possibility of a sentence which avoids the death penalty cannot be said to be disadvantageous to the offender.
>
> Accordingly, we find that the trial court's refusal to consider the possibility of imposing a sentence of life without parole provision under the provisions of 21 O.S. Supp. 1987, § 701.10 was error.

Allen v. State, 821 P.2d 371, 376 (Okl.Cr. 1991). See also Wade v. State, 825 P.2d 1357, 1363 (Okl.Cr. 1992). The court has applied this rule to retrials and resentencings as well. McCarty v. State, 906 P.2d. 110 (Okl.Cr. 1995).

The court has also consistently held that failing to instruct the jury and consider the life without parole option is fundamental error and mandates reversal even in the absence of an objection. Salazar v. State, 852 P.2d 729, 741 n.9 (Okl.Cr. 1993); Hain v. State, 852 P.2d 744, 752-753 (Okl.Cr. 1993); Humphrev v. State, 864 P.2d 343, 344 (Okl.Cr. 1993); Fontenot v. State, 881 P.2d 69, 74 n.2 (Okl.Cr. 1994); Parker v. State, 887 P.2d 290, 299 (Okl.Cr. 1994); Cheatam v. State, 0 P.2d 414, 428-430 (Okl.Crim. 1995).

The court has also consistently held that this error is harmful and mandates reversal regardless of the aggravating and mitigating circumstances in a given case. Salazar; Wade; Allen; Hain.

The conclusion of the Oklahoma Court of Criminal Appeals that a defendant who is tried and sentenced after the effective date of the life without parole option must receive consideration of this option and that this error is fundamental and always mandates reversal is supported by the decisions of the United States Supreme Court, this Court, and the courts of other jurisdictions.

In Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) the United States Supreme Court struck down an Alabama statute that prohibited the giving of lesser offenses in a capital case. The Court held that the Due Process Clause required this in a capital case because of the unwarranted risk of conviction. 447 U.S. at 638-639. The Court relied, in part, on the unique need for reliability in a capital case. The same unwarranted risk is at work here. The jury and/or judge could vote to impose the death penalty in order to avoid the possibility of release, rather than because it is the required penalty.

The reasoning of the Oklahoma Court of Criminal Appeals is also supported by the decision of the United States Supreme Court in Simmons v. South Carolina, 512 U.S. ___, 114 S.Ct 2187, 129 L.Ed.2d 133 (1994). In Simmons, the defendant would be sentenced to life without parole as

an habitual offender, if he did not receive the death penalty. The jury was instructed that he would receive a life sentence and counsel was prohibited from arguing that he was ineligible for parole. The United States Supreme Court held this to be a violation of Due Process. 114 S.Ct. at 2194.

> It is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole.

114 S.Ct. at 2194. The Court also noted a recent South Carolina study in which:

> More than 75 percent of those surveyed indicated that if they were called upon to make a capital-sentencing decision as jurors, the amount of time the convicted murderer would have to spend in prison would be an "extremely important" or a "very important" factor *in* choosing between life and death.

114 S.Ct. at 2191. The Simmons opinion supports the holding of the Oklahoma Court of Criminal Appeals that the failure to give the life with no parole option is always harmful.

The importance of the alternative penalty to jurors has been noted by this Court in Jones v. State, 569 So. 2d 1234 (Fla. 1990). In Jones, the defendant was prevented from arguing that he could be sentenced to two consecutive minimum twenty-five year prison terms on the murder charges should the jury recommend life sentences. This Court held this to be error.

> The standard for admitting evidence of mitigation was announced in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The sentencer may not be precluded from considering as a mitigating factor, "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 605, 98 S.Ct. at 2965. Indeed, the Court has recognized that the state may not narrow a sentencer's discretion to consider relevant evidence "that might cause it to decline to impose the death sentence." McClesky v. Kemp, 481 U.S. 279, 304, 107 S.Ct. 1773, 95 L.Ed.2d 262 (1987) (emphasis in original; footnote omitted). Counsel was entitled to argue to the jury that Jones may be removed from society for at least fifty years should he receive life sentences on each of the two murders. The potential sentence is a relevant consideration of "the circumstances of the offense" which the jury may not be prevented from considering.

569 So. 2d at 1239-1240.[18]

Assuming arguendo that this error can be harmless, it was harmful in this case. The jury vote for death was only eight to four (R 3087). See Omelus v. State, 584 So. 2d 563, 567 (Fla. 1991) (finding harmful error, in part, because jury's vote for death was only eight to four) There was substantial mitigating evidence introduced. The trial judge only found two aggravating circumstances, while finding two statutory mitigating circumstances and four non-statutorymitigating circumstances

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[18] The decisions of other courts have emphasized the importance of the length of the alternative sentence to a jury in a capital case. State v. Henderson, 789 P.2d 603 (N.M. 1990), (error not to inform the jury that a life sentence involves ineligibility for parole for thirty (30) years); Clark v. Tansy, 882 P.2d 527 (N.M. 1994) (in capital case, trial judge must first impose sentence on all non-capital counts and instruct jury accordingly); Turner v. State, 573 So. 2d 657, 673-675 (Miss. 1990) (trial judge must conduct the habitual offender hearing prior to capital sentencing and inform jury that the defendant is ineligible for parole if found to be an habitual offender).

R3756-3798. Additionally, it must be noted that six (6) other defendants were convicted in this incident. None received the death penalty. This is a significant mitigating factor.

The jury's and judge's consideration of the life without parole option could well have changed the result. Given the jury's close vote, they well could have chosen this option. Indeed, the PSI, which recommended life, specifically recommended this sentence SR20. The trial judge found the defendant's capacity for rehabilitation as a mitigating circumstance R3788-3789. There was testimony presented that the defendant could function well in a structured environment, such as a prison setting (R 2974). The failure to instruct on this option and consider it is fundamental error. This denied Mr. Puccio due process of law pursuant to Article I, Sections 2, 9, 16 and 22 of the Florida Constitution and the FIfth, Sixth and Fourteenth Amendments to the United States Constitution. This subjected him to cruel and/or unusual punishment pursuant to the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution, and Florida Statute 921.141.

POINT X

THE TRIAL COURT ERRED IN ALLOWING APPELLANT TO CALL A WITNESS WITHOUT CONDUCTING A ~~FARETTA~~ INQUIRY

At the penalty phase, defense counsel told the trial court that Appellant wanted to call a cell mate, Mark Lopez, to testify on his

behalf R2945. Defense counsel stated that he was 'less than enthusiastic about using a cell mate to testify," and asked the trial court to inquire of Appellant R2946. The trial court then engaged in a colloquy with Appellant to determine that Appellant wanted to call Lopez as a witness R2945-47.

After the trial court was satisified that it was Appellant's decision to call Mr. Lopez as a witness, defense counsel called Mr. Lopez to the stand even though defense counsel did not know what Mr. Lopez was going to say R2946,2948. Lopez then went on to give testimony that did more harm than good R2948-2954. On cross-examination, it was revealed that Lopez had been charged with sexual battery on a sixteen year old girl R2952. In closing argument, the prosecutor used Lopez's testimony to his advantage by tarring Appellant with the brush of his cellmate's misdeeds:

> What we have here is an average detainee [Appellant] who is waiting for trial on Murder in the First Degree charges, taking an art class, receiving peer approval from a fellow detainee who is looking at life in prison for sexual battery on a sixteen year old girl. That about sums it up.

R3057; emphasis added.

The trial court erred in assuming that Appellant had the authority to control witness selection. It is generally recognized that witness selection is one of the non-fundamental decisions within the control of counsel. Wainwrisht v. Svkes, 433 U.S. 72, 93, 97 C.Ct. 2497, 2509-2510, 53 L.Ed.2d 594 (1977) (Burger, C.J., concurring) ("[The attorney],

not the client, has the immediate--and ultimate--responsibility of deciding if and when to object, which witnesses, if any to call, and what defenses to develop").; State v. Davis, 506 A.2d 86, 89 (Conn. 1986) (citing cases). Section 4-5.2(b) of the ABA Standards for Criminal Justice, The Defense Function, provides:

> The decisions on what witness to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client.

See Jones v. Barnes, 463 U.S. 745, 753, n. 6 (1983) (Court adopts these standards) .

In assuming that Appellant controlled the selection of witnesses, the trial court permitted Appellant to act as cocounsel without conducting a Faretta[19] inquiry into Appellant's age, education, experience, etc. This is reversible error as to the penalty phase. State v. Young, 626 So. 2d 655 (Fla. 1993) (requiring a reversal when there is not a proper Faretta inquiry). Resentencing is required.

POINT XI

THE TRIAL COURT ERRONEOUSLY APPLIED A PRESUMPTION OF DEATH

The trial court erroneously presumed that death is the proper penalty when one or more aggravating circumstances are found unless outweighed by mitigating circumstances R3797. Allowing this presumption

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[19] Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975). See also Fla. R. Crim. P. 3.111(d) (3).

to influence the sentencing decision violated § 921.141, Fla. Stat., and the Florida and United States Constitutions. The imposition of the death sentence in this case violates Article I, Sections 2,9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The trial judge stated in his sentencing order:

> Death is presumed be the proper penalty when one (1) or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances.

R3797. This is a misstatement of Florida law. § 921.141(3), Fla. Stat. requires the judge to find 'sufficient aggravating circumstances to justify the death penalty before he can even begin weighing the aggravating and mitigating circumstances. There is nothing in the judge's order that indicates he performed this required first step.

This Court implicitly recognized the importance of this initial step in Rembert v. State, 445 so. 2d 337 (Fla. 1989). In Rembert, this Court reduced a sentence of death to life imprisonment even though the trial court had found no mitigating circumstances and this Court had upheld one aggravating circumstance. Id. at 340. Thus, this Court implicitly recognized that the aggravation must be sufficiently weighty to justify death, regardless of the mitigation. See also Terry v. State, 668 So. 2d 954 (Fla. 1996) (death disproportionate even though two aggravators and no mitigation).

The Eleventh Circuit court of Appeals has held that the use of a "death presumption" violates the Eighth Amendment. Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). In doing so, the Court noted that Justice McDonald had astutely pointed out the problems created when such a presumption is relied upon by the sentencing authority. Id. 1473. The Court quoted with approval Justice McDonald's opinion that:

> The death sentence is proper in many cases. But it is the most severe and final penalty of all and should, in my judgment, be excercised with extreme care. I am unwilling to say that a trial judge should presume death to be the proper sentence simply because a statutory aggravating factor exists that has not been overcome by a mitigating factor.

Jackson, 837 F.2d at 1473. The Eleventh Circuit correctly held that employing a presumption of death at the level of the sentencer vitiates the individualized sentencing determination required by the Eighth Amendment. Id. In a capital case, judge and jury are cosentencers. Espinosa v. Florida, 112 S.Ct. 2926 (1992); Johnson v. Sinaletary, 612 So. 2d 575 (Fla. 1993) . Therefore, a death sentence imposed by a sentencer influenced by the erroneous "death presumption" is constitutional error. Resentencing is required.

POINT XII

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE INSTRUCTION

Over Appellant's objections R2815,[20] the trial court instructed the jury on HAC as follows:

> Heinous means extremely wicked or shockingly evil.
>
> Atrocious means outrageously wicked and vile.
>
> Cruel means designed to inflict a high degree or 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 accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.
>
> In determining whether or not a particular murder is heinous, atrocious or cruel, it is also important to realize that the Defendant's actions after the death of the victim are irrelevant.

R3071-72. Giving this instruction was error and denied Appellant's rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

States are required to narrow the class of death eligibles and to channel the discretion of the sentencers by clear, objective, and reviewable standards. Mavnard v. Cartwrisht, 486 U.S. 356, 108 S.Ct.

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[20] Appellant also requested a special HAC instruction, but the trial court denied it R3616,3618,3816.

1853, 1859, 100 L.Ed.2d 372 (1988). Special care must be taken to ensure this requirement in a "weighing" state such as Florida where the jury will first directly weigh the aggravating and mitigating circumstances and then the judge in turn gives "great weight" to the jury's weighing of the circumstances. See Espinosa v. Florida, 112 S.Ct. 2926 (1992).

The instruction that was given in this case is fatally flawed as it fails to properly limit the jury's discretion in deciding what offenses are HAC. The first part --

> 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.

R3072 -- has been directly held to be unconstitutional in its failure to channel discretion. Shell v. Mississippi, 111 S.Ct. 313 (1990).

The only difference between the unconstitutional HAC instruction in Shell, and the one given in this case is the second part of the instruction that was given in this case:

> The kind of crime intended to be included as heinous, atrocious or cruel is one accompaniedby additional acts that show that the crime was conscienceless or pitiless or was unnecessarily tortuous to the victim.

R3072. The question is whether the second part of the instruction showing an example of the type of crime included in the kinds of HAC offenses adequately limits the jury's discretion in finding HAC. Obviously, it does not. The second part of the instruction merely shows

an example of "the kind of crime" which is "intended to be included" and not a limitation as to what constitutes HAC.

The plurality opinion of the United States Supreme Court *in* Prnffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) stated that limitation of HAC to conscienceless, pitiless, or unnecessarily tortuous crimes as those terms have been construed by case law can provide adequate guidance to those recommending sentences in capital cases:

> As a consequence, the [Florida Supreme Court] has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim" .... [cites omitted] We cannot say that the provision as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.

Proffitt, 428 U.S. at 255-256 (emphasis added). However, as noted above, the instruction in this case is an example of HAC rather than a limitation of HAC. By its very nature, an example signifies that there are other kinds of offenses that qualify as HAC. In other words, by adding the second part of the HAC instruction, the jury's discretion has been broadened instead of channeled.

In addition, the "unnecessarily tortuous" and "conscienceless" language of instruction the in this case acts as a catch-all to broaden discretion. As noted earlier, the "unnecessarily tortuous" or "conscienceless" provision "so as construed" by the Florida Supreme Court as a limit may provide the jury adequate guidance. Proffitt.

POINT XIII

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE REQUIREMENT OF "EXTREME" MENTAL OR EMOTIONAL DISTURBANCE FOR MITIGATING CIRCUMSTANCES

Appellant objected to the characterization of the mitigating circumstance of the offense being committed while Appellant was under the influence of "extreme" mental or emotional disturbance R 2782,3578. Appellant objected on the ground that if the "extreme" modifier was not eliminated the jury would discount the mitigating evidence because it did not reach the level of "extreme" R3578. The trial court overruled Appellant's objection R2782. This was error.

The inclusion of the modifier would lead to rejection of an unrebutted mitigating circumstance when viewed under the strict statutory definition of "extreme" mental or emotional disturbance. The limitation of the jury's consideration of a mitigating circumstance by use of the modifier "extreme" violates Article I, Sections 9, 16, and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

In Cheshire v. State, 568 So.2d 908 (Fla. 1990) this Court held it was error to restrict consideration of mitigating circumstances by the use of the "extreme" modifier despite the language of the statute:

> Florida's capital sentencing statute does in fact require that emotional disturbance be "extreme." However, it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, any emotional disturbance

> relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say. Locket-t; Rogers. Any other rule would render Florida's death penalty statute unconstitutional. Lockett.

568 So.2d at 912.

Given the instruction requiring "extreme" mental or emotional influences, the sentencer will summarily reject valid mental mitigation that does not reach that level. The term "extreme" prevents consideration of compelling emotional or mental influences as valid mitigation unless the perpetrator is psychotic, and, perhaps, even then. See Provenzano v. State, 497 So.2d 1177, 1184 (Fla. 1986) (defendant not under influence of "extreme" mental or emotional distress, even though two of five psychiatrists testified that defendant was legally insane at the time of offense). The modifier unduly restricts the categories that may be considered as mitigation, and its use violates the Eighth and Fourteenth Amendments by making consideration of valid mitigation inconsistent, arbitrary and capricious.

POINT XIV

THE TRIAL COURT ERRED IN FAILING TO ADEQUATELY DEFINE NONSTATUTORY MITIGATING CIRCUMSTANCES

Defense counsel asked the trial court to give a number of special jury instructions defining nonstatutory mitigating circumstances which were applicable to this case R2802-10,3614-15. For example, defense counsel wanted the jury instructed that a mitigating circumstance would include: the defendant is a good candidate for rehabilitation, and

would be a good, cooperative prisoner; the homicide was committed for emotional reasons or while under substantial stress occasioned by the victim, Bobby Kent; and that two co-participants in the homicide will receive consequences less severe than death R3614-3615. The trial court denied the special instruction R2814-2815. Failing to instruct on special nonstatutory mitigating circumstances on motion of defense violates due process and the Eighth Amendment requirement that all mitigating evidence be considered in a death sentencing proceeding.

An attorney's argument will not substitute for a proper jury instruction. See Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA 1981); Toole v. State, 479 So. 2d 731, 734 (Fla. 1985) ("Had the jury been properly instructed that it could consider this specific mitigating factor, it might not have recommended death"). Abstract instructions relating to a defense theory are insufficient; such instructions must be "precise and specific rather than general and abstract." United States v. Mena, 863 F.2d 1522 (11th Cir. 1989). This is true even where standard jury instructions are involved. See Harvev v. State, 448 So. 2d 578, 580-81 (Fla. 5th DCA 1984). Jurors will only be properly able to understand what specific nonstatutory mitigating evidence is being offered if they are given instructions on such evidence.

Jury instructions which are constitutional, in general, can be unconstitutional, if they do not allow the jury to properly consider and weigh mitigation. Penrv v. Lynaugh, 492 U.S. 302 (1989). Here, the

instruction that the jury could consider 'any other aspect of the Defendant's character or record, and any other circumstance of the offense" would not tell the jury it could consider certain aspects of this case in mitigation.

Given the lack of clarity in defining nonstatutory mitigation, putting this issue before the jury in lump form with no instructions on what can mitigate, invites the jury to decide for itself what is mitigating. The refusal to instruct on the non-statutorymitigators may have led the jury to ignore relevant mitigating evidence contrary to the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution.

POINT XV

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE THE HEARSAY STATEMENTS OF DEREK KAUFMAN

Kenneth Calamusa told the jury that Appellant confessed to him R2109-2113. Calamusa testified that Appellant told him that he "plunged" the knife into Kent's neck in a stabbing motion R2111,2133. This was inconsistent with the physical evidence and cast doubt upon Calamusa's credibility.[21] Calamusa also testified that Appellant said

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[21] The medical examiner testified that Kent's neck was slit ('incised"), not stabbed R1980.

he helped put Kent's body in the water R2111. On cross-examination, defense counsel asked Calamusa:

> Q. Do you know if anyone has testified that Mr. Puccio, in fact, is the one that helped carry the body?
>
> A. I have no idea. I have no way of knowing that.
>
> Q. So you don't know if there is anyone that would substantiate what he said he told you?
>
> A. All I know is what he told me. I'm here to tell you what he told me.

R2137-2138.

The prosecutor argued that this cross-examination, as well as the fact that defense counsel would argue to the jury the conflict between the medical examiner's testimony and Calamusa's, opened the door to the introduction of Derek Kaufman's hearsay statements to the lead detective R2163-2170;2184-2207. The trial court agreed that the last question and answer quoted above opened the door to the hearsay statements of Kaufman R2211-2213.

Over defense objection, Detective Murray told the jury what Derek Kaufman told him on July 19, 1993 R2233.[22] Kaufman told Detective Murray that he and Dzvirko carried Kent's body to the water's edge R2233. Dzvirko dropped Kent and walked away R2233. Appellant then helped him put Kent's body in the water R2233. Kaufman also told

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[22] Before Detective Murray testified, the trial court instructed the jury: 'There is now going to be testimony placed before you that is being offered not for the truth of the statement, but merely as the statement pertains to the testimony of Mr. Calamusa" R2225.

Detective Murray that Appellant cut Kent's neck laterally and in a jabbing motion R2233. Murray told the jury: "And I remember [Kaufman] used his hand like this, to show a jabbing motion into the neck of Bobby Kent (indicating)" R2234.

The trial court erred in allowing Detective Murray to tell the jury what Kaufman told him. This testimony was inadmissible hearsay not within any recognizable exception. §§ 90.801, 90.802, 90.803 Fla. Stat. 1993. Any conspiracy had ended by the time Kaufman was in custody; therefore, the co-conspirator hearsay exception was not applicable. Burnside v. State, 656 So. 2d 241, 245 (Fla. 5th DCA 1991)(in murder prosecution, error to admit statement of co-conspirator under section 90.803(18) which occurred after murders occurred).

Defense counsel did not open the door to this inadmissible hearsay. The fact that the state's case suffered from a conflict between the physical evidence and Calamusa's testimony is a problem the state could only attempt to cure with admissible evidence, e.g., call Kaufman to the stand and see if his testimony can withstand cross-examination by defense counsel. It would be a novel holding indeed if a conflict in the state's case gave it the power to introduce inadmissible evidence.

Nor did the cross-examination quoted above open the door to this testimony. This is because Calamusa's common sense answers to those questions did not create any false or misleading impression which would have made it appropiate to admit evidence to "right the scales."

United States v. Young, 470 U.S. 14, 105, S. Ct. 1038, 1045 (1985). Unless Calamusa was watching the entire trial (prohibited by the rule of sequestration), the jury would not expect him to know if anyone testified that Appellant helped carry Kent's body to the water. Nor would the jury expect Calamusato know if anyone could substantiate what he claims Appellant told him; the jury knew that Calamusa was not an eyewitness, or a detective interviewing witnesses. In short, Calamusa's credibility was not undermined by the line of cross-examination quoted above, and therefore the door was not opened to Kaufman's self-serving hearsay statements to Detective Murray. See Tindall v. State, 645 So. 2d 129 (Fla. 4th DCA 1994) (asking officer if witnesses had made statements did not open door to what they said: "Appellant's counsel does not make inquiry into the content of the anonymous witness' statements. Rather, the questions were designed to impeach the officer's testimony that they told him anything at all"); Thompson v. State, 615 So. 2d 737, 743 (Fla. 1st DCA 1993) (asking officer from whom he got information for warrant did not open door to testimony what the information was). Calamusa's testimony was suspect simply because the jury had already heard the medical examiner testify that Kent's neck was incised, not stabbed. But, as indicated above, this was a problem the state had to deal with in some legitimate fashion using admissible evidence.

Hhar --

In order for the inadmissible hearsay to be deemed harmless, the state must prove beyond a reasonable doubt that the jury's verdict was not influenced by it. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Here, the error cannot be deemed harmless. First, the hearsay was introduced into evidence to bolster Calamusa's credibility and corroborate his testimony that Appellant gave him a detailed confession to the crime. The hearsay was therefore enormously prejudicial to Appellant, who testifed that he acted in self-defense. See Young v, State, 598 So. 2d 163 (Fla. 3d DCA 1992) (hearsay not harmless because it was prejudicial to defendant's claim of self-defense). Second, the the fact that Detective Murray testified as to the hearsay only compounded the error. "Juries generally regard police officers as disinterested, objective and highly credible, and thus their testimony is particulary capable of improperly influencing the jury." Tindall, supra, 645 So. 2d at 131 (reversible error to admit inadmissible hearsay through police officer). The error in admitting Derek Kaufman's hearsay statements through Detective Murray was not harmless error. A new trial should be ordered.

Penalty Phase Harm

Appellant was the only defendant who was sentenced to death; therefore his role in the murder must have been critical to the jury's

recommendation.[23] Allowing the state to introduce into evidence the self-serving hearsay statements of Derek Kaufman which cast blame on Appellant and increased Appellant's role in the crime cannot be deemed harmless error as to the penalty phase. See Lawrence v. State, 614 So. 2d 1092, 1096-1097 (Fla. 1993) (evidence that may be harmless as to guilt, maybe harmful as to the penalty phase); Lovette, 636 So. 2d 1304, 1308 (Fla. 1994) (same). At a minimum, resentencing is required. The trial court's ruling violated Article I, sections 9, 16 and 17 of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT XVI

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE DEREK KAUFMAN'S OUT OF COURT STATEMENTS TO MICHAEL COLLETTI UNDER THE COCONSPIRATOR HEARSAY EXCEPTION

Michael Colletti testified that he was a friend of Derek Kaufman's R2172. Sometime in July 1993, Colletti burglarized a house and stole some guns R2173. Over defense hearsay objection, Colletti testified that on July 9, four or five days before Kent was killed, Kaufman told him that he wanted these guns to kill someone R2174,2182-2183. Kaufman did not say who the intended victim was, but he did say that the intended victim's best friend could "give" him a house to burglarize

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[23] In Point I Appellant argues that his death sentence is not proportionate because equally culpable co-defendant's received life sentences.

R2179. The trial court allowed the state to admit this hearsay pursuant to the coconspirator hearsay exception under § 90.803(18)(e), Fla. Stat. (1993).

The admission of coconspirator hearsay requires that the conspiracy itself and each member's participation in it be established by independent evidence, i.e., evidence apart from the coconspirator hearsay statements. Rnmani v. State, 542 So. 2d 984 (Fla. 1989). Statements made prior to one's entry into the conspiracy are inadmissible under this exception. State v. Edwards, 536 So. 2d 288, 294 (Fla. 1st DCA 1988); Moore v. State, 503 so. 2d (5th DCA 1987).

Colletti's testimony was inadmissible because there was no independent evidence (i.e., evidence apart from these hearsay statements) that Appellant was involved in the conspiracy at this time. Even the prosecutor conceded that the first piece of independant evidence establishing Appellant's involvement in the conspiracy was Appellant's statement made Tuesday night (July 13) that "Bobby needs to be dead" and Lisa Connelly's agreement with that statement by saying "Marty couldn't have a relationship with his parents because Bobby Kent wouldn't let him" R1632.

Colletti's testimony was also inadmissible because there was no predicate evidence that the hearsay conversation related to the plot to kill Bobby Kent. Colletti testified that on July 9 Kaufman was trying to obtain guns to kill someone R2174,2182-83. There was no evidence at

trial that anyone had plotted to kill Kent at this time. In fact, the first time that there is a plan to kill Kent is July 13 (as the indictment reflects). Thus, no predicate could be shown that the July 9 conversation related to the conspiracy to kill Bobby Kent. See Capaldo v. State, 654 So. 2d 1207, 1208 (Fla. 5th DCA 1995) (§ 90.803(18)(e) does not permit statements made during a conspiracy to commit one crime to be admitted in a prosecution for an entirely different offense not involving the conspiracy); Usher v. State, 642 So. 2d 29, 31 (Fla. 2d DCA 1994) ("Any statement of an alleged coconspirator which the prosecution seeks to admit must have been made during the course and in furtherance of the conspiracy as that time period is defined in the charging document").

Since Kaufman's statements to Colletti were made well before there was any independent evidence that Appellant was a member of a conspiracy to kill Kent, it was error for the trial court to allow the state to introduce this inadmissible hearsay evidence. The trial court's ruling violated Article I, sections 9, 16 and 17 of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the united States Constitution.

POINT XVII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL MADE AFTER THE STATE COMMENTED ON HIS POST-ARREST SILENCE IN CLOSING ARGUMENT

In closing argument, the prosecutor stated:

> You have to ask the question, and what was interesting is they brought out the fact that Mr. Dzvirko never made a statement when he was arrested until six months later when he gave one to our office.
>
> Ms. Swallers gave a statement initially when she was arrested, but she never implicated Mr. Puccio until six months later after she pled guilty.
>
> Mr. Puccio never gave a statement--

R2681; emphasis added. At this point, defense counsel objected and moved for mistrial; the trial court took the motion under advisement and later denied it R2681-2683;2730-2733.

In State v. Smith, 573 So. 2d 306 (Fla. 1990) this court stated at pages 317-318:

> Our cases have made clear that courts must prohibit all evidence or argument that is fairly susceptible of being interpreted by the jury as a comment on the right of silence. E.g., State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); State v. Kinchen, 490 So. 2d 21 (Fla. 1985); Starr v. State, 518 So. 2d 1389 (Fla. 4th DCA 1988); Hosper v. State, 513 So. 2d 234 (Fla. 3d DCA 1987). "The prosecution is not permitted to comment upon a defendant's failure to offer an exculpatory statement prior to trial, since this would amount to a comment upon the defendant's right to remain silent." Hosper, 513 so. 2d at 235 (citations omitted).

In this case, the prosecutor commented on Appellant's failure to make a statement before trial ("Mr. Puccio never made a statement"). Because comments on silence are "high risk errors," based on the substantial likelihood that meaningful comments will vitiate the right to a fair trial by influencing the jury verdict, State v. DiGuilio, 491 So. 2d 1129, 1136-1137; Sharp v. State, 605 So. 2d 146, 148 (Fla. 1st DCA 1992), a new trial is required. The trial court's ruling violated Article I, sections 9, 16 and 17 of the Florida Constitution, and the

Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT XVIII

THE TRIAL COURT ERRED IN ALLOWING THOMAS LEMKE TO TESTIFY THAT A "MARTY" CALLED HIM SEEKING MONEY AND HELP IN GETTING OUT OF STATE

Thomas Lemke testified that he was a friend of Derek Kaufman's R2084. Lemke had never met Appellant and had never heard his voice before R2101. Nonetheless, Lemke was allowed to testify over defense objection that a "Marty" called him asking for help in getting out of state R2088. Lemke and "Marty" spoke three or four times that day. Lemke told him that he would see if he could get some money to help him out R2091. Meanwhile, Lemke spoke to Kaufman (who was in jail) who said that it was over, and that "Marty" should turn himself in. Lemke relayed this to "Marty" R2097. The trial court erred in allowing Lemke to testify about phone conversations attributable to Appellant without a proper predicate.

Before the state can introduce into evidence phone conversations purportedly made by a defendant, the state must "unambiguously connect the defendant's voice to that of the telephone caller[.]" Manuel v. State, 524 So. 2d 734, 736 (Fla. 1st DCA 1988); Hargrove v. State, 530 So. 2d 441, 443 (Fla. 4th DCA 1988). In the instant case, Lemke could not connect Appellant's voice to that of the telephone caller because he had never heard Appellant's voice before. Accordingly, the trial

court erred in allowing Lemke to testify as to these phone conversations.

POINT XIX

THE TRIAL COURT'S REASONABLE DOUBT INSTRUCTION VIOLATED DUE PROCESS, THE EIGHTH AMENDMENT, AND ARTICLE I, SECTIONS 9 AND 17, OF THE FLORIDA CONSTITUTION, BECAUSE IT MINIMIZED THE "BEYOND A REASONABLE DOUBT" STANDARD OF PROOF

At the beginning of voir dire, the trial court read to the jury panel the standard jury instruction on reasonable doubt R901-903. The trial court then ad-libbed:

> There is no requirement for the state to prove a defendant's guilt perfectly or 100 percent, or to prove guilt by certainty because as human beings we all know one thing in using our experiences, that if we do not have the opportunity to see and observe something ourselves we can just never be absolutely sure that it happened. Any time we have to take someone else's recollection of what might have occurred, we can never be certain of what it is that might have occurred. And that's why the law does not require it.

R903.

Recently, the Supreme Court in Cooper v. Oklahoma, 64 U.S.L.W. 4255 (April 16, 1996), quoting from Addington v. Texas, 441 U. S. 418, 423 (1979), stated:

> "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." Quoting, In re Winship, 397 U. S. 358, 370 (1970) (Harlan, J., concurring).

In the instant case, the purpose of the trial court's reasonable doubt explanation was to make the jurors feel comfortable with a "lower degree of confidence" in the correctness of their verdict.

In Lovett v. State, 30 Fla. 142, 11 So. 550 (1892), this Court considered in depth the necessary and correct instruction that should be given on reasonable doubt in a criminal trial and framed the instruction used to this day. Thus, for over one-hundred years, Florida has had a reasonable doubt instruction which adequately instills in jurors "the degree of confidence our society thinks he should have in the correctness" of his verdict. The trial court's sua sponte attempt to lessen that confidence level is error in any criminal case; it is intolerable in a case where a human being's life is at stake.

The determination of which standard of proof to apply involves assessing interests which the individual has at stake and weighing those against the state's interests. Addington v. Texas, 441 U.S. 418, 425 (1979). For example, due process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake are more substantial than mere loss of money. Santosky v. Kramer, 455 U.S. 745, 756 (1982) (termination of parental rights). The stakes involved in an ordinary criminal case demand an even higher burden of proof:

> "Where one party has at stake an interest of transcending value--as a criminal defendant his liberty--this margin of error is reduced as to him by the process of placing on the other party the burden of . . .persuading the factfinder

> at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt."

In Re Winship, 397 U.S. 358, 362 (1970).

Due process and the Eighth Amendment demand a greater degree of reliability when the interest which the individual has at stake is life itself. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In Beck v. Alabama, 447 U.S. 625, 638, 100 S.Ct. 2382, 2390, 65 L.E.2d 392 (1980), the Court stated that the need for greater reliability in death cases includes both the guilt and penalty determination:

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. [Footnote omitted; emphasis added.]

In the instant case, the trial court's ad-libbed reasonable doubt explanation diminished the reliability of both the guilt and penalty determination. In a criminal case, and especially in a death case, the jury should be made to feel uncomfortable about doubt. As noted above, our reasonable doubt instruction has long struck the right balance in this regard. By telling the jury that certainty was not required, the trial court went out of its way to make the jurors feel comfortable about having doubt and convicting. This minimization of the reasonable doubt standard violated due process and the Eighth Amendment in the

United States Constitution, and Article 1, Sections 9 and 17, of the Florida Constitution.

Finally, even assuming that the trial court's reasonable doubt explanation was correct on an academic or theoretical level, that does not mean the trial court was correct, or did not err, in giving the jury that explanation. For example, it is factually correct to say that every death sentence is automatically reviewed by this Court. However, it violates the Eighth Amendment to instruct the jury to that effect because such an instruction minimizes the jurors' role and diminishes their sense of responsibility. Caldwell v. Mississippi, 472 U.S. 329, 105 S.Ct. 2633, 86 L.Ed. 231 (1985). Likewise, the trial court's gratuitous attempt to provide a "better" definition than Florida's time-honored definition of reasonable doubt cannot be condoned. It is interesting to note that the trial judge did not expend his creative energy at the other end of the reasonable doubt spectrum. For example, he did not attempt to creatively explain that portion of the reasonable doubt instruction which tells the jury they must acquit--even if they have an abiding conviction of guilt--if that abiding conviction "waivers and vacillates." The trial judge chose not to work at this end of the scale; instead, of "maximizing" reasonable doubt, he chose to minimize it. In doing so, the trial court reversibly erred.

POINT XX

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE

Appellant moved for a new trial on the ground of newly discovered evidence R3652,3216. The trial court denied the motion R3237-39. This was error. Newly discovered evidence is that which is unknown by the party at time of trial and which could not have been known by the party by the use of due diligence. State v. Gunsby 670 So. 2d 920 (Fla. 1996). The evidence must be of such a nature that it would probably produce an acquittal. Id. The evidence was a psychiatric report of one of the state's main witnesses -- Heather Swallers R3652. Defense counsel explained that the existence of the report had never been disclosed and that Heather Swallers had even failed to disclose such a report when questioned R3653-54. It was only after the trial that disclosure was made R3654. Thus, the report could not have been discovered through due diligence.

Because of the nature of the case it is probable that use of the undisclosed report could have led to an acquittal. Defense counsel explained that the report revealed that Heather Swallers was suggestible and had a history of drug abuse R3653. Counsel explained had the information been disclosed he could have prepared to cross-examine Swallers at greater length about her memory lapses and other matters associated with her credibility including her suggestibility R3653-54.

Because Swallers was a key state witness and her credibility was vital to the state, the reduction of her credibility probably would have resulted in a different verdict. It was error to deny the motion for new trial. Appellant was denied a fair trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution.

CONCLUSION

This Court should vacate Appellant's convictions, and reduce or vacate his sentences, and remand for a new trial or grant relief as it deems appropiate.

Respectfully submitted,

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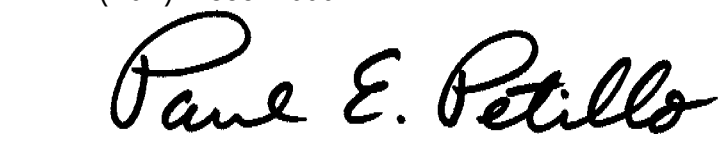

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Celia Terenzio, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Florida 33401, by courier this 16th day of January, 1997.

Paul E. Petillo

Attorney for Martin Puccio

IN THE SUPREME COURT OF FLORIDA

MARTIN PUCCIO,	)	
	)	
Appellant,	)	
	)	
vs.	)	**CASE NO. 86,242**
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

APPENDIX

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA.

CASE NO: 93-12440CF10 D
JUDGE CHARLES M. GREENE

STATE OF FLORIDA,
Plaintiff,

v.

MARTIN PUCCIO,
Defendant.
_____/

SENTENCINGORDER

On September 21, 1994, the defendant, Martin Puccio, after a trial by a jury of his peers, was found guilty of Murder in the First Degree and Conspiracy to Commit Murder in the First Degree. The jury deliberated for approximately two and one half hours prior to announcing its verdict. The same jury was again impaneled on September 28, 1994, to render an advisory opinion to this Court whether the defendant should be sentenced to death or life imprisonment, without the possibility of parole for twenty-five (25) years. Assistant State Attorney Tim Donnelly urged the jury to recommend the imposition of the death penalty and Defense Attorneys Tom Cazel and Kenneth Duckworth urged the jury to recommend a life imprisonment sentence, without the possibility of parole for twenty-five (25) years. On September 29, 1994, following receipt of the appropriate jury instructions applicable to

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ROBERT E. LOCKWOOD
ON 2/27/95
BY Lillie Walker

penalty phase proceedings, the jury deliberated for approximately five hours forty-five minutes. The jury rendered an advisory opinion in which the majority of the jury, by a vote of eight to four, recommended that the defendant be sentenced to death for the murder of Bobby Kent.

On December 6, 1994, the Court reconvened to afford the defendant the opportunity to present additional testimony, evidence and argument pertaining to sentencing, pursuant to Spencer v. State, 615 So.2d 688 (Fla. 1993). On March 22, 1995, the Court received requested sentencing memoranda from counsel for the defendant. On June 2, 1995, the Court received requested sentencing memoranda from counsel for the State.

This Court, having heard the evidence presented during both the guilt and penalty phases of the proceeding, having had the benefit of legal argument, both in favor of and in opposition to the death penalty, finds as follows:

FINDINGS OF FACT

1. The defendant and six other young adults/juveniles were charged with the murder and conspiracy to commit murder of Bobby Kent which occurred on July 15, 1993.
2. Martin Puccio resided on the same block as the victim, Bobby Kent. They had been best friends since third grade.
3. Lisa Connelly, at the time of the murder, was Martin Puccio's girlfriend and was pregnant with his baby.
4. Alice Willis was best friends with Lisa Connelly. Shortly after Connelly began to date Martin Puccio, Connelly introduced Bobby Kent to Alice Willis. Kent and Willis subsequently began to date. Their relationship lasted for a few weeks.

Afterwards, Alice Willis moved back to Palm Bay, Florida to reside with her parents.

5. On July 13, 1993, Lisa Connelly telephoned Alice Willis in Palm Bay. Willis was told that Bobby Kent was planning to come to Palm Bay to murder her (Willis) and smother her baby, unless she returned to Broward County to date him again.

6. Shortly after this discussion, Alice Willis, Donald Semenec and Heather Swallers arrived at Connelly's house from Palm Bay, Florida. They all proceeded to Derek Kaufman's house. There, Willis and Connelly enlisted Derek Kaufman's assistance in the plan to murder Bobby Kent.

7. Derek Kaufman portrayed himself as a gang leader. He had the reputation of one who could do, and had previously done, harm to others. He suggested that they (Connelly and Willis) wait to attack Bobby Kent until plans could properly be made, so that the crime could be committed without detection.

8. Kaufman suggested that the proper place to attack Bobby Kent was a remote area of western Broward County (Weston). He claimed that he had previously killed others at this site. This is where Bobby Kent was murdered the next night.

9. Lisa Connelly and Alice Willis did not heed Kaufman's advice. That night, they took Connelly's mother's handgun, concealed it, and drove with Bobby Kent to the remote site where he was ultimately murdered the next night. After their attempt failed, Willis, Connelly and Bobby Kent returned to Kent and Puccio's block. There, in the presence of Martin Puccio, Lisa Connelly, Heather Swallers and Donald Semenec, Bobby Kent walked off hand in hand with Alice Willis to his house. Martin Puccio made the comment that Bobby

Kent had to die. Allegedly, Bobby Kent raped Alice Willis that night at his house.

10. The next day, Derek Dzvirko (Lisa Connelly's cousin) was enlisted. He joined Donald Semenec, Derek Kaufman and Martin Puccio in murdering Bobby Kent the next night.

11. On the night of his murder, Bobby Kent was lured to the same remote rock pit area in western Broward County, where he had been the night before with Willis and Connelly . Bobby Kent went there under the belief that Willis and he were rekindling their relationship and to race her new car.

12. Prior to meeting Bobby Kent on the night of his murder, Lisa Connelly, Alice Willis, Donald Semenec, Derek Dzvirko and Heather Swallers picked Derek Kaufman up at his house. On the way to Bobby Kent's and Martin Puccio's block, the group discussed various methods to kill Bobby Kent.

13. Upon arrival at Martin Puccio's house, the group continued to discuss their plan with Martin Puccio present. On this hot summer night, Puccio wore a trench coat. Underneath his coat, he had strapped a divers knife to his leg. He also brought with him a metal pipe. Derek Kaufman hid in the back of Martin Puccio's mother's car so that Bobby Kent, who had not yet arrived, would not know he was present with the others.

14. Between the group's members there were four (4) weapons: two (2) knives, a baseball bat and a lead pipe.

15. Unknown to the victim, there was no intention to race cars and Alice Willis was not

desirous of rekindling their relationship. To the contrary, Alice Willis brought along her current boyfriend, Donald Semenec, who was introduced to the victim as "Alex", the alleged boyfriend of co-defendant, Heather Swallers.

16. Together, Willis, the victim, Semenec and Swallers drove for approximately one-half hour to the rock pit. Lisa Connelly, Martin Puccio, Derek Dmirko and Derek Kaufman, (who had hidden himself from Bobby Kent's sight), drove along in a second car.

17. At the rock pit, Alice Willis walked hand in hand with Bobby Kent by the bank of the canal. While she feigned her relationship with him, the other co-conspirators (including Puccio) were making their final preparations prior to commencing the deadly attack.

18. As the prearranged signal was given, Donald Semenec stealthily approached Bobby Kent from behind and stabbed him in the back of the neck. This action commenced the deadly attack of Bobby Kent.

19. The medical examiner, Dr. Daniel Selove, testified that Bobby Kent died as a result of multiple stab wounds. There were two (2) stab wounds to the back of Bobby Kent's neck. One stab wound penetrated the skin one (1) to two (2) inches in depth along the side of the backbone. The other stab wound was located in the back of Bobby Kent's head, scalp deep.

There were three (3) superficial stab wounds in the area of Bobby Kent's right shoulder. These wounds did not penetrate more than a half-inch to an inch below

the skin. Bobby Kent's right abdomen was slashed open. This wound was two (2) inches wide at the opening and penetrated his body six (6) to seven (7) inches deep, After passing through the skin and muscle at the front of the abdomen, the wound passed through some attachments of the intestine, through the diaphragm and then punctured tissues of the lower back. This eventually caused Bobby Kent's intestine to protrude from his body.

Two (2) defensive wounds were located, one (1) on Bobby Kent's right arm and the other on his left hand.

There were two (2) incised wounds from slicing motions which slit his neck twice. The upper wound was four (4) inches across, while the lower wound was five (5) inches across. The voice box, or windpipe, was severed as a result. This prevented Bobby Kent from speaking and caused bleeding into the windpipe which obstructed his ability to bring air in and out of his lungs.

Bobby Kent's neck was fractured just inside the cut throat area. Two (2) bones were fractured in the vertebrae column behind the trachea by a force which caused the head to move backward.

Bobby Kent was also stabbed in the left chest. The wound was two (2) inches across and penetrated six (6) to seven (7) inches into his chest. The knife penetrated three

(3) of his four (4) heart chambers, continuing through a lung and puncturing the tissue between the ribs and the back of the chest.

There was a two (2) inch-long laceration of Bobby Kent's right scalp, This injury was inflicted by a blunt instrument. The skull was not fractured.

20. After the first blow was inflicted upon Bobby Kent, he turned to his childhood friend, Martin Puccio, for help, It was at that time that Puccio stabbed him in the abdomen, Wounded, Bobby Kent attempted to flee from his attackers. Kaufman yelled to the others that the victim had to be stopped. Kent was pursued, brought to the ground and surrounded by Semenec, Kaufman and Puccio. The attack, which resulted in the murder of Bobby Kent, then continued.

21. As the attack concluded, Derek Kaufman took the heavily weighted baseball bat and swung it at the prone and almost lifeless body of Bobby Kent. Afterwards, witnesses testified that the noise which had been coming from Kent stopped.

22. Bobby Kent, clinging to life, was thrown into the canal by Martin Puccio and Derek Kaufman and left to die. Afterwards, all the co-conspirators drove away as planned to Hollywood Beach.

23. Upon arrival at the beach, it was discovered that the sheath to Martin Puccio's knife had been left at the scene of the murder. Alice Willis drove Derek Kaufman and Martin Puccio back to the rock pit area to retrieve the sheath. While they were

gone, Lisa Connelly wiped the fingerprints off Martin Puccio's car. She also buried the knives used during the murder, as well as her own and Heather Swallers' shoes, in the sand.

24. Later, when all seven of the co-defendants were again together at the beach, they discussed an alibi, The knives used in the murder were dug up and thrown into the ocean. The bat was cleaned and the pipe thrown into some bushes.

25. According to the alibi, Bobby Kent had left the group for a date with an unknown girl. All of the others, except Derek Kaufman, were to have gone to the "South Beach" area of Miami. Kaufman, according to the alibi, was never present.

26, At approximately 4:00 a.m. (after Bobby Kent was already deceased) Martin Puccio telephoned the Kents' house from Lisa Connelly's home. Following the script of the alibi, Martin Puccio spoke to the victim's father, Fred Kent. Puccio, pretending to be speaking to Bobby Kent, announced he had returned home from his evening out, and said that he would speak with him later.

27. The day after the murder Alice Willis, Lisa Connelly and Derek Dzvirko drove back to the crime scene to see if Bobby Kent's body had been found and to erase tire tracks left there. Afterwards, they picked Derek Kaufman up at his house. Six of the seven defendants met to further discuss the alibi.

28. Later that morning, Lisa Connelly went to Martin Puccio's house. Fred Kent, the victim's father, arrived soon after. He inquired whether Puccio had any knowledge of what had happened to his son. Martin Puccio stuck to the alibi, and indicated that he had last seen Bobby Kent the evening before, when Kent

friend of Bobby Kent. They first met in third grade and had lived on the same block ever since. The evidence described the defendant, Martin Puccio, and victim, Bobby Kent, as best and inseparable friends. Unfortunately, the evidence also revealed hatred and evil intent by Martin Puccio towards Bobby Kent. This ill will and hatred ultimately culminated in the especially heinous, atrocious and cruel attack on Bobby Kent, which resulted in his death, primarily at the hands of his childhood best friend.

The testimony revealed a plan formulated by the conspirators, including the defendant, Martin Puccio, which brought Bobby Kent to a remote area of Broward County under the pretense that he was going to spend an evening with his friends, socializing and racing cars. Bobby Kent must have felt very secure surrounded by his childhood best friend, Martin Puccio, Puccio's girlfriend, Lisa Connelly, and his former girlfriend, Alice Willis, who in an Oscar winning performance, pretended to rekindle their relationship. There were also four other young adults, three of whom, Heather Swallers, Derek Dzvirko and Donald Semenec, knew Bobby Kent to a lesser degree (Semenec was introduced as Heather Swallers' boyfriend), and Derek Kaufman (whose presence was not known to the victim).

Unfortunately, these seven young adults never intended to participate in an evening of fun and pleasure, but took Bobby Kent to the Weston development solely to murder him. Each of the young adults had their specific part and role to play in the murder conspiracy and several had armed themselves accordingly. The defendant, Martin Puccio, was armed with a diver's knife in a sheath, as well as a small lead pipe. Donald Semenec was also armed with a knife, Derek Dzvirko had procured a baseball bat for the group, which was used by Derek Kaufman during the attack and murder.

Crime scene and homicide detectives testified how they observed Bobby Kent, days after his murder, floating face down in a small canal. Dr. Selove, the attending medical examiner, told the Court of the multiple stab wounds that were inflicted upon Bobby Kent, as well as the defensive wounds which indicated how the victim had attempted, in vain, to avoid his death. The doctor also testified as to the blunt object blow to Bobby Kent's head. The detectives, using blood found on the ground, testified as to the size of the area where the attack occurred.

Heather Swallers and Derek Dmirko both plead guilty to Murder in the Second Degree and Conspiracy to Commit Murder in the First Degree as a result of their actions. Their testimony described the events immediately before and during the attack which resulted in the murder of Bobby Kent.

According to plan, the act progressed to its deadly conclusion. After being lured to the remote area in the Weston subdivision under a ruse, Bobby Kent was distracted from the majority of the group by his former girlfriend, Alice Willis. She walked with him along the canal bank, feigning to rekindle their relationship, As planned, she stopped by the water's edge. Heather Swallers then approached the couple, and began to engage them in conversation. This afforded the attackers the opportunity to stealthily approach the victim. Donald Semenec delivered the first of the many stab wounds inflicted on Bobby Kent. The testimony and evidence proved that Semenec stabbed Bobby Kent in the back of his neck. Bobby Kent, in pain and conscious disbelief, turned to his childhood best friend, the defendant, Martin Puccio, and asked for his help. Puccio answered his friend's pleas by sticking his knife into the victim's abdomen and slicing it open, in a motion similar to that

used to gut a fish.

Even after he received these wounds, Bobby Kent attempted to distance himself from his attackers, The defendant, Martin Puccio, and accomplices Donald Semeoec and Derek Kaufman pursued him, tackled him to the ground and then inflicted several additional stab wounds. After a period of time, several of the young adults who, during the attack had entered Alice Willis' car, turned on the car and its headlights. The testimony revealed that from the car, they could see the victim lying on his back, surrounded by his three attackers. He was still alive, and they could hear his breathing. Derek Kaufman then swung the baseball bat into Bobby Kent's head and no further sound was heard by those in the car. Bobby Kent was carried to the water's edge by Derek Kaufman and Derek Dzvirko. Kent was making a wheezing sound and was covered in his blood. The defendant, Martin Puccio, then assisted Derek Kaufman in putting Bobby Kent into the water.

The medical examiner, Dr. Selove, testified that on July 18, 1993 he arrived at the murder scene. The victim was badly decomposed. At the scene, and during autopsy, Dr. Selove observed the following injuries to Bobby Kent:

The initial stab wound to the back of the neck.

A stab wound to the chest, that pierced three of the four heart chambers.

Two knife wounds that slit Bobby Kent's throat and windpipe.

A superficial wound to the shoulder.

The slicing wound which opened Bobby Kent's abdomen.

Some defensive wounds on Bobby Kent's arm, finger and shoulder.

Blunt trauma to his head,

Dr. Selove also made the observation that the attack took place within approximately a ten yard area. This was consistent with the blood evidence and testimony of the crime scene detectives.

Other evidence including, but not limited to, the testimony of Kenneth Calamusa, a jailhouse informant, described how the defendant, Martin Puccio, boasted to him that he had cut Bobby Kent's throat, had stabbed him from behind, and had stabbed him in the stomach. After these attacks, Bobby Kent attempted to run off. Martin Puccio told Calamusa that he had cut Bobby Kent in the throat and had stabbed him in the chest through the heart. Puccio further told Calamusa that Kaufman had hit Kent in the head with the baseball bat. After the murder, Derek Kaufman complimented Martin Puccio, but added that he should have twisted his knife while it was in Bobby Kent's heart. Heather Swallers testified that, at Hollywood Beach, Martin Puccio told her that he had stabbed Bobby Kent in the upper chest.

The defendant, Martin Puccio, testified at trial. He stated that the did not know of the plan to kill Bobby Kent. Yet, he admitted that he had armed himself with a knife and lead pipe, claiming that he had done so at the victim's request. The defendant testified that he had stabbed or slashed Bobby Kent after the victim had been stabbed in the back of the neck by Donald Semenec, The defendant claimed that he had stabbed Bobby Kent only after the victim had become crazed in a rage of anger. The jury chose to disbelieve the defendant's version of the events leading to Bobby Kent's death.

The Court concludes from the testimony and evidence, that the actions of the defendant, Martin Puccio, resulting in the death of Bobby Kent, were especially heinous, meaning extremely wicked or shockingly evil. The acts were especially atrocious, meaning

outrageously wicked or vile; and were especially cruel, moaning designed to inflict a high degree of pain with utter indifference to, or even with enjoyment of the suffering of another. The pain and suffering the victim endured during the duration of the attack has been established not only by the defensive wounds he received, indicating that he was well aware of what was happening, but by the victim's screams and gestures, as well as the blood stains which evidenced his struggle. All of this evidence proves that he did not die instantly. Bobby Kent fought for his life as he contemplated his own death. This murder was the product of multiple stabbings and a beating, during which the victim was conscious throughout and aware of what was happening. The murder was extremely wicked and vile and inflicted a high degree of pain and suffering to the victim. The defendant, Martin Puccio, acted with utter indifference to the suffering of the victim. This murder was clearly accompanied by such additional acts so as to set it apart from the norm of Capital felonies. It was indeed a conscienceless, pitiless crime which was unnecessarily torturous to Bobby Kent. Davis v. State, 620 So. 2d. 152 (Fla. 1993); Campbell v. State, 571 So.2d. 415 (Fla. 1990); Hansborough v. State, 509 So. 2d. 1081 (Fla. 1987); Nibert v. State, 508 So.2d 1 (Fla. 1987). The State has clearly proven that Bobby Kent's murder was committed in an especially heinous, atrocious or cruel manner. Martin Puccio's level of culpability, respective to the other defendants charged, was substantial. The State has proven beyond and to the exclusion of every reasonable doubt, the actual acts of Martin Puccio in the murder of Bobby Kent. In contrasting the relative culpability of each defendant indicted for the murder of Bobby Kent, Martin Puccio is extremely culpable, relative to the others charged. The Court considers that the defendant, Martin Puccio, stabbed Bobby Kent several times, assisted in **tackling**

Bobby Kent when he attempted to flee from his execution,' and then put his body into the water of the nearby canal, Scott v. Dugger, 604 So.2d 464 (Fla. 1992). The applicability of this aggravating circumstance has been proven beyond a reasonable doubt.

2. The Capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. F.S. 921.141 (5) (i).

Four elements must be proven beyond a reasonable doubt to support a finding that this aggravating circumstance exists. Jackson v. State, 648 So.2d 85 (Fla. 1994). First, the murder must have been "cold", which means that it was the "product of calm and cool reflection, and not an emotional frenzy, panic, or fit of rage." Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992). The murder must have been "calculated", which means the product of a careful plan or prearranged design to commit the murder before the fatal incident. Ropers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed, 2d 681 (1988). There must have been a "heightened premeditation", which is a higher degree of premeditation than that required for a conviction of murder in the first degree. Id. at 533. Finally, the murder must have been committed with "no pretense of moral or legal justification". Banda v. State, 536 So.2d. 221, 224-5 (Fla. 1988), cert. denied, 489 U.S. 1087, 109 S. Ct. 1548, 103 L. Ed. 2d 852 (1989). A pretense of moral or legal justification "is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." Id. at 225.

The murder of Bobby Kent was planned for at least two days. The evidence at trial

revealed that on July 13, 1993, the defendant's girlfriend, Lisa Connelly, telephoned and later met with Eileen Traynor. Connelly told Traynor that Martin Puccio wanted Bobby Kent dead, as Kent had beaten him up. Lisa Connelly further telephoned Alice Willis, the victim's former girlfriend, who was at her home in Palm Bay, Florida. Connelly told Willis that Willis was in danger, as Kent was planning on going to Palm Bay to murder Willis and to smother her baby, unless Willis came back to Broward County to again date Kent.

Shortly after the phone call, Eileen Traynor arrived at Connelly's house, Alice Willis, along with Heather Swallers and Donald Semenec, soon arrived from Palm Bay. Together, they traveled to Derek Kaufman's house attempting to obtain an untraceable firearm with which to shoot Bobby Kent. Later that night, Lisa Connelly and Alice Willis took Bobby Kent to Weston intending to shoot him. However, after shooting the gun, the girls became scared and returned with Bobby Kent to the block where his and Martin Puccio's houses were located. In the presence of Martin Puccio, Lisa Connelly, Heather Swallers and Donald Semenec, Bobby Kent walked away hand in hand to his house with Alice Willis. After Kent and Willis left, Martin Puccio told the remaining defendants that Bobby Kent needed to be killed.

On July 14, 1993, the evening of Bobby Kent's murder, the defendants gathered in front of Martin Puccio's house. There, they discussed who would stab Bobby Kent first. They further discussed where the murder would' occur, how the murder would occur and what would be done with Bobby Kent's body afterwards. The group also decided to meet at Hollywood Beach afterwards. Martin Puccio, despite the heat of a South Florida night in July, wore a bandanna and trench coat. Underneath the coat, Puccio had strapped a diving

knife to his leg. Puccio also brought a metal pipe with him, which he offered to Derek Dzvirko to use, After midnight, on July 15, 1993, the plan to murder Bobby Kent was carried out. It occurred at the place planned and in the manner discussed by the defendants. Bobby Kent's body was disposed of as planned and the group departed and met as arranged at the Hollywood Beach area. There was no evidence presented which showed any pretense of a moral or legal justification for this murder.

The events and facts of Bobby Kent's murder proves the four elements which constitute that the homicide was committed in a cold, calculated, and premedicated manner, without any pretense of moral or legal justification, beyond and to the exclusion of any reasonable doubt.

MITIGATING CIRCUMSTANCES

STATUTORY MITIGATORS:

1. **The Defendant has no significant history of prior criminal activity.** F.S. 921.141 (6) (a).

Prior criminal history is not limited to violent felonies, as aggravating circumstances are pursuant to F.S. 921.141 (5) (b). When a Defendant relies on this mitigating circumstance, the state may rebut it by showing prior convictions for non-violent felonies, misdemeanors, and even juvenile records of delinquent acts. Booker v. State, 397 So.2d 910 (Fla. 1981); Quince v. State, 414 So.2d 185 (Fla. 1982).

PRIOR CRIMINAL ACTIVITY

The defense acknowledges that Martin Puccio had been previously arrested for

misdemeanor juvenile and adult crimes. During the penalty phase of the trial, several witnesses testified, including the defendant's mother. She said that she caught her son and the victim, Bobby Kent, using marijuana in her home. She testified that the defendant used drugs. Dr, Dennis Day, a clinical psychologist, also testified to the defendant's drug use.

These factors are all worthy of consideration, since it is not the absence of prior criminal convictions which negates this mitigating factor but, rather, the lack of prior criminal activity. Perry v. State, 522 So.2d 817 (Fla. 1980); ~~Washington v. State,~~ 362 So.2d 658 (Fla. 1978); Simmons v. State, 419 So.2d 316 (Fla. 1982); ~~Funchess v. Wainwrieht,~~ 772 F.2d 683 (11th Cir. 1985).

The defendant was also convicted of Conspiracy to Commit First Degree Murder in this case, which by definition occurred prior to the actual murder. His contemporaneous conviction for this criminal conduct further reduces the weight of this mitigator, ~~Zeigler v.~~ Sate, 580 So.2d 127 (Fla. 1991), cert. denied 502 U.S. 946, 112 Sup. Ct. 390, 116 Law. ~~Ed.~~ 2d 346 (1991); ~~Wasco v.~~ State, 505 So.2d 1314 (Fla. 1987).

This statutory mitigating factor has been thoroughly reviewed and considered. The above criminal activity of the defendant is beyond that of an individual with no prior criminal activity. The Court finds that the defendant does not have a significant history of prior criminal activity; however, gives this mitigating circumstance little weight.

2. The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance F.S. 92 1.141 (6) (b).

Dr. Dennis Day, a psychologist, testified during the ~~Spencer~~ Hearing that he saw the

defendant in June of 1990, approximately three years prior to the murder, while Martin Puccio was at the Coral Ridge Psychiatric Clinic. Dr. Day summarized his findings from a battery of tests as follows:

> "Martin Puccio does not show the presence of a serious thinking disorder. He shows an average to high average intellectual potential that has suffered in its development, particularly in the area of vocabulary and verbal conceptual development.
>
> He shows excellent mental alertness. His physical appearance is immature for his chronological age. However, this conflict appears to be more of an annoyance factor rather than a deep-seated problem. Early and continuing marijuana use with an apparent extensive family history of substance abuse appears to be the greatest detrimental factor in his personal development. "

He also described Puccio's relationship with his parents as being limited and emotionally impoverished. According to what Puccio told Dr. Day; "his parents do not function as a family for him, they prepared few meals at home, there was no parent/son recreation." Puccio felt that his parents had "retired from raising children. " Dr. Day felt that Puccio showed strong patterns for dependency and passive aggressive behavior. Dr. Day, in 1990, felt it was of paramount importance that Puccio's pattern of substance abuse be defeated. Dr. Day opined that Puccio "could be expected to manipulate others by using his 'All American Boy Charm' to avoid confrontation with the realities of his

behavior. "

Dr. Day had the opportunity to reevaluate the defendant in September, 1994, after his arrest. He concluded that the defendant, from a psychiatric or psychological standpoint, was not in "acute distress".

Dr. Day testified that the defendant was sane at the time of the commission of the offense and competent to proceed to trial.

Dr. Day further testified that he had a discussion with the defendant as to what occurred during Bobby Kent's murder. Based upon that discussion, Dr. Day opined "I think that one of the things I probably saw was a continuation of some of the things that had been described in the testing that had been done previously. " (1990 evaluation).

Dr. Day believed that Puccio demonstrated qualities of the passive dependent mode and he was a follower rather than a leader, There was no information or impression that there was anything of a psychiatric nature which clouded his behavior, his judgment, or his functioning.

Dr. Day testified that the defendant had failed to continue to develop in a constructive and healthy manner. Puccio "showed positive qualities that didn't go to positive fulhllment. They got sidetracked. "

Dr. Day also testified that the defendant was in a more vulnerable emotional or psychological state than most would be, for the approval of others.

Dr. Day, in response to a hypothetical question, testified that the defendant would go along with a group of six or seven individuals, if it were his reference group. "Reference

group" was not defined.

Dr. Day opined that Puccio would not have committed the murder of Bobby Kent by himself, based upon his 1990 evaluation data.

During cross-examination, Dr. Day said that the defendant told him he struck the victim twice with the knife, and that he "struck him once and then slashed at him once or something like that", and Dr. Day said "I knew it was frontal". Dr. Day added that the defendant admitted to him that after the victim was killed he was put into the water; however, he claimed that others did this.

Dr. Day testified that he hoped that Puccio could be rehabilitated. He said "I think it is a possibility".

The Court finds the applicability of this mitigating circumstance was rebutted by the defendant's own expert. This conclusion is based upon Dr. Day's examination of the defendant, the extensive psychological testing of the defendant, interviews with family, his personal history, and a review of the facts of this case. Dr. Dennis Day's expert opinion was that Martin Puccio was not under extreme mental or emotional disturbance when he committed the murder of Bobby Kent.

The defense also raises the fact that the defendant soiled his pants until he was twelve (12) or thirteen (13). This behavior, the testimgny revealed, ended years before the murder. The defendant also claims that he slept at the foot of his parent's bed until he was seventeen (17) years old. Again, this practice ended three years before the murder.

Three years prior to the murder, Dr. Day suggested that the defendant move from the area. Martin Puccio did, in fact, move to New York, for approximately six (6) months,

where he lived with an aunt. The defendant did well in school. The defendant, however, chose to return to Florida to live with his parents, and to continue his relationship with Bobby Kent. Additionally, while in New York, the defendant was charged with petty theft. While the defendant may have had a strained family life, the record is also clear that his brothers are law abiding and lead productive lives. This minimizes the defendant's familial complaints. Several witnesses testified that the entire Puccio family, including Martin Puccio, went on numerous camping trips with other families from their church. The defendant's mother testified that she and her husband were supportive of their son and desperately tried to get him help for his drug and behavior problems. As a last resort, they even participated in the "Tough Love" program, by setting and enforcing rules on the defendant's behavior. They would lock the doors of the house and not let the defendant in if he did not arrive home by the set time. In their attempts to help, they even took the defendant for a one-week family vacation, so he could fulfill his dream to surf in California.

The Court has reviewed the entire record, including the testimony of the defendant's own psychologist, Dr. Dennis Day, and fails to find even any remote evidence that the murder of Bobby Kent was committed while Martin Puccio was under the influence of extreme mental or emotional disturbance,

The standard required to establish this factor is less than insanity but more than the emotions of an average man, however inflamed. State v. Dixon, 283 So.2d 1 (Fla. 1973); Duncan v. State, 619 So.2d 279 (Fla. 1993). The evidence presented does not establish, by a preponderance of the evidence, that the defendant was under the influence of extreme mental or emotional disturbance when the murder of Bobby Kent was committed. There is nothing

in the record to support this statutory mitigating factor; therefore, this mitigating factor does not exist, As such, the court finds that this mitigating circumstance does not apply. See Nibert v. State, 574 So.2d 1059 (Fla. 1990), rehearing denied; Duncan v. Sate, 619 So.2d 279 (Fla. 1993).

3. **The defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person and the defendant's participation was relatively minor.** F.S. 921.141(6) (d).

The defendant alleges that the other co-defendants are substantially culpable in comparison to his minor participation in the murder of Bobby Kent. The facts and evidence presented at trial contradicts this assertion.

On the evening of the killing, Martin Puccio met with the other co-conspirators at his parents' house in Hollywood, Florida. He was wearing an overcoat and bandanna on this hot Summer night, concealing a diver's knife which he had strapped to his leg. He and the others lured his "best friend" to an extremely remote section of Broward County, under the pretense of racing cars and rekindling a prior relationship. The cars were never raced; the romance was never intended to be rekindled. Instead, Bobby Kent was murdered.

After Bobby Kent was initially stabbed in the back of the neck, he cried out to his best friend for help. Puccio responded by stabbing and slashing him in the abdomen; chasing him; tackling him; and, further attacking and killing him. Afterwards, Martin Puccio helped put him into the water of the rock pit, where he was eventually found, days later, decomposing.

After the assassination, the defendant went to the beach with the other conspirators to

devise an alibi. He noticed that the sheath to his knife was missing, and returned to the crime scene with two of his co-conspirators to find it. That night at approximately 4:00 a.m., Puccio called the Kent home, pursuant to the alibi. Pretending that he was speaking to Bobby Kent, he told the victim's father, Fred Kent, that he was home for the night and would speak to him (Bobby) the next day. The next day, when Fred Kent came to Puccio's house to inquire if Puccio knew where his son was, Puccio said that he had last seen Bobby the night before, when Bobby left to go on a date with an unknown girl.

Accordingly, the role of the defendant's participation in the murder was anything but minor. The defendant was not merely an accomplice in an offense that was committed by another person. Of all the defendants charged with the murder, this defendant was clearly the most responsible. This is based on his relationship with the victim, his role in the murder, and his actions. When Bobby Kent called to Puccio for help, the response was a vicious knifing. If anyone could have prevented Bobby Kent's killing, it was Martin Puccio, his best friend.

Bobby Kent and Martin Puccio were like brothers. They grew up together. They surfed together. They worked out together at the local Y.M.C.A. lifting weights. They double dated. They used drugs together. They worked together. They were inseparable, until Bobby Kent was killed by Martin Puccio's own hands.

The defendant's participation in this offense was not minor. This mitigating circumstance clearly does not exist.

4. The age of the defendant at the time of the crime. F.S. 921.141 (6) (g).

The defendant was twenty-years old at the time of the offense, on July 15, 1993. The death

penalty may properly be imposed on a defendant seventeen or older. LeCroy v. State, 533 So.2d. 750 (Fla. 1988).

In Morgan v. State, 639 So.2d 6 (Fla. 1993), the Florida Supreme Court held that a defendant's age of sixteen (16) at the time he committed the murder must be considered as a potential mitigating circumstance, but does not exclude a sixteen (16)-year old from the death penalty because of his age. In Stanford v. Kentucky, 492 U.S. 361 (1989), the United States Supreme Court held that it is not cruel and unusual punishment to execute sixteen (16) and seventeen (17) year old convicted murderers, Age, by itself, is insufficient to be a mitigating circumstance for this defendant unless linked with some characteristic of the defendant or the crime.

The Court has thoroughly considered the defendant's age in conjunction with all factors of this case, and all mitigators presented and argued. No credible evidence was presented that would indicate a diminished capacity of mental age. While Dr. Day testified that in 1990, the defendant "appeared three years younger than his chronological age", he further testified that when he saw Puccio during the post-arrest interview in 1994, he realized "there wasn't any lag or any discrepancy between his age and his appearance at that point".

Dr. Day found that the defendant "shows an average to high average intellectual potential". Dr. Day also testified that the defendant manipulated others by using his "All American Boy Charm".

The evidence presented indicated a highly planned and coordinated conspiracy to commit first degree murder, This evidence showed a great deal of cunning and leadership by

the defendant. The Court has also considered the defense's assertion that "even if Puccio was twenty (20) when he committed this crime, mentally and physically he was not. He is still so very young and has a great ability for rehabilitation". However, as the Supreme Court has noted, every murderer has an age and the fact that this defendant is twenty (20) years of age without more is, in itself, insignificant. Echols v. State, 484 So.2d 568 (Fla. 1985).

It is alleged that Martin Puccio has suffered from a history of low self esteem since age twelve (12) or thirteen (13) because of his immature physical appearance. Puccio claims "this is directly related to the abuse he received from Mr. (Bobby) Kent and the lack of his ability to escape the abuse".

The defendant cites to Penry v. Lynaugh, 109 S.Ct. 2934 (1989) for the proposition that the absence of instructions informing the jury that it could consider and give effect to mitigating evidence of a defendant's mental retardation and abused background by declining to impose the death penalty, deprived the jury of expressing its "reasoned moral response" to mitigating evidence in rendering a sentencing decision, in violation of the Eighth and Fourteenth Amendments.

Penry does not apply. Dr. Dennis Day testified at trial about his pre-murder and post-murder evaluations of the defendant. Nine witnesses testified on the defendant's behalf concerning his difficult childhood. There is no evidence that Martin Puccio is mentally retarded.

The defendant claims that he was "emotionally and physically immature", and that "the lack of his physical maturation fed his lack of self esteem and his lack of emotional immaturity". He claims he "has had a tremendous amount of difficulty adjusting to society".

The defendant argues that Dr. Day's opinion three '(3) years prior to the murder that the defendant was three (3) years behind in his physical development, proves this mitigator. Furthermore, when Dr. Day examined Puccio subsequent to the murder, it is alleged that Puccio was still behind in his emotional development. The Court and the Jury has heard and considered Dr. Day's testimony, as well as the other testimony presented during the penalty phase.

In Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987) testimony by the defendant's mother was excluded from testifying at the sentencing phase of a death penalty trial, because she had sat through the trial and the sentencing phase notwithstanding a sequestration order. As a result, the sentence of death was reversed. Dutton, supra, does not apply. The Puccio jury heard all mitigating circumstances the defendant asked to present, including testimony of his parents, family and friends.

Therefore, the Court finds that while this mitigating circumstance exists, since the defendant was 20 years old at the time of the crime, it deserves little weight.

5. **The capacity of the defendant to appreciate the criminality of or to conform his conduct to the requirements of law was substantially impaired.** F.S. 921.141(6)(f).

The defendant alleges that he was unable to determine whether or not Bobby would be in control of him for the rest of his life. When he heard Bobby Kent curse at him (after Kent was stabbed in the back of the neck by Semenec), just prior to Puccio stabbing Kent, he argues that his ability to conform his conduct and appreciate his actions as criminal were substantially impaired.

This statutory mitigating circumstance was not relied upon by the defendant nor argued to the jury. Additionally, there was no evidence presented by the defendant to support this mitigating circumstance. Accordingly, it is held that this mitigating circumstance does not apply to the defendant.

***6.* Any other aspect of the defendant's character, record, background, or early life, and other circumstances of the offense.**

The defendant's Sentencing Memorandum in Opposition of the Death Penalty briefly describes the interrelationships of the seven (7) co-defendants and the victim, and the alleged roles played by them, as follows:

a) Defendant Puccio and co-defendant (Donald) Semenec opened the trunk and began to put the T-tops back on Alice Willis' car. (testimony during the trial indicated that this was the signal to begin the attack on Bobby Kent).

b). Donald Semenec and co-defendant Derek Kaufman retrieved all of the weapons out of Willis' trunk.

c) Semenec **was** holding a knife that **was** about twelve inches long.

d) Donald Semenec walked behind Kent and stabbed him from behind, in the neck.

e) Defendant Puccio saw Bobby Kent grab the back of his neck, at which point, Kent, according to Puccio, turned toward him in **a rage** and said: "What the fuck, I'm going to kill you!"

f) Puccio, having seen Bobby Kent's rages before, stabbed Kent in

the stomach and started running.

It has been proven beyond and to the exclusion of every reasonable doubt from the testimony and evidence presented that all of the co-defendants played a role in this crime. However, Martin Puccio's actions and involvement in the murder of Bobby Kent are far greater, and give rise to a superior level of culpability than any of the other co-defendants. Due to the defendant's involvement and level of culpability, the Court finds that this mitigating circumstance does not exist, as addressed above.

The other areas of potential mitigation addressed under this heading of the defendant's Sentencing Memorandum are again addressed individually by the defendant in his memorandum, Accordingly, the Court will address each issue individually as follows:

7. **His sentence compared to the other people who partook in the murder.** This will also be discussed in the proportionality section of this order.

Each of the other six co-defendants have been sentenced as follows:

a) **Heather Swallers:** She had plead guilty to, and was adjudicated of, Second Degree Murder and Conspiracy to Commit First Degree Murder. She was sentenced to seven (7) years in Florida State Prison to be followed by three (3) years of Probation. She was a minor participant in the murder, and did not strike a blow to the victim. She was a cooperating witness for the State, who testified at numerous depositions and trials.

b) **Derek Dzvirko:** He plead guilty to, and was adjudicated of, Second Degree Murder and Conspiracy to Commit First Degree Murder. He was sentenced to eleven (11) years in Florida State Prison to be followed by

five (5) years Probation.

He was a minor participant in the murder, and did not strike a blow to the victim. He was a cooperating witness for the State, who testified at numerous depositions and trials.

c) **Alice Willis:** She was convicted of Second Degree Murder and Conspiracy to Commit Murder in the Second Degree.

She was sentenced to forty (40) years in Florida State Prison, to be followed by forty (40) years of Probation.

She was the former girlfriend of the victim, who was brought into the conspiracy to kill Bobby Kent by Lisa Connelly's telephone call which alleged that Bobby Kent was going to harm Willis and her baby. She did not inflict any physical injuries to Bobby Kent.

d) **Donald Semenec:** He was convicted of Second Degree Murder and Conspiracy to Commit Murder in the Second Degree.

He was sentenced to Life in Florida State Prison for Murder in the Second Degree, and to fifteen (15) years consecutive Probation for Conspiracy to Commit Murder in the Second Degree. He inflicted the first wound, by stabbing Bobby Kent in the neck, from behind. He assisted Puccio and Kaufman in tackling the victim as he tried to escape, and participated in the infliction of further wounds.

e) **Derek Kaufman:** He was convicted of First Degree Murder and Conspiracy to Commit First Degree Murder.

The Jury recommended a sentence of Life for this defendant.

He was sentenced to life imprisonment with twenty-five (25) years without the possibility for consideration of release or parole on Count I, Murder in the First Degree, and to thirty (30) years imprisonment, consecutive to Count I, as to Count II, Conspiracy to Commit Murder in the First Degree. He assisted in the planning of Bobby Kent's murder. After Kent was stabbed by both Semenec and Puccio, Kaufman yelled to the others to stop Kent as he attempted to escape. Kaufman participated in tackling and surrounding Kent while the final wounds were inflicted. Afterwards, Kaufman struck Kent in the head with a baseball bat and, with Puccio's assistance, placed Kent into the water.

f) **Lisa Connelly:** She was convicted of Second Degree Murder and Conspiracy to Commit Aggravated Battery.

She was one of the primary planners and instigators of the murder, however she did not inflict any wounds upon Mr. Kent.

She was sentenced to life imprisonment for Murder in the Second Degree, and to five years concurrent for Count II, Conspiracy to Commit Aggravated Battery.

The Defendant Martin Puccio cites Slater v. State, 316 So.2d 539 (Fla. 1975), in which it was held that disparate treatment of a co-defendant renders punishment disproportional if the co-defendant is equally culpable. **This is not applicable in this case.** Martin Puccio has a greater level of culpability compared to the other co-defendants.

The defendant additionally cites Basset v. State, 449 So.2d 803 (Fla.1984), for the proposition that a co-defendant's sentence is relevant and may be considered by the judge and jury in determining the appropriate sentence. In Basset, the defendant was convicted and sentenced to death prior to the trial of the co-defendants. This Court, prior to imposition of sentence on Martin Puccio, has had the opportunity to fully consider the sentences of the co-defendants, the penalties recommended by the juries, where applicable, as well as the different acts and circumstances of each of the defendants.

The defendant also cites to Scott v. Dugger, 604 So.2d 465, 468-69 (Fla.1992), for the proposition that a co-defendant's sentence may be relevant to a proportionality analysis where the co-defendant is equally or more culpable. Martin Puccio's acts create a significantly higher level of culpability than the acts of his co-defendants. As a result, Scott v. Dugger, supra, is not applicable.

Martin Puccio has a greater level of culpability than any of the other co-defendants. Therefore, this mitigating circumstance has not been proven.

8. The defendant claims that he was adversely affected, physically or emotionally, by the use of drugs or alcohol during his youth.

It is claimed that Martin Puccio has used marijuana on a regular basis since he was thirteen (13) years old. It is additionally alleged that he used alcohol, belladonna, and acid. His parents tried to hospitalize him a few times,, but could not find an acceptable and suitable facility. However, he was hospitalized at age seventeen (17) (approximately three years prior to the murder). As a result, it was the advice of Coral Ridge Hospital that Puccio should stay away from old friends. Puccio claims he tried to avoid Bobby Kent who, he

claims, came to his window at night. He began to use drugs and alcohol again.

In Robs v. State, 474 So.2d 1170 (Fla. 1985), it was held that the death penalty was not warranted in light of mitigating factors that the defendant was an alcoholic, was intoxicated at the time of the homicide, and that the homicide was the result of an angry domestic dispute. Martin Puccio's behavior, according to his own psychologist, was a behavioral problem, not a drug problem. No evidence was presented that the defendant was an alcoholic, nor that the defendant was intoxicated on drugs or alcohol at the time of the crime. This homicide was not the product of an angry domestic dispute. Rather, the murder was premeditated and brutal.

Penry also holds that the jury must be able to consider any mitigating evidence relevant to a defendant's background, character, or circumstances of the crime. Martin Puccio was given every opportunity to present evidence of mitigating circumstances to the jury and this Court. These were considered by the jury, and have been considered by this Court. The Court has considered this mitigating circumstance, and finds it not applicable to the commission of the crimes for which the defendant will now be sentenced. Nevertheless, in considering the defendant's background, the Court finds this mitigating circumstance to apply; however, gives it little weight.

9. **The defendant's capacity for rehabilitation.**

In Simmons v. State, 419 So.2d 316 (Fla. 1982), it was held that a defendant's capacity for rehabilitation has some value for a jury in determining whether the death penalty was appropriate in light of the circumstances of the crime and the defendant.

The issue of Martin Puccio's likelihood of rehabilitation was addressed by Dr. Day.

When asked "Do you think he could be subject to rehabilitation?", Dr. Day answered "I would hope so". See page 71, lines 10-14 of transcript of Sept. 28, 1994 hearing. On cross examination Dr. Day testified "It's a possibility". See page 73, lines 3-5 of transcript of Sept. 28, 1994 hearing.

The defendant claims that he has demonstrated his capacity to be rehabilitated by obtaining his GED and taking art and computer classes in jail. He states that he would do well in a structured environment that provides psychotherapy. He states that without Bobby Kent's influence, he will lead a normal life.

Several individuals testified on behalf of the defendant and labeled him as a good brother, son, friend, etc. While these qualities may be true, they are no more than what society expects from all of us. Zeigler v. State, 580 So.2d 127 (Fla. 1991).

Therefore, established by a preponderance of the evidence, this Court finds that this non-statutory mitigating circumstance applies; however, it is entitled to very little weight.

10. The defendant claims prior suffering created great situational stresses leading up to the time of the homicide and that the homicide was committed for emotional reasons.

Puccio claims that Bobby Kent ran his life. It is alleged that there was nothing that he could do that would please the victim. He states that he could not open up to anyone about his problem because he was embarrassed. Puccio claims that the homicide was committed as a reaction to his embarrassment over letting Bobby Kent abuse him and control his life. The defendant claims that there were many incidents of physical and emotional abuse by Bobby Kent. Puccio claims that he was too embarrassed to share this information even with his

brother, with whom he was very close.

No case law has been cited concerning this mitigator. The Court has considered this mitigating circumstance, finds that it applies; however, gives it little weight.

11. The defendant is unlikely to endanger others while serving a life sentence.

The defendant alleges that he has never been involved in a physical altercation before the murder of Bobby Kent. The evidence presented rebuts this assertion, The defendant's brother, Anthony Mark Puccio, testified that the defendant told him about an incident where he struck Larry Schafer.

This Court does not have a crystal ball to determine whether this defendant could pose a threat to others in prison, However, in an abundance of caution, finds this mitigating circumstance to apply, but gives it little weight,

12. Prior inappropriate treatment and/or counseling for emotional problems.

Puccio claims that his prior treatment and counselling were ineffective because there was no follow-up. He alleges that his treatment showed very good signs that it was working; however, it ended when his insurance ran out. The evidence showed that he did receive some out-patient treatment. He was advised to move away from the area. The defendant alleges that this was not possible for the Puccio family, and the treatment came to an end. However, the defendant did move to his aunt's house in Upstate New York and stayed there for about six months.

The record is clear that the defendant had several opportunities for treatment. Furthermore, as previously discussed, the Puccio family participated in numerous activities and programs in attempts to alter Martin Puccio's behavior. The Court has considered this

mitigating circumstance, and finds it not applicable.

13. This crime was committed by a group and that Puccio would not and could not have committed this crime on his own.

The defendant argues that the presence of the other co-defendants gave him the ability to act. Puccio claims that he had never previously been able to get up the nerve or' strength to attack Bobby Kent but, by participating with the group, he was able to attack the victim.

The fact that the presence of others enabled Puccio to commit that which he was unable to commit alone, is irrelevant. Either alone, or by participation in a group, Puccio's intent to kill Bobby Kent was carried out.

The Court has considered this mitigating circumstance and finds it not applicable.

14. **Capacity for hard work and other fine qualities.**

Puccio alleges that he is young and able to work, and that he had a job delivering pizzas, which lasted for one and one-half years. He states that he has worked since he was able to; however, he was only twenty (20) years old when he committed the murder, and has been incarcerated since. He now stands before the Court convicted of Murder in the First Degree and Conspiracy to Commit Murder in the First Degree. **As** a result, he must either be sentenced to life in prison without the possibility or consideration of parole for twenty-five (25) years, or death.

The Court has considered this mitigating circumstance, and finds it not applicable.

15. The defendant claims that his post conviction behavior is good.

The defendant alleges that he now has structure and has demonstrated good conduct and attitude in jail. However, good behavior in jail is what is expected from all inmates.

Nevertheless, while in jail awaiting trial, he was placed in disciplinary confinement for making "Buck" (a homemade alcoholic beverage).

The Court has considered this mitigating circumstance, and finds it not applicable.

PROPORTIONALITY

The Court has deliberately chosen not to sentence Martin Puccio, or any of the other defendants charged as a result of the death of Bobby Kent, until after they have all stood trial. The Court has had the opportunity to hear and evaluate the evidence presented by the State of Florida against each defendant, as well as each defense asserted. The Court has, prior to this sentencing, had the opportunity to reflect upon the relative culpability of each defendant, the various verdicts rendered and, where appropriate, the recommendation of sentence. The Court makes its finding of fact as to Martin Puccio solely from the evidence presented during his trial and penalty phase proceedings.

Co-defendants Heather Swallers and Derek Dzvirko entered pleas of guilty to the lesser included offense of Murder in the Second Degree and Conspiracy to Commit Murder in the First Degree. As part of their plea agreement with the State of Florida, they were required to testify truthfully, if called upon by any party,

Martin Puccio was the first defendant to stand trial as a result of this offense. Subsequently, Derek Kaufman was tried and found guilty of Murder in the First Degree and Conspiracy to Commit Murder in the First Degree. The Kaufman jury recommended that this Court sentence Mr. Kaufman to life in prison without the possibility of parole or release for a minimum of twenty-five (25) years for his conviction for Murder in the First Degree,

by a vote of ten (10) to two (2).

The evidence presented at trial showed that Kaufman was instrumental in planning the murder of Bobby Kent. At the scene of the murder, he played an integral role in Bobby Kent's death. As the planned and orchestrated attacks began at the knife-wielding hands of Puccio and Semenec, the victim, Bobby Kent, while wounded, attempted a desperate flight from his attackers. Kaufman yelled at Puccio and Semenec to stop the victim from getting away. Kaufman, Puccio and Semenec proceeded to tackle the victim and surrounded him as he lay on the ground. Bobby Kent was then further attacked, stabbed in the chest, and his throat slashed twice, As Bobby Kent lay desperately gasping for breath, Kaufman took a baseball bat and swung it at Kent's head. Kaufman, in a later statement, claimed that he was just trying to put Kent out of his misery. Kaufman next attempted to make Bobby Kent's death appear to be the result of a robbery. He then directed Derek Dzvirko to assist him in carrying the victim's body to the water's edge, from where Martin Puccio and Derek Kaufman placed Bobby Kent into the canal.

Next, Alice Willis and Donald Semenec jointly stood trial. Both were convicted of Murder in the Second Degree and Conspiracy to Commit Murder in the Second Degree. The evidence presented as to Alice Willis established that she lived in Palm Bay, Florida, and had previously dated the victim. A short time before Bobby Kent's death, they terminated their relationship. Alice Willis told others that she had been abused during her relationship with Bobby Kent and had been raped by him. No evidence was presented to establish that she had, in fact, ever been raped. Co-defendant, Lisa Connelly, telephoned Alice Willis in Palm Bay and told her that Bobby Kent was mad at her and threatening to kill her and her baby if

she, Willis, did not return and resume her relationship with Kent. Connelly also told Willis that she and Martin Puccio felt Kent had to be killed, as he was a threat to Willis, had repeatedly beaten Puccio, and had interfered in the Puccio/Connelly relationship. Alice Willis responded to this telephone call by driving to Broward County with her current boyfriend, Donald Semenec, and friend, Heather Swallers, Once she arrived, she conspired with Lisa Connelly in an attempt to obtain a gun to shoot Bobby Kent, Pursuant to that effort, the group: Willis, Connelly, Swallers, Semenec and Eileen Traynor, traveled to Derek Kaufman's house, There, primarily, Willis and Connelly attempted unsuccessfully to obtain a gun. They then proceeded to discuss with Kaufman and the others how Bobby Kent should be killed. Later that evening, Willis and Connelly took Bobby Kent to the future site of his death, intending to shoot him with Lisa Connelly's mother's gun. They were unsuccessful and returned to the block where both Kent and Puccio lived. There, in the presence of others, Willis and Kent left. It was later alleged that Bobby Kent raped Willis while they were alone.

The next day the conspiracy to murder Bobby Kent continued, and ultimately culminated in Kent being lured to the remote Broward County site, where he met his death. The script had Alice Willis pretending to again be Bobby Kent's girlfriend. Hand in hand they strolled to the water's edge, and waited for the physical attack to commence on the unsuspecting victim, As the actual attack proceeded, Alice Willis fled to the safety of her car, leaving the killing for Semenec, Puccio and Kaufman,

Donald Semenec lived in Palm Bay, Florida, and dated Alice Willis. He had never met Bobby Kent. He had come to Broward County with Willis and Swallers to have a good

time and go to the South Beach area. He was penniless and dependent upon Alice Willis to take him back to Palm Bay. As time progressed, it became clear that Willis was not going to return to Palm Bay, nor would she go to have a good time, until Bobby Kent was dead. Ultimately, it was Semenec who volunteered to stab Bobby Kent first. As Bobby Kent and Alice Willis stood at the water's edge, Semenec stealthily approached from behind, and stabbed Bobby Kent in the neck. According to the medical examiner, this stab wound was nonfatal, and somewhat superficial. As Kent tried to escape from his attackers, Semenec assisted in tackling Kent and assisted Puccio in inflicting the fatal wounds. Throughout, Semenec had no reason to participate in the attack, other than the belief that Kent had raped his girlfriend, Willis, and his frustration, resulting from his unsuccessful attempts to return to Palm Bay.

Lisa Connelly was the last defendant to stand trial. She was convicted of Murder in the Second Degree and Conspiracy to Commit Aggravated Battery. The evidence revealed that Ms. Connelly was Martin Puccio's girlfriend and was pregnant with his baby at the time of the murder. Ms. Connelly solicited and recruited Alice Willis to come from Palm Bay to Broward County to participate in the plot to harm to Bobby Kent. Upon Willis' arrival, Ms. Connelly and the others, without Martin Puccio being present, recruited Derek Kaufman to participate in their plan. Connelly insisted that Bobby Kent be harmed immediately. With the intention of shooting him, she and Willis drove Kent to the west Broward site, where he was ultimately murdered the next night. However, neither of the women was able to carry out their plot. The evidence revealed that Ms. Connelly was instrumental in arranging the events of July 14 and 15, 1993, when Bobby Kent was murdered. She was present at the

murder scene when the homicide occurred, but did not physically participate in the murder.

The culpability of the defendants charged in the death of Bobby Kent are not equal. Bobby Kent's death was primarily the result of Martin Puccio's actions. Martin Puccio's level of culpability, respective to the other defendants charged, was substantial. The State has proven beyond and to the exclusion of every reasonable doubt, the actual acts of Martin Puccio in the murder of Bobby Kent. Contrasting the relative culpability of each defendant indicted for the murder of Bobby Kent, Martin Puccio is significantly more culpable. The Court considers that the defendant, Martin Puccio, stabbed Bobby Kent several times, assisted in tackling Bobby Kent when the victim attempted to flee from his execution, and then placed his body into the water of the nearby canal. Scott v. Dugger, 604 So.2d 464 (Fla., 1992).

SUMMARY

In summary, this Court finds that there are two (2) aggravating circumstances applicable to this case which have been proven beyond and to the exclusion of every reasonable doubt. The Court finds two (2) statutory and four (4) non-statutory mitigating circumstances of little weight were proven by a preponderance of the evidence. After independently evaluating all of the evidence presented, it is this Court's reasoned judgment that the mitigating circumstances do not outweigh the aggravating circumstances.

On September 28, 1994, the jury recommended that this Court impose the death penalty upon MARTIN PUCCIO by a majority vote of (eight) 8 to four (4). This Court must give great weight to the jury's sentencing recommendation. ~~Tedder v. State,~~ 322

So.2d 908 (Fla. 1975). Death is presumed to be the proper penalty when one (1) or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances. White v. State, 403 So.2d 331 (Fla.1981).

The ultimate decision as to whether the death penalty should be imposed rests with the trial judge. Hoy v. State, 353 So.2d 826 (Fla.1977). Additionally, the sentencing scheme requires more than a mere counting of the aggravating and mitigating circumstances. It requires the Court to make a reasoned judgment as to what factual situations require the imposition of the death penalty, and which can be satisfied by life imprisonment, in light of the totality of the circumstances. Floyd v. State, 569 So.2d 1225 (Fla. 1990): Jackson v. State, 498 So.2d 406 (Fla.1986).

Based upon the above analysis it is the sentence of this Court that you, MARTIN PUCCIO, be sentenced to DEATH for the Murder of Bobby Kent.

It is further ordered that you, MARTIN PUCCIO, be confined by the Department of Corrections and he kept in close confinement until the day of your execution, and on that day, you be put to death by electrocution, which is the manner prescribed by law.

It is further ordered that you, MARTIN PUCCIO, are hereby notified that you have thirty (30) days from this date in which to appeal the Judgment and Sentence of this Court. The Judgment of conviction and the sentence of death is subject to automatic review by the Supreme Court of Florida. You are further advised that you have the right to assistance of counsel in the filing and preparation of your appeal. If you cannot afford your own attorney,

you should advise the Court and an attorney will be appointed for you.

DONE AND ORDERED in Open Court, Broward County Courthouse, Fort Lauderdale, Florida, this 27th day of July, 1995.

CHARLES M. GREENE
CIRCUIT COURT JUDGE

cc: Timothy Donnelly, Assistant State Attorney
Thomas Cazel, Esquire
Kenneth Duckworth, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy the Appendix has been furnished to Celia Terenzio, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Florida 33401 this 16th day of January, 1997.

Paul E. Petillo

Attorney for Marty Puccio