IN THE SUPREME COURT OF FLORIDA

KRISTOPHER SANDERS,

Appellant,

vs. : Case No. 87,231

STATE OF FLORIDA, :

Appellee. :

_____ :

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Kristopher Sanders **was** charged by indictment filed June 2, 1994, in Pasco County with the first degree murder of Henry L. Clark (1/16-17). A jury trial was held September 26-28, 1995, and appellant **was** found guilty as charged (2/270; 9/609). Following the penalty phase, the jury recommended by a vote of 8-4 that appellant be sentenced to death (2/281; 11/971). On January 18, 1996, Circuit Judge William R. Webb imposed the death penalty, finding that the single aggravating factor he considered ("cold, calculated, and premeditated") outweighed the mitigating circumstances present (2/307-14; 4/595-606).

STATEMENT OF THE FACTS

A. Trial

During the early morning hours of April 26, 1994, Pasco County Sheriff's officers, responding to a report of a drunk driver passed out behind the wheel of **a** truck, discovered the body of a white male, later identified as Henry Clark (6/224-26,234-37,249-50). The pickup truck was parked, facing northbound, on the east side of Old Dixie Highway, in an area of Hudson known as the Mines (6/224, 234-35,249-50). The driver was slumped over to his right and there was a large amount of blood on his clothing and on the driver's side of the vehicle (6/225-26,237,251-53,270). Bullet wounds to the right temple and the top of the head were visible (6/227,237, 250).

Inside the truck, a large sum of money was in plain view on the underside of the sun visor (6/226,228,233,244,253-54). There **was** also some money in a pair of jeans folded on the seat of the truck, and inside a pouch (6/244-45,253-54). Crime scene technician Boekeloo determined that there was a total of $2,379.30 left inside the truck; $1,330 in the visor, $1,020 in the jeans, and $29.30 in the pouch (6/254). There were two bags of marijuana on the seat next to the deceased (6/254). Boekeloo later found more marijuana after searching the vehicle; the total amount was 215 grams (6/254-55,277). He also found a postman's scale, but he did not find any cocaine (6/255,277). An eighteen inch long cattle prod or "stun gun" was found under the driver's seat, within the driver's reach (6/265-66,277-78). It carries a nine-volt battery, but has a transformer to give it a much larger voltage shock (6/265-66). Boekeloo also found a second stun gun and some pepper spray in the back of the truck (6/278).

Outside the truck, the police officers observed what appeared to be bare footprints, beginning at the passenger-side door and going southward behind the truck along the side of the road for about 60-100 feet, whereupon they curved into the roadway and stopped (6226,229-30,235-36,243-46,253,256-57,278). About 80 feet behind the truck was a gold chain with two charms on it; one was an S and the other a Giants team pendant (6/236,243-44,246,256,267, 278-79). [This necklace was identified in court by the deceased's brother as belonging to Henry Clark (7/385-86)].

When the associate medical examiner arrived at the scene at about 8:00 a.m., a .9 millimeter spent shell casing was found on the floorboard of the truck, between the seat and the driver's door (6/242-43,255-56,264; 7/301,404). Boekeloo found one bullet hole located behind the driver's left side, and another bullet hole in a doorpost right behind the window (6/256). He then looked down and recovered a bullet (6/256,265).

Boekeloo lifted two palm prints from the truck; one near the door handle on the passenger door, and the other toward the rear of the truck bed on the passenger side (6/257-58). [A latent print examiner with the Sheriff's office subsequently testified that these prints matched appellant's right palm (7/381-83).

Dr. Robert Davis, the associate medical examiner, went to the scene, where he observed a deceased male in the green GMC pickup (8/404-05). He saw stippling in the area of the wound to the temple, and concluded that (although it was definitely not a contact wound) the shot had been fired at close range (8/405-06,411, 424-25). At trial, he estimated the distance at maybe an inch to an inch and a half, though he acknowledged that he had said in his deposition that it could have been up to a foot away (8/424-26). His observations inside the truck and his medical findings were consistent with Henry Clark having been shot by a person who was sitting in the passenger seat (8/453).

Dr. Davis performed an autopsy and determined that Henry Clark had sustained three bullet wounds; one to the right side of the head; one near the top of the head; and a third which entered the

upper arm, fractured the clavicle, and travelled toward the back of the neck (8/407-08,411-12,414-16). Dr. Davis could not tell the sequence of the shots, but the first two wounds were each fatal, and would have caused death very rapidly, within a matter of seconds (8/414,416-17,422,428). Dr. Davis estimated the time of death between 10:00 p.m. to 1:00 a.m. (8/419).

Testing revealed that Henry Clark's urine had cocaine and cocaine metabolites, while his blood had cocaine metabolites only (8/419). The test results do not distinguish between crack cocaine and other forms of cocaine (8/427). Dr. Davis thought it was unlikely that Clark would have been using cocaine within minutes of his death (8/420-21). Clark also had marijuana in his system; there was no way to determine when he would have used it (8/421-22,427-28). There was no alcohol in his system (8/422).

The bullet fragments which were removed from Henry Clark's body were examined by an FDLE firearms analyst, who testified that they were nine millimeter Luger caliber, and they were fired from the same firearm (8/430-31,435). The markings were consistent with the bullets having been fired from either of two possible kinds of firearm; a Highpoint automatic or a Standard Arms (8/435-36).

Barbara Jean Mock was an acquaintance of appellant and Joey Duckett; she did not know Henry Clark (7/285-86,289-90). In April, 1994, she would see appellant when she was at Duckett's house; it appeared to her that he was staying there (7/290). One day in mid-April, while a group of people including Wayne Sargent, Ole Anderson, Eddie Gibbs, Judd, and a pregnant woman were present, Ms.

Mock heard Joey Duckett tell appellant that Hank needed to die (7/286-87,291). Appellant responded that he would do it (7/287). The conversation was spoken loudly enough so that everyone could hear it (7/291). Ms. Mock did not know whether they were serious, or how to take it (7/288,298). Some of the people -- including appellant, Joey, and Wayne -- were high on drugs at the time, but Ms. Mock testified that she wasn't smoking (7/291,298-99).

Detective Clifford Blum interviewed appellant on May 23, 1994 (7/301-04,310-11). Blum read appellant his Miranda rights (7/302-03,311). He testified that appellant's demeanor was calm, and he did not appear to be under the influence of alcohol or drugs (7/361).

In his statement to Detective Blum, appellant admitted to killing Hank Clark (7/311-12). Clark was into using a lot of rock cocaine -- four to five hundred dollars a night (7/313-14). He came up with the money by selling drugs (7/314). Joey Duckett ordered the killing (7/327, 338). A lot of people were involved in and knew about the plan to kill Clark, including (in addition to Duckett and appellant) Wayne (Sargent), George (Nashef), Ole (Anderson) and Eddie Gibbs (7/328-29,331-32,339). Detective Blum asked:

> What was George's involvement? What was he -- what was he planning?
>
> A. He's the coke man.
>
> Q. How was -- how did he get involved in the plan or whatever?
>
> A. That's the whole purpose, stop Hank, it cuts Hank out of the crack so he can move in,

'cause I guess he's got some kind of big deals with cocaine up in Ft. Lauderdale.

Q. George's brother or something like that, right?

A. Yeah.

Q. Yeah.

A. That's his brother.

Q. That's his brother, or that's what he's calling him. Got the drugs or that's what he's told me.

A. Yeah.[1]

(7/329-30).

Joey Duckett owed Hank Clark $1,200 (7/327). A couple of weeks before the killing was supposed to occur, Duckett paid appellant $900 (7/327-28,343). Appellant was supposed to rob Clark and "make sure all his clients see what he done" (7/330). The gun -- a .9 millimeter Highpoint -- belonged to Ole, and it was brought to appellant by Wayne (7/319,328,331,333,339,360). During the interrogation, Detective Blum told appellant, "I don't want you standing alone. I want the guys that were involved in it" (7/322, see 7/359). Blum also stated " . . . now you've done the right thing and you told us what you did and you told us who did it, I mean, who put you up to it, and that's important for us to know and that's Joey. So Joey being in jail is a good thing and Joey is in jail" (7/338).

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[1] Detective Blum testified that no last name for George was mentioned during the interview. Blum subsequently attempted to locate George, and did find him (7/363-64).

A couple of weeks before the killing was supposed to happen, Hank Clark picked appellant up at Charlie's house, where some of the group were sniffing nitrous oxide (7/332-33,344). Hank and appellant drove to Tampa, where they bought $450 worth of crack (7/312-13). Appellant had the gun with him, inside his pants where Hank couldn't see it, because "when we're going to Tampa, dude, I'm not going to take the chance of being shot" (7/319). When they got back to Pasco County, they stopped at a convenience store, where appellant bought a six-pack of soda and called Joey Duckett to tell him where he was (7/313,345-56). They then drove around a little bit "hitting the stem every now and then", and decided to pull over and smoke some rocks (7/313,317). Hank changed his mind about selling any of the rock; he wanted to smoke it (7/313). He parked on the side of the road. Appellant told him it was not a cool place because they'd seen a cop drive by, but Hank didn't care (7/317). Hank was going to sit there and smoke up all of appellant's stuff too, and "[i]t was pissing me off" (7/315). Appellant told him to slow down, he was going to get fucked up and they weren't going to have any left, but Hank kept on smoking (7/315). Appellant took the stem away from him, and Hank got pissed off (7/315). "The dude started flipping out, man, over nothing" (7/314). When Hank reached down and grabbed the cattle prod (which appellant knew was under the seat), appellant reacted too fast without thinking; he pulled the gun and fired four shots (7/315-18,355). He thought that one shot went in Hank's neck, two in the head, and one in the

chest (7/316,318-19). The shots were fired from a distance of within two feet (7/319,363). Appellant told Detective Blum:

> I just -- when I pulled it I just -- I didn't react the right way, man. I wasn't thinking, dude. I was fucked up.
>
> Q. I'll bet. Ya know, I mean (inaudible).
>
> A. Piss on his life, man. I have no remorse for it, ya know, I really don't, because it just means it's one less face in the world I have to deal with, dude, but, I mean, I was fucked up, dude.
>
> Q. Yeah.
>
> A. And he fucking -- ya know, he just jumped too quick. And I'm -- I'm an aggressive person when it comes to shit like that 'cause I don't want to be taken out, dude. Ya know, I could sit here and tell you I don't want to die. It doesn't matter if I die, dude --
>
> Q. Yeah.
>
> A. -- but I don't want somebody else to take me, ya know what I mean?
>
> Q. I hear ya.
>
> A. And I just flipped, dude.
>
> Q. So you reacted --
>
> A. Too fast.
>
> Q. Okay.
>
> A. I should've used my head, but I didn't.

(7/318).

Appellant told Blum the shooting wasn't intentional and it wasn't even a robbery; it just happened (7/314,328,355). It wasn't supposed to happen for another two weeks (7/328,330). Asked by

Blum if he would have done it then, appellant said he probably would have (7/353).

Appellant told Detective Blum he picked up three of the shell casings but he left one in the truck on purpose; asked why he did that he said, "I don't know, just stupid" (7/316,318-19). Appellant wasn't there to steal anything from Hank, and the only money he knew of that Hank had on him was what he had paid for the rock cocaine (7/326,355). Appellant took the rest of his rock, and he took twenty dollars that was sitting in the ashtray, so he could get a cab if he didn't have a way to get home (7/322-23,326). He adamantly insisted that he did not take any gold chain or necklace, nor was he aware of Hank's having a gold necklace (7/320,322,325-26, 340,343) .

Appellant got out of the truck and began walking southbound (7/324,345). He dropped the gun in the bushes, then changed his mind and retrieved it (7/324,349) Then -- within thirty seconds of when he got out of the truck -- a car went by. Appellant ducked, and then realized it was George, so he got in the car (7/322-23, 326,335-36,339,345,349).

Appellant gave Detective Blum several explanations of how George had come to pick him up. At one point he stated that after the shooting he had walked to the pay phone by the bait store and called George to come get him (7/323-24). Later, when Blum asked him if he had to walk a long way, appellant replied:

> No, dude, I didn't have to walk anywhere, George was there to pick me up.

Q. Well, yeah, but I mean how long did it take you to get to that bait shop?

A. I don't know where it is, dude.

Q. George just came and got you?

A. George knew what **was** going on. George followed me everywhere, dude.

Q. He followed you up there?

A. Yeah, he followed 'cause he wanted to make sure, you know what I mean, anything did decide to happen, see. See, George is smart (inaudible).

Q. Yeah.

A. He followed me. And I didn't know he was following me, that **was** the car that went by. And then when I realized who it was I stopped and got in the car with him, dude.

(7/335).

Appellant told Blum that when he and Hank Clark had stopped at the convenience store after returning from Tampa, he had called Joey Duckett:

. . . told him where I was at. Joey knew everything. I always let somebody know where I am --

Q. Where you are.

A. You know what I'm saying? So they'd know --

Q. Yeah.

A. And I guess that's when he probably told George.

Q. Sent George out there.

A. Yeah.

Q. **Now, was - -**

A. I didn't tell him that was going to happen.

Q. Right, just that --

A. I just told him what was going on.

Q. That you were with Hank and all that.

A. Yeah. And then I guess he sent George out to look after me, dude. As soon as George -- I saw George it was like wow. I didn't have no idea George was there, dude, he just went. When he drove by I just hollered his name and he stopped and I knew it was him, man. I didn't even realize it was him at first.

(7/346)

Appellant told Detective Blum that the whole reason "for [George] coming to pick me up was for him to go to Ft. Lauderdale to pick up half [a] ki" (7/339). Asked whether George **was** expecting to get money from Hank, appellant said "I guess so", but George could not have grabbed **a** gold chain from Hank because George didn't get out of his car (7/339-40). Appellant reiterated that he knew nothing about any chain (7/340).

George drove appellant back to Joey Duckett's house, where appellant showeredandchangedhis clothes (7/327,334,350,352,354). Appellant never actually told Joey it was done, but Joey knew it from appellant's face and from the blood on his shirt (7/327,337). Appellant burned the clothes and put them in a trash can on another street (7/321-22). Wayne disposed of the gun (7/319-20,333-34,341-42,355).

Another detective, Rodney Bishop, testified that after appellant gave the statement to Detective Blum, he [Bishop] was alone

with appellant in the interview room (7/388-89). Bishop asked appellant if he'd like a glass of water; appellant declined, but made some statements: "I keep hearing gunshots, I wish I didn't do it, but shit happens", and "Nothing really matters, I'm going to the electric chair anyway" (7/389).

George Nashef testified that in the early evening of April 25, 1994, he was at Joey Duckett's house, sitting around with a few people smoking a joint (8/446,446-67,488). A phone call came in from appellant (8/446). George was requested to go to the Lasalle Apartments to see him (8/446-47). When he got there, appellant said that Hank was coming to pick appellant up (8/447). George was to wait a few minutes, and then come pick him up at Belcher's Mine (8/447-48). A teal green pickup truck came and appellant got in; George did not see the driver (8/448). After the truck drove off, George waited around for a while and then drove to the Mines (8/449). As he was going north on Old Dixie Highway, between 9:00 and 11:00 p.m., appellant jumped out of the bushes and flagged him down (8/449-50). Appellant had blood on his face and clothing (8/450). George told him he wasn't going to get in his car covered with blood, and he needed to take his shirt off (8/450-51,497). Appellant complied and got in the car; he wrapped the gun in his shirt and put it under the passenger seat (8/451). In George's opinion, appellant did not appear to be high on alcohol or drugs (8/455).

George turned the car around and drove off heading south (8/451,490). Appellant was saying, "I killed him. I killed him.

He wouldn't die" (8/452). Appellant showed George a tiny gold chain and 100 dollars in twenties, which he said he got from either Hank or the vehicle (8/452,455).

When they got back to Joey Duckett's house, Joey came out and met them (8/453). He asked appellant if he had done it, and appellant said he did (8/453). There was a party going on in the house (8/453,466-67,497). George went in the front door; appellant went in through the garage (8/453,467). Only appellant and Joey Duckett were in the garage (8/489). When George saw appellant afterwards, it appeared that he had showered. (There was a shower in the garage) (8/453,489). Appellant told him the clothing went into the washing machine (8/453).

George testified that he didn't report what had happened because he was scared (8/453-54). In late November, 1994, Detective Cliff Blum found him in Sebring, Florida (8/454). At that time George denied any involvement in the case (8/454). Later, he told Detective Blum what he knew about the case "in more detail the second time" (8/454). Asked to explain his initial denial of any knowledge, George testified that he was scared and didn't want to be a witness (8/454).

On cross, George Nashef acknowledged that he talked to Detective Blum on at least three different occasions -- November 30, 1994, December 8, 1994, and February 23, 1995 (8/456-57). George admitted that he told Blum different stories, and that he lied (8/457, see 8/456-62,464-65,480-83). He also admitted that he lied under oath in a deposition given February 16, 1995 (8/457).

On November 30, George did not tell Detective Blum anything about going out to pick appellant up at the Mines (8/464). On December 8, he told Blum he picked up appellant, who had blood on him and said he'd just killed somebody, but George left out the part about his going over to the Lasalle Apartments and following appellant to the Mines (8/485-87). George told Blum that part on February 23 (8/487). In the February 16 deposition, George had stated that he was asked by Joey Duckett to pick appellant up at the Mines (8/478-79). At trial, George acknowledged making this statement under oath, but testified that it was a lie (8/479).

George attributed his changing stories and his reluctance to being a witness to fear (8/454,461,481-84,487). He didn't want to incriminate himself, or have anything to do with it (8/481). He claimed that if he had known something was going to happen, he wouldn't have picked appellant up (8/481).

> Q. [by defense counsel]: Now, were you also afraid of being prosecuted for something else?
>
> A. I was afraid of being killed for knowing too much; that's what I was afraid of.
>
> Q. Were you afraid of being prosecuted?
>
> A, No. I **was** afraid of being killed.
>
> Q. But you knew Kris Sanders was in jail?
>
> A. Well, is that going to stop Joey?

(8/481-82).

George also stated that his differing versions of events were "most probably" due to **a** memory problem (8/483). Whether or not he

was under oath would have no effect "[o]n whether I can remember or not, no it doesn't" (8/483).

> Q. [by defense counsel]: And you remembered one version from November up until February 16th, and then you remembered something else a week later, is that what you're saying?
>
> A. Could have happened, yes.

(8/483).

On redirect, the prosecutor asked George Nashef:

> Mr. Swisher asked you the question, if you knew Kris Sanders was in jail . . . , why were you afraid, do you remember that question?
>
> A. Yes.
>
> Q. To your knowledge, did Kris Sanders hang around with a group of people?
>
> A. Yes, he did.
>
> Q. Were you concerned about this group of people?
>
> A. Yes, sir.
>
> Q. Were you concerned about your own safety?
>
> A. Very much, yes, sir.
>
> Q. And the fact that Kris Sanders was in jail at the time that you talked to Detective Blum, were you still concerned about your safety?
>
> A. Yes, I was.

(8/484, see 8/485).

He explained his conflicting stories:

> Because I didn't want to rat on anybody. I mean, I come from up north. People usually rat on other people end up being dead sooner or later. I was in fear for my life the whole

time this happened, from the point he opened the door and got in the car with that gun.

(8/487).

On recross, defense counsel asked:

> You said you were afraid of this group of people; you were part of this group of people, right?
>
> A. That is not true.
>
> Q. You didn't become a part of this group of people during the month or so that you knew them, two months?
>
> A. I was never part of anybody. I was on my own as far as I was concerned.
>
> Q. You were running drugs for them weren't you?

(8/490).

The prosecutor objected and asked for an instruction to the jury to disregard the question (8/491). Defense counsel asserted that the prosecutor had opened the door by questioning Nashef about his fear of this group of people (8/491). "I should be allowed to deal with that and not just ignore it in a vacuum. He's the one that brought it up. I didn't" (8/491). The prosecutor complained "All he's trying to do is [impugn] his credibility", and suggested that if the defense were allowed to do so, the state could counter with evidence of collateral criminal activity by appellant acting as "Joey Duckett's right hand man" (8/492-93). The trial court asked for a proffer (8/494).

In the proffer, with the jury absent, George Nashef testified that he got drugs from Fort Lauderdale for this group of people one time (8/494). Asked if he told Detective Blum he had made maybe

four runs for this group of people, he replied "Not Joey Duckett and his gang, no" (8/494). Those three or four runs had to do with Ole Anderson (8/494). According to Nashef, they were two separate groups; Ole and Wayne were together, and Joey and appellant and "whoever else they had" were together (8/494). Asked if he was afraid because he owed money for drugs he was fronting for these people, Nashef said nobody was after him for money, "I put out my own money" (8/495). Asked if he told Detective Blum on videotape that he was working two jobs to pay back the money he had to front, he first answered "That was money I took from myself", and then said he didn't recall that statement (8/495-96). Defense counsel asked Nashef about his fear of retaliation, and he elaborated:

> You ratted me out on something I did and you're going to pay for it. This man is on trial for murder here, you know. And somebody put him up to it. And that somebody is not in jail right now. I could walk out of the courtroom and end up dead.
>
> Q. Is that why you're afraid?
>
> A. You're damn right that's why I'm afraid. Wouldn't you be?

(8/496).

The trial court sustained the state's objection, and instructed the jury to disregard defense counsel's question about Nashef's running drugs for these people (8/496-97, see 8/490).

The prosecution and the defense rested (8/498,509). The defense's motion for judgment of acquittal was denied (8/498,502).

B. Penalty Phase

The state recalled Detective Clifford Blum. After the murder of Hank Clark, Blum spoke with John Martin, a friend of appellant's (9/636). [Martin subsequently committed suicide (9/638). His deposition and his statements during the State Attorney's investigation were included in the trial record as Court Exhibits (9/634-35)1- Martin told Blum that on the Friday after the crime, appellant showed him a gold rope chain necklace which Hank Clark wore along with another necklace (9/637-38). The chain had a dent in it, which appellant told Martin occurred when he shot Hank in the neck (9/637-38). Detective Blum never saw the necklace (9/638, 641).

John Martin also mentioned to Blum that Hank Clark **was** violent toward appellant, and acted that way every time he was around him (9/640; see Court's Exhibit #2, p.9,15; Court's Exhibit #4, p.4-5).

The defense called appellant's former girlfriend, Lisa Cantrell. She had met appellant three years earlier when he was a patient at a Pinellas County mental health facility where she worked as a technician (10/664,678). They were friends at first, and the friendship developed into a boyfriend-girlfriend relationship (10/664). The lived together for a little over a year (10/665). Lisa testified that they had a good, loving relationship and enjoyed each other's company (10/665-66). They went fishing and did a lot of things together (10/665). Appellant **was** always there for her, and he played a very important role in her nephew Eric's life as well (10/665-66). Eric never had a father 'figure

growing up, and appellant would play sports with him and take him fishing (10/666). Eric looked up to appellant and cared a lot about him (10/666).

When Lisa was diagnosed with diabetes, appellant "was with me every step of the way" (10/665). He educated himself about the disease, and tried to get her to watch her diet (10/665). When she went to the hospital for her kidneys, he stayed with her the entire time in the emergency room, and after that he visited her twice a day, every visiting hour (10/665). He was very caring for her, and "he was there for me, whatever I needed" (10/665).

Lisa had known, from early on in their friendship, that appellant had mental and emotional problems, and that he used drugs and huffed gasoline (10/666). While they were together, appellant remained off drugs for a period of time, but toward the end of their relationship he began using them again (10/667). His drug and alcohol use became very noticeable to Lisa at that time (10/667,677-78). She tried unsuccessfully to persuade him to stop, and eventually she concluded that the relationship was not going to work; that it would be better for both of them if she left (10/666,675-76, 678). She ended the relationship about a month and a half before the charged homicide (10/667). She testified that she still has feelings for appellant, and she saw a lot of potential in him (10/668, 679). "It was like a Dr. Jekyll, Mr. Hyde kind of thing. As I said, in nature he's a very caring, loving person. And when he was doing drugs I guess excessively, he

would just act like he thinks -- that things didn't matter to him. I didn't matter to him, when I know that I did" (10/667).

Dr. Michael Maher, a psychiatrist, interviewed appellant and his grandmother, and reviewedmedical records, police reports, depositions, and witness statements, as well as the audiotape and transcript of appellant's statement to Detective Blum (10/687-88,692-93). Based on this information, Dr. Maher formed the opinions that appellant is mentally ill (although competent to stand trial); and that at the time of the homicide he was under extreme mental or emotional disturbance, his ability to appreciate the criminality of his conduct was substantially impaired, and his ability to conform his behavior to the requirements of law was also diminished (10/693-94,792-93).

Appellant was twenty years old at the time of the offense (10/694-95). When asked if there was a disparity between his chronological age and his emotional age, Dr. Maher answered:

> Yes. He certainly was -- Kris has a long, complicated, tragic personal and psychiatric history, family history, personal history, psychiatric history. And among the various effects this has had on him is that he's not the normal -- and wasn't then and isn't now, doesn't have the normal maturity for his years, for his twenty years of life at the time of the killing.
>
> He was certainly emotionally immature, more consistent in his emotional and psychological development with a young teenager, fourteen, fifteen, that age range.

(10/695).

When appellant was an 18-month old child, his father -- a cab driver -- was murdered during a taxi robbery (10/695-96,757; see

12/623). Before that, the family had been functioning in a reasonably normal, positive way, but the murder of the father "is overwhelmingly traumatic and tragic and an event which often a family never recovers from" (10/696).

Appellant's mother was totally shocked by the death of his father, and couldn't cope with it (10/697). As a child, appellant was very much aware of the absence of his father, and **was** angry and upset (10/696). He would say things to his mother like "If you give me a father, everything would be okay" (10/696). He would identify people he knew or had heard about, and would say that this man is his father or that man is his father (10/696-97). Dr. Maher testified that appellant experienced emotional isolation and abandonment, and became extremely sad, upset, and withdrawn (10/698-99). By the age of eleven, behavioral problems became evident (10/699-700). His mother couldn't control him, and she was constantly condemning, criticizing, and rejecting him; he in turn was not respectful of her and would talk back to her (10/699-701). There was some family counseling, which did not resolve the problems (10/699-700).

During his early adolescence, appellant's emotional disturbance became evident "many times under many different circumstances" (10/700-01). It manifested itself in rebelliousness, truancy, and doing things that were socially unacceptable (10/701-03). In his early teenage years, appellant began drinking alcohol, smoking marijuana, and "huffing or inhaling gasoline or other solvents of that type" (10/701-03). "Huffing", according to Dr.

Maher, immediately clouds a person's consciousness, and makes them confused, tired, and weary (10/702). Every such use causes brain damage (10/702). Appellant's drug use continued and got him much worse as he got further into his teens (10/704).

Dr. Maher testified that appellant's behavioral and internal response to circumstances was that "he became extremely pessimistic, depressed, discouraged, hopeless, and experienced incredibly intense frustration" (10/702-03, see 10/701). He physically ran away from his home, and also ran away emotionally via his substance abuse (10/703). Another way in which he psychologically "ran away" was by self-mutilation (10/703). Appellant would take a knife or a razor and lacerate his forearms and wrists (10/703). He began doing this at age 14-15, and the behavior continued consistently up until the time of his incarceration in this case (10/704). To Dr. Maher, such acts are a sign of "an extremely disturbed individual who is absolutely desperate to change their condition, their state of mind, their experience, their feelings at the moment" (10/703). The internal pain which the person is experiencing is intolerable; by inflicting physical pain on themselves, they block out the psychic pain (10/704, see 10/760,788-89). Appellant was seeking both to kill himself, and "simply to block out the pain of his own experience and existence" (10/704, see 10/788). It was also a way which he had developed to control himself and to control what might otherwise be disruptive behavior toward other people (10/760). He also recognized that cutting himself **was** disruptive in and of itself (10/760).

Later in his teens, appellant was admitted to the Dozier Boys' School (10/705). There, as he did at other places, he received a diagnosis of severe major depression (10/705,803-04,807). At another facility, he was diagnosed as having dysthymic disorder, which is a second type of depression (10/705,803-04). In addition, he was diagnosed as having a personality disorder with borderline traits as well as antisocial traits (10/705-06). "Borderline" describes symptoms "similar to [those] that are present in schizophrenia where a person is psychotic, out of touch with reality" (10/706). "So borderline is a word that people have come up with to describe traits that are very close to that" (10/706).

Dr. Maher testified that appellant is not a sociopath; although he is capable when under the influence of drugs of behaving in a manner consistent with what a sociopath might do (10/711). "The important issue in Kris' circumstance to distinguish is that that is not a reflection of his true personality. That is a reflection of his state and condition under the influence of drugs, drugs which he may voluntarily take but which after he takes he has no ability to control their influence on him" (10/711). In Maher's opinion, appellant's mental condition is very treatable, if drugs were removed from his life (10/710).

Dr. Maher received records from at least four different treatment facilities (10/701). On one occasion prior his stay at the Dozier School, appellant was Baker Acted, which meant in his particular case that he was taken into custody because he was thought to

be dangerous to himself due to his mental illness (10/707-08). Appellant also received treatment from Pinellas Emergency Mental Health Services, and he spent five and a half months in the Britt House, a residential treatment program in St. Petersburg (10/706-07). He was responsive to treatment and his condition improved for a time, but every time he would return to using cocaine and inhaling gasoline (10/707-08). He became more and more enslaved to the influence of the drugs and to "the impulses that had for a long, long time overwhelmed him", and he became less and less able to control what he was doing (10/708).

Dr. Maher testified that when appellant was fifteen, his IQ was measured at 80 (10/709,805). This is within the average or dull normal range, only ten points above mentally retarded (10/709,762, 805). Dr. Maher also stated that the long term effect of using drugs and inhaling gasoline is to cause a small but measurable amount of brain damage, and to diminish the ability of an individual to use whatever intelligence he has (10/709, see 10/702).

Dr. Maher interviewed appellant twice (10/711). During the first interview, appellant told him that another individual had shot the victim; appellant was present but did not know it was going to happen (10/711). From his knowledge of the case, Maher strongly suspected that this was untrue, and it did not interfere with his ability to evaluate appellant (10/711-12, see 10/770-72). Maher interviewed appellant a second time on the morning of the

penalty phase, and he admitted that he was the one who had shot Hank Clark (10/713-14,759).

On cross-examination, Dr. Maher stated that the Dozier Boys' School is "a place where there are a lot of juveniles who have conduct disorder problems and [a] lot of other serious problems" (10/728). The records which Dr. Maher reviewed indicated a pattern of conduct beginning at age 11 or 12, which included having a "smart mouth", hanging out with a bad crowd, running away, and using drugs (10/732-38). Maher reviewed incidents of self-mutilation or attempted suicide while appellant **was** in the Dozier School (10/734). There **was** one incident where he had walked away from another facility and brought back drugs for other residents (10/733). He had problems complying with the requirements of the juvenile programs he was in, and he **was** out after curfew a lot (10/739-40). Over defense objection, the prosecutor brought out that, as a juvenile through 1989, appellant had a history of getting in trouble with the law, including stealing from his mother, shoplifting, one grand theft or burglary that was not related to family members, an incident of dealing in stolen property (he had taken some money from his mother and tried to use it to check into a hotel room), and escape from halfway houses (10/750-52, see 10/732, 755). Also over objection, the state cross-examined Dr. Maher about appellant's adult **criminal record** (10/790-91). The prosecutor asked:

> Did you see any pattern with those adult offenses and his juvenile offenses?
>
> A. He deals things and he uses drugs.

(10/791).

The documents reviewed by Dr. Maher indicated that appellant received counseling for his psychological problems on more than five or six different occasions (10/794). On several of these occasions, he was also given medications to assist him with his psychological problems (10/794). On redirect, Dr. Maher stated that the reason the medications were prescribed for appellant [w]as "because he **was** suffering from a mental illness" (10/802-03).

Also on redirect, Dr. Maher agreed that appellant's prior juvenile and adult record did not indicate any offenses involving violence (10/805). His adult record was for a theft (10/805). Prior to the incident for which he was on trial:

> [t]here was no record or indication of violent behavior toward other people. There was an indication that he was violent to himself, that he had tried to hurt himself, kill himself, slash his arms. And in fact he was characterized as having severe violent traits.
>
> And those were based on the things he did to himself. That is certainly a form of violence. It's not what we typically think of as criminal violence that is directed to somebody else.

(10/806).

Following Dr. Maher's testimony, the defense introduced appellant's GED certificate (high school equivalency diploma), and rested (10/812,814,817; 11/840,842, Defense Exhibit 1).

Dr. Sidney Merin, a clinical psychologist and neuropsychologist, testified for the state. [The defense had unsuccessfully moved the court to prohibit the state from using Dr. Merin as a prosecution witness, on the ground that Merin was originally con-

tacted and authorized to act as the defense's confidential expert in this case, and the defense had provided him with information which was confidential and privileged (see 1/166-72,175,185-91; 3/435, 491-92,495-97,500-01,523-32). The facts relating to this objection are set forth in Issue IV].

Dr. Merin testified on direct that he has never met or interviewed appellant; "[t]he only thing I know about him is what I've read here and the other information that had been made available to me" (11/857-58). Asked by the prosecutor if it is necessary to see or talk to a defendant before forming an opinion, Dr. Merin replied, "Well it's not an absolute necessity, but it would be nice to do. And there was some question about whether I should or should not . , , "[2] (11/858) Dr. Merin noted that he had other records he could look at, and he could "hear [appellant's] voice in the statements that he made on the audio, follow it on the transcript" (11/858, see 11/884).

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[2] Prior to the penalty phase, the prosecutor told the judge that he had not yet discussed with Dr. Merin whether or not he would be examining appellant "because Dr. Merin's [been] quite busy in the last couple of days and I didn't know if we'd get a Murder I or not and would just be anticipating too much, so I'd have to discuss it with him, but I'm aware of the case law that says he has the right to conduct an examination of this Defendant" (9/619). The prosecutor stated that at the lunch recess following the testimony of Dr. Maher, "I could have Dr. Merin, if I deem it appropriate, examine the Defendant or request the Court to examine the Defendant" (9/620) The prosecutor twice indicated that he was not sure whether Dr. Merin thought an interview was necessary; they had not yet discussed it (9/620; 10/661). Since nothing in the record indicates that the state or Dr. Merin ever followed through by conducting or moving for an examination; or that the defense ever objected to such an examination; or that Dr. Merin was in any way prevented from interviewing appellant, it appears that the state and its expert simply decided that they did not need one.

Dr. Merin testified that from his review of the records and the taped confession, he "didn't see any mental mitigators" (11/857). In his opinion, appellant was not under extreme mental or emotional disturbance at the time of the offense; and he was able to appreciate the criminality of his conduct and to conform to the requirements of law (11/859-60). He testified that appellant was not psychotic or delusional; his characteristics were more consistent with a personality disorder, with traits associated with an antisocial personality disorder (11/857; see 11/854-56, 864-66).

According to Dr. Merin, appellant's depressionwas "reactive"; "[h]e was in a bad situation, he was locked up, he didn't like to be locked up and thereby became depressed" (11/854). The incidents of self-mutilation and attempted suicide referred to in the records were, in Dr. Merin's opinion, "manipulative techniques" to gain attention (11/856). Based on appellant's excellent memory for facts and details revealed in the audiotape and transcript -- his ability to concentrate and retain information -- Dr. Merin concluded that he was not suffering from any significant depression at the time of the incident (11/860-63,900-01). Merin did not doubt that appellant has a substance abuse disorder, "but the manner in which he presented the memories on this transcript did not suggest to me that he was factually mentally or emotionally impaired on that particular night by virtue of any substance abuse" (11/863).

On cross-examination, Dr. Merin stated that he had reviewed appellant's records from various mental health facilities and the Dozier School (11/884). Merin acknowledged that, prior to the

crime for which he was on trial, appellant was diagnosed as having a severe major depressive disorder, which recurred several times, and for which he received several different psychotropic medications (11/896-97; see 11/887-95). He also acknowledged:

> Q. Now, there's a difference, is there not, Doctor, between IQ and emotional ages, right?
>
> A. Yes. Sure.

(11/896).

SUMMARY OF THE ARGUMENT

The trial court, during the death-qualification process, excused prospective juror Claire Payeur for cause, while denying defense counsel's repeated requests for an opportunity to examine her on voir dire. This Court has consistently held that a trial court's refusal to allow such questioning by counsel violates due process and Fla.R.Cr.P. 3.300(b), and requires reversal of the death sentence for a new penalty trial. [Issue I].

The trial court's refusal to allow the defense to cross-examine George Nashef, a key prosecution witness, about his drug running activities for Joey Duckett (who masterminded and paid for the killing) and Ole Anderson and Wayne Sargent (who were involved in the planning and preparation) was prejudicial error, and deprived appellant of his constitutionally guaranteed right to confront adverse witnesses. The proffered cross-examination was both critical to the jury's assessment of Nashef's credibility, and relevant to matters opened up on direct (including Nashef's explanation of his prior lies and inconsistent stories as being the product of his fear of these people, whose enterprises he claimed not to be aware of or involved in). The proffered cross-examination would have impeached Nashef's credibility [note the prosecutor's comment, "All he's trying to do is [impugn] his credibility (8/492)], and would have tended to corroborate appellant's statement to Detective Blum that Nashef was involved in the planning of the homicide, and the whole reason for the plan was to cut Hank Clark out of the crack cocaine so that Nashef and his "brother" could move in. Most

importantly, by impeaching Nashef's credibility the proffered cross-examination would have made the jury and the judge much less likely to believe Nashef's claim (made at trial, and inconsistent with his deposition given under oath) that appellant called him out to the Lasalle Apartments and told him to follow him out to the Mines. This was the main piece of evidence relied on by the trial court to establish premeditation and calculation, and to refute appellant's statement to Detective Blum that he didn't intend to kill Clark that night; that the shooting resulted from an argument over crack cocaine and Clark's reaching for a stun gun. [Issue II].

The state's theory of the case -- its theory of why the homicide **was** premeditated, why it **was** "CCP", why it warranted a death sentence -- was that it was a contract killing ordered and paid for by Joey Duckett. At least two state witnesses, the aforementioned Nashef and Jean Mock, in addition to appellant's statement to Detective Blum, established that Duckett masterminded the killing, while appellant -- referred to by the prosecutor as Duckett's "right-hand man" -- was the triggerman. Yet the trial judge, in his sentencing order, essentially airbrushed Duckett out of the picture. In his CCP finding, he inaccurately stated that Jean Mock quoted appellant as saying "Hank needs to die, I'll do it", when in fact it **was** undisputed that Joev Duckett told appellant that Hank needed to die, and appellant responded that he would do it. The more lenient treatment of an equally culpable coparticipant is a valid mitigating circumstance in a capital case, and is relevant to a proportionality analysis. The trial court's failure to meaningfully

consider or weigh Duckett's role in the homicide and the vastly disparate treatment accorded appellant (who was sentenced to death) and Duckett (who was never prosecuted) renders appellant's death sentence unreliable under Eighth Amendment standards. [Issue III].

Dr. Sidney Merin, who was authorized to serve as the defense's confidential psychological expert in this case, and who received (but claimed not to have read) privileged materials supplied by the defense, should not subsequently have been allowed to be called as a witness for the prosecution, or to assist or consult with the prosecution prior to trial. This was a violation of the attorney-client privilege as guaranteed by Fla.R.Crim.P. 3.216(a) ("The expert shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client privilege"). As numerous Florida decisions have recognized, where a psychologist or psychiatrist is employed by counsel for a defendant to assist him in preparing a defense for his client and not to treat the defendant, the attorney-client privilege applies; the state may not depose the expert or call him as a witness. (The privilege is waived if the doctor is used as a defense witness). The case which was argued by the state and relied on by the trial court in allowing Dr. Merin to switch sides -- Rose v. State, 591 so. 2d 195 (Fla. 4th DCA 1991) -- is inapplicable by its own terms, since Rose (which involved a medical examiner who had received no privileged information from either side) expressly distinguishes the cases where a mental health expert is obtained pursuant to Rule 3.216(a), and recognizes that

the attorney-client privilege applies in the latter context. Finally, the pathology expert's testimony in Rose was cumulative and harmless, while in the instant case Dr. Merin was the centerpiece of the prosecution's penalty-phase case; his testimony was the focus of closing argument, and it was used by the trial court as his basis for rejecting all three statutory mitigating factors proffered by the defense. [Issue IV].

A trial court's discretion to reject a mitigating circumstance is neither unlimited nor unreviewable. The rejection of a mitigating factor cannot be sustained unless supported by competent substantial evidence refuting the existence of the factor. Here, there was no competent substantial evidence to support the trial court's refusal to weigh appellant's age (20) as a mitigator where (1) the evidence that he had the emotional and psychological maturity of a 14 or 15 year old was unrebutted; (2) he had a traumatic, emotionally isolated childhood, and was diagnosed, treated, and medicated throughout his teenage years for severe major depression; (3) the trial court's rejection of the age mitigator was based solely on **a** finding that appellant is of average intelligence (where the evidence was of a "dull normal" IQ of 80); and (4) the state's own expert, Dr. Merin, readily agreed that there is a difference between IQ and emotional age. [Issue VI.

Under Florida law, the death penalty is reserved only for the most aggravated and least mitigated homicides. Where, **as** here, there is only **a** single aggravating factor, a death sentence can be sustained only when there is very little or nothing in mitigation.

In view of the unrefuted evidence of appellant's traumatic childhood, his psychiatric history, his chronic drug and alcohol abuse, his **emotionalandpsychological** immaturity, his dull-normal intelligence, the positive personal traits described by his ex-girlfriend, the absence of any prior crimes of violence, and the fact that he was clearly the follower rather than the leader in this criminal episode, this is not such a case. Appellant's death sentence should be reduced to life imprisonment on proportionality grounds. [Issue **VII.**

Finally, the trial court's failure to instruct the jury on the sentencing option of life imprisonment without parole, where that penalty became law shortly after the crime but before the trial, violated due process, fundamental fairness, and the Eighth Amendment. The Oklahoma Court of Criminal Appeals has so ruled, and that court's analysis of the constitutional issue is sound. [Issue VII],

The trial court's instruction on CCP (which was the only aggravator submitted to the jury, and thus was the essential element necessary to return a death recommendation) violated due process by effectively directing the jury that the aggravating factor was established by the evidence. The error was fundamental. [Issue VIII].

ARGUMENT

ISSUE I

THE TRIAL COURT VIOLATED FLORIDA RULE OF CRIMINAL PROCEDURE 3.300(b) AND DUE PROCESS OF LAW WHEN, IN EXCUSING PROSPECTIVE JUROR CLAIRE PAYEUR FOR CAUSE, HE DENIED DEFENSE COUNSEL'S REQUESTS FOR AN OPPORTUNITY TO EXAMINE THE JUROR ON VOIR DIRE.

A. The Applicable Law

This Court has repeatedly held that a trial court's refusal to allow defense counsel to attempt to rehabilitate death-scrupled jurors on voir dire violates a defendant's due process rights, and violates Florida Rule of Criminal Procedure 3.300(b). O'Connell v. State, 480 So. 2d 1284, 1286-87 (Fla. 1985); Hernandez v. State, 621 So. 2d 1353, 1355-56 (Fla. 1993); Rhodes v. State, 638 So. 2d **920**, 924 (Fla. 1994); Willacy v. State, 640 So. 2d 1079, 1081-82 (Fla. 1994). Except where additional voir dire error taints the conviction as well as the sentence [O'Connell], or where the issue is waived by defense counsel's failure to request an opportunity to examine the juror or jurors [Rhodes], the appropriate remedy for deprivation of this right is reversal for a new penalty proceeding before a new jury. Hernandez; Willacy.

Under Florida law, a reasonable voir dire examination of each prospective juror, by counsel, is assured by Rule 3.300(b). See O'Connell; Willacy; Williams v. State, 424 So. 2d 148, 149 (Fla. 5th DCA 1982); Francis v. State, 579 So. 2d 286 (Fla. 3d DCA 1991); Perry v. State, 675 So. 2d 976, 978-79 (Fla. 4th DCA 1996); Miller

v. State, So. 2d (Fla. 2d DCA 1996) [21 FLW D2464]. The rule provides that after the prospective jurors have been sworn:

> **(b) Examination.** The court may then examine each prospective juror individually or may examine the prospective jurors collectively. Counsel for both the state and defendant shall have the right to examine jurors orally on their voir dire. The order in which the parties may examine each juror shall be determined by the court. The right of the parties to conduct an examination of each juror orally shall be preserved.
>
> **(c) Prospective Jurors Excused.** If, after the examination of any prospective juror, the court is of the opinion that the juror is not qualified to serve as a trial juror, the court shall excuse the juror from the trial of the **cause.** If, however, the court does not excuse the juror, either party may then challenge the juror, as provided by law or by these rules.

Florida law governing both criminal and civil trials clearly recognizes the primary role of counsel -- and the limited, referee-type role of the trial judge -- in conducting voir dire. See Sutton v. Gomez, 234 So. 2d 725, 727 (Fla. 2d DCA 1970) ("The trial judge's role during jury selection, given a permissible line of interrogation, is really only to evaluate the conduct of counsel as to good faith and propriety in pursuing the inquiry"). While the trial court "may . . . examine" the jurors individually or collectively, counsel "shall have the right to examine jurors orally" and "[t]he right of the parties to conduct an examination of each juror orally shall be preserved". Rule 3.300(b). As recognized in Miller v. State, supra, "if trial judges choose to question prospective jurors extensively, they should not do so in a manner which impairs counsel's right and duty to question the venire."

Moreover, Rule 3.300(c) provides that challenges for cause are to take place "after the examination of any prospective juror", and, as previously discussed, an important part of that examination (subject to waiver only if he fails to assert it) is counsel's right to orally question each juror. This right is especially crucial in a capital trial, where the accused's life is at stake, and where the questioning involves the "unique body of law" applicable to death-qualifying the jury. See Fleckinser v. State, 642 So. 2d 35 (Fla. 4th DCA 1994), distinguishing O'Connell on this basis.

In the instant case, as in O'Connell and Green v. State, 575 So. 2d 796 (Fla. 4th DCA 1991), the trial court's refusal to allow the defense any opportunity to examine the challenged juror cannot be justified as "control of unreasonably repetitious and argumentative voir dire questioning",[3] since defense counsel never got to ask her a single question. In Green -- a non-capital case -- the majority of the Fourth DCA panel agreed with the defendant that O'Connell was applicable, and reversed. Judge Stone, dissenting, opined "This is not a capital case and does not involve, as did O'Connell v. State, the prejudice that accrues to a defendant facing a death sentence who is not afforded an opportunity to rehabilitate a potential juror expressing concerns about the imposition of capital punishment."

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[3] See Jones v. State, 378 So. 2d 797 (Fla. 1st DCA 1979), cert.den., 388 So. 2d 1114 (1980).

O'Connell and Rhodes recognize that, in addition to depriving a defendant of the important procedural right guaranteed by Rule 3.300(b), the excusal of a death-scrupled juror coupled with the absolute denial of any opportunity for counsel to examine the juror violates due process. Regarding the due process aspect of a defendant's right to a reasonable examination by counsel of prospective jurors during the death-qualification process in a capital case, see **also** the Ohio appellate opinions in State v. Anderson, 282 N.E. 2d 568 (Ohio 1972) (recognizing that a failure to permit any such questioning violates due process of law); State v. Jenkins, 473 N.E. 2d 264, 286 (Ohio 1984) (distinguishing Anderson, in which counsel were prohibited from asking any questions on the subject, and holding it inapplicable to a case where counsel was permitted considerable leeway in questioning jurors about their attitudes toward capital punishment, but was precluded only from **asking the** jurors if they would vote for the death penalty if Hitler or Manson were the accused); Akron v. Wendell, 590 N.E. 2d 380, 384 (Ohio App. 9 Dist. 1990) (recognizing that failure to permit any such questioning by counsel violates due process, but finding the issue unpreserved due to lack of a timely objection).

B. The Excusal of Juror Payeur

In the instant case, at the beginning of voir dire, the trial court told the prospective jurors that "questions will be posed to you, initially by myself, and then by counsel for the State, and then by counsel for defense" (5/9-10). The judge asked individual

jurors, including Ms. Payeur, a few questions each (see 5/14-27),[4] and then instructed the jurors collectively on the procedure applicable to their decision whether to recommend the death penalty or life imprisonment (5/34-38). The judge told the jurors "[Y]our attitude towards the death penalty is a proper subject of inquiry by myself and the attorneys" (5/34). At the end of his instruction, the judge said:

> Before allowing the attorneys to question you concerning your qualifications to serve as a juror in this case, I have a few general questions for you.
>
> Are any of you opposed to the death penalty? If so, please signify -- and I'm addressing the jurors in the box at this time -- if so, please signify by raising your hands.

(5/38).

Ms. Payeur was the only juror who raised her hand (5/38). The judge asked her if her views on the death penalty would prevent or substantially impair her ability to judge appellant's guilt or innocence; she answered "No" (5/38). The judge then asked if she would automatically vote against imposition of the death penalty in all cases without regard to the evidence or instructions; she answered "Yes" (5/39). The judge then invited the prosecutor to proceed with his voir dire (5/39). Instead, the prosecutor immediately [and prematurely under Rule 3.300(b) and (c)] challenged two jurors

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[4] Asked by the trial judge if she'd had any prior contact with the justice system, Ms. Payeur said she had not, but her son is with an IRS office and has had contact with federal judges (5/23). She would follow the law concerning credibility of witnesses and would not automatically give greater or lesser weight to a member of law enforcement (5/23-24). Asked if she felt she could be fair and impartial, she answered yes (5/24).

for cause; Ms. Sands (who said she could not pay attention to the case due to her child-care situation), and Ms. Payeur (5/39-40). Defense counsel said:

> Judge, I have no problem with Ms. Sands. But I would like to try to rehabilitate Ms. Payeur.

(5/40).

The prosecutor objected, saying "there's no way to rehabilitate her. Maybe counsel can lead her to saying something different, but this Court has already asked for an answer, and . . . her answer is binding. I don't think she equivocated" (5/40). Defense counsel again stated that he would like a chance to question the juror (5/40-41). Instead, the judge said that he was "going to pose some additional questions of Ms. Payeur to make sure that there's no ambiguity or misunderstanding on her part, but if she confirms that previous answer, then I'm going to excuse her for cause" (5/41). The judge then asked her if she understood that in the event that a penalty phase became necessary the jury would be asked to recommend either death or life imprisonment (5/42). She replied that if it got to that point, "I would say life in prison over the death penalty. That is how I feel" (5/42). The judge asked if her feelings concerning the death penalty would not enable her to receive and listen to the aggravating and mitigating factors and render an advisory verdict; she answered "I think my feelings would interfere with that" (5/42). Asked by the judge if that meant she would not vote for recommendation of the death penalty regardless, she said that that was correct (5/43). The judge

thereupon excused her for cause (5/43). Defense counsel renewed his objection: ". . . I feel I should have had the chance to rehabilitate her, and that to excuse her at this time, I think, is a violation of the constitutional laws of the United States . . . " (5/44). The judge overruled the objection (5/44).[5]

This Court's prior decisions in O'Connell, Hernandez, and Willacy are controlling; they cannot be meaningfully distinguished and they require reversal for a new penalty proceeding before a new jury. The state will argue on appeal (as the prosecutor did in opposing defense counsel's assertion of his right to examine the juror) that Ms. Payeur's answers to the judge's questions were unequivocal, and therefore nothing defense counsel could have brought out would have been enough to rehabilitate her. This is essentially the same justification which this Court rejected in O'Connell. There, the judge excluded two jurors over defense counsel's objection that he'd had no opportunity to examine or rehabilitate them; the judge noted counsel's objections but stated:

> Some of these people that Terry -- I don't believe could rehabilitate under any stretch of the imagination because I wouldn't accept a change of moral values between now and the hour he gets through . . . . That's right. And as I pointed out before, they wouldn't impose it under any circumstances, they would not be heard to change their minds in an hour.

O'Connell v. State, supra, 480 So, 2d at 1286.

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[5] Appellant's motion for new trial was largely based on the trial court's error "in denying the Defendant's counsel an opportunity to question and/or otherwise rehabilitate juror, Claire Payeur, after requesting to do so" (2/283-84,286; 4/578-79). The trial court denied the motion for new trial (2/294; 4/579).

In Willacy the juror's answers were similarly unequivocal:

> MR. WHITE [state attorney]: Is there anything that you know of that would make it impossible or difficult to serve on this jury?
>
> MS. CRUZ: The same as the first gentleman. If it ever came to the penalty part, I will not be able to give a death penalty sentence.
>
> MR. WHITE: You realize from all the questions that the law is, if you are to serve here, you should consider the death penalty under the applicable rules and law that the Court gives you. Are you saying you cannot abide by that law?
>
> MS. CRUZ: Right.
>
> MR. WHITE: Well, your Honor, with regard to Miss Cruz, it's the State's position that she announced that under her beliefs, religious or conscientious or whatever, she could not abide by the law with regard to the penalty in this case, and for that reason we would ask the Court to excuse her for cause.
>
> THE COURT: Very well, Miss Cruz, you may step down and return to the jury pool area.
>
> MR. ERLENBACH [defense counsel] : Your Honor, we would like a brief opportunity to try to rehabilitate.
>
> THE COURT: The Court has ruled, Mr. Erlenbach.

Willacy v. State, supra, 640 So. 2d at 1081, n.4.

In reversing for a new penalty phase, this Court held:

> The trial judge properly sustained the State's challenge for cause, but committed error in not affording defense counsel an opportunity to rehabilitate the juror pursuant to Rule 3.300(b). We find [O'Connell] and most recently [Hernandez] dispositive.

Willacy v. State, 640 So. 2d at 1082.

Those decisions are likewise dispositive in the instant case. O'Connell, Hernandez, Willacv, and Rule 3.330(b) were all established law at the time of this trial. When defense counsel attempted to assert his right to examine the juror who had been prematurely challenged for cause by the state, the prosecutor's successful objection and the judge's erroneous ruling deprived appellant of an important procedural right guaranteed by the rules [see Wike v. State, 648 So. 2d 683, 687 (Fla. 1994)], and his right to due process guaranteed by the Florida and United States Constitutions. His death sentence must be reversed for a new penalty proceeding. Willacv; Hernandez.

ISSUE II

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENSE TO CROSS-EXAMINE A KEY PROSECUTION WITNESS, GEORGE NASHEF, ABOUT HIS DRUG RUNNING ACTIVITIES FOR JOEY DUCKETT AND OTHER INDIVIDUALS INVOLVED IN PLANNING THE HOMICIDE, WHERE THE CROSS-EXAMINATION WAS (1) CRITICAL TO THE JURY'S ASSESSMENT OF NASHEF'S CREDIBILITY AND (2) GERMANE TO MATTERS OPENED UP ON DIRECT.

"Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316 (1974). The right of full and fair cross-examination, including the right to examine a witness as to matters affecting his credibility, is guaranteed to the accused in a criminal case by the Sixth and Fourteenth Amendments to the

United States Constitution and Article I, Section 16 of the Florida Constitution. Davis v. Alaska, supra; Coxwell v. State, 361 So. 2d 148, 151-52 (Fla. 1978); Kelly v. State, 425 So. 2d 81, 83-84 (Fla. 2d DCA 1982), rev. den., 434 So. 2d 889 (Fla. 1983). As this Court recognized in Coxwell, and in Coco v. State, 62 So. 2d 892, 894-95 (Fla. 1953):

> a fair and full cross-examination of a witness upon the subjects opened by the direct examination is an absolute right, as distinguished from a privilege, which must always be accorded to the person against whom the witness is called and this is particularly true in a criminal case such as this wherein the defendant is charged with the crime of murder in the first degree . . . . Cross-examination of a witness upon the subjects covered in his direct examination is an invaluable right and when it is denied to him it cannot be said that such ruling does not constitute harmful and fatal error.
>
> . . .
>
> [C]ross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief . . .

See also Zerquera v. State, 549 So. 2d 189, 192 (Fla. 1989).

In addition to the accused's right to clarify, modify, supplement, or contradict the matters testified to on direct, cross-examination is also "the traditional and constitutionally-guaranteed method of exposing possible biases, prejudices and ulterior motives of a witness as they may relate to the issues or personalities in the case at hand." Wooten v. State, 464 So. 2d

640, 641 (Fla. 3d DCA 1985), rev. den., 475 So. 2d 698 (Fla. 1985).

Florida's Evidence Code provides:

> Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in its discretion, permit inquiry into additional matters.

Fla. Stat. §90.612(2).

"Any evidence tending to establish that a witness is appearing for the state for any reason other than to tell the truth should not be kept from the jury." Lavette v. State, 442 So. 2d 265, 268 (Fla. 1st DCA 1983), rev. den., 449 So. 2d 265 (Fla. 1984).

> Evidence that is relevant to the possible bias, prejudice, motive, intent or corruptness of a witness is nearly always not only admissible, but necessary, where the jury must know of any improper motives of a prosecuting witness in determining that witness' credibility.

Jaggers v. State, 536 So. 2d 321, 327 (Fla. 2d DCA 1988).

As summarized in Mendez v. State, 412 So. 2d 965 (Fla. 2d DCA 1982):

> Whenever a witness take the stand, he . places his credibility in issue. [Citation omitted]. Cross-examination of such a witness in matters relevant to credibility ought to be given a wide scope in order to delve into a witness's story, to test a witness's perceptions and memory, and to impeach that witness. United States v. Williams, 592 F.2d 1277 (5th Cir. 1979). Limiting the scope of cross-examination in a manner which keeps from the jury relevant and important facts bearing on trustworthiness of crucial prosecution testimony is improper, especially where the cross-examination is directed at a key prosecution witness. Truman v. Wainwright, 514 F.2d 150 (5th Cir. 1975); Stripling v. State, 349 So. 2d 187 (Fla. 3d DCA 1977), cert. denied, 359 so. 2d 1220 (Fla. 1978). The right of full

> cross-examination is absolute, and the denial of that right may easily constitute reversible error. Coxwell v. State, 361 So. 2d 148 (Fla. 1978).

In the instant case, in its successful effort to convince the jury to find that the killing was premeditated, and to persuade the jury and the trial court that it was cold and calculated,[6] the state's key witness was George Nashef. In the tape-recorded interview with Detective Blum, appellant stated that Joey Duckett paid him 900 dollars to kill Hank Clark, but it wasn't supposed to happen for another two weeks. Appellant told Blum that the shooting occurred when Clark -- angry from an argument that developed over his smoking up all the crack cocaine -- reached for a cattle prod under the seat and appellant overreacted. To persuade the jury and the trial judge otherwise, the prosecutor relied heavily on the testimony of George Nashef. The judge in his sentencing order -- in finding "cold, calculated, and premeditated" as the sole aggravating factor warranting a death sentence -- stated:

> That portion of the defendant's statement which suggests that the actual shooting and killing of the victim was committed in response to the victim's argument and movement towards a weapon is negated by the testimony of George Nashiff. Mr. Nashiff was approached by the defendant just before the murder and the defendant instructed Nashiff to pick him up at the mines (scene of murder) even though Henry Clark (victim) was picking up the defendant and the two were going out to the mines.

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[6] Since "CCP" was the only aggravating factor which the state contended was applicable and upon which the jury was instructed, it could not lawfully have returned a death recommendation without finding that this aggravator was proven. See Banda v. State, 536 So. 2d 221, 225 (Fla. 1988); Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992).

> George Nashiff's testimony is clear that the defendant was ordering a ride back from the scene knowing that the victim would be left at the mines after the murder.

(2/308).

There was conflicting evidence as to George Nashef's own role in the homicide. Appellant told Detective Blum that a lot of people were involved in planning to kill Clark, including (in addition to Duckett and appellant) Wayne (Sargent), George (Nashef), Ole (Anderson) and Eddie Gibbs (7/328-29, 331-32,339). At the time of the interrogation (May 23, 1994), appellant did not know George's last name (7/323,363). Detective Blum asked:

> What was George's involvement? What was he -- what was he planning?
>
> A. He's the coke man.
>
> Q. How was -- how did he get involved in the plan or whatever?
>
> A. That's the whole purpose, stop Hank, it cuts Hank out of the crack so he can move in, 'cause I guess he's got some kind of big deals with cocaine up in Ft. Lauderdale.
>
> **Q.** George's brother or something like that, right?
>
> A. Yeah.
>
> **Q.** Yeah.
>
> A. That's his brother.
>
> Q. That's his brother, or that's what he's calling him. Got the drugs or that what he's told me.
>
> A. Yeah.

(7/329-30).

George came by in his car and picked up appellant after the shooting. There were a number of conflicting explanations as to what prompted George's arrival. Appellant variously told Detective Blum that he had called George from a pay phone after the shooting (7/323-24); that George must have been sent by Joey Duckett after appellant phoned Duckett upon his return from Tampa (7/345-56); that George was following him on his own (7/335); and that "the whole reason for [George] coming to pick me up was for him to go to Ft. Lauderdale to pick up half [a] ki" (7/339). In November, 1994 -- six months after appellant's statement was made and recorded -- Detective Blum found George Nashef in Sebring, Florida (8/454). Blum spoke with Nashef on at least three separate occasions over the next few months. First, on November 30, 1994, Nashef denied any involvement in the case. Second, on December 8, Nashef told Detective Blum he picked up appellant at the Mines, but did not say what caused him to go there. In a deposition on February 16, 1995, Nashef stated under oath that Joey Duckett asked him to pick up appellant at the Mines. A week later, on February 23, Nashef told Detective Blum the version he subsequently gave at trial; i.e., that appellant had called him over to the Lasalle Apartments, told him that Hank was coming to pick him up, and that George was to wait a few minutes and then come pick up appellant at Belcher's Mine. (See 8/446-48,456-65,478-87). Nashef testified at trial that he had lied under oath and lied to Detective Blum (8/457,479). He claimed that if he had known anything was going to happen, he wouldn't have picked appellant up (8/481). He attributed his dif-

fering stories to a memory problem (8/482-83) and his lies to fear (8/454,461,481-84,587). He said he was afraid of being killed "for knowing too much" (8/481-82, see 8/487):

> Q. [prosecutor]: But you knew Kris Sanders was in jail?
>
> A. Well, is that going to stop Joey?

(8/482).

On redirect, the prosecutor asked Nashef:

> Mr. Swisher asked you the question, if you knew Kris Sanders was in jail . . , , why were you afraid, you remember that question?
>
> A. Yes.
>
> Q. To your knowledge, did Kris Sanders hang around with a group of people?
>
> A. Yes, he did.
>
> Q. Were you concerned about this group of people?
>
> A. Yes, sir.
>
> Q. Were you concerned about your own safety?
>
> A. Very much, yes, sir.
>
> Q. And the fact that Kris Sanders was in jail at the time that you talked to Detective Blum, were you still concerned about your safety?
>
> A. Yes, I was.

(8/484, see 8/485).

On recross, defense counsel asked:

> You said you were afraid of this group of people; you were part of this group of people, right?
>
> A. That is not true.

Q. You didn't become a part of this group of people during-the month or so that you knew them, two months?

A. I was never part of anybody. I was on my own as far as I was concerned.

Q. You were running drugs for them weren't you?

(8/490).

The prosecutor objected and asked for an instruction to the jury to disregard the question (8/491). Defense counsel asserted that the prosecutor had opened the door by questioning Nashef about his fear of this group of people (8/491). "I should be allowed to deal with that and not just ignore it in a vacuum. He's the one that brought it up. I didn't" (8/491). The prosecutor complained "All he's trying to do is [impugn] his credibility", and suggested that if the defense were allowed to do so, the state could counter with evidence of collateral criminal activity by appellant acting as "Joey Duckett's right hand man" (8/492-93). The trial court asked for a proffer (8/494).

In the proffer, with the jury absent, George Nashef testified that he got drugs from Fort Lauderdale for this group of people one time (8/494). Asked if he told Detective Blum he had made maybe four runs for this group of people, he replied "Not Joey Duckett and his gang, no" (8/494). Those three or four runs had to do with Ole Anderson (8/494). According to Nashef, they were two separate groups; Ole and Wayne were together, and Joey and appellant and

"whoever else they had" were together (8/494).[7] Nashef denied that he owed money for drugs he was fronting for these people. Asked if he'd told Detective Blum he was working two jobs to pay back the money he'd had to front, Nashef first answered "That was money I took from myself", and then said he didn't recall the statement (8/495-96). Nashef reiterated his fear of Joey Duckett:

> This man [appellant] is on trial for murder here, you know. And somebody put him up to it. And that somebody is not in jail right now. I could walk out of the courtroom and end up dead.
>
> Q. Is that why you're afraid?
>
> A. You're damn right that's why I'm afraid. Wouldn't you be?

(8/496).

The trial court sustained the state's objection, and instructed the jury to disregard defense counsel's question about Nashef's running drugs for these people (8/496-97, see 8/490). In so doing, he kept from the jury evidence critical to Nashef's credibility, and deprived appellant of his constitutional right to confront adverse witnesses. Nashef admitted to lying in this case -- to Detective Blum and in a deposition under oath; it was for the jury to determine whether he **was** lying before, or lying in his trial testimony, or both. The prosecution, seeking anticipatorily to rehabilitate its witness, brought out from Nashef that he lied

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[7] According to what appellant told Detective Blum, Ole, Wayne, George, and Joey all knew about and participated in planning to kill Hank Clark (7/328-29,331-32,339). The gun which was used belonged to Ole and was brought to appellant by Wayne (7/319,328, 331,333,339,360). Wayne disposed of the gun after the shooting (7/319-20,333-34,341-42,355).

because he was scared of Joey Duckett and the other people appellant hung out with. Nashef presented himself as essentially a bystander, in the wrong place at the wrong time with the wrong people. He claimed to have had no knowledge of what was going on. This is in stark contrast with what appellant told Detective Blum six months before the police even located Nashef. Asked how George got involved in the plan, appellant explained that George is "the coke man", and the whole purpose was to cut Hank out of the crack so that George -- who had some kind of big deals with cocaine in Ft. Lauderdale -- could move in (7/329,see 7/339).

The proffered cross-examination was critically relevant to Nashef's credibility, his motive to testify against appellant, and his motive to minimize his own involvement. If -- as he repeatedly answered the prosecutor on direct when questioned about why he had lied previously -- Nashef was deathly afraid of "Joey Duckett and his gang", it is certainly important for the jury to know that Nashef was a drug runner for Joey Duckett and his gang, not some innocent bystander and outsider as he portrayed himself.

Nor can Nashef's drug activities involving Joey Duckett be artificially separated from those involving Ole and Wayne, since there was evidence in the state's case that **all four were involved** in planning Hank Clark's death. Even the prosecutor admitted in closing argument what Nashef himself denied in front of the jury just before the proffer; that he was a part of this group (see 8/490);

> Evaluate George by using your God given common sense, ladies and gentlemen. He's an

> individual who associates with him, he associates with Joey Duckett. He associates with Ole and Wayne and everybody else's name you heard during the course of this trial. He's in with that group. And he's reluctant. He's part of these individuals, and there's an old saying, you're not going to find swans in the sewer.

(8/532-33).

The proffered cross-examination would have strongly tended to corroborate appellant's statement to Blum that George Nashef -- contrary to his own denial of knowledge or intentional involvement -- was one of the most culpable conspirators in Hank Clark's murder. See Lavette v. State, supra, 442 So. 2d at 267-68; Powe v. State, 413 so. 2d 1272, 1273 (Fla. 1st DCA 1982) ("Great latitude should be allowed in the cross-examination of an accomplice who testifies for the prosecution"). It would have destroyed or greatly reduced the credibility of Nashef's trial testimony, as contrasted to the statements made by appellant to Detective Blum. If the cross-examination had been allowed, the jury could reasonably have disbelieved Nashef's most recent claim that appellant called him out to the Lasalle Apartments and instructed him to wait a few minutes and then follow him out to the Mines; testimony which was central to persuading the jury and judge that appellant knew in advance that he was going to kill Hank Clark that night and would need a ride back. Instead, the jury could reasonably have concluded (as suggested in appellant's statement) that George was following appellant on his own, or that appellant called him after the shooting, or (as Nashef said under oath in an earlier deposition,

and as was suggested in appellant's statement) that Joey Duckett sent him.

Appellant's defense at trial was based almost entirely on his statements to the detective that, while he had indeed been ordered and paid by Joey Duckett to kill Hank Clark, it was not supposed to happen for another two weeks; the actual shooting was an unplanned overreaction when Clark, during an argument stemming from their use of crack cocaine, reached for a cattle prod (see 8/512-29,566-76). George Nashef's testimony was instrumental to the state in defeating this defense. The trial court's refusal to allow cross-examination which was critically relevant both to Nashef's credibility, and to Nashef's own involvement in the crime for which appellant was on trial for his life, deprived appellant of his state and federal constitutional right of confrontation. See Davis v. Alaska; Coxwell; Mendez; Kelly; Lavette; Wooten; Jaggers. Appellant's conviction and death sentence must be reversed for a new trial.

ISSUE III

APPELLANT'S DEATH SENTENCE FALLS SHORT OF EIGHTH AMENDMENT STANDARDS OF RELIABILITY DUE TO THE TRIAL COURT'S FAILURE TO PROPERLY CONSIDER THE VASTLY DISPARATE TREATMENT ACCORDED TO JOEY DUCKETT, AN EQUALLY CULPABLE IF NOT MORE CULPABLE COPARTICIPANT IN THE HOMICIDE.

Disparity in the treatment or punishment of other participants in a homicide is a valid mitigating consideration in a capital

case. O'Callaghan v. State, 542 So. 2d 1325, 1326 (Fla. 1989) (jury should have been apprised that it could consider that one co-participant would be sentenced for second-degree murder, another had been granted immunity, and a third had not been charged with a crime). See also Maxwell v. State, 603 So. 2d 490, 492-93 (Fla. 1992); Scott v. Dugger, 604 So. 2d 465, 468-69 (Fla. 1992); Craig v. State, So. 2d__ (Fla. 1996)[21 FLW S417]. Where an equally culpable participant has received a life sentence or a lesser sentence, this fact is relevant to a proportionality analysis on direct appeal or even on collateral review. Scott v. Dugger, supra, 604 So. 2d at 469. Contrast Cardona v. State, 641 So. 2d 361, 365 (Fla. 1994) (disparate treatment is justified where the defendant who received a death sentence was the more culpable of the two).

In the instant case, the state's theory of the case -- its theory of why the homicide was premeditated, why it was "CCP", why it warranted a death sentence -- was that it was a contract killing ordered and paid for by Joey Duckett. It was the prosecutor who twice referred to appellant as "Joey Duckett's right-hand man" (8/492-93, 531). It was the prosecutor who gave the following explanation of why Hank Clark's necklaces were taken while several thousand dollars were left in the truck:

> Was there pecuniary [gain] here? No. Do you know why he took the necklaces. To show Duckett he committed the murder.
>
> . . .
>
> Did the defendant want to take that necklace for financial gain? Didn't want to make

himself rich over it but wanted to take it for one reason, to show somebody that he committed the murder.

Is that consistent with the defendant's statement that yes, Duckett told me to kill him. And I was going to kill him for Duckett. And that's the memorabilia of Mr. Clark that I have with me to prove it.

(8/535-36, see also 11/926).

It was the state which introduced appellant's statement to Detective Blum that Joey Duckett ordered the killing and paid him 900 dollars in advance (7/327-28). The taped statement included Detective Blum's remark ". . . now you've done the right thing and you told us what you did and you told us who did it, I mean, who put you up to it and that's important for us to know, and that's Joey" (7/338). Blum told appellant he didn't want him standing alone; he wanted everyone who was involved (7/332, see 7/359).

It was the state which introduced Jeannie Mock's testimony that she overheard Joey Duckett (in the presence of Ole, Wayne, and several others) tell appellant that Hank needed to die, and appellant responded that he would do it (7/286-87,291, see 8/531). It was the state which called George Nashef, and then attempted to explain away his lies and divergent stories as the product of fear (See 8/454). The basis of his fear was explored on cross:

Q. Were you afraid of being prosecuted?

A. No. I was afraid of being killed.

Q. But you knew Kris Sanders was in jail?

A. Well, is that going to stop Joey?

(8/482)

On redirect the prosecutor asked:

You said you told Detective Blum that you were afraid because of people up north; is that what you said or what happened up north?

A. What happens to people up north that rat on other people is they usually end up dead.

Q. How does that relate to this?

A. This is the same scenario.

Q. Well, how?

A. You ratted me out on something I did and you're going to pay for it. This man is on trial for murder here, you know. And somebody put him up to it. And that somebody is not in jail right now. I could walk out of this courtroom and end up dead.

(8/496)

It was the state which presented Nashef's testimony that when he drove appellant back to Joey Duckett's house after the shooting, "I pulled up on the lawn and Joey immediately came out the front door and met us at the front. Joey asked him if he had done it; Kris said, yeah, I did it" (8/453).

As the prosecution well understood, absent the evidence that Joey Duckett ordered and paid for the killing and appellant -- his underling -- carried it out, there would be nothing left but an argument between appellant and Hank Clark over the latter's smoking up all the rock cocaine, culminating in an unplanned, spur-of-the-moment shooting when Clark reached for a cattle prod and appellant overreacted. Without the Joey Duckett evidence, there is no premeditation, no CCP, no aggravating circumstances, and no possibility of a death sentence.

Under Florida law, and under the constitutional principle of Lockett v. Ohio, 438 U.S. 586 (1978) and its progeny, that the sentencer in a capital case must give individualized consideration to any evidence offered in mitigation which is relevant either to the character of the defendant or the circumstances of the crime, Joey Duckett's major role in this homicide, coupled with the enormous disparity between appellant's death sentence and Duckett's outright freedom from prosecution,' must be fairly weighed in determining appellant's sentence. In the instant case, due to the trial court's inexplicable denigration of the evidence relating to Joey Duckett, it was not fairly weighed, and the reliability of the death sentence (supported by only a single aggravating factor -- CCP -- which was established only via the Joey Duckett evidence) was compromised.

Initially, in finding CCP, the trial court states in his sentencing order, "The testimony of witness Jean Mock further confirms the degree of planning when she quoted the defendant as stating, before the murder, "Hank needs to die, I'll do it" (2/308). That of course is not what Jean Mock said at all. Her testimony was:

> Q [prosecutor]: And could you tell us, this jury, what you overheard by way of conversation between Joey Duckett and Kristopher Sanders?
>
> A. Joey said that Hank needed to die.

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[8] During pretrial hearings, defense counsel represented, without contradiction by the prosecutor, that Joey Duckett and Wayne Sargent were initially arrested as co-conspirators, but the charges against them were dropped (2/354; 5/508; see 12/619).

Q. That's Joey Duckett who said Hank needed to die?

A. Yes, sir.

Q. What did Kris Sanders respond to that?

A. He said he'd do it.

. . .

Q. And when Joey Duckett said that Hank needed to die and Kris Sanders said he'll do it, did you think they were serious?

A. I didn't know how to take it.

(7/287-88).

Thus, in the CCP finding, the trial court mischaracterizes the homicide as appellant's idea, when the undisputed evidence presented by the state establishes that it was Duckett's. While appellant was the triggerman, he was also plainly the follower, the "right-hand man"; while Duckett was the leader, the organizer, and the person who paid for the killing. Duckett was at least equally culpable, if not more so; the evidence of his role could potentially have supported a death sentence. See Larzalere v. State, 676 so. 2d 394, 407 (Fla. 1996) (while capital defendant was not the triggerman, she "instigated and was the mastermind of and was the dominant force behind the planning and execution of this murder . . . "); see also Williams v. State, 622 So. 2d 456, 464 (Fla. 1993).

The trial court, in his discussion of nonstatutory mitigating factors, again mischaracterizes the nature of the evidence of Duckett's role:

> The defendant related in his recorded statement that he **was** paid $900.00 by Joey Duckett to kill the victim. The defense argues that Joey Duckett was never charged for the subject offense in any capacity. The defendant has not submitted authority to support this as a non-statutory mitigating factor, but resolving the question of it's application in favor of the defendant, said ground has been accepted as a non-statutory mitigating factor. There exists any number of reasons why Joey Duckett has not been prosecuted for this murder, including the factor that the only proof that may exist consists of the statement of a convicted murderer, but said factor was considered and the Court gave it some slight weight.

(2/313).

As with the CCP finding, the trial court has essentially airbrushed Duckett out of the photo, leaving appellant standing alone. In addition to ignoring the testimony of prosecution witnesses Mock and Nashef, and discounting the state's entire theory of the case, the trial court's order distorts the true circumstances of the crime, thereby violating Lockett and the constitutional requirement of reliability in capital sentencing.[9] What matter is not why Duckett was never brought to trial or punished; what matters is the fact that he was never brought to trial or punished for his equal or greater role in the homicide while appellant has been sentenced to death.

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[9] The United States Supreme Court has repeatedly recognized that the Eighth and Fourteenth Amendments require a heightened degree of reliability when a death sentence is imposed. Lockett v. Ohio, supra, 438 U.S. at 604; Zant v. Stephens, 462 U.S. 862, 884-85 (1983); Caldwell v. Mississippi, 472 U.S. 320, 329-30 (1985); Sumner v. Shuman, 483 U.S. 66, 72 (1987); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988).

The state will likely argue that the weight to be given a mitigating factor is discretionary with the trial judge. However, a trial court's discretion is never absolute; it is subject to "the test of reasonableness . . . [which] requires a determination of whether there is logic and justification for the result." Cannakiris v. Cannakiris, 382 So. 2d 1197, 1203 (Fla. 1990); Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990). See also Ellard v. Godwin, 77 So. 2d 617, 619 (Fla. 1995); Matire v. State, 323 So. 2d 109, 210-11 (Fla. 4th DCA 1970); State v. Reed, 421 So. 2d 754 (Fla. 4th DCA 1982). In a capital case "[f]inding or not finding that a mitigating circumstance has been established and determining the weight to be given . . . is within the trial court's discretion and will not be disturbed if supported by competent substantial evidence." State v. Bolender, 503 So. 2d 1247, 1249 (Fla. 1987); Bryan v. State, 533 So. 2d 744, 749 (Fla. 1988). As recognized in Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990), this Court is not bound to accept the trial court's findings "when . . . they are based on misconstruction of undisputed facts and a misapprehension of law."

Since there was only a single aggravating factor in this case; since the weight given to that factor (CCP) was likely distorted by the trial court's inaccurate statement that the killing was appellant's idea; since the nonstatutory mitigating factor of the disparity in the treatment of appellant and Joey Duckett was not fairly considered; and since there was other substantial mitigation in this case, the trial court's flawed analysis and unsupported

denigration of Duckett's role in the homicide cannot be deemed harmless. Appellant's death sentence must be reversed for resentencing.

ISSUE IV

DR. SIDNEY MERIN, WHO WAS INITIALLY AUTHORIZED TO SERVE AS THE DEFENSE'S CONFIDENTIAL PSYCHOLOGICAL EXPERT, AND WHO RECEIVED PRIVILEGED MATERIALS SUPPLIED BY THE DEFENSE, SHOULD NOT HAVE BEEN ALLOWED TO BE CALLED AS A WITNESS FOR THE PROSECUTION IN VIOLATION OF THE ATTORNEY-CLIENT PRIVILEGE AS GUARANTEED BY FLORIDA RULE OF CRIMINAL PROCEDURE 3.216(a).

By any measure, the testimony of Dr. Sidney Merin was of paramount importance to the prosecution in securing a jury death recommendation and a death sentence in this case. Dr. Merin's testimony was the focal point of the prosecutor's penalty phase

argument to the jury,[10] and the trial court relied on Dr. Merin's opinions to contradict the defense's expert, Dr. Maher, and to reject all three statutory mitigating circumstances proffered by the defense (see 2/309-11). Dr. Merin never should have been allowed to be called as a prosecution witness, in violation of the attorney-client privilege as guaranteed by Fl.R.Crim.P. 3.216(a). Nor should the prosecution have been permitted to consult with him prior to trial. Appellant's death sentence was improperly obtained, and should be reversed for a new penalty phase before another jury.

Florida Rule of Criminal Procedure 3.216(a) codified the holding in Pouncy v. State, 353 So. 2d 640 (Fla. 3d DCA 1977), that

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[10] The prosecutor ended his argument as follows:

> Is there any reason given to us by Defense counsel after the aggravating factor was proven to us that made us want to spare his life, want us to come in and say we're merciful for you, Mr. Defendant, Mr. Sanders. I submit there are none. There are no mitigation here. His age isn't mitigation, the fact that he's twenty. The fact that he -- Dr. Maher says he was under some kind of mental duress, he couldn't conform his conduct or appreciate the criminality of his conduct, that's not here. Doctor Merin told us that. We sot an aggressive person, that's what Dr. Merin tells us. We got a sociopath, that's what Dr. Merin tells you. We got a bad apple here, that's what Dr. Merin tells us. And what does the Defendant tell us? Well, we know from Rodney Bishop, Detective Bishop, he tells us that I wish I didn't do it, shit happens, and I'll get the electric chair anyway. Ladies and gentlemen of the jury, don't disappoint this defendant. Thank you.

(11/943-44).

where a psychiatric or psychological expert "is hired solely to assist the defense and will not be called as **a** witness, the state may not depose the expert or call him as a witness." Lovette v. State, 636 So. 2d 1304, 1308 (Fla. 1994). Rule 3.216(a), which applies to competency and sanity determinations and also to mental health experts appointed to assist the defense in the penalty phase of a capital trial [see Lovette, 636 So. 2d at 13071, provides:

> **Expert to Aid Defense Counsel.** When in any criminal case counsel for a defendant adjudged to be indigent or partially indigent, whether public defender or court appointed, shall have reason to believe that the defendant may be incompetent to proceed or that the defendant may have been insane at the time of the offense or probation or community control violation, counsel **may** so inform the court who shall appoint 1 expert to examine the defendant in order to assist counsel in the preparation of the defense. The expert shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client privilege.

Accordingly "where a psychiatrist is employed by counsel for a defendant to assist him in preparing a defense for his client and not to treat the defendant, the State **may** not depose the expert or call him as a witness. The witness is subject to the attorney-client privilege. On the other hand, if the doctor is used as a witness, the privilege dissipates and he is subject to treatment as any witness." Townsend v. State, 420 So. 2d 615, 618 (Fla. 4th DCA 1982). See State v. Hamilton, 448 So. 2d 1007, 1008 (Fla. 1984); Lovette v. State, supra, 636 So. 2d at 1308; Morgan v. State, 639 So. 2d 6, 10 (Fla. 1994); Pouncy v. State, supra, 353 So. 2d at 642; Ursry v. State, 428 So. 2d 713, 714 (Fla. 4th DCA 1983);

McKinnis v. State, 439 So. 2d 302, 303 (Fla. 2d DCA 1983); Tucker v. State, 484 So. 2d 1299, 1300 (Fla. 4th DCA 1986), overruled on other grounds in Lovette v. State, supra; Erickson v. State, 565 so. 2d 328, 332 n.5 (Fla. 4th DCA 1990); Hall v. Haddock, 573 So. 2d 149 (Fla. 1st DCA 1991); H.A.W. v. State, 652 So. 2d 948, 949 (Fla. 5th DCA 1995).

In this case, on May 27, 1994, defense counsel filed a motion pursuant to Rule 3.216(a) requesting the court to appoint a confidential expert to assist counsel in the preparation of a defense and for mitigation (1/10-11). The trial court granted the motion (1/106,111). Neither the motion nor the order granting it specifies a particular expert by name, but the court's order states, "The said psychiatrist or psychologist is hereby authorized to visit the Defendant in the Pasco County Jail in order to examine him (1/106,111)

On June 30, 1994, defense counsel wrote a letter to Dr. Sidney Merin, requesting that he serve as the defense's confidential expert (1/170; see 1/166; 3/491; 11/848-49). Counsel informed Dr. Merin that appellant had a history of mental illness, and was in institutions during adolescence (1/170). He stated that in addition to investigating appellant's mental status at the time of the offense, there was also a possibility that his confession was involuntary, as appellant indicated that he was high on drugs during the interrogation (1/170). At the same time or shortly thereafter, the defense provided Dr. Merin with numerous documents, including appellant's medical files (see 1/166,168; 3/491,496,528; 11/848-

49) . Dr. Merin acknowledged at trial that "when I had received the data from Mr. Swisher's [defense counsel's] office . . . there may have been some sort of communication, I may have spoken with somebody that time" (11/849). On July 14, 1994, defense counsel wrote a follow-up letter to Dr. Merin, which appears to reflect an understanding that Merin was assisting him in preparing appellant's defense:

> Enclosed please find a letter of authorization for you to talk with Mr. Sanders in the Pasco County Jail in Land O'Lakes and the Order appointing me as counsel for the Defendant. Also enclosed, please find a copy of the Amended Order to Appoint a Confidential Expert to be signed by Judge Mills. Once my office has received the Order back from Judge Mills I will send you a copy signed by him. If you need any additional information from my office feel free to call. Thank you for assisting me with Mr. Sanders' case.

(1/171; see 11/870,880).

Another follow-up letter was sent by defense counsel to Dr. Merin on August 18, 1994, reminding him "Sometime ago I had you appointed to examine Kristopher Sanders" (1/172). Counsel wanted Merin to let him know when he would be able to examine appellant to determine whether his confession was involuntary (1/172). He wrote:

> It seems that the confession was made in that the Defendant said that he thought that this was what they wanted to hear and he was tired of being closed up in a room. Mr. Sanders has substantial psychiatric background and I have enclosed records for YOU. It also seems that Mr. Sanders was under the influence of gasoline in that he stated that he had inhaled gasoline at the time of his arrest. A look at the photos in the possession of the investigator which were taken the night of his

> arrest seemed to substantiate the fact that he was somewhat impaired.

(1/171)

For about six months, the medical records and other materials provided by the defense remained in Dr. Merin's possession, while the file remained "dormant" (1/168; see 11/871) Due to an office snafu which he attributed to lack of communication between himself and his secretary, Dr. Merin took no action on the case. (1/168; see 11/849,873,877-78). Defense counsel made a couple of phone calls to find out why Merin hadn't seen appellant; then finally gave up and hired another mental health expert, Dr. Michael Maher (1/173; 3/491,502).

On February 15, 1995, Dr. Merin was contacted by Michael Halkitis, the assistant state attorney handling this case (see 1/168). On February 17, the state filed a supplemental discovery response listing Dr. Merin as a witness (1/165). Defense counsel soon received the following letter from Dr. Merin:[11]

> Dear Mr. Swisher:
>
> In June 1994, you had written to me requesting that I engage in a confidential examination of your client, Mr. Sanders. For some unexplained reason, this file remained dormant with no action having been taken on it. You had sent me some documents regarding Mr. Sanders. Those documents were neither read nor analyzed.

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[11] This letter was dated January 20, 1995, but the trial court agreed with defense counsel that this must have been a typo, and the correct date was probably February 20, since the letter refers to the phone call from Halkitis occurring on February 15, 1995 (1/168; 3/532).

> I would apologize for the lapse in my office resulting in this case file not having been attended to as I normally would with other cases involving a criminal action. We have no reasonable explanation for why the file had not been acted on, despite several communications from your office.
>
> On February 15, 1995, I received a telephone call from Mike Halkitis who informed me my absence of action on this case led to your office retaining another examiner. His call clearly shocked me into an immediate awareness the file had been overlooked.
>
> In view of the manner in which this has evolved, I am returning all of the documents to you. I can assure you I have not reviewed any of them. Without exception, when I do review documents I make side notes or underline in red. You will note no such markings are on these documents.
>
> Again, my sincere regrets in the manner in which this office has handled this file. I would certainly hope to receive future referrals from your office and would extend the assurance a similar lapse will not occur.

(1/168-69).

On February 22, the defense filed a written motion to strike Dr. Merin as a witness (1/166-67), and attached copies of the correspondence from defense counsel to Merin, as well as Merin's letter which accompanied the return of the documents (1/168-72).

At the hearing on the motion, the prosecutor said that he had recently contacted Dr. Merin about his availability to testify for the state, and Merin had told him, "I'm free, I'm able to testify. And matter of fact, I have some lag time so I can review any reports you give me" (3/496). The prosecutor continued:

> Dr. Merin called me back that same day later on in the afternoon, said, Mike, I was actually sent some materials by the defense

> back months and months ago. I never read them and they never called me to get me moving on this case. So I don't know what to tell you. I said, well, I'll call defense counsel, tell them you'll be sending back the stuff. You have no firsthand knowledge, you didn't examine Mr. Sanders, you didn't read anything confidential, you were told we want to use you. That's how it was left. We want to use you.[12]

(3/496-97).

The prosecutor, in arguing that he should be allowed to call Dr. Merin as a state witness, relied on the Fourth DCA's opinion in Rose v. State, 591 So. 2d 195 (Fla. 4th DCA 1991) (3/523-26). Defense counsel countered that Rose was inapplicable to this situation; that case involved a medical examiner testifying as to cause of death (3/528; see 3/524-25) rather than a mental health expert retained under Rule 3.216(a). Defense counsel argued:

> Because [Dr. Merin's] been provided -- what he was provided with was not transcripts, not police reports, not lab reports. He was provided with this defendant's personal medical files. Now, he says he didn't look at them.

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[12] Dr. Merin, in his letter to defense counsel accompanying the return of the materials, wrote that Mr. Halkitis had informed him that his absence of action on this case had resulted in the defense hiring another expert; Halkitis' call "shocked me into an immediate awareness" that the file had been overlooked (1/168). On the other hand, the prosecutor stated at the hearing that he had inquired into Merin's availability to testify and Merin said he could; then Merin called him back to inform him that he was actually sent some materials by the defense.

Also, the prosecutor's statement that Dr. Merin told him that the defense never called him to get him moving on the case appears to conflict with defense counsel's representation that "I made a couple of phone calls to find out why he hadn't seen Mr. Sanders, heard nothing back" (3/491), although it is possible that (as with the correspondence) the phone messages got lost somewhere between Dr. Merin's secretary and Dr. Merin. In the letter to defense counsel, Merin wrote "We have no reasonable explanation for why the filed had not been acted on, despite several communications from your office" (1/168).

> The analogy I think this case is closer to, as a lawyer: If a lady comes in to me and starts talking to me about a divorce, and starts telling me what it is and I don't see or hear from her for another year; then her husband comes in and he says, I want you to represent me and file for a divorce. I say, fine. I don't recall this other lady ever coming in, saw her once and forget everything she said, which could actually be true. I file for the divorce and she says, whoa, wait a minute. I went to this guy and I spilled my guts to him and he shouldn't be representing my husband. I say, but I don't remember anything. But she doesn't know that.
>
> I can tell you what would happen to me if I continued to represent that man. The bar would be on me and pull my ticket like that (indicating). If she says I talked to her, if I look back on my calendar, sure enough, she came in. I talked to her before. I don't remember anything confidential or not. We've got the same situation. I supplied this stuff to Dr. Merin. He admits it in his letter. I supplied it to him in June of '94. He holds it until February 20th, 1995, and says, I didn't look at it. He may not have, but I'm not real sure.

(3/528-29).

The trial judge, agreeing with the state that Rose applied, denied the defense's motion to strike Dr. Merin as a prosecution witness, based on Merin's representation that he did not read or analyze the materials furnished to him by the defense (3/530-32).

This ruling was error. Dr. Merin -- whose penalty phase testimony proved to be the state's main weapon in securing a death sentence -- should never have been allowed to switch sides and consult with or testify for the prosecution, in violation of the attorney-client privilege as expressly guaranteed by Rule 3.216(a). What occurred here was unfair, and appeared to be unfair; it also

enabled the state to subtly convey to the jury that, while one psychiatrist said appellant was mentally ill and the mental mitigators existed, as opposed to another psychologist who said he was just a sociopath and the mental mitigators did not exist, the doctor who had been the defense's first choice -- Merin -- was the one whose testimony favored the state.[13]

The case relied on by the prosecutor, and upon which the trial court based his ruling, is thoroughly distinguishable -- in fact, the main point of difference is emphasized in the Rose opinion itself. In that case, defense counsel had hired a medical examiner and discussed the case with him, but then decided not to use him as a witness. The medical examiner, who had not yet arrived at any opinion because the defense had not provided all of the necessary information, was then contacted by the state. Defense counsel moved to exclude the medical examiner as a witness, on the ground that the attorney-client privilege barred the state from calling him. The trial court refused to preclude the witness from testifying for the state, but said he could not give any testimony which involved "actual privileged communications." On appeal, the Fourth DCA wrote:

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[13] On direct examination, the prosecution brought out before the jury that Dr. Merin has been retained both by defense lawyers and prosecutors -- about a 50-50 split -- and that he has testified in the penalty phases of high profile murder cases for the defense and for the prosecution (11/846-47). The prosecutor then had Dr. Merin explain that he was initially contacted by the defense in this case, and was provided with documentation which he never reviewed (11/849). [The prosecutor had previously elicited on cross-examination of the defense's expert, Dr. Maher, that he mostly testifies for the defense, and has never testified for the prosecution in any high profile murder case (10/726-27)].

Appellant relies on Pouncy v. State, 353 So. 2d 640 (Fla. 3d DCA 1977) which held that the doctrine of attorney-client privilege bars the state from calling as a witness a psychiatrist hired by an accused or his counsel for the sole purpose of aiding the defense attorney's preparation of an insanity defense. This holding has been codified in Florida Rule of Criminal Procedure 3.216(a). However, the attorney-client privilege is appropriately asserted in such cases because, as Pouncy pointed out, quoting United States v. Alvarez, 519 F.2d 1036, 1047 (3d Cir. 1975):

> A psychiatrist will of necessity make inquiry about the facts surrounding the alleged crime, just as the attorney will. Disclosures made to the attorney cannot be used to furnish proof in the government's case. Disclosures made to the attorney's expert should be equally unavailable, at least until he is placed on the witness stand. The attorney must be free to make an informed judgment with respect to the best course of the defense without the inhibition of creating a potential government witness.

Thus, the assertion of the privilege in the psychiatric witness cases is based on the confidential communications which may be made to the psychiatrist. See also Tucker v. State, 484 So.2d 1299 (Fla. 4th DCA 1986); Ursry v. State, 428 So.2d 713 (Fla. 4th DCA 1983).

In the instant case the appellant's attorney nowhere asserted that confidential communications between appellant and the attorney which were passed on to the expert were involved. Instead what he claimed was that he had sent Dr. Reeves all of the autopsy information and photographs and that he had discussed his defense strategy with him. Neither of these contentions support the assertion of the attorney-client privilege. First, the autopsy information which he [defense counsel] received from the state was in no way privileged. And, second, the discussion of defense strategy falls within a work product privilege granted under Florida Rule of Criminal Procedure 3.220(g)(1), not an attorney-client privilege. No objection was made on work product

> grounds. Furthermore, Dr. Reeves stated, and the attorney for appellant conceded and accepted, that **all** of the doctor's opinions rendered in this **case** were based on materials supplied by the state and meetings with the pathologist who performed the autopsy on the child, not on any conversations or material provided by the defense. Therefore, the record does not support the contention that the state was provided with material or opinions which would constitute the attorney's work product.

Rose v. State, supra, 591 So. 2d at 197.

In the instant case, in contrast, Dr. Merin was retained by the defense as a psychological expert in a capital case, pursuant to Rule 3.216(a), for the sole purpose of assisting counsel in the preparation of appellant's defense. Unlike the situation at issue in Rose, this rule specifically includes the following broad protection: "The expert shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client privilege." Unlike Rose, defense counsel did assert that he had provided Dr. Merin with privileged and confidential materials, including appellant's personal medical files (1/167; 3/528). Counsel also supplied Dr. Merin with copies of the court orders appointing a confidential expert, which authorized the expert to examine appellant at the jail, and with a letter of authorization from defense counsel to do so (1/106,111, 171; see 11/870, 880). For six months, these privileged materials remain in Dr. Merin's possession, and throughout that time appellant and defense counsel reasonably believe he is working under court-appointment to assist the defense, through counsel increasingly wonders why he is dragging his feet. Follow-up letters are written, follow-up phone

calls are apparently made; defense counsel finally gives up and hires Dr. Maher, whereupon Dr. Merin simultaneously (1) returns the file with "no reasonable explanation for why [it has] not been acted on, despite several communications from your office" (1/168) and (2) turns up as a witness for the prosecution.

Clearly this is not a situation analogous to Rose. There the attorney-client privilege did not apply across the board, but only to "actual privileged communications"; here, under Rule 3.216(a), the attorney-client privilege applies to all "matters related to the expert", and absent a waiver the expert may not be called as a state witness or even deposed. Lovette, 636 So. 2d at 1308; Pouncy, 353 So. 2d at 640; Townsend, 420 So. 2d at 618; Ursrv, 428 So. 2d at 714; Tucker, 484 So. 2d at 1300; Erickson, 565 So. 2d at 332, n.5; H.A.W., 652 So. 2d at 949.

Even in Rose, where the appellate court distinguished the Rule 3.216(a) situation, and held that the attorney-client privilege did not apply as an absolute bar to the testimony of a medical examiner who had not been furnished any privileged information by the defense, the court nonetheless expressed its concern about the state's use of an expert witness consulted by the defense, and observed that if it had been a civil case the state might not have been allowed to use the witness. The court also concluded:

> . . . [E]ven if the use of Dr. Reeves was error, it was harmless. We have read all of the medical testimony presented by the five doctors who testified, including Dr. Reeves. We find that Dr. Reeves' testimony was cumulative of the testimony of the other four doctors. In particular, the testimony of Dr. McCormick, a nationally recognized expert, was

> equally as compelling as that of Dr. Reeves and primarily relied on by the State in its closing argument. All of the physical evidence in this case and the doctors' testimony, even absent Dr. Reeves, overwhelmingly pointed to the guilt of appellant.

Rose v. State, supra, 591 So. 2d at 198.

Appellant submits that if side-switching by experts is unacceptable in a trial involving money judgments, however large, it is certainly unacceptable in a trial to determine whether a man is to be put to death. See Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988) ("A high degree of certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty is administered evenhandedly"). In the instant case (in contrast to the harmlessness of the challenged evidence in Rose), Dr. Merin's testimony **was** the focal point of the state's penalty phase argument to the jury, and it was the basis for the trial court's rejection of all three statutory mitigating circumstances proffered by the defense. Without Merin's testimony, it is highly unlikely that the state could have gotten a death recommendation or a death sentence, or that a death sentence could

have withstood proportionality review.[14]

As this Court recognized in Castro v. State, 597 So. 2d 259, 160 (Fla. 1992), our judicial system "must not only refuse to tolerate impropriety, but even the appearance of impropriety as well." See Kolker v. State, 649 So. 2d 250, 252 (Fla. 3d DCA 1994), quoting Wheat v. United States, 486 U.S. 153, 160 (1988) ("[C]ourts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them"). Did the circumstances which culminated in Dr. Merin's being called to testify for the state appear fair? Listen to Dr. Merin's own discomfort, as reflected in his trial testimony on cross and redirect: When the prosecutor, Mr. Halkitis, "called me and reminded me I went back and I discovered then that, by golly, you had sent it to me. I explained this to him and then the process went from there." Dr. Merin continued, "I felt horribly guilty and uncomfortable when I was reminded that you had sent this to me and emotions act as a very, very powerful reminder" (11/876-77). Mr. Halkitis reassured Dr. Merin that he had taken it up with the court, and the court had said that since he had not reviewed the material received from the defense, it would be acceptable for him to testify for or get

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[14] Indeed, as appellant has argued in Issues V and VI, appellant's death sentence is disproportionate even with Dr. Merin's testimony, as it did not rebut the statutory mitigating factor of youth and immaturity, nor the nonstatutory mitigators including his traumatic childhood, history of psychiatric treatment and medication, effects of chronic drug and alcohol abuse, dull-normal intelligence, lack of prior violent criminal record, and his role as a "follower" to the person who ordered the killing

material from the state (11/877). On redirect, Dr. Merin reiterated that when he wrote the letter to defense counsel returning the materials, "I felt very uncomfortable about being called by both sides."

> **Q.** [prosecutor]: And were you told that the Court has now allowed you to testify as a state expert in whatever opinion you might have in this case?
>
> A. That is correct. When I talked with you several weeks ago YOU reminded me of that because I was still uncomfortable about it and you reassured me that it was acceptable to the court, then I went ahead and accepted the commission.[15]

(11/917)

If the circumstances smelled bad to Merin, imagine how they smelled to appellant, or to a disinterested observer.

As previously discussed, when a mental health expert is obtained to assist the defense pursuant to Rule 3.216(a), the attorney-client privilege applies. The state may argue that since Dr. Merin did not actually do anything useful for the defense, the privilege was never activated. However, under Florida law the existence of an attorney-client relationship depends on the intent of the client, not on the actions (or inaction) of the lawyer. See Dean v. Dean, 607 So. 2d 494, 496-97 (Fla. 4th DCA 1992); Garner v.

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[15] It is noteworthy that back in February -- more than seven months before the trial -- when the prosecutor successfully persuaded the judge that Dr. Merin should be allowed to testify for the state, he never suggested that there was any reluctance or discomfort on the doctor's part due to his being "called by both sides." The prosecutor simply indicated that Merin was free and able to testify, and he [the prosecutor] didn't see a problem as long as Merin sent the defense "back the stuff", since he hadn't read it (3/496-97).

Somberg, 672 So. 2d 852, 854 (Fla. 3d DCA 1996); Lane v. Sarfati, 676 So, 2d 475 (Fla. 3d DCA 1996); Blackhawk, Tenn., Ltd. Partnership v. Waltemyer, 900 F.Supp. 414, 418 (M.D.Fla. 1995). The same logic should apply when the situation involves an expert retained to assist the client when, as here, matters related to the expert are expressly afforded the protection of the attorney-client privilege. Fla.R.Crim.P. 3.216(a). Once an attorney-client relationship is shown to have existed, it "gives rise to an irrefutable presumption that confidences were disclosed." Garner v. Somberg, supra, 672 So. 2d at 854, citing State Farm Mut. Auto Ins. Co. v. K.A.W., 575 So. 2d 630, 635 (Fla. 1991). As explained in Dean v. Dean, supra, 607 So. 2d at 496-97, the attorney-client privilege "is founded wholly on subjective considerations: '[i]n order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure must be removed . . , ' 8 Wigmore at §7291" (emphasis in opinion). Thus:

> The privilege that supports the irrefutable presumption "does not turn on the client actually hiring or engaging the attorney; it is enough if the client merely consulted the attorney . . . 'with the view to employing [the attorney] professionally . . . although the attorney is not subsequently employed.

Garner V. Somberg, supra, 672 So. 2d at 854, quoting Dean v. Dean, supra, 607 So. 2d at 497.

The focus is "on the perspective of the person seeking out the lawyer, not on what the lawyer does after the consultation." Lane v. Sarfati, supra, 676 So. 2d at 467; see Dean v. Dean, supra, 607

So. 2d at 497 ("It is thus necessary . . . that we focus not on what Krischer did but on what the client intended").

Therefore, the existence of the attorney-client relationship, which expressly extends to Rule 3.216(a) mental health experts, depends not on Dr. Merin's actions or inaction on the case, but solely on whether appellant and counsel reasonably believed they had retained him to assist the defense. In the instant case, that question answers itself: counsel sent Dr. Merin voluminous records including appellant's personal medical files; authorized him (and sent him a court order authorizing him) to visit and examine appellant at the jail; informed him of appellant's history of mental illness and hospitalization during adolescence; relayed to Merin appellant's statements to counsel that he was high from inhaling gasoline at the time of his confession, and that he just told the officers what they wanted to hear because he was tired of being closed up in the room; asked him to assess the voluntariness of appellant's confession; and sent follow-up letters and tried to reach Merin by phone to find out why he hadn't seen appellant. Undersigned counsel does not dispute the genuineness of Dr. Merin's apology, and does not suggest that he was untruthful in claiming not to have read the materials which he eventually returned to the defense. But for a prolonged period of time in this case, defense counsel and his client were operating under the reasonable belief that Dr. Merin was the defense's confidential mental health expert under Rule 3.216(a); once that occurred, the attorney-client privilege applied and precluded Dr. Merin from switching sides and becom-

ing a witness for the prosecution. It also precluded him from consulting with the assistant state attorney about this case prior to trial, or reviewing materials supplied by him, or discussing prosecution strategy. The rule provides the expert shall report only to the attorney for the defendant and that matters related to the expert shall be deemed to fall under the lawyer-client privilege. The snafu in Dr. Merin's office was attributable to himself or his secretary, and it should have resulted in Merin's nonparticipation in this case; not in his reappearance as the state's key penalty-phase witness. Appellant must be afforded a new penalty trial before another jury.

ISSUE V

THERE WAS NO COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S REFUSAL TO WEIGH APPELLANT'S AGE (20) AS A MITIGATING CIRCUMSTANCE, WHERE (1) THE EVIDENCE THAT APPELLANT HAD THE EMOTIONAL AND PSYCHOLOGICAL DEVELOPMENT OF A 14 OR 15 YEAR OLD WAS UNREBUTTED; (2) APPELLANT HAD A TRAUMATIC CHILDHOOD, AND WAS DIAGNOSED AND TREATED THROUGHOUT HIS TEENAGE YEARS FOR SEVERE MAJOR DEPRESSION; (3) THE TRIAL COURT'S REJECTION OF THE AGE MITIGATOR WAS BASED SOLELY ON A FINDING THAT APPELLANT IS OF AVERAGE INTELLIGENCE (WHERE THE EVIDENCE WAS OF A "DULL NORMAL" IQ OF 80), AND (4) THE STATE'S OWN EXPERT READILY AGREED THAT THERE IS A DIFFERENCE BETWEEN IQ AND EMOTIONAL AGE.

A trial court's discretion to reject a mitigating circumstance, and give it no weight in determining whether a defendant is

to be sentenced to death or life imprisonment, is not unlimited or unreviewable. As this Court explained in Maxwell v. State, 603 So. 2d 490, 491 (Fla. 1992), ". . . [E]very mitigating factor apparent in the entire record before the court at sentencing, both statutory and nonstatutory, must be considered and weighed in the sentencing process. . , . The rejection of a mitigating factor cannot be sustained unless supported by competent substantial evidence refuting the existence of the factor."

In reaching the decision that age should be a statutory mitigating factor "the legislature intended that youth and its potential characteristics be considered as a factor by the jury and the sentencing judge in determining whether a youthful defendant should be subject to the death penalty." LeCroy v. State, 533 So. 2d 750, 758 (Fla. 1988). Under the caselaw that has developed, there are three "tiers" of youth -- a defendant who is fifteen or younger is ineligible for the death penalty as a matter of Florida constitutional law;[16] a defendant who is sixteen or seventeen is automatically entitled to a finding of age as a mitigating factor;[17] while a defendant who is in his late teens or early twenties may or may not receive the benefit of the age mitigator, "depend[ing] upon the evidence adduced at trial and at the sentencing hearing." Peek v. State, 396 So. 2d 492, 498 (Fla. 1981); Mills v. State, 476 So. 2d 172, 179 (Fla. 1985). As this Court stated in Sims v. State, 681

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[16] Allen v. State, 636 So. 2d 494, 497 (Fla. 1994).

[17] Ellis v. State, 622 So. 2d 991, 1001 (Fla. 1993). In such a case the weight given to the age factor may be diminished, but only if there is evidence supporting a finding of unusual maturity.

So. 2d 1112, 1117 (Fla. 1996) , "Whether a defendant's age constitutes a mitigating factor is a matter within the trial court's discretion, depending on the circumstances of each individual case. . . . There was no evidence that Sims' mental, emotional, or intellectual age was lower than his chronological age, and without more, age twenty-four is not a mitigator."

In the instant case, there was strong and unrebutted evidence of the "something more" than just chronological age, and there was no competent substantial evidence to refute the existence of the mitigator. Therefore, the trial court's refusal to weigh it -- especially for the reasons given -- was an abuse of discretion. Maxwell. At the time of the offense, appellant was twenty years old (10/694-95; see 1/7). Asked if there was a difference between his chronological age and his emotional age, Dr. Maher, the defense's expert, answered "Yes"; that appellant had a "long, complicated, tragic personal and psychiatric history":

> And among the various effects this has had on him is that he's not the normal -- and wasn't then and isn't now, doesn't have the normal maturity for his years, for his twenty years of life at the time of the killing.
> He was certainly emotionally immature, more consistent in his emotional and psychological development with a young teenager, fourteen, fifteen, that age range.

(10/695).

No evidence presented by the state refuted or contradicted Dr. Maher's testimony as to appellant's immaturity. [See the testimony of Dr. Sidney Merin (11/843-918)]. Nevertheless, in his findings as to statutory mitigating factors, after noting that the defense

requested the court to consider "3. While the defendant's chronological age at the time of the offense was twenty years of age, his emotional age was in his early teens" (2/309,311), the trial court proceeds to reject age as a mitigating factor based on the following analysis:

> Dr. Maher testified that the defendant tested at an I.Q. of 80 as a young teenager, but conceded during cross examination that the defendant was not retarded, and, in fact, was of normal intelligence. Dr. Merin confirmed the defendant is of average intelligence. The defendant, confirming his intellect, obtained his GED while awaiting trial. Accordingly, the defendant's emotional age is consistent with his actual chronological age. The defendant's age at the time of the crime is not a mitigating factor.

(2/311) (Emphasis in sentencing order).

The trial court's finding is based on his use of the wrong legal standard [see Morgan v. State, 639 So. 2d 6, 13-14 (Fla. 1994)], and on his misconstruction of uncontradicted evidence [see Pardo v. State, supra, 536 So. 2d at 80]. Evidence that a defendant possesses average intelligence might rebut the nonstatutory mitigating factor of low intelligence or a learning disability, but it does not rebut the evidence that appellant was a twenty year old with the maturity level of a fourteen or fifteen year old. See Morgan, supra, 639 So. 2d at 13 (trial judge determined that Morgan's age of sixteen could be considered as a mitigating factor only if it was relevant to his mental and emotional maturity, and then erroneously rejected the mitigator because Morgan's low IQ was still within the normal range). In the instant case, the state's expert, Dr. Merin, readily agreed that there is a difference

between a person's IQ and his emotional age (11/896). Contrary to the trial court's statement that "Dr. Merin confirmed the defendant is of average intelligence" (2/311), Dr. Merin gave no testimony as to either appellant's intelligence level or his emotional age, nor did he express any disagreement with Dr. Maher's testimony concerning appellant's IQ or his emotional age (11/843-918). Nor did Dr. Merin ever meet appellant, or talk to anyone who knew him, or delve into the circumstances of his early childhood. Therefore, Dr. Maher's testimony that appellant was an especially immature twenty-year-old, with the emotional development of an early teenager, was uncontradicted. As for his intelligence, Dr. Maher testified that appellant:

> was either not very bright to begin with or not able to use his intelligence because of [his emotional] problems. His IQ was measured when he was a young teenager at 80, which is certainly not mentally retarded but it's not very smart, either.

(10/709)

The tested IQ of 80 (at age 15) is within the "average range" or "dull normal" range of intelligence, and is only ten points above mentally retarded (10/762,805). In addition, the cumulative use of drugs and huffing gasoline (habits which appellant began at about age 15, and which worsened as he grew into his later teens):

> All . . . cause a small measurability of brain damage when used over a consistent period of time. And . . . they diminish the ability of the individual to use intelligence and capacity to function that they have.

(10/709, see 10/702).

This, according to Dr. Maher, is especially significant in an individual like appellant who already has other emotional or psychological problems (10/709).

Aside from his agreement that IQ and emotional age are two different things, the sum total of Dr. Merin's testimony on the subject of intelligence is this -- on cross, in challenging Merin's suggestion that appellant did not have a mental disorder, defense counsel asked:

> Well the records indicate it was a mental disorder, do they not?
>
> DR. MERIN: You refer to a mental disorder, but it has the same sort of interpretation of the use of the word clinical, that is a mental disorder can be anything that's included in the DSM-IV. But, you see, average intelligence is also included in that, would that also be a mental disorder, and it's not.

(11/886-87)

Clearly Dr. Merin is not saying here that appellant is of average intelligence; he is simply explaining that just because something is mentioned in the psychiatric diagnostic manual (DSM-IV) doesn't necessarily mean that it is a mental illness. Dr. Merin was not previously aware that appellant had gotten a high school equivalency diploma (GED), but he was pleased to hear it (11/898-99).

To recapitulate, the unrebutted evidence established:

> 1. Appellant's age at the time of the offense was 20.
>
> 2. He was immature, with the emotional and psychological development of a 14 or 15 year old.

> 3. He had a tested IQ of 80, which is within the average or dull normal range; ten points above mentally retarded and twenty points below median. He has obtained a GED.
>
> 4. He has been a chronic user of drugs and alcohol, and has inhaled gasoline and other toxic chemicals over a substantial period of time. This can be expected to cause some degree of brain damage.
>
> 5. He had a traumatic, emotionally isolated childhood, beginning at 18 months when his father was murdered. As a teenager he received mental health treatment at various facilities, was diagnosed as suffering from severe major depression, and was treated with psychotropic medications. (See Dr. Merin's testimony, at 11/896-97).

Under these circumstances, the trial court's refusal to weigh age in mitigation was an abuse of discretion, because there was no competent, substantial evidence refuting the existence of the mitigator [Maxwell], because of his misconstruction of the evidence [Pardo], and because of his use of an incorrect standard which would effectively eliminate youth and immaturity as a mitigating factor except in cases where the defendant also is mentally retarded [Morgan].[18] Mental retardation is a nonstatutory mitigating circumstance, separate and apart from the statutory age mitigator. See Penry v. Lynaugh, 492 U.S. 302 (1989). [For that matter, an IQ of 75 was described in Morris v. State, 557 So. 2d 27, 30 (Fla. 1990) as "borderline retarded"; an IQ of 79 -- one point

[18] As examples of cases in which trial courts used an incorrect standard or faulty analysis in evaluating a mitigating circumstance, see Nibert v. State, 574 so. 2d 1059, 1062 (Fla. 1990); Campbell v. State, 571 So. 2d 415, 418-19 (Fla. 1990); Ferguson v. State, 417 So. 2d 631, 639 (Fla. 1982); Mines v. State, 390 So. 2d 332, 337 (Fla. 1980).

lower than appellant's -- was recognized as mitigating in DuBoise v. State, 520 So. 2d 260, 267 (Fla. 1988); and the combination of youthful age (21) and dull-normal intelligence was found as a mitigator in Meeks v. State, 336 So. 2d 1142 (Fla. 1976)]. To use the fact that a youthful, immature defendant is not mentally retarded -- though not very bright either -- as the sole basis for rejecting the age mitigator is illogical, arbitrary, and unfair. Compare Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990) in which the defendant:

> produced uncontroverted evidence that he had been physically and psychologically abused in his youth for many years. The trial court found this to be "possible" mitigation, but dismissed the mitigation by pointing out that "at the time of the murder the Defendant was twenty-seven (27) years old and had not lived with his mother since he was eighteen (18) ." We find that analysis inapposite. The fact that a defendant had suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary. Nibert reasonably proved this nonstatutory mitigating circumstance, and there is no competent, substantial evidence to support the trial court's refusal to consider it.

In Ellis v. State, supra, 622 So. 2d at 1001, this Court said it was gravely troubled by inconsistent application of the age factor, where "some courts find young age a mitigating factor and others reject the factor outright . . . based on the same or highly similar facts." The state, if it chooses, can list in its answer

brief a dozen cases where defendants aged twenty or younger were denied the benefit of the age mitigator. Appellant can then list in his reply brief another dozen cases where defendants aged twenty or older were given the benefit of the age mitigator. In many of the opinions there will be no discussion of the evidence upon which the finding or lack of a finding was based. However, the decision must be based on the evidence of the individual defendant's maturity or immaturity [see Peek; Mills; Sims]; not on the whim or unguided discretion of the trial court. Lack of a standard for determining the applicability or inapplicability of this statutory mitigating circumstance would make the decision arbitrary and capricious, and would bring into question the constitutionality, as applied, of Florida's death penalty law. See the reasoning in Herring v. State, 446 So. 2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting), receded from by Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987) (adopting Justice Ehrlich's approach).

The state cannot show that the trial court's error in failing to find appellant's youth and immaturity as a mitigating circumstance did not affect the weighing process or the ultimate sentencing decision, especially since there was only a single aggravating factor and there was other substantial mitigation (including appellant's traumatic childhood, his psychiatric history, his chronic drug and alcohol abuse, the absence of prior crimes of violence, and the at least equal culpability of Joey Duckett). Appellant's death sentence must be reversed for resentencing.

ISSUE VI

APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE

Under Florida law, the death penalty is reserved only for the most aggravated and least mitigated homicides. State v. Dixon, 283 so. 2d 1, 7 (Fla. 1973); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989), DeAngelo v. State, 616 So. 2d 440, 443 (Fla. 1993); Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993). This Court has rarely affirmed death sentences supported by only a single aggravating factor, and then only when there was very little or nothing in mitigation. Songer, 544 So. 2d at 1011; DeAngelo, 616 So. 2d at 443; Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990); McKinney v. State, 579 So. 2d 80, 85 (Fla. 1991); White v. State, 616 So. 2d 21, 26 (Fla. 1993). As was stated in Fitzpatrick, 527 So. 2d at 811, "A high degree of certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty is administered evenhandedly."

In the instant case, there was only one aggravating factor, CCP.[19] While the undersigned does not contend that it was error, as a matter of sufficiency of the evidence, for the trial court to find CCP, the weight given to this aggravator was likely distorted,

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[19] The "cold, calculated, and premeditated" factor was the only aggravator requested by the state (10/827), the only one upon which the jury **was** instructed (11/965), and the only one which the trial court considered (2/308-09). The prosecutor specifically stated that he was not relying on financial or pecuniary gain or robbery (9/627-28; see also 8/535-36; 11/926)

as evidenced by the court's misstatement of Jean Mock's testimony. Contrary to the sentencing order, it was Joey Duckett -- not appellant -- who instigated the murder. [See Issue III]. The trial court also mistakenly believed that the jury had recommended death by a 9-3 vote, when in fact it was 8-4 (2/307; 4/595-96; see 2/281; 11/971). The reliability of the death sentence was further compromised by the absence of any competent substantial evidence to support the trial court's outright rejection of the age mitigator [Issue VI, and by his failure to give any meaningful consideration to the equal, if not greater, culpability of Duckett [Issue III].

For the reasons stated in Issue IV, Dr. Sidney Merin should never have been allowed to be called as a witness for the prosecution. Absent his improperly admitted testimony, there is no evidence to contradict Dr. Maher's opinion that both statutory mental mitigating circumstances existed. Assuming for the sake of argument that Dr. Merin could testify for the state, then there was conflicting evidence as to the existence, at the time of the offense, of the statutory mental mitigators. On the other hand, the record contains extensive unrebutted evidence of nonstatutory mitigating circumstances, including appellant's traumatic childhood, and the emotional pain and isolation which began with the murder of his father when appellant was a toddler; his psychiatric history (including treatment as a teenager at about half a dozen mental health facilities, being diagnosed more than once as suffering from severe major depression, and being treated with several different

psychotropic medications);[20] his history of self-mutilation;[21] his chronic and worsening abuse of drugs, alcohol, and huffing gasoline and other toxic chemicals;[22] the absence of any prior crimes of

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[20] All of which occurred prior to this crime and incarceration, and when his only legal problems involved non-violent juvenile offenses.

[21] Dr. Maher testified that appellant "became extremely pessimistic, depressed, discouraged, hopeless, and experienced incredibly intense frustration" (10/702-03). From age 14 or 15 on, appellant habitually lacerated his forearms and wrists with a knife or razor, as a way to block out the intolerable psychological pain he was experiencing, by replacing it with physical pain (10/703-04, 760,788-89). It also served to control what otherwise might be disruptive behavior toward other people (10/760).

Dr. Merin, who acknowledged that appellant had been diagnosed and treated for severe major depression (11/892-96) but did not think he was extremely depressed at the time of the offense, opined that these acts of self-mutilation were "manipulative techniques" (11/856). Later, the prosecutor asked him:

> Doctor, are people who are depressed more apt to murder other people?
>
> DR. MERIN: No. In fact, it goes the other way. People who are depressed are more apt to injure themselves than to injure someone else. You have two sides of the same coin. If you have a a certain degree of anger which is -- except for very elderly people, anger can be directed either inwardly or outwardly. At the extreme it can create suicide, if it's turned inwardly, and we call it depression or it's associated with depression. If it is directed outwardly it could result in homicide.

(11/863).

[22] The testimony of Dr. Maher and Lisa Cantrell chronicles appellant's drug and alcohol problems, and his unsuccessful efforts to overcome them. Dr. Merin said he did not doubt that appellant has a substance abuse disorder (11/863), but he didn't think his faculties were impaired on the night of the crime. A history of drug and alcohol abuse is a nonstatutory mitigating factor. See e.g., McKinney v. State, 579 So. 2d 80, 85 (Fla. 1991); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992); Scott v. State, 603 So. 2d 1275, 1277 (Fla. 1992).

violence; and the positive personal traits testified to by his ex-girlfriend Lisa Cantrell. Add to these appellant's age (20), his emotional and psychological immaturity (that of a 14 or 15 year old), his dull-normal IQ of 80 (which could well have been dulled still further by brain damage from huffing), the fact that he was the follower rather than the leader in this criminal episode, and the at least equal culpability of Joey Duckett, and it is clear that this is not a case where there is "nothing or very little" in mitigation.[23] See Songer, 544 So. 2d at 1011; Nibert, 574 So. 2d at 1063. Accordingly, appellant's death sentence should be reduced to life imprisonment.

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[23] Due to the length of this brief, appellant will rely on, without repeating, the testimony set forth in the Statement of the Facts (Penalty Phase). Also before the trial court [2/307; 4/596; see Engle v. State, 438 So. 2d 803, 813 (Fla. 1983)] was the PSI, which refers to appellant's history of suicide attempts and self-destructive behavior (including eating light bulbs and drinking toilet bowl cleaner) (12/623); his prior in-patient mental health treatment at six different facilities (12/623); the fact that his primary source of income was a $446 monthly SSI disability payment for his mental health condition (12/624, see 12/622); the fact that he dropped out of school after three failed attempts to complete the 8th grade, prior to getting his GED (12/624); his history of drug and alcohol abuse from age 13 (12/624); and the statements of Detective Cliff Blum that appellant is a crack cocaine user or "crackhead", and the victim, Hank Clark, was his drug supplier (12/619,624).

ISSUE VII

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE SENTENCING OPTION OF LIFE IMPRISONMENT WITHOUT PAROLE, WHERE THAT PENALTY BECAME LAW SHORTLY AFTER THE CRIME BUT BEFORE THE TRIAL, VIOLATED DUE PROCESS, FUNDAMENTAL FAIRNESS, AND THE EIGHTH AMENDMENT.

The Florida Legislature has abolished parole eligibility for persons convicted of first-degree murder; the sentencing options are death or life imprisonment without possibility of parole. Fla. Stat. §775.082(1). This amendment became effective May 25, 1994.[24] The trial in the instant case took place from September 25 - October 2, 1995; more than a year after parole eligibility was abolished. However, the crime occurred on April 25 or 26, 1994; a month before the amendment took effect.

The Oklahoma Court of Criminal Appeals, in a line of capital cases arising from similar circumstances, has held that where the crime occurred before that state's "life without parole" statute went into effect, but where the sentencing occurred after that date, due process, fundamental fairness, and the Eighth Amendment require the judge to instruct the jury on the sentencing option of life imprisonment without possibility of parole. Salazar v. State, 852 P. 2d 729,736-41 (Okla. Cr. 1993); Hain v. State, 852 P. 2d 744, 753 (Okla. Cr. 1993); Humphrey v. State, 864 P. 2d 343, 344

[24] Parole was abolished in first degree murder cases by Laws 1994, c.94-228, §1, eff. May 25, 1994. Fla. Stat., §775.082(1) was further refined by Laws 1995, c. 95-294, eff. Oct. 1, 1995 to apply to all capital felonies.

(Okla. Cr. 1993); Fontenot v. State, 881 P. 2d 69, 74 and n.2 (Okla. Cr. 1994); Parker v. State, 887 P. 2d 290, 299 (Okla. Cr. 1994); Cheatham v. State, 900 P. 2d 414, 429-30 (Okla. Cr. 1995); McCarty v. State, 904 P. 2d 110, 129 (Okla. Cr. 1995); Bowie v. State, 906 P. 2d 759, 765 (Okla. Cr. 1995). The Oklahoma Court reasoned:

> Given the gravity of the death penalty, we find that principles of fundamental fairness compel us to reverse this case for a new second stage trial. As discussed in Allen v. State, 821 P.2d 371 (Okl.Cr.1991), we find no constitutional prohibition to the application of this possible sentencing option in cases where the penalty became law in the period while the offender awaited trial. Quite simply, we cannot justify a decision which would act as a total bar to consideration of a punishment alternative to death merely because the crime giving rise to the trial occurred a short time before the effective date of previously enacted legislation.

Hain v. State, supra, 852 P. 2d at 753; Cheatham v. State, supra, 900 P. 2d at 429.

Because the amendment is procedural, and because the availability of a sentencing option which affords the jury a more palatable alternative to a death sentence is ameliorative in nature [see Dobbert v. Florida, 432 U.S. 282 (1977)], the prohibition against ex post facto laws does not prevent application of the life without parole statute to a defendant who is tried after its effective date but whose crime occurred before it. See Allen v. State, 821 P. 2d 371, 375-76 (Okla. Cr. 1991); Salazar v. State, 852 P. 2d at 737-38; Parker v. State, supra, 887 P. 2d at 299. In any event, even if an ex post facto claim could potentially have been made by

appellant, defense counsel's requested Penalty Instruction #6 on the abolition of parole would have waived it. (See 2/275; 9/615; 11/840-41). Finally, while the undersigned concedes that the requested instruction was inartfully worded, the Oklahoma Court of Criminal Appeals has held that the trial judge has a duty to instruct the jury sua sponte on the option of life without parole, and his failure to do so is fundamental error. Salazar, 852 P. 2d at 74, n.2; Cheatham, 900 P. 2d at 430. As stated in Salazar:

> The trial court's failure to provide proper sentencing instructions to a jury in a capital case is of critical importance. The death penalty is different from all other penalties in its severity and finality. . . . "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." [Citations omitted].

Appellant should be granted a new penalty trial before a jury which is fully instructed on all the sentencing options.

ISSUE VIII

THE JURY INSTRUCTION ON THE "COLD, CALCULATED, AND PREMEDITATED" AGGRAVATING FACTOR (WHICH WAS THE ONLY PROFFERED AGGRAVATOR IN THIS CASE, AND THEREFORE WAS THE ESSENTIAL ELEMENT WHICH NEEDED TO BE FOUND IN ORDER TO MAKE APPELLANT ELIGIBLE FOR A DEATH SENTENCE) VIOLATED DUE PROCESS BY RELIEVING THE STATE OF ITS BURDEN OF PROOF AND USURPING THE JURY'S FACT-FINDING FUNCTION.

The only aggravating factor submitted to the jury in this case was that the crime was "committed in a cold, calculated, and premeditated manner." The Florida standard jury instructions include the following preface:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:

The trial judge then instructs the jury on each aggravating circumstance for which evidence has been presented. The jury then determines which, if any, of the aggravators have been proven.

In the instant case, because there was only one aggravator relied on by the state, the judge -- without objection -- omitted the words "any of" and changed the plural "are" to the singular "is." The resulting jury instruction was:

> The aggravating circumstance that you may consider is limited to <u>the following circumstance that is established by the evidence:</u>

(2/277; 11/965; see 10/828-29).

The judge then defined the "cold, calculated, and premeditated" aggravating circumstance (2/277; 11/965-66).

A properly modified instruction would have told the jury, "The aggravating circumstance that you may consider is limited to the following circumstance, if YOU find that it is established by the evidence." In the modified version given here, however, the trial judge instructed the jury that CCP was established by the evidence. Since CCP was the essential element which the jury needed to find in order to make appellant eligible for a death recommendation, the instruction violated the state and federal constitutional guarantee of due process, by relieving the state of its burden of proof and usurping the jury's fact-finding function. See Sandstrom v. Montana, 442 U.S. 510 (1979); Wright v. State, 586 So. 2d 1024, 1030-31 (Fla. 1991); Stanley v. State, 560 So. 2d 1269, 1270 (Fla. 3d DCA 1990); Sarduy v. State, 540 So. 2d 203, 204 (Fla. 3d DCA 1989). In addition, the instruction amounted to an impermissible judicial comment on the evidence, as cautioned against in Whitfield v. State, 452 So. 2d 548, 549 (Fla. 1984) and Speights v. State, 668 So. 2d 316, 318 (Fla. 4th DCA 1996).

Since CCP was the only aggravating factor submitted to the jury, counsel's failure to object to the constitutionally deficient instruction does not procedurally bar appellant from raising the issue on appeal, nor does it bar this Court from granting relief. Under Florida law and under the U.S. Constitution, death is not a legally permissible sentence in the absence of any valid aggravating factor; therefore, the jury could not lawfully have returned a death recommendation unless it found the CCP aggravating circumstance. See Banda v. State, 536 So. 2d 221, 225 (Fla. 1988);

Thompson v. State, 565 So. 2d 1311, 1318 (Fla. 1990); Richardson v. State, 604 so. 2d 1107, 1109 (Fla. 1992); Elam v. State, 636 So. 2d 1312, 1314 (Fla. 1994); Tuilaepa v. California, 512 U.S. ___ , 114 s. ct. 2630, 129 L. Ed. 2d 750, 759 (1994).

"'Fundamental error', which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action." Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970). The error must be "basic to the judicial decision under review and equivalent to a denial of due process." State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993); Mordentiv. State, 630 So. 2d 1080, 1084 (Fla. 1994). In regard to jury instructions, "fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict." Stewart v. State, 420 So. 2d 862, 863 (Fla. 1982); State v. Delva, 575 So. 2d 643, 645 (Fla. 1991). Cf. Sochor v. State, 619 So. 2d 285, 290 (Fla. 1993) ("Failure to give an instruction unnecessary to prove an essential element of the crime charged is not fundamental error").

A death sentence based on a jury recommendation tainted by a constitutionally deficient instruction on the only arguably applicable aggravating factor is absolutely basic to the decision under review, and amounts to a denial of due process. An instruction which effectively directs the jury to find an essential element of the crime (or an essential element of a death sentence) violates due process. Sarduy; Stanley. Hence, the error is fundamental,

and can be remedied on appeal even without an objection below.[25] Appellant's death sentence should be reversed for a new penalty trial.

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[25] In addition, since absent the CCP finding appellant would be ineligible for a death sentence, the error involves a claim of "actual innocence" of the death penalty as delineated in Sawyer v. Whitley, 505 U.S. 333, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992). ... exception (which permits review on the merits of procedurally defaulted federal constitutional claims, even without the otherwise required showing of "cause and prejudice"):

> must focus on those elements which render a defendant eligible for the death penalty, and not on additional mitigating evidence which was prevented from being introduced as a result of a claimed constitutional error.

120 L. Ed. 2d at 285.

The Sawyer Court also noted with approval the Eleventh Circuit's statement in Johnson v. Singletary, 938 So. 2d 1166, 1183 (11th Cir. 1991) that "a petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates all of the aggravating factors found to be present by the sentencing body." 120 L. Ed. 2d at 285, n.15 (emphasis in Johnson opinion).

CONCLUSION

Based on the following argument, reasoning, and citation of authority, appellant respectully requests that this Court grant the following relief:

> Reverse the conviction and death sentence and remand for a new trial [Issue 2].
>
> Reduce the death sentence to life imprisonment [Issue 6].
>
> Reverse the death sentence and remand for a new penalty trial before another jury [Issues 1, 4, 7, and 8].
>
> Reverse the death sentence and remand for resentencing [Issues 3 and 5].

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 14th day of February, 1997.

Respectfully submitted,

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