FILED
SID J. WHITE
MAY 29 1998
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

DAVID PAUL SNIPES, :

Appellant, :

vs. : Case No. 90,413

STATE OF FLORIDA, :

Appellee. :

_____ :

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

# INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

DEBORAH K. BRUECKHEIMER
Assistant Public Defender
FLORIDA BAR NUMBER 0278734

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(941) 534-4200

ATTORNEYS FOR APPELLANT

## TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

## TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)



OTHER AUTHORITIES

## STATEMENT OF THE CASE

On October 31, 1995, David Snipes (Appellant) and John Saladino were charged by indictment for the first-degree murder of Markus Mueller, a/k/a Markus Müller, a/k/a Markus Muller, a/k/a Kark Markus Muller, with a gun in violation of §782.04 and §777.011, Fla. Stat. (1993). The homicide occurred on February 9, 1995, in Lee County, Florida. (V1/R9-11) Over objection, the prosecutor was allowed to amend the indictment in September 1996 by changing the name of the victim from "Kark" to "Karl." (V4/R131-137) Mr. Snipes had a jury trial in January 1997 and was found guilty as charged on January 16, 1997. (V5/R281;V10-14;V14/T907) The penalty phase was held on February 14, 1997; and the jury recommended death 11-1. (V7/R378-575; V8/R576-620) A Spencer hearing was held on March 14, 1997; and the sentencing hearing took place on April 11, 1997. On April 11, 1997, Circuit Court Judge Jay Rosman sentenced Mr. Snipes to death. (V8/R655-776; V9/R777-800,810-813) The notice of appeal was filed on April 15, 1997. (V9/R802,803)

## STATEMENT OF THE FACTS

### Trial Testimony

On February 9, 1995, at about 10:20 -10:26 p.m., Markus Mueller's neighbors in Bonita Springs, Florida, heard shots fired coming from the direction of Mr. Mueller's townhouse. One neighbor called 911; but due to miscommunications in the police department, no one contacted that neighbor that night. In addition, a patrol officer's drive-through of the neighborhood revealed nothing amiss.[1] (V11/T348-383)

The next day at about noon, Danielle Bieber and her husband David Bieber showed up at Sergio Acosta's home. Mrs. Bieber wanted Mr. Acosta to take her to Mr. Mueller's home. Mrs. Bieber said she did not want her husband to get into a fight with Mr. Mueller; however, Mr. Bieber followed Mr. Acosta and Mrs. Bieber separately to the Mueller residence. Mr. Acosta waited in his car while Mrs. Bieber went into the Mueller townhouse, and within a minute Mrs. Bieber came running back out "freaking out" saying Mr. Mueller had killed himself and Mr. Bieber had killed Mr. Mueller. Mr. Acosta went into the townhouse with Mrs. Bieber, and he saw Mr. Mueller on the floor dead. Mrs. Bieber called the police, and then she went upstairs. She went through Mr. Mueller's things and took some money from his wallet. (V11/T384-399; V12/T400) When the police arrived, Mrs. Bieber had to be told several times to leave the

---

[1] After an internal investigation, the patrol officer received two days suspension. (V11/T380,381)

townhouse by both the police outside the townhouse and the dispatcher on the phone. (V12/T436,437) When Mrs. Bieber did speak to police outside the townhouse, she said Mr. Bieber could have done this. (V12/T419) The office who heard this spoke to Mr. Bieber briefly at the scene, but did not arrest him. (V12/T412-414,419)

The autopsy on Mr. Mueller was done on February 11, 1995. There were three shots to the body: one in the head, one in the lower right side of the abdomen, and one in the chest. There was no way of knowing which shot came first. The wound to the head was fatal while the other two wounds would not have been fatal. The fatal wound to the head would have rendered Mr. Mueller unconscious almost immediately, and death would have followed very shortly thereafter. The official cause of death was cranial cerebral injury (injuries to the head and brain) from a gunshot wound to the head. (V13/T616-635) The medical examiner said that if someone is found cold with lividity set in and rigor mortis fully set in, the person has been dead for a minimum of four hours. (V13/T630,631) One officer at the scene at about 12:30 p.m. on February 10, 1995, described the blood on the body as being dried and not fresh. (V12/T433) The investigator from the Medical Examiner's office described the body before it was removed from the scene as being cold and rigid. (V12/T577,578)

Two bullets were removed from the body and two bullets were found at the scene. (V12/T458,464,493-501,526-538; V13/T629) An expert in firearms identification described all four bullets as either .38 special caliber or .357 magnum caliber. There are

certain brands of firearms that could have fired these bullets, and one of these is a Charter Arms brand of gun - Charter Arms made a .38 special caliber, 5-shot, snub-nose revolver called a Pit Bull between 1989-1993. All of the bullets in question could have been fired from a .38 snub-nose revolver, but the markings made by the gun on these bullets are not rare. (V12/T548-567) The weapon used in this case had never been recovered according to one of the case agents. (V12/T586)

The main case agent in this case, Agent Barry Futch, believed David Bieber was responsible for Mr. Mueller's death. Mr. Bieber had made numerous statements that he wanted Mr. Mueller dead, and Mr. Bieber had contacted Mr. Mueller the night of the homicide at about 8:30 or 9:30 p.m. There was two possible motives: steroid trafficking and jealously over Danielle Bieber.

Various witnesses Agent Futch interviewed said Mr. Mueller used anabolic steroids, and there were steroids recovered. (V13/T769-784) Drugs and needles in pharmaceutical-type packaging were recovered from Mr. Mueller's bedroom. (V12/T518-523) Six syringes and a vial were retrieved from Mrs. Bieber's car. (V12/T542) A search of Mrs. Bieber's home revealed some syringes and little bottles. (V12/T590) The Medical Examiner stated that Mr. Mueller's body was not tested for steroids (this requires a special test that is not commonly done by Medical Examiners); but Mr. Mueller had some physical attributes suggestive of the use of steroids: highly muscular, shrunken testicles, and cardiomegaly (enlarged heart). These are all findings typical of steroid users. (V13/T637-639)

According to Agent Futch, there was a large amount of steroids involved. (V13/T792)

As for the jealousy over Danielle Bieber, Agent Futch learned that Mrs. Bieber had married David Bieber on February 3, 1995; but Mrs. Bieber had been a girlfriend of Mr. Mueller before that. Mrs. Bieber had been secretly seeing David Bieber since November 1994. (V13/T796,797)

Based on one or both of the above-stated reasons, it was believed Mr. Bieber had either killed Mr. Mueller or had had Mr. Mueller killed. (V13/T784) Mr. Bieber, however, has not yet been found; and there is a warrant out for his arrest. (V12/T582,583; V13/T698,793)

In September 1995 Mr. Snipes and Mr. John Saladino were arrested for Mr. Mueller's murder.[2] Mr. Snipes was arrested because of information supplied by Michael Larson. (V13/T698,699) Mr. Larson said he lived next door to Mr. Snipes and they were friends. Some time prior to February 1995 Mr. Snipes asked Mr. Larson for a .38 pistol, and Mr. Larson gave Mr. Snipes a blue .38 that said Pit Bull on it. Mr. Larson never got the gun back. (V13/T663-665)

According to another of Mr. Snipes' friends, Chris Johnson, Mr. Saladino approached Mr. Johnson at the end of January 1995 or early February 1995 and asked if Mr. Johnson would shoot somebody.

---

[2] Mr. Larson had been arrested on two felonies and a misdemeanor, but a week later he gave a statement about Mr. Snipes. Subsequently, Mr. Larson pled to two misdemeanors and got 6 months probation. (V13/T665-669)

Mr. Johnson said "no"; but he knew that Mr. Saladino knew Mr. Snipes. Shortly thereafter in February 1995, Mr. Snipes told Mr. Johnson that he (Snipes) shot and killed someone for $1,000. (V12/T594-601)

Melissa Snipes[3] was Mr. Snipes' live-in girlfriend in January and February 1995. In February 1995 she noted that Mr. Snipes had more money than usual -- he made a car payment, got new tires for the car, and paid the rent. Mr. Snipes initially said he got the money by robbing somebody in Bonita Springs. Later, he said he had been hired by John Saladino to shoot someone. (V13/T608-615)

While in custody awaiting trial, Mr. Snipes also spoke to two of his uncles. Lawrence Patterson visited his nephew in October or November of 1995, and his nephew said he had done something stupid. He had shot someone for $1,000. Mr. Snipes said he had gone to the person's home in Bonita Springs in the later evening hours, knocked on the door, and shot the man five or six times when he answered the door. (V13/T646-652) Martin Patterson, who had once served in the military and was a private investigator, was in law school at the time of the trial. He started speaking to his nephew January 30, 1996, by phone; and the two had numerous phone conversations after that. Martin Patterson secretly recorded these conversations. His nephew also wrote him; but despite telling his nephew that he destroyed all the letters, so that they could not be used as evidence, Martin Patterson kept them all. After a couple of months, Martin Patterson decided his nephew had no remorse; so out

---

[3] The two were married on August 13, 1996. (V13/T607)

of concern for the community, Martin Patterson turned the six hours of tapes and all the letters over to the police. In his letters to his nephew, Martin Patterson encouraged his nephew to tell him everything ("You must earn my trust through honesty") and to find someone to unload thoughts and guilt trips on -- someone who could be trusted, like Martin Patterson. Martin Patterson also encouraged his nephew to speak to him with the implied promise of helping the nephew on his case (getting a private attorney).

After obtaining his nephew's trust, Martin Patterson said his nephew told him the following: On February 9, 1995, he shot four times an individual wearing a Mohawk; and one shot missed. He did it with a .38 caliber revolver he got from Mike Larson which he later threw in the river. No one saw him and there were no fingerprints. Afterward he threw his clothes and shoes in a pile and burned them. John Saladino hired him to do this and paid him either $1,000 or $1,100. He knew John Saladino, and John Saladino knew Dave Bieber. Dave Bieber asked John Saladino to get someone to do this, and John Saladino asked him. John Saladino is the middle man in this. He went by himself, but he told John Saladino and Mike Larson what happened. (V13/T627-689)

Agent Futch interviewed Mr. Snipes on September 23, 1995, from 2:00 a.m. to 6:25 a.m. The agent said they had nothing to arrest Mr. Snipes on, and they needed Mr. Snipes' confession. At 6:07 a.m. Mr. Snipes gave a taped statement: A few days before February 9, 1995, John Saladino asked him if he wanted to make some money. John Saladino knew he needed money. John Saladino told him that

someone would pay $1,000 to shoot somebody. He told Mr. Saladino he would think about it, and a few days later he told Mr. Saladino he would do it. He asked Mr. Saladino for an address and directions. He got a .38 caliber gun from his friend next door; went to the apartment at night on February 9, 1995; shot the man who answered the doorbell four or five times in the head and chest; threw the gun in the creek; and got paid the next day. (V13/T699-748)

Although Mr. Saladino was arrested at the same time as Mr. Snipes (V13/T697,698), Mr. Saladino's case was still pending at the time of Mr. Snipes' trial in January and February 1997. In August 1997, 24-year-old Saladino made a deal with the State: Mr. Saladino plead to the reduced charge of second-degree murder in this case with a 15-year prison sentence followed by 10 years probation. In exchange, Mr. Saladino agreed to testify against David Bieber in the murder of Markus Mueller should Mr. Bieber ever be caught. The sister and father of Markus Mueller (who testified against Mr. Snipes in his penalty phase) agreed to this deal. (SV/R1-18)

**Penalty Phase**

In addition to all evidence presented in the guilt phase, the State presented two members of Mr. Mueller's family -- his sister and father. Although both lived in Germany, they said Markus Mueller visited them. Nancy Mueller said she was close to her brother and his death hurt her. His death changed her life a lot; it left a pain in her heart she could do nothing about. Roland Mueller said his son's death had a very bad affect on him. "If you

can imagine when one of your children dies and someone tells you he's dead, it's very bad on us, the family." (V7/R433-438)

Mr. Snipes presented the following evidence at the penalty phase:

Dr. Sidney Merin, an expert in clinical psychology, interviewed and tested Mr. Snipes. The testing revealed that Mr. Snipes' brain is capable of dealing with complexities under a high degree of time pressure, able to shift his mental gears and change direction, able to move rapidly in a sequence, can learn from whether he was just right or wrong and capable of holding that information. Although Mr. Snipes can understand what is said to him and can respond verbally, his ability to verbally comprehend and his social understanding were significantly below average. In other words, Mr. Snipes is capable of language function, but not as capable when it comes to making adequate social judgments. Something went wrong in order for Mr. Snipes to not be able to make appropriate social judgments despite the brain's ability to deal with it. (V7/R443-458)

Mr. Snipes is emotionally immature and is very insecure. He is very sensitive to what other people think of him -- so sensitive that he reads into what people say or do motives that really aren't there. Due to his feelings of inadequacy, Mr. Snipes had to prove himself. It is very important for him to be a very strong masculine figure; it is a bravado or macho sort of thing. Mr. Snipes got into drugs[4] and alcohol at an early age -- 12 or 13. Something

[4] The drugs listed were marijuana, LSD, glue, and gasoline.

had to have gone wrong before that time in the way he was reared or he would not have turned to alcohol and drugs. The alcohol and drugs then create additional problems and everything escalates. Mr. Snipes could be easily led, and some of the alcohol and drug use was trying to get acceptance with his peers. If a person has vast amounts of insecurities and can't learn how to deal with their problems, that person will associate with people who equally don't know how to deal with their problems. Mr. Snipes could be easily led by older persons to do an act that would be against social norms. (V7/R458-463,470)

In Dr. Merin's opinion Mr. Snipes was acting under mental duress at the time of this incident, but not the type of mental duress that is usually thought of. Mr. Snipes' duress was a result of many, many years of experiencing a dysfunctional family consisting of horrendous, very poor models of behavior. Mr. Snipes tried to adjust himself to life, but he obviously failed. Mr. Snipes has been experiencing stress throughout his life; so by the time this event occurred, he was operating at a high level of stress to which he had already become adjusted and adapted. This level of stress, however, was much higher than what would be found in a typical or average person. Mr. Snipes' stress at the time of the killing might not have been much beyond his usual amount of stress, but his usual level of stress was very high. (V7/R466-467,476)

Although the doctor could not find any evidence of brain impairment or mental or emotional defect or disorder, Mr. Snipes had a behavioral disorder. Both parents used alcohol and drugs;

and Mr. Snipes was exposed to an uncle who sexually abused him when he was 3, 4, 5 years old. The uncle left, but was invited back into the home by a family member when Mr. Snipes was 7. The abuse then continued. No one listened to Mr. Snipes about the abuse, and his family did not protect him. Being raised in this bad environment caused a vast amount of things to go wrong. Mr. Snipes was able to understand the consequences of his decisions. (V7/R469,471-475)

Dr. Merin did believe Mr. Snipes had the potential for rehabilitation in a confined environment based on several factors: normal/average intelligence and nothing wrong with the brain. It is a matter of what he was and was not exposed to that shaped the way Mr. Snipes has lived. If he were in a different environment that was structured and that set out rules for him, there is nothing to inhibit his learning of those rules. Mr. Snipes was very cooperative; and he was not delusional, hallucinatory, or malingering/faking. (V7/R463,464) Mr. Snipes did express remorse as to what had happened for the victim, the victim's family, and his own family. The doctor believed this remorse to be genuine. (V7/R467, 468)

Cheryl Pettry, a mitigation specialist, had only 20-21 days to work on this case (she usually has 12-18 months to prepare a case). She discovered the following about Mr. Snipes' family: Both of his parents were 19 when they were married. Mr. Snipes was born in 1977. His family constantly moved and lived with various family members. His parents separated and filed for divorce in 1978. His

father was harassing the family, and his mother got a restraining order. Once when his father had visitation for the day, the father disappeared for five weeks with the kids and would not let the mother know where the children were. His mother was eventually given custody. (V7/R483-489)

Mr. Snipes told counselors that he had been sexually abused by an uncle. The uncle was allowed to move back into the home in 1993 even though the family knew about the sexual abuse. Mr. Snipes felt betrayed and no longer had contact with this father. (The uncle was in the father's house.) Mr. Snipes had an older brother who had quite a few problems. Whenever the older brother wanted to go live with their father, Mr. Snipes had to go too -- the older brother was not allowed to go alone. Mr. Snipes had no choice. Mr. Snipes did not want to go back to his father's, but that was the only way his older brother could go. (V7/R490,491)

Mr. Snipes' mother is an alcoholic, but she had refrained from alcohol for a number of years. His father smokes marijuana several times a day. Grandparents, several aunts, and the stepfather were all alcoholics. Mr. Snipes was constantly confronted with alcoholism. Both he and his father abused marijuana. (V7/R492)

Mr. Snipes got his GED voluntarily in 1993. His son was born April 12, 1996, while Mr. Snipes was in jail; and he married the baby's mother in August 1996. His wife said she will continue to visit him with their son so that he could continue to have contact with his son. Mr. Snipes' mother remarried in 1980 when Mr. Snipes

was about 3 years old. The stepfather was involved with Mr. Snipes' school activities and counseling. (V7/R494-497)

Veronica Lorentz, Mr. Snipes' aunt, has had contact with her nephew about 8 to 10 times for about a week each time. She knows what Mr. Snipes did, but she still stands by him -- she does not want him to die in the electric chair. Mr. Snipes is sweet, friendly, warm, and loving. When she was last down for a visit, she trusted her granddaughter to his care in the pool. She never thought there was a "bad bone" in his body. Mr. Snipes had had a rough life with his own parents and in growing up in general. There was a lot of alcoholism in her family for many, many years, which included her parents, and their parents, extended family, and Mr. Snipes' mother. She knew her nephew had been in treatment for narcotics; when she would ask if he was doing okay and was clean, he would say yes. She has spoken to her nephew since this has happened and gotten letters. They did not speak specifically about the murder, but she felt like her nephew was probably on drugs or he never would have had the strength to do it; it is not his nature. (V7/R498-500,506-508)

Mr. Snipes' mother did provide Mr. Snipes with food, shelter, and clothing. Ms. Lorentz never saw his parents violent with Mr. Snipes, and they seemed to love him. Mr. Snipes played football and did clogging. His mother and stepfather went to the football scrimmages, and she saw them do a lot of family activities together. Even though Mr. Snipes had everybody's love, it was fragmented; he needed attention and some consistency in his life.

There also wasn't much money in the family. Mr. Snipes started working at 14 or 15 at a grocery store to earn money to get a car. For Christmas and birthdays she tried to send things because she knew that her nephew did not get many presents. (V7/R501,502,508, 512-517)

If her nephew receives a life sentence, she believes he could do something worthwhile in the prison system. He would keep in contact with his family and could learn a trade. He loves his family and son very much. (V7/R507,508)

Candy Ball, Mr. Snipes' aunt, would see her nephew when he was young about 7 or 8 times a year and in recent years once or twice a year. Out of the five nephews and three nieces, Mr. Snipes is "the one that holds" her heart. He was always very loving, tender-hearted, and affectionate. His mother always had a beer in her hand; and the trailer they lived in was crowded, rundown, dirty and trashy (the plumbing did not always work). She knew her nephew well, and he did not lack for love. However, he did lack boundaries; discipline was inconsistent. His parents were not there emotionally because of the alcohol; he wasn't given proper attention as a child -- he seemed lost. She believes he has the ability to be rehabilitated and could become a productive member of the prison society. She still loves her nephew and wants him to live. (V7/R519-526)

Lawrence Patterson, Mr. Snipes' uncle, believes his nephew lacked direction in growing up and lacked opportunity. His nephew's family has been "screwed up" as far back as he could

remember with alcohol. There were alcoholics throughout the family. His nephew has a good heart, but he never got an opportunity to get out of the environment he grew up in. That environment provided no opportunity. Mr. Patterson believes his nephew has the potential to be rehabilitated; his nephew could be productive in the prison community. He would help financially with his nephew's education in prison; and if the prison was near, he would visit his nephew. His nephew needs to be punished for this crime, but the death penalty is excessive in this case. He loves his nephew and does not want to see him die in the electric chair. (V7/R529-534)

Eileen Ball, Mr. Snipes' mother, acknowledged that she has been in treatment for alcoholism and drug addiction for the last 9 years. She is now an addictions' counselor. Before that, drinking was a way of life. She didn't know how to get through anything without a drink or drug. She was actively using alcohol and drugs (marijuana) during the first 9 years of Mr. Snipes' life. When Mr. Snipes was 9 years old, her father died; and she stayed drunk every day until she went into AA. Her son's father was also addicted to marijuana. In the early years of her son's life, the family moved around a lot, lived with relatives, and changed jobs a lot. She would go out drinking with friends and would not go home. This would cause fights with her husband. Her husband would also smoke marijuana, and this would cause fights in the last year of being together. During this last year, the fights became physical and were in front of the boys. It was pretty ugly and pretty loud. During the divorce they fought over custody of the boys. She

wanted to keep the boys from their father. She wound up with custody, and the boys' father got very liberal visitation. (V7/ R537-541,548,549)

Two years later she met her present husband, and they were married 6 weeks later. She had hid her marijuana use from her new husband, and he had hid his alcohol use from her before the marriage. After the marriage they started to fight about these things a lot. She would go out with friends after work and would not go home until she was thrown out of the bars. She and her new husband would fight about this in front of the boys. She had a son with her new husband, and Mr. Snipes was displaced by the baby. (V7/ R541)

She had discipline problems with Mr. Snipes and his older brother, so she would send them to their father. Then when she did not like the way their father dealt with them, she would yank them back. The older brother was really the problem, but both had to go since the father did not want to separate the boys. The father refused to take just one son. Mr. Snipes did not want to go, but he had to go for his older brother's sake. (V7/R542,543)

During one of the times the two boys were living with their father, the older son told her that an uncle was sneaking into the boys' room at night. The older son was 11, and Mr. Snipes was 9. When she spoke to Mr. Snipes, he admitted there was sexual abuse and oral sexual abuse happening. She confronted her ex-husband about it; and her ex-husband told the uncle that if he left the state, he would not be prosecuted. The uncle was gone before she

could contact him. When Mr. Snipes was 15, he was hanging around with a kid in the neighborhood she did not like; so she sent Mr. Snipes to his father's home. Her son kept begging her to let him come back, but she said no. When she let her son come home in the summer, he told her that a week after he moved in with his father the uncle who had sexually abused him moved back in. Her son was very angry, because he felt like everybody treated him like he was too stupid to remember what had happened to him. Everyone acted like nothing had happened, and he was too scared to talk to his father about it. (V7/R544-549)

Ms. Ball has visited her son in jail with her son's wife and infant son. Mr. Snipes talks with his son, plays patty-cake through the window, talks to him, and tries to discipline him. Her son's wife has said she will live near the prison so that Mr. Snipes can continue to see his son. (V7/R549,550)

Ms. Ball did give her son food, shelter, and clothing. She said her second husband loved her son and participated in his activities -- football and little league. When her son was in counseling, she and her second husband participated. (V7/R551)

## SUMMARY OF THE ARGUMENT

The trial court committed reversible error when it allowed the prosecutor to amend the victim's name in the indictment. Indictments cannot be amended, and the amendment of the victim's name is a material change inasmuch as the victim's name is an essential element of the charge. Reversible error occurred when the prosecutor was allowed to bring out the fact that Mr. Snipes was in jail prior to trial. Mr. Snipes had the right to be presumed innocent during the trial, and the prosecutor telling the jury that Mr. Snipes was in jail prior to trial prejudicially destroyed that presumption. Reversible error occurred when Mr. Snipes' statements were not suppressed. Mr. Snipes was a juvenile at the time of the interrogation, and he was not told that he had the right to have his parents present. In fact, Mr. Snipes was taken from his mother's home by the officer with a ruse, and the mother was not offered the opportunity to go with her son. The mother was also not told the real reason for the taking of her son, so she would have no reason to request to accompany her son. Under the totality of the circumstances, the statements obtained from Mr. Snipes were involuntary. In addition, Mr. Snipes' statements to his Uncle Martin Patterson were coerced and should have been suppressed. When highly coercive tactics are used to obtain statements from a defendant -- even by a non-state individual -- the trial court should still make a threshold determination of the voluntariness and admissibility of these statements. In this case the trial court did not make that threshold determination because Uncle

Martin was not a state-agent. This Court should find that Mr. Snipes' statements to Uncle Martin were involuntary and inadmissible. Also, Mr. Snipes is entitled to a new trial and/or penalty phase when the State was allowed to have a main State witness testify about Mr. Snipes having no remorse and being a danger to the community. These impermissible statements were highly prejudicial and totally irrelevant. These statements affected both the guilt phase and the penalty phase, so a new trial and/or penalty phase is required.

The final issue is that the death sentence in this case is disproportionate. Mr. Snipes' extensive evidence of substantial mitigating circumstances -- including his age (17), his dysfunctional family with the alcohol and drugs, his being sexually abused for years by an uncle while his family turned a blind eye to what was happening, his use of drugs starting at a young age, his behavioral disorder, his remorse, his rehabilitation potential, his good character traits, his family support, his voluntary statements that made the State's case against him and co-defendants Saladino and Bieber, his religious devotion, and co-defendant Saladino's short sentence -- outweighed the 2 aggravators (agreeing to kill for money) that were closely connected. The death sentence imposed by the trial court is disproportionate both to the circumstances of this offense and in comparison with the numerous cases in which this Court vacated death sentences because of similar mitigating circumstances. The death sentence must be vacated and reduced to life.

## ARGUMENT

### ISSUE I

DID THE TRIAL COURT ERR IN ALLOWING THE STATE TO AMEND THE INDICTMENT?

The indictment in this case gave various spellings of the victim's name: Markus Mueller, a/k/a/ Markus Müller, a/k/a Markus Muller, a/k/a Kark Markus Muller. (V1/R9-11) On September 18, 1996, the prosecutor asked the trial court to amend the indictment as to the victim's name in the fourth deviation. The fourth deviation is the victim's name on his birth certificate, and the correct spelling should have been "Karl" Markus Muller. The prosecutor described the error as a typographical error/scrivener error and asked the indictment be corrected. Mr. Snipes objected to the request because indictments cannot be amended and the victim's name is an essential element of the charge. The trial court granted the prosecutor's motion, and the order correcting the indictment was entered. (V4/R131-137)

As pointed out in Akins v. State, 691 So. 2d 587 at 588 (Fla. 1st DCA 1997), "Florida cases have long held that an indictment, unlike an information, cannot be amended, not even by a grand jury, to charge a different, similar, or new offense." Fla. R. Crim. P. 3.140(c) states that the caption of an indictment is not essential; and any "defect, error, or omission in a caption may be amended . . . by a court order." Fla. R. Crim. P. 3.140(o) states that an indictment won't be dismissed or judgment arrested or new trial granted due to a defect in the indictment unless the defect makes

the indictment "so vague, indistinct, and indefinite as to mislead the accused and embarrass him . . . in the preparation of a defense or expose the accused after conviction or acquittal to substantial danger of a new prosecution for the same offense." This rule does not allow amendments to the indictment.

The name of the victim is an essential element of the charging document. An erroneously named victim means that a defendant remains at jeopardy for crimes against the real victim. See Jacob v. State, 651 So. 2d 147 (Fla. 2d DCA 1995).

Clearly, amendments to the body of the indictment are not allowed. To alter the indictment in any way is error. In this case, the amendment involved an essential element of the charge -- the victim's name. At this point the only option is to reverse and remand the case with instructions to discharge Mr. Snipes. See Jacob.

Had the prosecutor and trial court not amended the indictment, the issue would have been one of variance between the indictment and what was proved at trial. This Court has held that nicknames can fall under the concept of not being a material variance if there is a difference between what was charged and what was proven at trial as long as:

> proof of the identity of the deceased was established beyond a reasonable doubt[,] [t]he defendant could not have been embarrassed in the preparation of his defense, and the identity of the victim as alleged in the indictment with the person who was shot by the defendant is clearly shown by the record. This protects the accused against another prosecution for the same offense.

Raulerson v. State, 358 So. 2d 826 at 830 (Fla. 1978). The examples for these minor variances that did not fatally affect the allegation of the victim's name involved nicknames -- "Michael" versus "Mike" (Raulerson) and "Harry" versus "Henry" (Branch v. State, 115 So. 143 (Fla. 1928). In both cases someone testified as to the nickname at trial.

In this case the "variance" concept is not applicable. The trial court amended the order so that there would not be a "variance" issue. Thus, the question of the "variance being material" is not at issue in this case. But even if the concept of "variance" were to be argued, it would not work in this case. No one would have testified that "Kark" was a nickname for "Karl" at trial; no one could have testified at trial to explain that difference in names. The victim was from Germany, and this Court cannot take judicial notice of the fact that "Kark" is a nickname for "Karl" nor can it take judicial notice that "Kark" is a typographical error. Foreign German names are not common knowledge in this country.

There is also the fact that the victim's identity was not without question in this case. Although the State had established it had the body of Mr. Mueller found in Mr. Mueller's home and that Mr. Mueller died from gunshot wounds, the question at trial was whether Mr. Snipes shot Mr. Mueller. Mr. Snipes admitted he shot someone, but he did not know the victim and could not remember the victim's name or address. There were no eyewitnesses, no fingerprints, and no identifiable bullets that could be positively linked

prints, and no identifiable bullets that could be positively linked to Mr. Snipes' gun (which was also never found). The men who contracted to have the killing done did not testify, so no one testified that Mr. Snipes was hired to kill Mr. Mueller. For all that is known, the contractors could have had a list of people they wanted killed. It is to be noted at SV/R4,5 that co-defendant Saladino also pled out to an attempted murder charge on a Michelle Stanforth. It is also to be noted that Mr. Saladino was contacting others about killing for money. (V12/T594-601) Mr. Snipes may not have shot Mr. Mueller, but someone else. It was up to the State to prove that the victim alleged in the indictment was the person who was shot by the defendant, and this was not a clear-cut issue in this case. It cannot be said that a variance in the victim's name would not be material in this case.

The amendment of the indictment as to the victim's name was per se reversible error in this case. This case should be reversed and remanded for a discharge of Mr. Snipes.

## ISSUE II

DID THE TRIAL COURT ERR IN NOT GRANTING A MOTION FOR MISTRIAL WHEN THE PROSECUTION BROUGHT OUT THE FACT THAT APPELLANT WAS IN JAIL PRIOR TO TRIAL?

During the direct questioning of State witness Chris Johnson, the prosecutor started to ask about conversations Mr. Johnson had with Mr. Snipes after the shooting occurred. As a reference point, the prosecutor asked, "Now since [Mr. Snipes] has been in jail have you had conversations with him? Yes." (V12/T601) What the two talked about was irrelevant, and the trial court did not allow the prosecutor to go any further with this line of questioning. The damage, however, as to pointing out to the jury that Mr. Snipes was in jail pending trial was already done; and defense counsel objected to this comment as being highly prejudicial. Defense counsel noted that Mr. Snipes was not in jail garb but in street clothes, and he was not in shackles. The motion for mistrial was erroneously denied. (V12/T601,602)

In Coffin v. United States, 156 U.S. 432 at 453 (1895), the United States Supreme Court stated: "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." In Taylor v. Kentucky, 436 U.S. 478 at 485 (1978), the United States Supreme Court also stated: "This Court has declared that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on

grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. See, e.g., Estelle v. Williams, 425 U. S. 501, 48 L. Ed. 2d 126, 96 S. Ct. 1691 (1976)." (Emphasis added.) In Estelle v. Williams, 425 U.S 501 at 503 (1976), the United States Supreme Court reiterated that the "right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." The Court went on to state that the "presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." Id. In order to "implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Id. This Court stated in Shultz v. State, 179 So. 2d 764 at 765 (Fla. 1938), that "[e]very person is presumed to be innocent of the commission of crime and that presumption follows them through every stage of the trial until they shall have been convicted."

Most of the cases that discuss improper/prejudicial evidence of a defendant being especially dangerous generally involve physical evidence of the defendant being in custody -- defendant forced to go to trial in prison garb (see Estelle), and defendant shackled or put in handcuffs in front of the jury (see Illinois v. Allen, 397 U. S. 337 (1970); and Dufour v. State, 495 So. 2d 154 (Fla. 1986)). However, informing the jury that a defendant has been in

custody prior to trial is equally prejudicial. This was recently noted in Reeves v. State, 23 Fla. Law Weekly D121 (Fla. 2d DCA, Dec. 31, 1997), wherein the court found that the State's evidence of the appellant's "brother's incarceration before trial at the same time as the appellant was the vehicle to let the jury know that the appellant himself was incarcerated pending trial. This impermissibly raised an inference that the appellant was especially dangerous or had committed other crimes."

Mr. Snipes had the constitutional right to be presumed innocent prior to conviction. That presumption entitled him to sit before the jury as a U.S. citizen in normal street clothes as opposed to jail garb and without evidence of shackles or handcuffs. In other words, Mr. Snipes had the right to go to trial without evidence of Mr. Snipes being in custody. Dressing in street clothes and having shackles and handcuffs removed in the courtroom is meaningless if the prosecutor is allowed to tell the jury that Mr. Snipes is in jail pending trial. Telling the jury this fact was highly prejudicial and had no probative value. There was no reason to ask Mr. Johnson about other conversations that took place while Mr. Snipes was in jail. The prosecutor could easily just have asked about other conversations and left it at that. Where these conversations took place had no probative value. In fact, it was immediately ruled that these other conversations had no probative value at all.

As pointed out in Issue I, the identity of the person Mr. Snipes was supposed to have shot was not without question in this

case. The allegation was based solely on circumstantial evidence. The prosecutor telling the jury that Mr. Snipes has been sitting in jail pending trial was highly prejudicial and helped tip the scales in the State's favor. It cannot be said beyond a reasonable doubt that informing the jury that Mr. Snipes has been in jail pending trial had no affect on the jury's verdict. Under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), Mr. Snipes is entitled to a new trial.

## ISSUE III

DID THE TRIAL COURT ERR IN NOT GRANTING APPELLANT'S MOTION TO SUPPRESS HIS CUSTODIAL STATEMENTS?

On September 23, 1995, at around 2:30 a.m. Mr. Snipes was taken from his home and brought to the Lee County Sheriff's Office. (V1/R28,29) Prior to going to the Sheriff's Office, Mr. Snipes was asked if he would come with the deputies in reference to an investigation going on next door; but when Mr. Snipes got to the station, he was told the deputy wanted to talk about the Mueller homicide. Prior to Mr. Snipes giving a statement, he was given his Miranda rights. (V1/R30) The giving of the statement was from 6:07 a.m. to 6:25 a.m. (V1/R34) Three deputies saw Mr. Snipes during those early morning hours. (V1/R39) Mr. Snipes testified that he told two of the deputies on at least 3 separate occasions prior to the giving of the statement that he wanted an attorney, but both of the deputies said Mr. Snipes did not ask for an attorney. On the tape the deputy told Mr. Snipes he had the right to an attorney, but Mr. Snipes does not ask for one at that time. (V1/R47-49,50,51; V2/R66,68,71-73) It was also noted at the hearing that Mr. Snipes was only 17 at the time and the deputies did not advise Mr. Snipes that he had the right to have his parents present.[5] The state argued that being a juvenile did not give one the right to have an

---

[5] In reality Mr. Snipes was actually 18 at the time of the interview (date of birth 6-17-77), but under §39.01(10), Fla. Stat. (1993), a "child" or a juvenile or a "youth" is defined as someone charged with a crime that occurred before he reached 18. And under §39.054, Fla. Stat. (1993), custody over a juvenile ends at age 19.

attorney or parents present. (V2/R75,76) The deputy in charge did state that Mr. Snipes was living with his mother when the deputy noted that Mr. Snipes' mom got Mr. Snipes out of bed when the deputies arrived. (V1/R40) The trial court denied the motion to suppress prior to trial and when the motion was renewed during trial. (V1/R12,13,25-53,56,57; V2/R61-78; V13/T710-720) Mr. Snipes' taped statement was played at trial. (V13/T731-748)

This Court in Doerr v. State, 383 So. 2d 905 at 907,908 (Fla. 1980), held the juvenile statutes do not require the juvenile "not be subjected to an investigation until a parent or legal guardian has had an opportunity to consult with the child"; however, "[l]ack of notification of a child's parent is a factor which the court may consider in determining the voluntariness of any child's confession . . . ." Justice Adkins dissented, believing that the legislature had directed courts and law enforcement agencies "that juveniles shall be treated differently from other suspected criminals in that they shall not be interrogated until the parents or legal custodian shall be notified." Id. at 908, 909 (emphasis added). Justice Adkins went on to state, "The purpose of this directive is that a juvenile, presumptively inexperienced in the ways of crime, should not be subjected to an interrogation relative guilt until a parent of legal custodian has had an opportunity to consult with the child. In many instances Miranda warnings would mean nothing to the juvenile defendant." Id. at 909.

More recently in Allen v. State, 636 So. 2d 494 at 496 (Fla. 1994), this Court held that all police questioning should have

stopped as soon as the Appellant's mother asked to see her 15-year-old son. Even though this Court cited to Doerr in a footnote, it is difficult to reconcile the two cases. Under Doerr, parents need not be told their juvenile son is in custody and the juvenile's confession is not automatically invalidated if the parents aren't told; under Allen if the parents do somehow find out and show up, then all interrogation must stop or the statements must be suppressed. Justice Adkins' dissent seems to be more in keeping with Allen and with the United States Supreme Court's opinion in Gallegos v. Colorado, 370 U.S. 49 (1962).

In Gallegos the statements of a 14-year-old boy were suppressed based on a totality of circumstances that bear on two factors -- confessions obtained by "secret inquisitorial process" and the element of compulsion. The circumstances in Gallegos were the appellant's youth, the long detention, the failure to send for his parents, the failure to immediately bring him before the trial court, and the failure to see that the defendant had the advice of a lawyer or a friend. It is to be noted that although the United States Supreme court added in the 5-day detention as one of the circumstances, it refused to harmless error the end result of suppressing the defendant's statements when most of the statements were made immediately after he was arrested:

> But if we took that position, it would, with all deference, be in callous disregard of this boy's constitutional rights. He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his

> rights -- from someone concerned with securing him those rights -- and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had. To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights.

Id. at 54,55. And even though the United States Supreme Court held that there "is no guide to the decision of cases such as this" (Id. at 55), the Court did emphasize the special needs of a juvenile. Noting that the youth of the suspect was the crucial factor in Haley v. Ohio, 332 U.S. 596 (1948), the Court quoted from Haley, 332 U.S. at 599, 600:

> What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child--an easy victim of the law--is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability when the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim, first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him. No friend stood at the side of this 15-year-old boy as the police,

> working in relays, questioned him hour after hour, from midnight until dawn. No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. No counsel or friend was called during he critical hours of questioning. A photographer was admitted once this lad broke and confessed. But not even a gesture towards getting a lawyer for him was ever made.

Gallegos, 370 U.S. at 53 (emphasis added). Noting that the 14-year-old in Gallegos put the case on the same footing as Haley, the Court went on to state:

> The prosecution says that the boy was advised of his right to counsel, but that he did not ask either for a lawyer or for his parents. But a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.

Gallegos, 370 U.S. at 54 (emphasis added).

What can be gleaned from Gallegos is what Justice Adkins emphasized in his dissent in Doerr -- interrogating a juvenile without providing a parent or lawyer or legal guardian the opportunity to be with the juvenile is to disregard the child's constitutional rights. Children are not on the same footing as adults and need some adult protection to put them on more of an equal footing with the interrogators. To question a child for hour after hour during the early morning hours without a parent or attorney to

assist the child can mean obtaining a confession in violation of due process.

In Mr. Snipes' case it became apparent during the hearings on the motion to suppress that Mr. Snipes' mother was present at the home when the deputies arrived, and Mr. Snipes was told at that time he was going to be interviewed about a neighbor. Nothing was said about interrogating him about the Mueller homicide until after he was at the Sheriff's Office. Nothing is said about informing Mr. Snipes and his mother that the mother has the right to go along, and Mr. Snipes' mother may not have been concerned inasmuch as it was said at the home that the questioning was about a neighbor. Thus, the opportunity to have his mother present at the interrogation is apparently not mentioned to either Mr. Snipes or his mother (this statement by defense counsel went unchallenged by the prosecutor -- V2/R75,76). This is a major circumstance in determining the voluntariness of Mr. Snipes' confession. As in Gallegos, the questioning of Mr. Snipes -- a child -- went on for hours in the early morning hours without sending for his parents or an attorney. Mr. Snipes claimed he asked for an attorney 3 times prior to giving his taped statement, and the officers claimed this did not happen. This was another circumstance to be evaluated, and the trial court decided it against Mr. Snipes. However, in Gallegos advising the child that he had the right to counsel and the child not exercising this option was of little import. The child was deemed unable to know how to protect his own interests or

get the benefits of his constitutional rights -- no matter how sophisticated the child might be.

The standard on review of a motion to suppress is that a trial court's ruling is presumed correct, and a ruling on voluntariness will not be overturned unless clearly erroneous. Bonifay v. State, 626 So. 2d 1310 at 1312 (Fla. 1993). However:

> The admissibility of a juvenile confession depends upon the "totality of circumstances" under which it was made. Gallegos v. Colorado, 370 U.S. 49, 82 S.Ct. 1209, 8.L.Ed.2d 325 (1962); Doerr v. State, 383 So.2d 905 (Fla. 1980); Hall v. State, 421 So.2d 571 (Fla. 3d DCA 1982), review denied, 430 So.2d 452 (Fla. 1983). The burden is on the State to show by a preponderance of the evidence that the confession was freely and voluntarily given and that the rights of the accused were knowingly and intelligently waived. Thompson v. State, 548 So.2d 198 (Fla. 1989); McDole v. State, 283 So.2d 553 (1973).

Rimpdel v. State, 607 So. 2d 502 at 503 (Fla. 3d DCA 1992).

In Bonifay the circumstances were that the defendant went voluntarily with the deputies, was offered the presence of an attorney or his parents, and specifically said he did not want his parents to be contacted. Under these circumstances, the statements were deemed voluntary. In Rimpel the defendant went voluntarily with the police to talk about the homicide, and the defendant's father was invited to accompany his son but declined. In State v. Paille, 601 So. 2d 1321 (Fla. 2d DCA 1992), the defendant was 17 at the time of the investigation, had a job, and had been on his own for quite some time. The defendant was told about the police investigation and voluntarily went to the police station. Attempts to contact the defendant's mother were unsuccessful, and the defen-

dant said he did not want his mother contacted. Under the totality of the circumstances the statement was deemed voluntary.

All of these cases have some circumstances in common: the opportunity to have a parent present was expressly offered and rejected, and there was no subterfuge as to why the defendant was going with the officers. In this case Mr. Snipes was not offered the option of having a parent present (even though his mother was present when the police took Mr. Snipes to the Sheriff's Department), and the deputies did not divulge the "real" reason for being taken in for interrogation until Mr. Snipes was alone at the Sheriff's Department. The head agent, however, admitted that at the time of the interrogation "we had nothing to arrest David Snipes for other than we needed his statement, a confession. . . ." (V13/T701,702) Thus, the main purpose of the interrogation was to focus on the homicide and get a confession; the reason given at Mr. Snipes home about the neighbor was only a ruse to get Mr. Snipes to the Sheriff's Department.

In addition, there is Mr. Snipes' claim that he asked two of the deputies for an attorney on a least 3 occasions. The deputies denied this, and the prosecutor pointed to the taped statement -- made 4 hours after his being taken to the Sheriff's Department -- as being evidence that Mr. Snipes did not want an attorney. Because the taped statement was made 4 hours after the detention and after Mr. Snipes asked several times for an attorney, the taped statement is not conclusive evidence of Mr. Snipes never having asked for an attorney. It is possible that after several hours and

being ignored several times in his request, Mr. Snipes believed it to be futile to ask for an attorney. The reality is that the issue in this area came down to the deputies' word against Mr. Snipes'. The fact that there is a conflict is one of the circumstances that must be considered.

Under the totality of the circumstances in this case, the State has not met its burden by a preponderance of the evidence that the confession was freely and voluntarily given and that Mr. Snipes' rights were knowingly and intelligently waived. Mr. Snipes' age, the subterfuge used in getting Mr. Snipes to the Sheriff's Department, not offering Mr. Snipes or his mother the opportunity for a parent to be present when the parent was readily accessible, the question as to whether or not Mr. Snipes' asked for an attorney, and the head agent's need to get a confession in order to get an arrest demonstrate that under the totality of the circumstances the statements were not freely and voluntarily given. The statement given by Mr. Snipes to the deputies was in violation of his Fifth Amendment rights and should be suppressed.

The next question then becomes whether not suppressing the taped statement constitutes harmless error. As has been argued above, the victim's identity in this case was not a given; and pieces of what was said in the taped statement went towards circumstantially identifying the victim (victim in Bonita, it was at night, he jumped over a wall, victim shot in doorway in the head and chest -- V13/T737-740). Also, these statements were considered in the penalty phase as part of the planning aspect of cold, calcu-

lated, premeditated aggravator. Without this taped confession, the State was left with vague statements to Mr. Johnson that did not give any details as to the victim, vague statements to Melissa Snipes which were inconsistent and had no as details as to the victim, limited statements made to Lawrence Patterson, and statements made to Martin Patterson under extremely coercive tactics (and the admissibility of which is questioned in the next issue). It cannot be said that if Mr. Snipes' own words were suppressed, beyond a reasonable doubt there would be no affect on the jury's verdict. Under DiGuilio Mr. Snipes is entitled to a new trial and/or penalty phase.

## ISSUE IV

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR WHEN IT ALLOWED THE COERCED STATEMENTS OF APPELLANT TO COME IN AT TRIAL?

Prior to trial Mr. Snipes asked the trial court to keep out all statements he had made to his Uncle Martin Patterson, because these statements were induced by highly coercive and deceptive tactics. (V5/R187,188,197-207) While Mr. Snipes was in jail awaiting trial, he had several phone call conversations with and wrote several letters to his Uncle Martin Patterson. Unknown to Mr. Snipes, his uncle was surreptitiously recording those 6 hours of phone calls; and despite his uncle's statements that the uncle was destroying all of Mr. Snipes' letters, the uncle was keeping all of the letters. (V13/T682,683) The calls and letters were all encouraged by the uncle with promises of helping his nephew by firing a private attorney (V13/T683,684) In discussing whether or not the uncle would hire an attorney for his nephew, the uncle said, "How do you expect us to risk everything on half-baked answers?" and "You must earn my trust through honesty." (V13/T680) The uncle encouraged his nephew to 'unload his thoughts and guilt trips' on someone who could be trusted -- like him (the uncle). (V13/T681) The motion to keep out all of these statements was denied pretrial, and the motion was renewed at trial as they were about to be introduced. (V5/R207; V13/T675) The trial court did, however, consider the issue of coerciveness and involuntariness to be an

issue of weight for the jury and gave an instruction to that effect. (V5/R207; V14/T895,896)

The statements elicited by Uncle Martin Patterson from his nephew were involuntarily given due to the highly coercive and deceptive tactics that the uncle used on his young and pliable nephew. They should not have been allowed to be introduced at trial. The issue of using highly coercive tactics to illicit inculpatory statements from a defendant in a non-state action situation should be examined in a larger context.

If Uncle Martin had used physical torture to illicit inculpatory statements from his nephew, the question is would the trial court so easily have dismissed this issue as being solely one of weight for the jury? It is not beyond the realm of possibility that some non-state person might beat a confession out of an individual in order to get that individual to take the blame for a crime. Under the circumstances where the individual was physically coerced to confess, should a trial court allow the statements in light of the egregious circumstances on the basis that the issue is one of weight for the jury; or should a trial court exercise its judgment first and keep the statements out due to their involuntary nature? The answer should be that an initial threshold determination must be made by the trial court before the issue can go to the jury. One can then alter the question by substituting "physical coercion" for "mental coercion." The days of using brute force to illicit a confession are giving way to more sophisticated methods that are mentally coercive. Colorado v. Connelly, 479 U.S. 157

(1986). See also State v. Sawyer, 561 So. 2d 278 (Fla. 2d DCA 1990) (substantial portions of interrogation suppressed because the statements were a product of psychological coercion by police and, therefore, involuntary.) The fact that mental coercive tactics were used in Mr. Snipes' case instead of physical ones should make no difference to the ultimate question of voluntariness.

Although no caselaw could be located on the trial level or by undersigned counsel on this exact issue, the answer should be that the initial voluntariness-of-the-inculpatory-statements issue is up to the trial court; and if the method used in obtaining the statements demonstrates that highly coercive tactics were used, the trial court should not let the issue go to the jury. The legal basis for such a rule can be analogized to the issue of the admission of child hearsay evidence pursuant to §90.803(23), Fla. Stat. (1995). Initially, the trial court has to make specific findings of reliability in order to allow the child hearsay in; and if the trial court deems the child hearsay reliable and, thus, admissible, the trial attorney can still argue its reliability to the jury via §2.04 of the Florida Standard Jury Instructions in Criminal Cases as to the weighing of the evidence. Similarly, the initial issue of voluntariness of a defendant's inculpatory statement when coercive state action and the 5th amendment is involved is up to the trial court; but the voluntariness of the statements can still be argued to the jury via §2.04(e) of the Florida Standard Jury Instructions in Criminal Cases once the trial court deems the defendant's statements to be admissible. These examples demon-

strate a need for a threshold determination of admissibility by the trial court before the jury gets the issue as a matter of weight. So, too, should the trial court have made an initial determination as to the voluntariness of Mr. Snipes' statements to his Uncle Martin before giving the issue to the jury as a matter of weight.

When the issue of a defendant's statements being voluntary is put into question due to highly coercive tactics, there should be a threshold determination by the trial court of the admissibility of the statements. In this case the trial court, finding no state-action involved, abandoned its responsibility and left the issue entirely up to the jury. This was an abuse of the trial court's discretion.

The next question is what is the remedy? There are 2 possibilities: (1) This Court can send the issue back to the trial court for a new hearing on the issue of admissibility and a new trial if the issue of admissibility is resolved in Mr. Snipes' favor; or (2) this Court can determine that the egregious circumstances surrounding the making of these statements requires their inadmissibility and, thus, a new trial. Mr. Snipes, of course, believes the latter remedy is required here. The evidence in this case clearly demonstrates the highly coercive and deceptive tactics used by Uncle Martin on his young and pliable nephew; the statements made by Mr. Snipes in response to these tactics were clearly involuntary and should not have been submitted to the jury. Mr. Snipes' youth was a well-known fact, and his mental abilities were highly question-

able.[6] Even before Dr. Merin testified that Mr. Snipes was emotionally immature, easily led by older persons, and under high levels of stress on a daily basis, Uncle Martin knew his nephew had been raped as a child and had expressed concerns about this to the police. (V13/T683,684) Uncle Martin, on the other hand, had served in the military for a period of time, worked as a private investigator, and was in law school at the time of trial. (V13/T672,682) He knew how to tap the phone calls, and he knew exactly what to say to illicit inculpatory statements from his nephew. Uncle Martin set out to set up his nephew; and his sophisticated, mentally coercive techniques were most successful. This Court should rule that the statements were involuntary and should not have been admitted at trial.

As for the matter of whether the use of these inadmissible statements at trial was harmless error or not, the error was harmful. As has already been argued above, the victim's identity in this case was an issue -- Mr. Snipes admitted to shooting someone but he did not know who he shot. The State had the deceased -- Mr. Mueller, but it needed to connect Mr. Snipes to Mr. Mueller's death. It could only do so circumstantially. The State needed as many of Mr. Snipes' statements as it could get to piece together the identity of who he said he killed. One piece unique to Uncle Martin Patterson was that the victim had a Mohawk. Without this, the identification of the victim becomes substantially weaker. The

---

[6] Appellant's mental condition must be considered when assessing voluntariness. Sawyer, 561 So. 2d at 285.

additional statements made to Uncle Martin also went to support other statements made by Mr. Snipes; and without the Uncle Martin statements, the remaining statements lack support. In addition, the statements made to the police are also under attack in this brief. If this Court suppresses these two groups of statements, very little is left to connect Mr. Snipes to the death of Mr. Mueller; so little that the evidence may not support a verdict. Under DiGuilio a new trial is required.

## ISSUE V

WHETHER APPELLANT IS ENTITLED TO A NEW TRIAL AND/OR PENALTY PHASE WHEN THE STATE WAS ALLOWED TO ELICIT FROM A MAIN STATE WITNESS THAT APPELLANT HAD NO REMORSE AND WAS A FUTURE DANGER TO THE COMMUNITY?

This particular issue impacts on both the guilt and penalty phases.[7] Most of the State's witnesses in this case had to do with the finding of the body and collecting of evidence. These witnesses could not connect Mr. Snipes to the homicide; only a few witnesses who repeated Mr. Snipes' statements could connect Mr. Snipes to a shooting, and only two of those could circumstantially connect Mr. Snipes to the homicide of Mr. Mueller. Martin Patterson, Mr. Snipes' uncle, was one of those witnesses; and Uncle Martin went to great lengths to get Mr. Snipes to make incriminating statements -- numerous phone calls with his nephew after the nephew was arrested (over 6 hours worth) that were surreptitiously taped without his nephew's knowledge, numerous letter between the two that he saved even though he told his nephew he was going to destroy them, and encouraging his nephew to speak to him with the implied promise of helping his nephew to obtain private legal counsel. (V13/T679-686)

The prosecutor apparently believed he had a problem with a close relative turning on his nephew in such a fashion; so in order to make his witness more palatable to the jury, the prosecutor asked Uncle Martin <u>why</u> he turned over everything to law enforcement officers. The response was, "I -- I thought about it for a couple

---

[7] See <u>Burns v. State</u>, 609 So. 2d 600 at 604 (Fla. 1992).

of months and I -- I just didn't see any remorse, and I was concerned about the welfare of the other folks in the community." (V13/T674) On cross-examination, defense counsel was then forced to address the claim of no remorse:

> [DEFENSE COUNSEL]: Q: Now as far as you saying that you saw no remorse, let me show you one of these letters. Let me ask you just to read this portion to yourself, if you would, and another portion if I may.
>
> Having reviewed those portions let me ask you again, are you telling us that David showed no remorse in his communications with you?
>
> [MARTIN PATTERSON] A: Aside from those two sentences, no.
>
> Q: Well, let's talk about those two sentences then. They talk about his being sorry, about his concern for the family, another reference to the grave and so forth. Do those not indicate remorse to you?
>
> A: Yes.
>
> Q: Would it be fair then to say that what you said earlier is incorrect?
>
> A: No.

(V13/T684,685) The prosecutor then on redirect felt the need to explore the area further, and at that point defense counsel objected to relevancy. The objection was overruled. (V13/T685)

> [PROSECUTOR] Q: Mr. Patterson, could you explain to us what you just said that you -- you agree that some of those lines in the letters perhaps show some remorse but that you didn't get that overall feeling, could you explain that to us?
>
> . . .
>
> A: I have over -- well over six hours of conversation with him, and in talking with him I never heard any remorse in his voice, never

> saw any emotions in fact, he could laugh while we talked about the murder. I just -- for -- for two sentences say I'm sorry in writing, I thought it was more manipulative than remorse, and I just didn't buy it.

(V13/T685,686) On re-cross, defense counsel continued to try to undo the damage caused by the prosecutor's questions:

> Q: The question simply you said earlier you felt that David was being manipulative?
>
> A: Yes.
>
> Q: It's saying here he doesn't want your money, that you worked too hard to get it, right?
>
> A: Correct.
>
> Q: "It would not be right to deprive you or any of my other relatives." Correct?
>
> A: That's true.

(V13/T689)

After the witness finished testifying, defense counsel objected and made a motion for mistrial and motion to strike the witness' testimony as to Mr. Snipes not having any remorse. The prosecutor said there was no error because it was not a feature, and defense counsel noted he did not immediately object because he thought he could correct the matter. However, when both he and the prosecutor continued to belabor the subject, it did become a feature. The motion for mistrial was denied; and when defense counsel was asked if he wanted a curative instruction, defense counsel refused saying that the instruction could not change anything but would just make it worse. (V13/T690-693) It is to be noted, however, that the initial comment made by Uncle Martin did more than just comment on

a lack of remorse -- it also indicated a fear for the community. Obviously, there would be no need to fear for the community for a deed already done unless there is a fear of future violence on Mr. Snipes' part. Neither comment could have been cured and erased from the jury's mind with an instruction.

The law in this area is very clear as to the State presenting evidence of no remorse. In 1983 this Court stated, "henceforth lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor." Pope v. State, 441 So. 2d 1073 at 1078 (Fla. 1983) (emphasis added). Pope's holding is still being followed. See Shellito v. State, 701 So. 2d 837 at 842 (Fla. 1997); Atwater v. State, 626 So. 2d 1325 (Fla. 1993); and Wuornos v. State, 644 So. 2d 1000 at 1009 (Fla. 1994). In these cases it was reiterated that commenting on a defendant's lack of remorse is error; but if the reference was of minor consequence (Shellito and Atwater) or if it was in the way the defendant confessed so that it can be construed as showing a lack of remorse there would not be an error without more (Wuornos). Shellito, Atwater, and Wuornos are not applicable in this situation.

The prosecutor's question to Uncle Martin was designed to elicit the comment that Uncle Martin believed his nephew had no remorse and that is why Uncle Martin was moved to turn his nephew's incriminating statements over to the police. This was not a "brief

reference" in that it gave the uncle moral justification to the jury for what he did. The prosecutor knew it was error to elicit statements about Mr. Snipes having no remorse, but he tried to hide the error by claiming it was not a "feature." Simply because the lack of remorse can be briefly stated initially should be no reason to allow a prosecutor to commit error because the reference was brief. It was clearly error for the prosecutor to elicit this statement, and this initial statement -- no matter how brief -- had to have had a great impact on the jury. This was a major State witness, and the State was bolstering that witness' credibility with the jury. Of course, when defense counsel tried to undo the damage that had been done, the hole got wider and deeper. Uncle Martin stood his ground on his opinion, and the prosecutor was allowed to come back on re-direct -- over objection -- to give specific reasons why he believed his nephew had no remorse. The "brief" remark had now become a thorough discussion of Mr. Snipes' lack of remorse. The State had no right to bring this matter up initially, and it definitely had no right to develop such an irrelevant and highly prejudicial subject. Shellito and Atwater are distinguishable.

In Wuornos an officer who took a confession from Wuornos noted that Wuornos had laughed while discussing the murder and said sometimes she felt guilty and sometimes she felt sad about the murder. This Court held that a defendant confessing in a way that can be construed as showing a lack of remorse is not error without more. In our case Mr. Snipes was not "confessing" to an officer, but

confiding in an uncle. More importantly, the uncle started out saying clearly it was his conclusion that his nephew had no remorse; and then he proceeded to give specific reasons which went way beyond laughing while discussing the homicide. Uncle Martin's discussion of his nephew's lack of remorse was not a minor reference nor was it an implication. The statements were error, and the error was not harmless.

The more applicable cases to be applied in this situation are Derrick v. State, 581 So. 2d 31 (Fla. 1991); and Kormondy v. State, 22 Fla. L. Weekly S635 (Fla. Oct. 9, 1997).

In Derrick a statement was made by a State witness in penalty phase over objection that the defendant had told the witness he had killed the victim and would kill again. It was argued that this statement was irrelevant and impermissibly showed lack of remorse and the possibility that the defendant would kill again. This Court agreed that the "testimony was erroneously admitted and constitutes reversible error." Derrick, 581 So. 2d at 36. The statement was not used in the guilt phase, so it was not relevant to the issue of guilt; and the statement was not relevant to any aggravating factor. This Court then noted lack of remorse was not rebuttal to evidence of remorse because it was introduced before the defense had presented any evidence. This Court then stated, "[t]he statement was highly prejudicial because it suggests that Derrick will kill again." Derrick, 581 So. 2d at 36. This Court then remanded for a new sentencing hearing. The testimony by Uncle Martin was very similar to that in Derrick. Testifying that he turned

everything over to the police because his nephew had shown no remorse and he feared for the community was totally irrelevant to the guilt phase (it did not go to Mr. Snipes' statements about the homicide), was an impermissible comment about no remorse, and was a highly prejudicial comment that suggested Mr. Snipes would kill again. These statements were made in the guilt phase and applied to both the guilt and penalty phases. Thus, these highly prejudicial and nonrelevant statements affected both the trial and the penalty phase.

Similarly in Kormondy the State was allowed to elicit in the penalty phase the defendant's statement that if he ever got out of jail he would kill two named individuals. Finding Derrick applicable this Court held that the "testimony was highly inflammatory and could have unduly influenced the penalty-phase jury. The manner in which the cross-examination was conducted effectively established another nonstatutory aggravating circumstance. It is important to note that our death penalty statute does not authorize a dangerousness aggravating factor." Kormondy, 22 Fla. L. Weekly at S638. This Court went on to state:

> The jury is charged with formulating a recommendation as to whether Kormondy should live or die. Testimony that Kormondy said he would kill again, when that testimony is not directly related to proving a statutory aggravating circumstance, is outside of the scope of evidence properly presented by the State during the penalty phase. We find that this evidence in this instance constitutes impermissible nonstatutory aggravation. For this evidence to be admissible at the penalty-phase proceeding, it has to be directly related to a specific statutory aggravating factor. Otherwise, our turning of a blind eye to the fla-

> grant use of nonstatutory aggravation jeopardizes the very constitutionality of our death penalty statute. Finally, we are unable to say that this evidence about Kormondy's desire to commit future killings, when presented to the jury by an attorney, was harmless beyond a reasonable doubt.

Kormondy, 22 Fla. L. Weekly at S638. This Court then reversed for new penalty-phase proceeding. The testimony by Uncle Martin also clearly indicated that if released Mr. Snipes would be dangerous. Why else would Uncle Martin be "concerned about the welfare of the other folks in the community"? This testimony was, as noted above, totally irrelevant to the guilt phase and was highly prejudicial in that it indicated Mr. Snipes would kill again. The source for this testimony was an uncle who had several contacts with Mr. Snipes after Mr. Snipes was arrested and who had tricked Mr. Snipes into trusting his uncle. The close family relationship, the several hours of tapes, and the several letters helped to bolster Uncle Martin's credibility -- along with his being in law school, having been in the military, and having been a private investigator. Uncle Martin's expressed belief that he had to make sure his nephew was convicted -- i.e., turning over all tapes and letters to the State Attorney's office -- out of concern for the people in the community has to be as prejudicial as the witness in Kormondy who was an attorney.

As a result of the prosecutor's having introduced this highly prejudicial and irrelevant statement and then developing it further on redirect in the guilt phase, both the guilt and penalty phases were tainted. The tapes and letters were not introduced at trial,

so the only evidence of Mr. Snipes' statements by Uncle Martin was Uncle Martin's testimony. As noted in Issue IV, there was a problem with the voluntariness of these statements that was argued to the jury. (V14/T841-847) Also as noted above, the only testimony that connected Mr. Snipes to this homicide were his statements to others, and some of those statements were too vague to identify the victim. Uncle Martin's testimony was more specific and helped make the circumstantial case against Mr. Snipes. The highly prejudicial and irrelevant comments made by Uncle Martin had to have had an effect on the jury's verdict in the guilt phase. Under DiGuilio a new trial is required.

At the very least, a new penalty phase is required. As will be fully developed in the next issue, the mitigating factors in this case are significant and substantial: Mr. Snipes had a very difficult childhood what with his constant exposure to alcohol and drug use by all the family adults around him, his own battle with drugs and alcohol, and his being sexually abused for years by an uncle while the rest of the family turned a blind eye; Mr. Snipes constantly operated at a high level of stress/duress caused by many years of living with a dysfunctional family consisting of horrendous role models. Mr. Snipes had a behavioral disorder, and he was easily led by older persons. The true masterminds of the crime -- Bieber and Saladino -- used Mr. Snipes to do their dirty work, and Bieber remains free while Saladino was sentenced to only 15 years on a reduced charged of second-degree murder (a fact not known to the jury when it recommended Mr. Snipes' death sentence). Mr.

Snipes was still only a child when he was approached, and his age was also a major mitigating factor. In addition, Mr. Snipes was still loved by his family, felt remorse, and had potential for rehabilitation in a prison environment.

On the other hand, the State only had 2 aggravating factors; and these 2 aggravators were closely connected. Both were committed within about the same period of time prior to the homicide. The cold-calculated-premeditated aggravator occurs during the planning stage, and the for-pecuniary-gain aggravator occurs the minute the defendant agrees to commit murder for money. See Bonifay v. State, 626 So. 2d 1310 at 1313 (Fla. 1993) (in a contract murder case where the contractor later refused to pay, the defendant still expected to receive payment so the for-pecuniary-gain aggravator still applied). According to the statement given to Agent Futch, this all happened in a relatively short period of time. In addition, even though a contract killing for money is considered two separate aggravators (planning and the money), these aggravators almost always go hand-in-hand.

Thus, there were substantial mitigators for the jury and trial court to consider and only 2 closely-related/connected aggravators. The highly prejudicial and irrelevant testimony by Uncle Martin of how his nephew had no remorse and was a danger to the community had to have had an affect on the jury's recommendation and had an affect on the trial court's decision (the trial court noted the lack of remorse in its sentencing order -- V9/R790). As in Derrick and Kormondy, a new penalty phase is required.

## ISSUE VI

WHETHER APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE WHEN THE MITIGATING FACTORS OUTWEIGH THE AGGRAVATING FACTORS?

Under Florida law, the death penalty is reserved only for the most aggravated and least mitigated homicides. State v. Dixon, 283 So. 2d 1 at 7 (Fla. 1973); Fitzpatrick v. State, 527 So. 2d 809 at 811 (Fla. 1988); Songer v. State, 544 So. 2d 1010 at 1011 (Fla. 1989); DeAngelo v. State, 616 So. 2d 440 at 443 (Fla. 1993); Kramer v. State, 619 So. 2d 274 at 278 (Fla. 1993). In addition, the 8th and 14th Amendments to the United States Constitution require that capital punishment be imposed fairly and with reasonable consistency, or not at all. Eddings v. Oklahoma, 455 U.S. 104 (1982); U.S. Const. amends. VIII and XIV. This Court's independent appellate review of death sentences is crucial to ensure that the death penalty is not imposed arbitrarily or irrationally. Parker v. Dugger, 498 U.S. 308 (1991). This requires an individualized determination of the appropriate sentence on the basis of the character of the defendant and the circumstances of the offense. Id.

To meet these constitutional requirements, this Court conducts proportionality review of every death sentence to prevent the imposition of unusual punishment which is also prohibited by Article I, §17, of the Florida Constitution. Kramer, 619 So. 2d at 277; Tillman v. State, 591 So. 2d 167 at 169 (Fla. 1991). "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." Fitzpatrick, 527 So. 2d at 811. Because death is a uniquely irrevocable penalty, death sentences require more intensive judicial scrutiny than lesser penalties. Tillman, 591 So. 2d at 169. "While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is nonproportional," this Court is "required to weigh the nature and quality of those factors as compared with other similar reported death appeals." Kramer, 619 So. 2d at 277.

This case is certainly not among the most aggravated murder cases in Florida. While the trial court found two aggravators that were closely connected -- cold-calculated-premeditated aggravator and for-pecuniary-gain aggravator where Mr. Snipes agreed to commit murder for money, the trial court found 37 mitigating factors. Several of these mitigators must be given great weight:

> 1. Mr. Snipes was only 17 when the homicide occurred.
>
> 2. Mr. Snipes was sexually abused as a young child by an uncle, and this abuse went on for some time without the family stopping it even after the family learned of the abuse.
>
> 3. Mr. Snipes started abusing drugs -- glue, gasoline, marijuana, LSD -- when he was 12 or 13.
>
> 4. Mr. Snipes' family was very dysfunctional in that his biological parents drank and other family members were alcoholics or used marijuana frequently.
>
> 5. Mr. Snipes has a behavioral disorder as a result of his dysfunctional upbringing and poor role models.

6. Mr. Snipes constantly operated at a high level of stress/duress caused by many years of living with a dysfunctional family.

7. Mr. Snipes was easily led by older persons.

8. Mr. Snipes had a very difficult childhood because of being raised in a dysfunctional family.

9. Mr. Snipes' parents divorced when he was 3, and the divorce was not a pleasant one with custody over the children being a major battle.

10. Mr. Snipes was remorseful.

11. Mr. Snipes expressed his remorse when he did not know such an expression of remorse would be of benefit to him.

12. Mr. Snipes had rehabilitation potential within the prison community.

13. Mr. Snipes had good character traits in that he is a trusting, loving, sweet, friendly, warm, tenderhearted and affectionate individual.

14. Mr. Snipes got his GED on his own initiative.

15. Mr. Snipes had been in a drug rehabilitation program.

16. Mr. Snipes was not known to be violent prior to this incident.

17. Mr. Snipes had family support even after his arrest and conviction.

18. Mr. Snipes had self-destructive traits; he deals with his anxiety by taking drugs and alcohol and by acting tough.

19. Mr. Snipes has a psychological dysfunction based on the behavioral disorder.

20. Mr. Snipes lacked any beneficial male role models when growing up due to divorce, alcohol, drugs, violence, and sexual abuse.

21. Mr. Snipes' childhood was very traumatic due to his dysfunctional family and the alcohol and drugs widely used by his family and by himself.

22. Mr. Snipes was suffering from some mental or emotional disturbance when he committed the crime even if it was not extreme.

23. Mr. Snipes suffers from some impairment so as to affect his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law due to his dysfunctional family life. Mr. Snipes' general history of alcohol and substance abuse, the sexual abuse, the behavioral problems, and the aunt's belief that her nephew had to be on drugs at the time.

24. Mr. Snipes' pretrial behavior was good.

25. Mr. Snipes trial behavior was good.

26. Mr. Snipes made voluntary statements prior to his arrest.

27. Mr. Snipes made voluntary statements after his arrest.

28. The State's conviction of Mr. Snipes was solely based on Mr. Snipes' voluntary statements.

29. Mr. Snipes' voluntary statements were instrumental in arresting (an convicting)[8] co-defendant Saladino.

30. Mr. Snipes' voluntary statements were instrumental in obtaining the warrant for co-defendant Bieber's arrest.

31. But for Mr. Snipes' statements to others he would not have been arrested.

---

[8] Since Mr. Snipes' sentencing, Mr. Saladino pled guilty and was sentenced on a lesser charge.

32. Mr. Snipes did not flee the jurisdiction (as Bieber did) even though he had ample opportunity to do so.

33. Mr. Snipes is a loving and caring father, and he has been teaching his son right from wrong.

34. Life in prison will allow Mr. Snipes some sort of meaningful parenting role in that Mr. Snipes has had contact with his son while in prison.

35. Mr. Snipes' wife was willing to relocate so that Mr. Snipes can see his son.

36. Mr. Snipes has a religious devotion.

37. The alternative sentence of life would have satisfactorily punished Mr. Snipes for the crime.

As noted above, several of these mitigators must be given great weight; however, although the trial court claimed it was giving Mr. Snipes'-sexual-abuse-as-a-child mitigator considerable weight, in the same breath the trial court diminished the mitigator by stating Mr. Snipes made a choice to kill for $1000 and the uncle's sexual abuse "did not enter into that equation." (V9/R784) In addition, the trial court gave only slight weight to Mr. Snipes' history of drug and alcohol abuse because there was no evidence (other than Mr. Snipes' statement) that he was under the influence of drugs or alcohol at the time of the killing. "The court does not find that his drug problem contributed to or was a factor in the killing." (V9/R784) Both of these conclusions are based on the erroneous assumption that years of psychological and physical abuse during a defendant's formative childhood and adolescent years has no affect on the penalty phase if the abuse ended prior to the

homicide. This erroneous assumption/conclusion by the trial court is directly in conflict with this Court's holding in Nibert v. State, 574 So. 2d 1059 (Fla. 1990).

As this Court stated in Nibert, Id. at 1062:

> . . . Nibert 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. See, e.g., Brown v. State, 526 So. 2d 903, 908 (Fla.) (defendant's disadvantaged childhood, abusive parents, and lack of education and training, constitute valid mitigation and must be considered), cert.denied, 488 U.S. 944, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988).

(Emphasis added.) Thus, the fact that Mr. Snipes had been sexually abused starting as a young child and continuing on for years so as to occur during his formative childhood and adolescent years was a major mitigating circumstance. It did not got away simply because Mr. Snipes' abuse eventually came to an end (with no help from his family who allowed the abuse to continue even after the abuse became known). Similarly, the trial court's rejection of Mr. Snipes'

testimony that he was on drugs very heavy at the time of the incident (V8/R707) does not diminish the fact that Mr. Snipes started taking drugs and alcohol at a very early age -- 12 or 13 -- and this abuse went on for years. This history played an import role in the agreeing and committing of the homicide despite the trial court's finding of "slight weight." In Nibert, the appellant's starting to drink at the early age of 12 was one of the large quantum of mitigating factors which ultimately resulted in this Court's reducing the sentence to life. This same mitigator must be given great weight in Mr. Snipes' case.

Nibert had other mitigators that are also present in Mr. Snipes' case. In addition to the psychological and physical abuse Nibert suffered as a child (alcoholic mother who beat her children, forced son to start drinking alcohol at about 11, having sex with men brought home from bars in front of the children), Nibert felt a great deal of remorse and had a good potential for rehabilitation in a structured environment such as prison. This Court held that the potential for rehabilitation -- even in a prison environment -- and the appellant's remorse were valid mitigators. Nibert, 574 So. 2d at 1062. These mitigators also exist in Mr. Snipes' case. Mr. Snipes had a very difficult childhood that consisted not only of his sexual abuse but also of his constant exposure to alcohol and drug use by all the family adults around him. Years of living with a dysfunctional family consisting of horrendous role models caused a behavioral disorder in Mr. Snipes. Dr. Merin (also the clinical psychologist and expert used in Nibert) believed Mr. Snipes was

operating at a high level of mental duress/stress due to his bad childhood, and this high level of duress/stress existed at the time of the killing. Dr. Merin also believed Mr. Snipes had the potential for rehabilitation in a confined environment and Mr. Snipes' expression of remorse for the victim, the victim's family, and his own family was genuine. (V7/T443-476)

As for aggravators, Nibert only had one (heinous, atrocious and cruel for stabbing victim 17 times) and Mr. Snipes had two (agreeing to kill --CCP -- for pecuniary gain). As pointed out in Issue V, however, these 2 aggravators are closely connected. Usually agreeing to kill someone is for pecuniary gain of some kind, and both aggravators occur at about the same time. The CCP aggravator occurs during the planning stage, and the for-pecuniary-gain aggravator occurs the minute the defendant agrees to commit murder for money. See Bonifay. In this case both occurred in a very short period of time, and the planning was not very extensive (getting a map from Saladino, getting a gun from a friend, and parking the car down the street). This Court considered the "large quantum of uncontroverted mitigating evidence" in Nibert to outweigh the aggravator and held the death penalty to be "disproportional punishment when compared to other cases decided by this Court." Nibert, 574 So. 2d at 1062, 1063. Because there was substantial mitigation, the death penalty was "inappropriate even when the aggravating circumstance of heinous, atrocious, or cruel has been proved." Id. at 1063. This Court then reversed and remanded

the sentence for the imposition of life imprisonment.[9] Although Mr. Snipes had 2 aggravators, these aggravators were closely connected. In addition, Mr. Snipes had additional substantive mitigators including his age -- 17 at the time. In light of the similarities between Nibert and Mr. Snipes' cases, Mr. Snipes' death sentence should also be declared disproportionate with a reduction to life. At the very least, a new sentencing hearing should be ordered in order to have the trial court reweigh the mitigators and aggravators.

Another case involving similar mitigators and 2 aggravators in which this Court found the death penalty disproportionate to other cases is that of Livingston v. State, 565 So. 2d 1288 (Fla. 1988). In Livingston, the 17-year-old defendant killed a convenience store clerk during a robbery. There were two aggravators -- previous conviction of a violent felony and committed during armed robbery -- and several mitigators which this Court held effectively outweighed the aggravators:

> Livingston's childhood was marked by severe beatings by his mother's boyfriend who took great pleasure in abusing him while his mother neglected him. Livingston's youth, inexperience, and immaturity also significantly mitigate his offense. Furthermore, there is evidence that after these severe beatings Livingston's intellectual functioning can best be described as marginal. These circumstances, together with the evidence of Livingston's extensive use of cocaine and marijuana, counterbalance the effect of the factors found in aggravation. Accordingly, we find that this case does not warrant the death penalty and,

[9] The jury in Nibert had recommended death. Nibert, 574 So. 2d at 1061.

> therefore, vacate that sentence and direct the trial court to resentence Livingston to life imprisonment with no possibility of parole for twenty-five years.

Livingston, 565 So. 2d at 1292 (emphasis added). The mitigators in Mr. Snipes' case are strikingly similar to those in Livingston: both were 17; both had an extensive drug use; both had extremely difficult childhoods; and whereas Livingston had marginal intellectual functioning as a result of his childhood beatings, Mr. Snipes developed a behavioral disorder as a result of his childhood with a dysfunctional family and being sexually abused. Even though the jury recommended death and the trial court imposed death in Livingston, this Court considered the circumstances revealed in the record in relation to other decisions, as it is required to do in reviewing death sentences. Menendez v. State, 419 So. 2d 312 (Fla. 1982); Livingston, 565 So. 2d at 1292. This Court then determined that the mitigators outweighed the 2 aggravators and reduced the sentence to life. The same result is required in Mr. Snipes' case.

Most recently in Urbin v. State, 23 Fla. Law Weekly S257 (Fla. May 7, 1998), this Court reversed a death sentence and reduced it to life in a situation very similar to Mr. Snipes'. In Urbin there were 2 aggravators -- prior violent felony and merged aggravators of murder committed in the course of a felony and murder for pecuniary gain -- and strong mitigators -- appellant was 17, appellant's capacity to appreciate the criminality of his conduct was substantially impaired at the time of the shooting, extensive evidence of parental abuse and neglect, appellant's mother in prison

for drug crimes during appellant's formative years (11-13). This Court particularly focused on Urbin's age of 17:

> In Allen v. State, 636 So. 2d 494, 497 (Fla. 1994), we held that the death penalty was either "cruel or unusual if imposed upon one who was under the age of sixteen when committing the crime; and death thus is prohibited by article I, section 17 of the Florida Constitution." Here the defendant is seventeen, below the age of majority, although above the constitutional line for the death penalty. However, considering that it is the patent lack of maturity and responsible judgment that underlies the mitigation of young age, Livingston, the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigator becomes. This is especially true when there is extensive evidence of parental neglect and abuse that played a significant role in the child's lack of maturity and responsible judgment.

Urbin, 23 Fla. Law Weekly at S259. This Court also emphasized Urbin's parental neglect and abuse as a mitigating circumstance. This Court then concluded in combination with the other mitigating circumstances, "Urbin's age is an extremely weighty mitigator" thus:

> For all of the reasons detailed above, we conclude that this tragic killing, while sufficient to result in the seventeen-year-old defendant's imprisonment for the rest of his life without the possibility of parole, does not belong in the category of the most aggravated and least mitigated of first-degree murders that merit imposition of the death penalty. Accordingly, we find that death is a disproportionate penalty in this case.

Id.

Mr. Snipes' case is very similar to Urbin's: Both had two aggravators. Both were 17 at the time of the shooting. Both had

extremely difficult childhoods with abuse, neglect, and drugs and alcohol playing a major role with the adults who raised these boys. (Mr. Snipes was not "abandoned" in the sense that his parents left him, but he was abandoned in the sense that his parents left him in a situation of sexual abuse by an uncle that was allowed to continue even after the family knew of the sexual abuse.) Both turned to drugs and alcohol at a very early age. Both had juries that recommended death and a trial court that imposed death. Both are entitled to have their sentences reduced to life. In Mr. Snipes' case there is even more mitigating circumstances -- his behavioral disorder, his remorse, his rehabilitation potential, his good character traits, his family support, his voluntary statements that made the State's case against him and his co-defendants, and his religious devotion -- that combine to make his age an extremely weighty mitigator. As in Urbin, which relies heavily on Livingston, Mr. Snipes is entitled to have his sentence reduced to life.

Another case involving similar mitigators and one aggravator wherein the jury recommended death and the trial court imposed death, but this Court found death disproportionate and imposed life is Songer v. State, 544 So. 2d 1010 at 1011 (Fla. 1989):

> The aggravating circumstance in this case was that Songer was under a sentence of imprisonment in Oklahoma when the killing was committed. The three statutory mitigating circumstances found to be supported by the record were that the crime was committed while Songer was under the influence of extreme mental or emotional disturbance, that Songer's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, and that his age, twenty-three years old, was a factor.

> The court also listed seven factors that were proven by a preponderance of the evidence: Songer's sincere and heartfelt remorse; his chemical dependency on drugs, which caused significant mood swings; his history of adapting well to prison life and using the time for self-improvement; his positive change of character attributes, as manifested in a desire to help others; his emotionally impoverished upbringing; his positive influence on his family despite his incarceration; and his developing strong spiritual and religious standards.

Mr. Snipes shares most of these mitigating circumstances: His behavioral disorder caused by his being raised in a dysfunctional family (alcohol and drug use rampant in the family and sexual abuse by uncle that went unchecked by family) directly impacted on Mr. Snipes' ability to adjust himself to life according to Dr. Merin. Although the trial court refused to find the statutory mitigators of being under the influence of extreme mental or emotional disturbance or being substantially impaired when it comes to his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law, Mr. Snipes was constantly operating at a high level of stress, had self-destructive traits by dealing with his anxiety with drugs and alcohol, he had a psychological dysfunction, he suffered from some mental or emotional disturbance at the time of the incident, and he suffered from some impairment so as to affect his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. In other words, Mr. Snipes' years of living with a dysfunctional family that both physically and psychologically abused him caused a behavioral disorder that made him incapable of making adequate social judgments. In addition, Mr. Snipes was significantly

younger than Songer;[10] Mr. Snipes was also sincerely remorseful; Mr. Snipes also had a chemical dependency on drugs; Mr. Snipes also has the potential for rehabilitation in a prison environment; Mr. Snipes also had a positive influence on his family -- as testified to by his parents, aunts, and uncle -- despite his actions and incarceration; and Mr. Snipes has also developed a sincere religious devotion. As in Songer, Mr. Snipes' death sentence is disproportionate and must be reduced to life.

In Caruthers v. State, 465 So. 2d 496 (Fla. 1985), this Court found the death sentence not appropriate where there was one aggravator and several mitigators including a voluntary confession, mutual love and affection of family and friends, and remorse. Mr. Snipes also has these mitigators and they should substantially contribute to this Court's finding that his death sentence is not appropriate.

In Boyett v. State, 688 So. 2d 308 (Fla. 1996), there were 2 aggravators -- CCP and committed in the course of a burglary -- and several mitigators. This Court found that the mitigating evidence supported the jury recommendation of life:

> This evidence includes Boyett's age (18 at the time of the incident); past history of sexual abuse; ongoing, significant emotional and psychological problems; traumatic family life; history of drug abuse; past relationship with the victim; remorse; and cooperation with law enforcement officials.

Id. at 310. This Court then reduced Boyette's sentence to life. Similarly, Mr. Snipes had 2 aggravators and most of the same

---

[10] See Ellis v. State, 622 So. 2d 991 at 1001 (Fla. 1993).

mitigators -- age (but Mr. Snipes was a year younger); past history of sexual abuse; ongoing, significant emotional and psychological problems; traumatic family life; history of drug abuse; remorse; and cooperation with law enforcement. Mr. Snipes's case, however, is even more mitigating inasmuch as he has potential for rehabilitation in prison, had family support, and had developed a sincere religious devotion. Thus, in a situation with the same number of aggravators but with even less mitigation, a jury recommended life and this Court overrode the trial court's death sentence to impose a life sentence. A similar result is required in Mr. Snipes' case.

In addition to the above-stated mitigators and case law which clearly demonstrate that death is not appropriate in this case, there is one other mitigating circumstance that has arisen since Mr. Snipes' sentencing -- the sentencing of co-defendant Saladino to only 15 years of prison after he pled to the reduced charge of second-degree murder. Mr. Saladino did not enter a plea and get sentenced until several months after Mr. Snipes was sentenced to death. (SV/R1-18) The trial court attempted to deal with the uncertainty of Saladino's fate in its sentencing order on Mr. Snipes by declaring Mr. Snipes' death sentence would not be out of proportion with regard to the co-defendants "even if the co-defendants were to receive a life sentence" because Mr. Snipes' involvement was "so great." (V9/R786,787) There are 3 problems with this finding: (1) The issue was premature because the co-defendants' outcome was not yet known. The trial court should not have tried to anticipate and speculate on Saladino's outcome. (2)

In actuality, Saladino was allowed to plead to a reduced charge and get a very small sentence of only 15 years. This plea agreement was, of course, with the State's agreement and with the victim's family concurrence. Thus, the trial court's belief that a "life" sentence for Saladino would not make a death sentence for Mr. Snipes disproportionate is erroneous. Saladino's 15-year sentence is much shorter than what the trial court expected and is much more disproportionate to Mr. Snipes' death sentence. (3) The trial court's findings are factually erroneous in that they are not supported by competent substantial evidence. This last aspect requires further discussion.

In Puccio v. State, 701 So. 2d 858 at 860 (Fla. 1997), this Court set out the standard for reviewing a defendant's death sentence when co-perpetrators were sentenced to lesser punishments:

> A trial court's determination concerning the relative culpability of the co-perpetrators in a first-degree murder case is a finding of fact and will be sustained on review if supported by competent substantial evidence. See generally Scott v. Dugger, 604 So.2d 465 (Fla. 1992) (relying on the factual statements of the trial judge concerning the relative culpability of the co-perpetrators). Our review of the present record, however, shows that the trial court's determination is not supported by competent substantial evidence.

By examining the facts in the case, this Court concluded "that the trial court's determination that Puccio was more culpable than the others is not supported by competent substantial evidence in the record . . . ." Puccio, 701 So. 2d at 863. This Court then found Puccio's death sentence to be disproportionate when compared to the sentences of other equally culpable participants. The key word

here is "participants," because not all equally culpable participants are "triggermen." The following cases are examples where contractors or dominant players in the murder for hire were found to be just as culpable as the "triggerman" or even more culpable, justifying their death sentences.

In Williams v. State, 622 So. 2d 456 (Fla. 1993), the defendant ran a drug trafficking ring that encompassed most of Florida. Williams directed his henchmen/enforcers to kill the victim and recover his money and drugs. Some of the actual triggermen got death sentences, and Williams tried to claim his death sentence was disproportionate since he was less culpable than the actual triggermen. This Court rejected that argument by stating that this is the type of "criminal organization, enforcement-style killing" in which this Court has upheld the death sentence.

In Larzelere v. State, 676 So. 2d 394 (Fla. 1996), the defendant planned the murder in a cold and calculated manner, she instigated and masterminded and was the dominant force in the planning and execution of the murder. The defendant was also present when the murder occurred. Even though the triggerman was not convicted, the defendant's death sentence was not disproportionate.

In Smith v. State, 365 So. 2d 704 (Fla. 1978), the defendant ordered his co-defendant to douse the car and set it on fire. The victim was inside and died from either incineration or asphyxiation from the smoke. Smith argued that because his co-defendant, the one who actually killed the victim, got life, his death sentence was disproportionate. This Court found Smith's culpability to be

much greater than that of his co-defendant in that Smith originated the idea and directed his co-defendant to kill the victim. The co-defendant was "dominated" by Smith.

This Court recently reiterated in Gordon v. State, 704 So. 2d 107 at 117 (Fla. 1997), that a co-defendant under the substantial domination of another person, among other mitigating factors, can get a life sentence and it not be disproportionate with those that got death.

The facts in Mr. Snipes' case clearly show that his co-defendants were equally, if not more culpable, than Mr. Snipes. Mr. Bieber and Mr. Mueller were heavily involved in steroids. At the March 14, 1997, hearing defense counsel pointed out that the 2 were involved in international drug trafficking; and such agencies as Interpol, D.E.A., F.D.L.E., F.B.I. and F.D.A. are all still looking for Mr. Bieber. (V8/R723) Mr. Bieber wanted Mr. Mueller dead, and he asked Mr. Saladino to find someone to do the killing. Mr. Saladino's participation in the drug trafficking is not set forth, but he did as instructed. It is known that Mr. Saladino asked another person -- Chris Johnson -- to kill someone, and Mr. Johnson refused. At about the same time, Mr. Saladino asked Mr. Snipes. Mr. Saladino, who was several years older than Mr. Snipes, offered Mr. Snipes $1000, supplied Mr. Snipes with directions, and then paid Mr. Snipes afterward. Mr. Snipes borrowed a gun that had bullets already in it from a friend, went to the address, and shot the person who answered the door. There was not a lot of planning to this homicide, unlike the situation in Gordon where the killing

was painstakingly planned for months and included extensive surveillance. Dr. Merin testified that Mr. Snipes was not able to make appropriate social judgments, and he was easily led by older persons. Mr. Snipes was also acting under a high level of stress on a daily basis. Mr. Snipes was a pawn in a major drug trafficking ring; Bieber and Saladino were the dominant forces in this homicide; and what little planning that went on in this case was mostly done by Saladino who hired a "triggerman," supplied directions, and paid the money. Mr. Snipes was dominated by Mr. Saladino. Mr. Saladino's pleading to a lesser charge and 15-year sentence is an extremely disparate sentence when compared to Mr. Snipes' death sentence. In light of such disparity, Mr. Snipes' sentence should be reduced to life.[11]

Mr. Snipes' extensive evidence of substantial mitigating circumstances -- including his age (17), his dysfunctional family with the alcohol and drugs, his being sexually abused for years by an uncle while his family turned a blind eye to what was happening, his use of drugs starting at a young age, his behavioral disorder, his remorse, his rehabilitation potential, his good character traits, his family support, his voluntary statements that made the State's case against him and co-defendants Saladino and Bieber, his religious devotion, and Saladino's short sentence -- outweighed the 2 aggravators that were closely connected. The death sentence

---

[11] At this point Mr. Bieber remains at large. Should he ever be brought to justice and sentenced, Mr. Snipes' death sentence will have to be re-evaluated in a Rule 3.850 hearing. See Scott v. Dugger, 604 So. 2d 465 (Fla. 1992).

imposed by the trial court is disproportionate both to the circumstances of this offense and in comparison with the numerous cases in which this Court vacated death sentences because of similar mitigating circumstances. The death sentence must be vacated and reduced to life.

## CONCLUSION

Based on the foregoing arguments and authorities, this Court should reverse and remand the trial court's sentence in this case.

## 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 28th day of May, 1998.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

DEBORAH K. BRUECKHEIMER
Assistant Public Defender
Florida Bar Number 0278734
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

DKB/ddv