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

REPLY BRIEF OF APPELLANT

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STATEMENT OF TYPE USED

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STATEMENT OF THE CASE AND FACTS

Appellant relies on the Statement of the Case and Facts contained in his initial brief.

ARGUMENT

ISSUE I

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

Appellant relies on his initial brief for this issue.

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?

In response to Mr. Snipes' argument in this issue, the State argues that Section 924.051, Florida Statutes (Supp. 1996), has changed the standard of review. According to the State, State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), is no longer the applicable standard of review. Instead of the State having the burden of showing that beyond a reasonable doubt the error had no affect on the jury's verdict -- i.e., State has burden to show error was harmless, the State claims the new statute puts the burden on the appellant to prove the error was prejudicial. The State's claim that the standard of review has changed is wrong.

The statutory change referred to in the State's brief has been in effect since July 1, 1996; yet, only three district courts of appeal have addressed the statutory change to the burden of proof. The Fourth District in Goodwin v. State, 23 Fla. Law Weekly D918 (Fla. 4th DCA April 8, 1998), held that the Legislature has the authority to enact a standard of review and had changed the existing harmless error standard set forth in DiGuilio when it enacted section 924.051(7), Fla. Stat. (Supp. 1996). The court did note that the DiGuilio standard of review still applies to constitutional errors. See Carter v. State, 710 So. 2d 110 (Fla. 4th DCA 1998), wherein the DiGuilio standard was used in an issue where the error had constitutional due process implications. On rehearing,

Goodwin certified the question on the harmless error standard. Goodwin v. State, 23 Fla. Law Weekly D1538 (Fla. 4th DCA June 24, 1998). However, in Mason v. State, 23 Fla. Law Weekly D1540 (Fla. 4th DCA June 24, 1998), the Fourth District further addressed the harmless error standard in a criminal case and held:

> It is important, when determining the effect of an error on the fact finder, to keep in mind that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). Accordingly, even where the defendant in a criminal case has the burden of demonstrating the prejudicial effect of the error, that burden will be easier to carry than the burden of an appellant in a civil case in which the burden of proof in the trial court is lighter, i.e., preponderance of the evidence or clearer and convincing evidence.

Id. at 1541 (emphasis added). The Fourth District, however, does not say what the burden is.

The Fifth District in Jackson v. State, 707 So. 2d 412 at 414 (Fla. 5th DCA 1998), read §924.051(1)(a), Fla. Stat. (Supp. 1996); §924.051(7), Fla. Stat. (Supp. 1996); and §924.33, Fla. Stat. (S1997), together with DiGuilio and concluded that "a defendant meets the burden of section 924.051(7) if he demonstrates a 'reasonable possibility' that the error complained of contributed to the verdict." Thus, the Fifth District found the harmless error standard had changed the DiGuilio standard under the Criminal Appeal Reform Act of 1996, but it came up with a standard not as burdensome to the defendant as the Fourth District's new standard.

The First District in Jones v. State, 23 Fla. Law Weekly D2020 (Fla. 1st DCA August 19, 1998), relied on Goodwin without discussion and certified the following question to this Court:

> IN APPEALS WHICH DO NOT INVOLVE CONSTITUTIONAL ERROR, DOES THE ENACTMENT OF SECTION 924.051-(7), FLORIDA STATUTES, ABROGATE THE HARMLESS ERROR ANALYSIS ANNOUNCED IN DIGUILIO V. STATE, 491 SO. 2D 1129 (FLA. 1986)?

The remaining district courts of appeal continue to use DiGuilio as the standard of review in determining whether or not an error is harmless: Corpus v. State, 23 Fla. Law Weekly D2285 (Fla. 2d DCA Oct. 9, 1998)[1]; and White v. Singletary, 23 Fla. Law Weekly D1868 (Fla. 3d DCA Aug. 12, 1998). In fact, this Court has continued to apply the DiGuilio standard of review as to the harmless error analysis. In the case of Mahn v. State, Case No. 83,423 (Fla. April 16, 1998), this Court used DiGuilio as its standard of review for determining harmless error in the penalty phase issues.

Should this case be the first to raise the issue of a new standard of review in this Court, the new statutory standard does not apply to this issue for two reasons: (1) formulating the standard of review is inherent in this Court's rule-making authority, and (2) the U.S. Supreme Court has set forth a standard of review for constitutional errors that cannot be changed by the Florida legislature.

As for the first reason, establishing the standard of review is inherent in this Court's rule-making authority. See Justice

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[1] In Denson v. State, 23 Fla. Law Weekly D1216 (Fla. 2d DCA May 13, 1998), the Second District did state in dicta that the standard for review is determined by the courts.

Grimes' specially concurring opinion in Ciccarelli v. State, 531 So. 2d 129 at 132 (Fla. 1988), "the standard of review for harmless error is properly established by this Court"; and State v. Lee, 531 So. 2d 133, 134 fn.1 (Fla. 1988), which noted that the Supreme Court "retains the authority . . . to determine when an error is harmless and the analysis to be used in making the determination." Thus, placing the burden of proving harmless error on the State is exclusively within this Court's authority. Ciccarelli; Lee v. State, 508 So. 2d 1300 (Fla. 1st DCA 1987), approved, State v. Lee, 531 So. 2d 133 (Fla. 1988). Inasmuch as §924.051, Fla. Stat. (Supp. 1996), tries to usurp this Court's jurisdiction in determining the standard of review, the statute violates the separation of powers clause of the Florida Constitution, Art. II, sec. 3, and is unconstitutional.[2] This Court noted in Amendment to Fla.R.App.P., 685 So. 2d 773, 774 (Fla. 1996), that the Legislature could "place reasonable conditions upon [the right of appeal provided by the Florida Constitution] so long as they do not thwart the litigants' legitimate appellate rights." In creating a new harmless error

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[2] In DiGuilio, 491 So. 2d at 1139, fn.12, this Court refers to a "legal reform movement of the early twentieth century which introduced the rule of harmless error as a means of substituting judgment for automatic application of rules in order to correct the history of abuses whereby appellate courts 'tower[ed] above the trials of criminal cases as impregnable citadels of technicality.'" The Criminal Appeal Reform Act of 1996, however, is not aimed at a 'history of abuse' wherein per se rules of automatic reversal are utilized, but is aimed at reducing or eliminating what few criminal cases are reversed for a new trial based on an harmless error analysis developed under DiGuilio. The standard set forth in DiGuilio can hardly be described as one based on a technicality. The Legislature has gone too far in creating a standard of review for harmless error that makes it impossible for a defendant to obtain a new trial.

standard for review that makes it impossible for a defendant to obtain a new trial, the Legislature has placed unreasonable conditions upon the criminal defendant so as to thwart that defendant's appellate rights. This Court should hold that the new harmless error standard set forth in the Criminal Appeal Reform Act is unconstitutional.

As for the second reason, the United States Supreme Court in Chapman v. California, 386 U.S. 18 (1967), set forth a standard of review for constitutional errors; and this standard cannot be set aside by the State of Florida. The United States Supreme Court held in Chapman that the harmless error test places on the beneficiary of the error the burden of proving beyond a reasonable doubt that there is no reasonable possibility that the error contributed to the conviction. Chapman goes on to hold that the application of a state harmless error rule is a state question when it involves only error of state procedure or state law; however, states cannot formulate laws, rules, or remedies designed to protect people from violations by the states of federally guaranteed rights. Thus, when it comes to constitutional errors, a statue that purports to shift the burden from the beneficiary/state to the appellant/ defendant violates the supremacy clause of the United States Constitution, Art. VI.

In Mr. Snipes' case the right to be presumed innocent at trial, "although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." Estelle v. Williams, 425 U.S. 501 at 503 (1976). A violation of

that presumption of innocence, therefore, must be categorized as a constitutional violation; and the standard of review set forth in Chapman and adopted in Diquilio is the correct standard of review in this issue.

The State's claim that the burden is on Mr. Snipes' to prove prejudice in this issue in order to obtain relief is wrong. The burden remains on the State to prove 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. DiGuilio, Chapman.

Mr. Snipes relies on his initial brief for the remaining argument on the issue.

ISSUE III

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

Appellant relies on his initial brief.

ISSUE IV

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

In response to Mr. Snipes' argument that his coerced, involuntary statements made to his Uncle Martin Patterson should have been suppressed, the State argues that police conduct is a necessary prerequisite to finding a due process violation and cites to Colorado v. Connelly, 479 U.S. 157 (1986). The State also claims the Florida cases that "at one time" held due process required the suppression of an involuntary confession made to a private person are no longer the law. The State cites to the cases of State v. Kettering, 483 So. 2d 97 (Fla. 5th DCA 1986); and Peak v. State, 342 So. 2d 98 (Fla. 3d DCA 1997). (Appellee's Answer Brief, p.25) Contrary to the State's claims, Kettering and Peak are still valid law in Florida and Connelly is not applicable.

In Johnson v. State, 696 So. 2d 326 at 329, 330 (Fla. 1997), this Court noted:

> It is well established that a confession cannot be obtained through direct or implied promises. In order for a confession to be voluntary, the totality of the circumstances must indicate that such confession is the result of a free and rational choice. Leon v. Wainwright, 734 F. 2d 770, 772 (11th Cir. 1984) It may not be obtained by either implied or direct promises. Bram v. United States, 168 U.S. 532, 542-3, 18 S. Ct. 183, 186-7, 42 L. Ed. 568 (1897); Harris v. Dugger, 874 F. 2d 756, 761 (11th Cir. 1989); Thomas v. State, 456 So. 2d 454, 458 (Fla. 1984), post-conviction relief granted on other grounds, 546 So. 2d 716 (Fla. 1989); Brewer v. State, 386 So. 2d 232, 235-6 (Fla. 1980).

Even though most cases go to State action, the question of voluntariness of a confession is not limited in Florida to just State action. Johnson does not indicate such a limitation. To the contrary, Florida law has developed to include involuntary statements made to private individuals which must be suppressed.

In Peak, the Third District held:

> that an involuntary confession, whether made to law enforcement officers or private persons, is inadmissible. People v. Haydel, 12 Cal. 3d 190, 115 Cal. Rptr. 394, 524 P. 2d 866 (1974). Also see Commonwealth v. Mahnke, 335 N.E. 2d 660 (Mass. 1975), and People v. Frank, 52 Misc. 2d 266, 275 N.Y.S. 2d 570 (1966).

Peak, 342 So. 2d at 99. About 9 years latter in Kettering, the Fifth District followed Peak in holding "that a involuntary confession, whether made to law enforcement officers or private persons, is inadmissible." Kettering, 483 So. 2d at 99. The Fifth District did not, however, just rely on Peak; it also relied on the Florida Supreme Court case of Lawton v. State, 13 So. 2d 211 (1943):

> At first glance, suppression of the evidence under these circumstances seems to serve no purpose and the interest of society in seeing the perpetrators of a crime punished is defeated. Application of the exclusionary rule to situations involving misconduct by the police is justified only because it then becomes unproductive for the police to resort to improper methods to secure confessions. The victim of a crime cannot be expected to know or to abide by the same rules or conduct expected and demanded of the police. By applying the exclusionary rule in these circumstances, the perpetrator goes free, the victim is frustrated and no need of society has been served.
>
> However, we conclude that the above question must be answered in the affirmative based on Lawton v. State, 152 Fla. 821, 13 So. 2d

211 (1943). In that case, Lawton had allegedly embezzled funds from Rosa Doyscher. After he was charged with embezzlement, Lawton signed a confession prepared by Rosa's counsel with the understanding that he would repay the embezzled funds and a criminal prosecution would not be pursued. Contrary to the agreement with private counsel, Lawton was arrested and tried for embezzlement. Over objection, Lawton's confession was admitted and he was convicted. On appeal, the supreme court reversed the judgment, holding that the state had failed to establish the voluntariness of the confession:

> It is not disputed that the appellant had a wife and two sons; he wanted to avoid a criminal prosecution; he did not want to embarrass his family; he wanted time to pay the indebtedness; the appellant believed his agreement with private counsel would obtain the objectives; he signed the confession for these purposes and not for a criminal prosecution. The private prosecutor and appellant were shocked by the action of the officials in calling and placing the case on trial; thereby upsetting their agreements. To render a confession voluntary and admissible as evidence, the mind of the accused should at the time be free to act, uninfluenced by fear or hope. If the attending circumstances be calculated to delude the accused as to hid true position and exert an improper and undue influence over his mind, the confession is not admissible.
>
> 13 So. 2d at 213.

Kettering, 483 So. 2d at 98, 99. Thus, the Fifth District did address the concern that if the exclusionary rule is applied to situations other than State action what purpose and interest of society is served. The bottom line as set forth by this Court in Lawton is that a confession must be voluntary in order to be admissible. If the accused's mind is influenced by fear and hope, the confession is not admissible.

Over a year and a half after Kettering, the Fourth District followed Lawton, Kettering, and Peak in the case of Howard v. State, 515 So. 2d 430 (Fla. 4th DCA 1987). In Howard, the victim of a burglary captured the appellant at gunpoint, had the appellant lie on the ground, handcuffed the appellant, pointed the gun in the appellant's face, and then told the appellant he was in no position to lie. At that point, the appellant made an involuntary statement. The court held "[t]he cases cited above stand for the proposition that involuntary confessions or admissions given to private persons are inadmissible in Florida courts." Id. The court found the appellant's statements "obviously involuntary" and not harmless. A new trial was ordered.

Most recently the Fourth District in Mirabal v. State, 698 So. 2d 360 (Fla. 4th DCA 1997), was again faced with an involuntary confession to a private individual -- the defendant's employer confronted the defendant about a loss of money in the store and told the defendant that if he admitted being the culprit the police would not be called and the defendant could keep his job. The employer also pointed out that the defendant was on probation, and the insinuation was if the defendant did not cooperate he would end up in jail. The State, as here in Mr. Snipes' case, made the argument that due process requires an act by a state agent in order to activate the U.S. Constitutional provisions and cited to Connelly. The court, however, rejected that argument:

> Appellant's confession to his employers was involuntary and should have been suppressed. See Lawton v. State, 152 Fla. 821, 13 So. 2d 211 (1943); Howard v. State, 515 So. 2d 430

> (Fla. 4th DCA 1987); State v. Kettering, 483 So. 2d 97 (Fla. 5th DCA 1986); Peak v. State, 342 So. 2d 98 (Fla. 3d DCA 1977). We find Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986), relied on by the state, inapposite as it held only that the due process clause of the United States Constitution required an act by a state agent to implicate the protection of the Fourteenth Amendment. Thus, the court focused on "voluntariness" of the confession within the meaning of the federal due process clause. However, in the instant case, we deal with the state right to due process under Article I, Section 9, of the Florida Constitution.

Mirabel, 698 So. 2d at 361 (emphasis added).

Thus, the response to the State's argument and citation to Connelly is that Connelly does not apply. It is the state right to due process under the Florida Constitution that is being applied to the situation where a private individual coerces a confession from an accused. As for the State's argument in this case that the line of Florida cases is out of date and no longer viable, the 1997 decision in Mirabel also refutes that argument.

If a defendant objects to the admission of coerced/involuntary statements, he "is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined." Jackson v. Denno, 378 U.S. 368 at 380 (1964). Such a hearing must be done separate and apart from the jury's guilt determination. Jackson. Mr. Snipes was denied such a hearing because the trial court erroneously believed that statements coerced by a private individual were not subject to a due process argument. In violation of the rule set forth in

Jackson, the trial court left the voluntariness of the statements up to the jury.

The statements elicited by Uncle Martin Patterson from his nephew, as has already been argued in the initial brief, were involuntary due to the highly coercive and deceptive tactics that the savvy and sophisticated uncle used on his young and pliable nephew. Mr. Snipes has also argued in his initial brief that the use of such statements at his trial were highly prejudicial in that these statements were used to link Mr. Snipes to the death of Mr. Mueller and to support other statements made by Mr. Snipes. It is to be noted the State does not address this aspect of the issue. Mr. Snipes relies on his initial brief for this argument but with the addition of one more case.

In Arizona v. Fulminante, 499 U.S. 279 (1991), the United States Supreme Court abandoned a per se reversible rule and adopted a harmless error rule when involuntary statements are admitted at trial. In that case, fear of physical violence and the promise of protection were used to get Fulminante to confess. The Court agreed the statements were the product of coercion. In applying the harmless error standard, the Court found the State had failed to establish beyond a reasonable doubt that the admission of these statements was harmless. Three considerations were listed: (1) The involuntary statement and a separate voluntary statement were used together to get a conviction "because the physical evidence from the scene and other circumstantial evidence would have been insufficient to convict." The confession was instrumental to bringing

the charges, and without the confession the police had suspected Fulminante but could not bring charges. Id. at 297. (2) The jury's assessment of the voluntary statement could have easily depended in large part on the presence of the involuntary statements. Absent the admission at trial of the involuntary confession, the jurors might have found the statements allegedly made to a second person unbelievable. (3) The admission of the involuntary statements led to the admission of other evidence that would not have been relevant and depicted Fulminante as a person who sought out the company of criminals. In other words, the use of impermissible involuntary statements led to the introduction of evidence that cast the defendant in an unfavorable light. In addition, the Court noted that the presence of the impermissible confession also influenced the sentencing phase of the trial.

In Mr. Snipes' case these same considerations also exist. Not only were the involuntary statements important by themselves to prove a circumstantial case against Mr. Snipes, but the involuntary statements were combined with other statements to get a conviction. The police admitted they had no grounds to arrest Mr. Snipes without his statements, and the physical evidence and other circumstantial evidence would not have been sufficient to convict Mr. Snipes. The statements made to Uncle Martin Patterson were numerous and detailed. They were used to support other statements Mr. Snipes made. In addition, the statements Mr. Snipes made to the police are also under attack in this case. The statements made to Uncle Martin Patterson were highly damaging to Mr. Snipes' case; and

absent these statements the jurors might have found the other statements coerced or unsupported. Finally, the admission of the involuntary statements led to the introduction of Uncle Martin Patterson's testimony that Mr. Snipes had no remorse and was a future danger to the community. See Issue V. As in Fulminante, the error in admitting these coerced statements cannot be deemed harmless.

Mr. Snipes relies on his initial brief for the remaining argument on this issue.

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?

Appellant relies on his initial brief for this issue.

ISSUE VI

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

The State responds initially to this argument by claiming that its presentation of cases are more factually similar and require the death penalty. These cases are distinguishable.

Bonifay v. State, 680 So. 2d 413 (Fla. 1996),[3] was a 17-year-old boy who agreed to rob and kill someone for his cousin. Although Bonifay killed the wrong person and his cousin refused to pay, there were three statutory aggravators: murder committed during a robbery; murder committed for pecuniary gain; and murder was cold, calculated, and premeditated. Factually, it is important to note that the contract killing took place over a period of days[4] and then Bonifay still killed the wrong person -- a different clerk was working the night of the killing -- and carried on with the robbery. It is also to be noted -- even though this Court did not find this fact supported the heinous, atrocious and cruel aggravator -- that after wounding this wrong person and this person was begging for his life and talking about his family, Bonifay told the victim to shut up and then shot him twice in the heard. Thus, agreeing to kill someone for money took a back seat to the robbery when Bonifay didn't kill the person he had agreed to kill but

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[3] Additional facts can be found in Bonifay v. State, 626 So. 2d 1310 (Fla. 1993).

[4] See Buckner v. State, 714 So. 2d 384 at 389 (Fla. 1998).

killed someone totally different. The robbery became the paramount reason for killing this victim and cannot be minimized as a minor aggravator. The robbery was a substantial aggravating circumstance in the case. Even though Bonifay was only 17, there are three statutory aggravators with the robbery being a major aggravator. In contrast, Mr. Snipes had only the two statutory aggravators of agreeing to kill for money, and the absence of an additional statutory aggravator cannot be minimized.

In a footnote (fn.5, p.33, Appellee's brief), that State tries to argue that there is an additional aggravator of "during the course of a burglary" because the victim was "killed inside his own home." The State cites to Sliney v. State, 699 So. 2d 662 (Fla. 1997), for the proposition that the State's failure to argue and the trial court's failure to weigh an aggravator does not preclude this Court from considering this factor in a proportionality analysis. In Sliney there was no finding of heinous, atrocious and cruel; but the killing was particularly brutal. The State did not not ask for the HAC aggravator,[5] and the trial court did not find it.

Because the State did not ask for this "burglary" aggravator at the trial level, it was not submitted to the advisory jury, it was not submitted to the trial court in the penalty phase, and the

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[5] Sliney was represented by another attorney in undersigned's office, and that attorney has informed undersigned counsel that the State did not ask for the aggravator. This Court, since this case was before the Court, can take judicial notice of this fact. See sec. 90.202(6), Fla. Stat. (1997); sec. 90.203, Fla. Stat. (1997); sec. 90.204, Fla. Stat. (1997).

State did not seek a cross-appeal on this issue, this issue has not been preserved for appeal and the State cannot now raise this issue. In the case of Cannady v. State, 620 So. 2d 165 (Fla. 1993), this Court rejected all of the aggravators considered and found by the trial court; and the State tried to argue for the first time on appeal an additional aggravator. In finding this issue had not been preserved for appeal, this Court stated:

> Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State. As such, we find that it would be inappropriate, and possibly a violation of due process principles, to remand this cause for resentencing. To do so would allow the State an opportunity to present an additional aggravating circumstance when the State did not initially seek its application, object to it non-inclusion, or seek a cross-appeal on this issue.

Id. at 170. Sliney does not mention Cannady, and it is difficult to reconcile the two cases. If this Court cannot reconcile these two cases, then it is Cannady's holding that must prevail. Inasmuch as the more recent passing of the Criminal Appeal Reform Act, effective July 1996, requires preservation of error, the holding of Cannady is in keeping with that Act. See sec. 924.051, Fla. Stat. (Supp. 1996). If the State fails to raise such an error at the trial level, it should be estopped from raising it for the first time on appeal.

Even if the State could argue an aggravator for the first time on appeal, there is an additional problem with this particular aggravator in this case which is perhaps why it was not presented by the State below. The facts in this case show that the killing did

not take place in the victim's home. There was a screened-in porch with an unlocked porch door before the actual door to the town-house. No one could knock on the actual door of the townhouse without first passing through the screen door and entering the porch. Thus, the public had to enter the porch in order to knock on the door.[6] The body of the victim was found on the floor of the doorway/foyer area where it fell after having been shot. The only conclusion was that the victim opened the door in response to a knock or the doorbell and was shot in the doorway. There was no discussion as to where the victim was actually standing when he was shot, but it is possible that the victim's torso could have been partially out of the door when he answered the door. In any case, there is no evidence that the shooter was ever in the townhouse. The victim apparently then fell backward and onto the floor of the entryway after being shot. Thus, the State could not establish beyond a reasonable doubt that a burglary took place in this case;[7] so the State on the trial level had a good reason not to pursue

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[6] Recently this Court held in Miller v. State, 713 So. 2d 1008 at 1010, 1011 (Fla. 1998), that when a structure is open to the public "there must be some evidence the jury can rationally rely on to infer that consent was withdrawn beside the fact that a crime occurred." To argue that the owner only invites those onto the property who don't commit a crime and that consent is impliedly withdrawn the moment a crime is committed is to "erode the consent section of the statute to a point where it was surplusage: every time there was a crime in a structure open to the public committed with the requisite intent upon an aware victim, the perpetrator would automatically be guilty of burglary. That is not an appropriate construction of the statute." Id. at 1010.

[7] The State has the burden of proving beyond a reasonable doubt that an aggravator has been established. See Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989).

this aggravator. The State cannot now raise such an aggravator for the first time on appeal -- especially in light of the lack of factual support for this aggravator.

The State's next case of Hayes v. State, 581 So. 2d 121 (Fla. 1991), is distinguishable in that Hayes' age at the time of the killing was 18. Mr. Snipes was only 17. This is a major difference. As this Court noted in Urbin v. State, 23 Fla. Law Weekly S257 at 259 (Fla. May 7, 1998), "the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigation 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." At this point the constitutional line for the death penalty is under the age of 16.[8] Mr. Snipes was only 17, and this puts him closer to that constitutional line than Hayes. In Urbin, as in Livingston v. State, 565 So. 2d 1288 (Fla. 1988), the age of 17 was "an extremely weighty mitigator." Urbin, 23 Fla. Law Weekly at S259. Being only 17 and having the strong mitigation of extensive evidence of parental abuse and neglect resulted in both Livingston and Urbin getting their death sentences reduced to life. This Court then noted in Urbin that having strong mitigation differentiated these cases "from those few instances where we have affirmed death sentences for seventeen-year-old defendants."

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[8] In a case presently pending before this Court, there is the issue of whether this line should be moved up to under the age of 17. See Brennan v. State, Case No. 90,279.

Urbin, 23 Fla. Law Weekly at S259 (emphasis added). As has already been argued in the initial brief, Mr. Snipes' situation is very similar to Livingston's and Urbin's. Considering how important the age of 17 is as a mitigating circumstance, the case of Hayes with an 18-year-old is not comparable.

This same reasoning also applies even more to the final case the State cites as being factually similar -- Gamble v. State, 659 So. 2d 242 (Fla. 1995). The fact that the defendant was 20 years old at the time puts that defendant even further from the constitutional age line. Thus, Gamble is not comparable.

The fact that this Court upholds death sentences of the triggerman in contract murder situations is not disputed; the question is should this Court uphold such a death sentence when the triggerman is only 17 years old and has had years of psychological and physical abuse during his formative childhood and adolescent years as well as a history of drug and alcohol abuse. Such factors play a significant role in a child's lack of maturity, as this Court noted in Urbin. Mr. Snipes' youthful age of 17 and poor/dysfunctional upbringing contradict the concept of the cold, hardened, professional hitman -- what is thought of as the typical hitman. This is probably why Saladino solicited Mr. Snipes to do Bieber's dirty work -- Mr. Snipes was young and easily manipulated. This Court should not uphold the death sentence in this case.

The State goes on to denigrate and disparage Mr. Snipes' mitigating factors. In doing so the State argues that the factual assertions in regards to the sexual abuse are not supported by the

record. The State then relies solely on Mr. Snipes' mother's testimony as the only source of information for the sexual abuse (Appellee's brief, p.41).

To rely solely on Mr. Snipes' mother's testimony on this matter is error. Dr. Merin testified that Mr. Snipes was exposed to an uncle who sexually abused Mr. Snipes 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. (V7/R469,471-475; Appellant's Initial Brief, p.11) The State readily admits that Mr. Snipes' mother and stepfather did not begin receiving alcohol treatment until Mr. Snipes was 9 years old (Appellee's brief, p.36), so this recognizes that his mother and stepfather were not mentally there for Mr. Snipes in his formative years when the abuse was actually going on. By the time Mr. Snipes's mother found out about the abuse when Mr. Snipes was 9 years old, about the time when the mother and stepfather sobered up; her confronting Mr. Snipes' father <u>after</u> the abusive uncle had left the state was too little too late. Even the fact that Mr. Snipes' father gave the uncle the option of leaving the state and he would not be prosecuted (V7/R544,545) showed a lack of support for Mr. Snipes.

Then the family added insult to injury when Mr. Snipes was forced to go back to live with his father at age 15 and the abusive uncle was allowed to move back into the same home even though the abuse was a well-known fact. (V7/R490,491,544-549) Whether or not more abuse took place when Mr. Snipes was 15 was not really the

point. Allowing the uncle back into Mr. Snipes' home showed that the family did not listen to Mr. Snipes about the abuse and the family did not protect him from possible further abuse. (V7/R475) Mr. Snipes' mother admitted her son was very angry because everyone acted like nothing had happened and he was too stupid to remember what had happened to him. (V7/R544-549) The mere fact that the family would allow the uncle to return showed a lack of family support for Mr. Snipes.

It is of no consequence or surprise that all 4 parents and step-parents would agree to send Mr. Snipes back to his father's home in 1993. According to Mr. Snipes' mother, she was not aware the uncle had moved back in until after her son had left his father's home that summer (ignorance is bliss). (V7/R547) In addition, Dr. Merin described the family as dysfunctional, consisting of horrendous, very poor models of behavior. Just because this dysfunctional family agreed to a particular course of action in regard to Mr. Snipes' upbringing does not make such a decision a good one. It is also most doubtful that a counselor would have agreed with the decision to send 15-year-old Mr. Snipes back to his father's home if the counselor knew the abusive uncle was then going to be invited back into the father's home.

The State also appears to put great weight on the fact that Mr. Snipes was living with his girlfriend prior to the crime and the erroneous fact that he had conceived a child prior to the crime as some sign of maturity. The facts reflect the opposite. Although Mr. Snipes was living with his then-girlfriend in January and

February of 1995, this situation did not last. The girlfriend only testified to living with Mr. Snipes for those 2 months (V13/T608, 609), and yet they did not break up. A child was conceived in June 1995, and they were married in August 1996. (V7/R494-497; V13/T607) When Mr. Snipes was arrested in September 1995, he was living at his mother's home. (V13/T698,699;V1/R40) Obviously, Mr. Snipes' attempt to live on his own were not successful; thus, showing a lack of maturity. As noted above, the child was not conceived prior to the crime; but the ability to physically conceive a child is not a sign of mental maturity -- only of physical maturity. In fact, conceiving a child while a teenager and unable to support oneself, let alone a wife and child, shows a lack of maturity.

The State also claims Mr. Snipes had been "a productive member of the work force for years" (Appellee's brief, p.37) and then cites to the aunt's testimony for record support. The only reference to working in the aunt's testimony is that Mr. Snipes started working at 14 or 15 years old at a grocery store to earn money to get a car. (V7/R516) A friend of Mr. Snipes did testify that at the time of the shooting Mr. Snipes was working on a shrimp boat. (V12/T605) Based on the above scant evidence of employment, the State's description of Mr. Snipes being 'a productive member of the work force for years' is not quite accurate; and Mr. Snipes disputes such a description. Again, the facts do not show a mature individual.

As for some of the cases cited in Mr. Snipes' brief not being exactly on point, Mr. Snipes' initial brief clearly notes the dis-

tinguishing factor in both Songer v. State, 544 So. 2d 1010 (Fla. 1989), and Caruthers v. State, 465 So. 2d 496 (Fla. 1985) (only one aggravator); but the purpose for setting forth these cases is to note the mitigating factors in these cases that are also in Mr. Snipes' case. As for Boyett v. State, 688 So. 2d 308 (Fla. 1996), being a jury override, that case dealt with two aggravators and similar -- if not less -- mitigation than in Mr. Snipes' case. The State claims that jury override cases -- no matter how similar -- are not relevant to a proportionality analysis; but if this Court is constitutionally required to evaluate each death penalty case to make sure capital punishment is imposed fairly and with reasonable consistency,[9] then a comparison of similar aggravating factors and mitigating factors is required without regard to whether the jury recommended life or death. If Boyett, who had two aggravators and similar mitigators, received a life sentence from this Court, then this Court should make Boyett part of its independent proportional review that insures a consistency in the imposition of the death penalty. As this Court stated in Tillman v. State, 591 So. 2d 167 at 169 (Fla. 1991), when discussing the fact that "death is a uniquely irrevocable penalty," it is "'unusual' to impose death based on facts similar to those in cases in which death previously was deemed improper." This Court went on to state "proportionality review is a unique and highly serious function of this Court, the

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[9] See, Eddings v. Oklahoma, 455 U.S. 104 (1982); Parker v. Dugger, 498 U.S. 308 (1991); Kramer v. State, 619 So. 2d 274 (Fla. 1993).

purpose of which is to foster uniformity in death-penalty law." Id.

As for the State's argument that temporal proximity of the aggravators is "inconsequential" (Appellee's brief, p.42), that argument is refuted by this Court's case of Terry v. State, 668 So. 2d 954 (Fla. 1996). In Terry the 2 aggravators -- prior violent felony or felony involving use of violence and capital felony committed during course of armed robbery -- happened at the same time. While Terry was robbing and shooting the wife, his co-defendant was holding the husband at gun point. In noting that this Court does not merely count up aggravators but relies on the weight of the underlying facts, this Court found the contemporaneous conviction for the co-defendant's actions -- although constituting a separate aggravator -- "occurred at the same time." Id. at 966. Although the trial court found no mitigation did exist, this Court found "not a great deal of mitigation in this case." Id. at 965. However, this Court found the aggravation "not extensive" and concluded the "homicide, though deplorable, does not place it in the category of the most aggravated and least mitigated for which the death penalty is appropriate." Id. Thus, the facts that underlie the aggravators can minimize those aggravators; and one of those minimizing facts is the temporal proximity of separate factors.

In Mr. Snipes' case, the two aggravators -- agreeing to kill for money -- occurred at about the same time. There was an agreement and then not much planning (getting a map, a gun, and a park-

ing space down the street). See Bonifay v. State, 626 So. 2d 1310 (Fla. 1993). The facts underlying these two aggravators, when weighed, are not as extensive as aggravators that are committed at different times. See Terry. In light of the substantial mitigation in Mr. Snipes' case, this is not one of those cases that are most aggravated and least mitigated for which the death penalty is appropriate. A life sentence is required.

Finally, the trial court's minimizing of two substantial mitigators -- sexually abused as a child and a history of drug and alcohol abuse -- because these happened in the past and were not going on at the time of the crime, was an abuse of the trial court's discretion. Appellant's initial brief sets forth case law that stresses the importance such history plays in a defendant's formative childhood and adolescent years. The law is well-settled to the contrary of the trial court's belief that what happened in the past has very little reflection on the crime the defendant commits now. In addition, the abuse Mr. Snipes suffered was hardly ancient history when he was only 17 at the time of the crime. In a more recent case of Walker v. State, 707 So. 2d 300 at 318 (Fla. 1997), the trial court improperly rejected the defendant's abusive childhood because the defendant had demonstrated good behavior in his adult life. This Court emphasized that evidence of a defendant's abuse is mitigating in nature, and the trial court's rationale for rejecting such mitigation has been expressly rejected by this Court.

In Mr. Snipes' case the trial court's rationale for minimizing these important mitigators (slight weight for history of drug and alcohol abuse and considerable weight for sexual abuse "that did not enter into that equation" of killing for money) has been expressly rejected by this Court. Thus, the trial court's imposition of death when it has erroneously used a rationale for minimizing substantial mitigators was an abuse of the trial court's discretion and calls into serious question imposition of the death penalty.

When this Court considers the underlying facts in Mr. Snipes' case and compares them with other capital cases, the penalty of death -- which is reserved for only the most aggravated, most indefensible of crimes[10] -- is not appropriate in Mr. Snipes' case. The weight of the substantial mitigation in this case -- his age (17), his dysfunctional family with the alcohol and drugs, his being sexually abused by a family member while the rest of the family turned a blind eye, his alcohol and drug usage at an early 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 his co-defendants, his religious devotion, and co-defendant Saladino's short sentence -- outweighed the closely related (both factually and temporally) two aggravators. A life sentence is required in this case.

Mr. Snipes relies on his initial brief for further argument on this point.

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[10] State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).