IN THE SUPREME COURT OF FLORIDA

ALVIN LEROY MORTON,	:	
Appellant,	:	
vs.	:	Case No. SC95171
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF TYPE USED

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PRELIMINARY STATEMENT

This is a capital resentencing appeal taken from two death sentences imposed by the trial court following a new penalty phase proceeding ordered by this Court in Morton v. State, 689 So. 2d 259 (Fla. 1997). [A 1-7] This Court has jurisdiction pursuant to Article V, Section 3(b)(1), Florida Constitution.

References to the record on appeal are designated by a Roman numeral for the volume number followed by the page number. References to the supplemental record are designated by SR and the page number. References to the second supplemental record are designated by 2dSR and the page number. References to the Appendix to this brief are designated by A and the page number.

STATEMENT OF THE CASE

On February 4, 1992, the Pasco County Grand Jury indicted the appellant, Alvin Morton, along with two codefendants, Robert Garner and Timothy Kane, for the first-degree premeditated murders of John Bowers and Madeline Weisser on January 26 or 27, 1992. [I 6] Morton was tried, convicted, and sentenced to death for each of the murders. [I 11-12] On appeal, this Court affirmed the convictions but vacated the death sentences and remanded for a new penalty phase proceeding before a new jury. [I 11-17; A 1-7]

A new penalty phase proceeding before a new jury was conducted on February 8-11, 1999. [I 107-14; II 1; VII 657] The jury recommended death by a vote of 11-1 for each murder. [I 131-132; VII 788] Counsel for both parties filed sentencing memoranda. [I 134-47] The court conducted a Spencer[1] hearing on February 19, 1999. [SR 301-06] On March 1, 1999, the court sentenced Morton to death for both murders. [I 152-61; VII 792-809; A 8-17]

Appellant filed a notice of appeal on March 12, 1999. [I 181] The court appointed the public defender to represent Morton on this appeal. [I 185]

[1] Spencer v. State, 615 So. 2d 688, 690-91 (Fla. 1993).

STATEMENT OF THE FACTS

A. The State's Case

Crime scene technician Jeff Boekeloo of the Pasco County Sheriff's Office responded to 6730 Sanderling Drive in Hudson at 6:45 a.m. on January 27, 1992. [III 209-10] There was a beige car parked in the front yard. The interior of the house was covered in black soot. [III 211] The bodies of a man and a woman were lying face down on the floor between the living and dining rooms. The man had a gunshot wound to the back of his neck, and the tip of his right pinkie finger had been cut off. The woman had a large gaping wound across the back of her neck. [III 212-213] Outside the house, the phone wires had been cut. [III 214] A black car was parked in the garage. [III 215] It appeared that fires had been started on the beds in both bedrooms. [III 216] No fingerprints were found inside the house because of the soot. A fingerprint on the outside of a sliding glass door had insufficient ridge detail for comparison. [III 217-18]

Pasco Fire Marshall William Brown determined that separate fires had been started by igniting clothes or paper with a match or lighter on the bed in each bedroom. [III 218-24]

Homicide detective Tim Powers received a tip that Alvin Morton was involved in the homicides. [III 224-26] Homicide detective William Lawless went to Morton's house around 6:30 a.m. on January 27, 1992. [III 226-27] Lawless spoke to Jeff Madden by telephone. Madden said Morton, Timothy Kane, Christopher Walker, and Bobby Garner came to his house around 11:00 p.m. the night before and

gave him a human finger wrapped in a bandanna. Morton said it was from a house on Sanderling Lane. [III 228-30] Lawless called Morton's phone. A male answered. Lawless said he was with the Sheriff's Department and asked him to step outside. The male hung up. Lawless called again, and another male answered. Lawless asked him to come outside. Garner, Walker, and Kane came out. They were arrested. Lawless subsequently identified the first voice as Alvin Morton's and the second as Bobby Garner's. [III 230-32]

Morton was arrested the next day, January 28, 1992. [III 232-34] The officers advised Morton of his Miranda[2] rights and tape recorded their interview. Lawless summarized Morton's statements: Morton said they discussed "something similar to this" about a week before the crime. Morton targeted the victim's house because Walker and Garner had previously lived next door. On the night of the incident, they approached the house, and Kane cut the phone line with a large knife. Morton was carrying a shotgun. He kicked the front door open. Morton, Garner, and Kane went in. [III 234] They looked around for something to take. [III 234-35] A man came into the living room. They told him to get on the ground, and he complied. An older woman came out of the bedroom area. Garner told her to get on the ground. She did not comply until she saw Morton carrying the shotgun. Both asked them what they wanted. The man started to get up. Morton told him to get down. When the man did not comply, Morton put the shotgun to the back of his neck

[2] Miranda v. Arizona, 384 U.S. 436, 467-79 (1966).

and shot him. The woman started to get up. Garner kicked her and stomped on her head. Morton put the knife in the back of her neck and told her to stay down. When she did not comply, he forced the knife into her neck until it hit bone. Garner then pressed down on the knife with all his weight and forced it through her neck. Garner cut off the man's pinkie finger. They left the house and went to Garner's house. [III 235] They wrapped the shotgun, knife, and other items in a towel and put them under Garner's mobile home. [III 235-36] Walker wrapped the finger in a bandanna. They took the finger to Jeff Madden's house to show it to him. After leaving Madden's house, Morton and Garner returned to the victims' house and set fire to items on the beds to destroy evidence. [III 236]

Lawless further testified that a 12 gauge shotgun with a sawed-off barrel was found wrapped in a blue towel under Garner's trailer. The magazine tube was damaged, so operating the slide after firing the gun did not feed another round to be fired. Instead, the gun usually jammed. [III 236-38] A Rambo knife and a pair of gloves were also wrapped in the towel. [III 238-39] Lee Sowell called to report the fire at the victims' house after hearing about it from Morton or Madden and going to the house to verify that there was smoke coming from it. [III 240-41]

Lawless authenticated a tape recording and transcript of Morton's statement. The jurors were provided copies of the transcript to read while the recording was played. [III T 241-45]

In the recorded statement, Morton's responses when asked what

they did at Garner's house and why they decided to "do this house" were inaudible. Morton said he, Garner, Walker, and Mike were outside the house, talking about nothing. [III 246] They decided to go inside. Kane cut the phone line with a knife with an 8 and 3/4 inch blade and a handle wrapped in rope. [III 247] Morton kicked in the front door. Morton, Kane, and Garner went inside, while Walker stayed outside. [III 248] Morton had the shotgun. Kane or Garner had the knife and laid it down on the chair later. They looked around for "[a]nything." [III 249]

Morton said a man came out. Morton told him to get on the ground, and he complied. [III 249-50] An old lady came out. Garner and Kane told her to get down, and she complied. The man and woman asked what the boys wanted, but they did not answer. [III 250] The man started to get up. Morton told him to get down. He did not, so Morton shot him in the back of the head where it joins with the neck. [III 250-51] The woman tried to get up. Garner kicked her in the ribs. She fell down. Garner kicked her a couple more times. She still tried to get up. Garner stomped on her head. Morton stuck the knife into her neck until it hit the bone. Garner pushed the knife down real hard, and it went right through. [III 251] Morton did not remember any other cutting. They searched the house for anything they wanted to take. Garner cut the pinkie finger off before they left. [III 252]

Morton said they went to Garner's house. Morton wrapped up the gun and knife and put them under the trailer. [III 252-53] Garner or Walker wrapped the finger in Walker's bandanna. Walker

took the finger when they went to Madden's house. They gave Madden the finger, "and he almost had a heart attack." Next, they rode their bikes to Morton's house. [III 253] Morton put his clothes and sneakers in the washer, along with Garner's shoes and "something else." [III 254]

When asked what was said in a conversation with the boys in Morton's bedroom about a week before the crime, Morton said he could not remember. [III 254] When asked about something Garner said, Morton replied that he was trying to cover his butt. When asked about the reason for cutting off the finger, Morton replied that Madden said he wanted somebody's pinkie, and he got one. Morton said he answered the phone when the officer first called. When asked if he immediately went up in the attic, Morton's answer was inaudible. [III 255] The officer said they "were going to gas the hell out of you." Morton said the other boys were too confused to see him leave. [III 256] The gas would go outside. Morton may have talked to his sister about this. Morton, Garner, and Walker talked about a lot of things in his room. When asked if anybody suggested "that house," Morton replied, "Not there." [III 257] Morton said Walker and Garner used to live right there next to them. [III 257-58]

Morton said they tried to light the house on fire while on the way back to his house. He used a lighter to set fire to the beds in both bedrooms. [III 258] They had decided on the house before they went out that night. They did not know if the people were home. One car was in the garage. They did not make any contin-

gency plans in case the people were home. A night light in the hallway was on. When asked why they ran after getting the man and woman on the ground, Morton said, "I don't know." [III 259] When asked what he was thinking, Morton said, "We wasn't. That's why we're in trouble." [III 259-60] When asked how long the people laid on the ground before he shot them, Morton said, "I have no idea. It was a long time." Morton said he already told the officer why he shot the man and why he stabbed the woman, and he was not going to change it. Morton said he would have shot the woman so it would have been less painful, but the shot would not go into the chamber. [III 260]

Morton agreed that Detective Lawless read his Miranda rights before the tape began and that he understood them. [III 260-61] Morton said they set the fire to destroy any evidence they may have left behind. They all wore gloves. [III 261] They did not wear anything to cover their faces. [III 261-62] Morton was unaware that the victims' next door neighbor saw them leaving. (The tape recording ended.) [III 262]

Lawless found no evidence that Morton was consuming drugs or alcohol at the time of the murders. Lawless determined that Mike Rodkey met up with the boys when they were roaming the street, but he did not participate in the crime. The police never found the pinkie finger. The bandanna was found in a canal where Walker threw it. About a week before the interview, Morton had a conversation in his room with Kane, Walker, Garner, his sister, and his sister's friend. [III 263] The court sustained defense

counsel's hearsay objection when Lawless began to say what they discussed. [III 263-64] Lawless determined that Morton owned the shotgun and the knife. [III 264]

Lawless disagreed with defense counsel's suggestion that the boys did not know what house they were going to. [III 265] According to Morton's statement, the boys did not know the people were going to be home, they went there to commit a burglary, and they were surprised when someone came out. Lawless could not say whether the murder was preplanned. [III 266] Walker told Lawless that he threw the finger into the canal. [III 267] Lawless interviewed Kane, Garner, and Walker. They giggled and laughed about it, while Morton was pretty somber. [III 267-68]

The court sustained defense counsel's objection when the prosecutor asked if Lawless talks "to other witnesses to see if what the defendant tells him jives with what the other witnesses say". [III 268] When the prosecutor asked if his investigation revealed why Morton, Garner, and Kane wanted to go into that home, the court sustained defense counsel's hearsay objection. [III 269-71] The court overruled defense counsel's beyond the scope objection and allowed the prosecutor to elicit Lawless's testimony that Walker said Morton gave him the finger he threw in the canal and that Garner wrapped it up in the bandanna. [III 271]

Wayne Whitcomb testified that he saw Morton in Jeff Madden's yard a couple of days prior to Super Bowl Sunday. Morton said something about going out and killing some people. [IV 289-90] Morton said he had a sawed-off shotgun. He said he would bring

back a finger or a head or something like that. [IV 290] Morton did not say who he was going to kill, and Whitcomb did not take him seriously. [IV 292] They were all teenagers. Morton was 19 and the oldest. Kane was 14 and the youngest. Garner was 18, and Walker was 16 or 17. [IV 293, 295]

Whitcomb testified that he and Jason Pacheco were at Madden's house on Sunday evening following the Super Bowl in January, 1992. [IV 279-81] Morton, Garner, Walker, and Kane came to Madden's house around 10:00 or 11:00 p.m. They told everyone to leave except Whitcomb and Pacheco. [IV 282] Morton had a red and white bandanna. He told Madden, "[W]e got what you wanted." Morton dropped a finger out of the bandanna and laid it on the bed. [IV 283-84] Morton said they went to a house, kicked in the door and went inside. An old man and an old woman came out. Morton told them to get down on the floor and they did. The man asked the boys not to hurt them and offered to give them all their money. Morton replied that the man would call the cops. The man said he would not. Morton said, "[T]hat's what you all say," then pulled the trigger of his sawed-off shotgun, which he held to the back of the man's head. [IV 285-87] Morton said he killed the woman. [IV 287] Morton said that they ran a knife up and down the woman's back "to see if they could hear noises like ta-ding, ta-ding, ta-ding." [IV 290, 292] Morton was laughing and excited, like he thought it was funny. [IV 287, 291] Morton said Garner cut off the finger. [IV 294] They threw the finger in a canal. [IV 287]

The prosecutor read the prior testimony of Jeff Madden to the jury because he was unavailable to testify. [IV 295-325] Madden was 18 years old when he testified. [IV 295, 320] On Super Bowl Sunday, January 26, 1992, Madden had some friends at his house, including Pacheco and Whitcomb. Around 11:30 p.m., Morton, Garner, Walker, and Kane came to the house. [IV 296-98] Morton told Madden to make the other kids leave. Whitcomb, Pacheco, Morton Garner, Kane, and Walker remained. [IV 299] Morton pulled out a bandanna and said, "I brought you what you wanted to see." A human finger fell out of the bandanna. [IV 299-301] In a prior conversation Madden had asked Morton to bring him back a finger, but he was not serious. [IV 317]

According to Madden, Morton said, "You should have been there, it was so cool, I blew the bitch's brains out." [IV 301] All four boys, including Morton, were laughing. [IV 302] Morton said he kicked in the door. [IV 304] Walker ran away. [IV 311] Morton said he woke the people up. He got them to the floor and held a gun to the back of the man's head. The man asked why he was doing this. [IV 304] The man offered to have the lady sign a check. Morton said, "[Y]ou'll call the cops." The man said no. Morton said, "[T]hat's what they all say," and shot the man. [IV 305] Morton said he did it for the fun of it. [IV 305, 323] Morton said Garner cut off the finger. [IV 320] Morton made Walker pick up the finger. They wrapped it in the bandanna and took it with them when they left Madden's house. The bandanna belonged to Madden. [IV 306] Morton and Garner told Madden, Pacheco, and

Whitcomb that if they told anybody the same was going to happen to them. They were smiling, but Madden took them seriously. [IV 307]

Madden testified that Garner said he stabbed the old lady in the neck, he ran the knife up and down her spine, and he could hear the bones popping. [IV 308, 322-23] They were all giggling and laughing. Morton said, "You should have been there, it was cool, there was blood and brains everywhere." Madden did not see any blood on Morton. [IV 308] Kane said Morton had blood on his shoes. [IV 312] Morton did not appear to be under the influence of any drug or alcohol. [IV 311]

Madden testified that on Friday, before the Super Bowl, Morton told Walker and Garner, "[L]et's go kill somebody." [IV 312-13, 321] During that conversation, Morton said he had a sawed-off shotgun and said something about killing people across from Walker. [IV 317-320] Morton liked to "talk big." [IV 320-21] Madden denied that he told them to bring him back a head, and said he did not recall Morton offering to bring a finger instead. [IV 321-22]

After they left on Sunday, Madden called Lee Swole and told him Morton murdered some people. Swole came to Madden's house with Pacheco and Curt. [IV 309] Madden told them what Morton said. [IV 310] Morton called around 1:30 a.m. and told Madden about the brains and pools of blood he had to jump over. Morton said Walker lit the sheets on fire. [IV 310-11, 324] After Morton called, Madden, Swole, Pacheco, and Curt Butcher went looking for the house, but they did not find it. [IV 313-15] Walker used to live down the street on which Swole was driving. [IV 316] Madden

talked to the police the next day. He showed them a stain on the mattress where the finger had been. [IV 315]

Lee Swole testified that he received a call from Jeff Madden around 1:00 a.m. on January 27, 1992. Madden told him that Morton, Garner, and some other people killed somebody. [IV 325-26] Swole went to Madden's house with Pacheco and Butcher. Madden told him about his conversation with Morton. [IV 327] Madden called Morton, then let Swole talk to him. [IV 327-28] Morton said they went to the house, which had a white Ford out front and a Trans Am in the garage. [IV 329, 336] Garner kicked in the door. [IV 329, 336] Morton hid behind the refrigerator, then the old man came out. Morton grabbed him, put him down, then held the 12 gauge sawed-off shotgun to him. [IV 329] The old man begged for his life, offering to have the woman write a check, but Morton refused. The man said he would not call the cops. Morton said that's what they all say and shot him. [IV 330] Morton said when he cut the woman's throat he got blood on his shoes. [IV 330, 341-42] Morton said he or Garner ran the knife up and down her back, and they could hear her bones cracking. [IV 335, 337, 341] Morton joked about Garner cutting the lady's finger off. [IV 331, 337-38] He was laughing. Morton said Kane was scared, freaking out in the corner, and did not do anything. Morton said the only money he found was change, nickels and pennies. [IV 331] Morton said they went back to the house and set the bed on fire. [IV 334]

Swole, Pacheco, and Butcher found the house. The car was there, and the door had been kicked in. Swole went to a conve-

nience store and called 911. The police came. Swole told them what he knew. [IV 332] A couple of days before the Super Bowl, Swole had a conversation with Morton and Garner. When they started to leave, they said they were going looking for somebody to kill. Swole had seen Morton with knives, including Rambo knives, most of which belonged to Madden. [IV 333] Morton liked to brag and talked big. Swole did not take them seriously. [IV 338]

The prosecutor read the prior testimony of Victoria Fitch to the jury because she was unavailable. [IV 345-51] Fitch was 19 when she testified. [IV 346] In January, 1992, she was in a car with Morton and his sister Angela, when Morton said he wanted to kill someone within a week. [IV 347-48, 350] That did not happen. Morton liked to "talk big" or brag. She did not take him seriously. [IV 350-51] Fitch had seen Morton with a sawed-off shotgun and a knife displayed to her by the prosecutor. [IV 348-49]

Dr. Edward Corcoran, an associate medical examiner, observed the bodies at the scene and performed the autopsies. [IV 351-54] John Bowers was 55 years old, six feet one inch tall, and weighed 180 pounds. [IV 354] A shotgun wound to the back of his neck destroyed four vertebrae, severed the spinal cord and major blood vessels, and caused his death. [IV 355, 357-59] He died within a few seconds after he was shot. [IV 360] There was a 6 and 3/4 inch cut from the corner of his mouth across his chin to the upper neck, and two half inch cuts below the side of the right lower lip. [IV 354-56] Dr. Corcoran could not determine whether the cut to the chin and neck occurred before or after the gunshot. [IV 359,

369] Bowers had an internal bruise on the back of his head [IV 354] and a bruise on the inner surface of the left elbow that could have been caused by a kick. [IV 361] His pinkie finger had been cut off. [IV 362] He had no defensive wounds. [IV 369] The fires did not contribute to the deaths of Bowers or Mrs. Weisser. [IV 360-61, 367]

Dr. Corcoran testified that Madeline Weisser was 75 years old, five feet two inches tall, and weighed 116 pounds. [IV 362] She had a six inch cut from the right cheek to the upper neck, another cut on the top of the shoulder towards the neck, and eight stab wounds to the neck which severed the vertebral column and spinal cord and left her paralyzed. She also had bruises, scrapes, and cuts on the body. Bruises on her back could have been from a kick. [IV 362-65, 369] Six cuts on her hands were defensive wounds. [IV 365-66] Her death was caused by blood loss and severance of the spinal cord. [IV 367] She probably lived and remained conscious for several minutes after her spinal cord was severed and she was paralyzed. [IV 368] She would not have felt pain below the point at which the spinal cord was severed. [IV 369-70] She could have been unconscious from loss of blood before her spinal cord was severed. [IV 370]

Mike Rodkey testified that he was 16 years old on Super Bowl Sunday, January 26, 1992. [IV 372-73] He was at home playing video games with Garner and Walker when Morton and Kane came over. [IV 374-75, 403] Morton, Garner, Kane, and Walker were talking. Morton was the most vocal. They said they were going to do it that

night, and they wanted to go to Garner's house to talk about it. They rode their bikes to Garner's house. [IV 375-76, 403] They talked about killing the people in the house they had selected about a week before, Walker's former neighbors. [IV 377-78, 381, 403-04] On Saturday, a week before the Super Bowl, Morton, Garner, Kane, Walker, and Rodkey went to the house on Sanderling on their bikes. They said they were going to kill the people in that home. [IV 400-01, 403, 411] On Sunday, they said they were going to shoot them. Morton had a gun wrapped in a blue towel. [IV 379] Morton had told Rodkey that he had a sawed-off shotgun. [IV 380] They rode their bikes to the vicinity of the house on Sanderling Drive. Everyone except Rodkey put their bikes in the bushes. Rodkey walked his bike. They entered the porch of a vacant house across the street by making a hole in the screen and unlocking the door. [IV 381-82]

There was a white car parked on the lawn of the victims' house. [IV 385, 407, 412] Morton and the others talked about entering the house and killing them. [IV 385] Sometime that Sunday, Morton said he wanted to kill these people and watch the Super Bowl on their TV set. He also said they were going to steal their stuff. [IV 397, 405, 411] Around 10:30 p.m., they walked around the victims' house. Morton looked in the windows. There was a night light on. [IV 386, 407] There was no movement in the house. The people may have been in bed. [IV 407] While on the porch of the vacant house, Morton said to cut the phone wires. Walker tried without success, then Kane cut the wires. [IV 387-89]

Morton or Garner said one person would kick in the door, and the last one inside would close it. [IV 391-92] They left the porch. Rodkey warned Garner not to do it. [IV 389-90] Walker said he was going to stay across the street and watch. [IV 390] Morton called Walker a coward. [IV 395, 409] Defense counsel read a passage from Rodkey's deposition in which counsel thought Rodkey said Morton called Garner a coward. [IV 410] Morton had the blue towel in his hands. [IV 390] Rodkey did not remember Garner having a knife or a gun. [IV 390-91, 408] Defense counsel read Rodkey's deposition testimony that Garner had the knife. [IV 408] Kane had socks on his hands. Rodkey did not remember anyone wearing gloves. [IV 391] As Rodkey was leaving, he saw Morton, Garner, and Kane approach the house. One of them kicked in the door. [IV 395-96] Rodkey testified that he did not know who kicked in the door. Defense counsel read his deposition testimony that he was pretty sure Garner kicked in the door. [IV 408] Rodkey rode away on his bike. Walker ran after him. They went to the next street over, then they heard a gunshot. [IV 396] Rodkey went home. [IV 396, 402] He did not tell the police what happened because he was scared. [IV 402-03]

On March 5, 1992, Joseph Savino was a Pasco County Corrections Officer. He overheard a conversation among Morton and two other inmates, Gianatasio and DiCarlo. [V 441-42, 444] Savino wrote down Morton's statements and put them in a police report. [V 443] Morton said that Garner was kicking the old lady in the head, "and it didn't do no good, so he started stomping her head." Morton

also said, "The guy turned around and looked. We told him not to, he turned around, and I shot him. I didn't have a choice, he looked." [V 444]

B. The Defense Case

Alvin Morton's mother, Barbara Stacy, testified that Alvin was born on July 11, 1972. [V 449, 461, 463] He was born prematurely and remained in the hospital for a month. Because of transportation problems, Barbara was able to see him only three to five times, and only for short periods of time, about an hour for each visit. She was not allowed to hold him for the first two weeks. [V 449-52] Alvin was a very sick baby who suffered from many allergies. His right lung filled with fluid and collapsed when he was nine months old. He had a double hernia and was not allowed to cry, crawl, climb, or pull himself up for three months while the doctors got his allergies under control so they could operate. Barbara was unable to pay his medical bills. [V 453] She also had a daughter, Angela Morton White, born on February 27, 1974. [V 459, 463]

Mrs. Stacy testified that Alvin's father, Virgil Morton, frequently told the children that he had murdered somebody, and he would murder them, too. [V 449-50, 454] When Virgil was in the Navy, he killed someone in a bar fight and pled guilty to manslaughter. [V 474] Virgil began abusing Barbara about three months after they were married. The abuse continued until she "finally got the kids out of there." [V 454] Virgil was an

alcoholic who drank every day, got drunk 90% of the time, and became both verbally and physically abusive of Barbara and their two children. [V 455-57] There was so much verbal and physical abuse, Barbara had difficulty explaining what happened; she could not remember all the beatings. At the end, Virgil threw knives at her when she walked through the house. [V 467-68] Barbara did not report the abuse because she was afraid of Virgil, who told her he would kill her and her family. [V 463-66]

Virgil never showed any love or affection for Alvin. He told Alvin he had to be tough, and tough boys don't cry. [V 470] When Alvin was only six or seven months old, Virgil threw him on the bed and "smacked his butt so hard that his back bowed." [V 466] When Alvin was one, Virgil put him in an inner-tube and pushed him out into the middle of a lake, then tried to prevent Barbara from rescuing Alvin, who was screaming. [V 468-69] Virgil hit the children on the head with a spoon hard enough to cause lumps on their heads if they did not sit properly at the table. [V 466] He hit them with a wound-up dish towel hard enough to leave bruises. [V 467] When Alvin tried to step in for his sister, he was hit harder. [V 463] Virgil sent the children to bed without supper because he did not want to see or hear them. [V 457] Barbara believed that Virgil's abuse made Alvin very hard and unemotional. [V 498] Virgil forbade any religious practice in the home and burned Barbara's Bibles and other religious books. She was a Jehovah's Witness who tried to instill religious values in the children when Virgil was not present. [V 457-59] Virgil kept

Barbara away from her family as much as possible. He only allowed her to go to her mother when he wanted her to borrow money. [V 469]

When Alvin was born his family lived with Virgil's parents in New Port Richey. [V 453-54] The family moved frequently and with little advance notice. Virgil would come home drunk at 2:00 or 3:00 a.m. and require them to move with only what Barbara could put in the car. They moved from Florida to Ohio, where they had relatives, remained three months, then returned to New Port Richey to stay with friends. They soon moved to Oklahoma with their friends, when Alvin was three or four. They remained in Oklahoma for about a year, but moved around to different towns. [V 459-60] They also lived in Tennessee, California, Texas, and Virginia. [V 469-70] The longest they stayed in one place was about six months. The children changed schools frequently. Alvin did not develop any friendships until he became friends with Walker, Garner, and Kane. [V 462]

Mrs. Stacy separated from Virgil in 1980 because she caught him in bed having sex with Angela. [V 461, 474-75, 496] Alvin was in his own bed in the same room. [V 496-97] Barbara had to wait a year to obtain a divorce. [V 461] She married Melvin Stacy in 1986. [V 475] Melvin tried to be a good father for Alvin, and Barbara had always tried to be a good mother. They lived in a nice home where Alvin had his own room, TV, stereo, video game, and new clothes for school. [V 476-78] Melvin never hit or abused Alvin. [V 485] Melvin took Alvin with him to visit his mother so Alvin

could shoot a gun one of his uncles had given him. [V 492] Barbara instructed Alvin not to use a gun improperly, and not to shoot birds. [V 493] Alvin collected knives, and Barbara discussed knife safety with him. [V 494] Alvin hurt some animals when he was younger, but Barbara did not know about it until after the murder. [V 494-95, 497, 500] Alvin wet the bed when he was two or three years old. He also started some fires. [V 497] As a juvenile, he was charged with arson for setting fire to a trailer down the street. She had to pay $700 restitution for the damage. [V 499]

As a teenager, Alvin and his stepsister stole the family car. He was taken for counseling, but he would not talk to the counselor. [V 472, 479-80] Alvin was good to his mother, helped around the house, and cleaned his room. [V 472-73] Alvin quit school when he was sixteen against his mother's advice. [V 482-83, 485] He had a couple of small jobs. He worked on a construction site for a few days. He delivered newspapers for one week, then he quit about three or four months before the murder and never worked again. [V 483, 485-87, 491] The prosecutor refreshed Mrs. Stacy's memory about Alvin quitting the newspaper job and not working again by reading a passage from her prior testimony. Defense counsel did not object. [V 486-87] When Alvin was 17 or 18, Mr. and Mrs. Stacy bought a car for Alvin to use, but they took it away because he was not working and was not paying for the car or the insurance. [V 487-91] The prosecutor refreshed Mrs. Stacy's memory that Alvin was 18 when they bought the car by reading a passage from her prior

testimony. Defense counsel did not object. [V 490-491] Alvin quit doing chores at home. [V 472, 482] He spent a lot of time in his room playing Dungeons and Dragons and video games with his friends. He quit talking to his mother. When his friends were not there he slept. [V 471-72] When Alvin first went to jail he acted like he did not care whether he saw his family. By the time of this trial, he seemed to enjoy their visits. He did not display much emotion, but sometimes he would smile and cover his mouth. [V 470-71]

Mrs. Stacy testified that Angela was not in jail. One time, years ago, Angela was caught shoplifting a bathing suit and was put on probation for it. [V 495-96]

Angela White testified that she could recall Virgil being violent from the time she was three until they left when she was five. [V 500-02] Virgil drank beer every day and became enraged and abusive. Her mother usually sent the children to their bedroom. She could hear Virgil calling her mother names, yelling at her, hitting her, pushing her, and throwing things. [V 503] Virgil sexually molested Angela quite a few times, beginning when she was four. She did not remember Alvin being in the same room. [V 505, 514] Virgil hit her and Alvin on the head with a spoon for putting their elbows on the dining table. [V 506] When Angela knocked a picture off the wall, Virgil kicked Alvin around the living room. [V 506-07] Alvin was punished for things Angela did about three-quarters of the time. [V 507] Virgil never displayed any affection for either of them. [V 508] In one incident, their

mother caught Virgil in bed with another woman and threw his clothes outside. Virgil began beating her, and she fell on top of the children, who were lying on the couch. Virgil continued beating her until the police came. [V 509-10] Other times, Virgil smacked, punched, and kicked Alvin. Virgil constantly yelled at the children. [V 509] Her mother was a loving mother who worked long hours to provide for Angela and Alvin. She bought Alvin a car. [V 513] In the months before the murders, Alvin slept during the day, then stayed up all night playing video games and Dungeons and Dragons with his friends and riding his bike. [V 511, 514] When Alvin first went to jail he would not tell Angela he loved her, hug her, or smile. By the time of this trial, Alvin would smile, but not without covering his mouth or looking down. He became more talkative, but did not have much to say. [V 510-11] Sometimes he wrote letters to Angela. He told her he regrets the crime. [V 512]

The prosecutor asked Angela whether a week before the murder Alvin was scheming to break into the house, kill the old people, and burn the house down. Angela responded that she did not remember the specifics of what he told her. [V 514] The prosecutor then questioned her as follows:

> Q. Okay. Do you remember on the 27th day of the year 1992 coming to the State Attorney's office?
> A. Yes.
> Q. And speaking with myself?
> A. Yes.
> Q. And there was a court reporter there, correct?
> A. Yes.

Q. And the day after all this happened I guess the facts would be clearest in your mind?

A. Yes.

Q. More clear than they are today, seven years later?

A. Correct.

Q. And do you remember being placed under oath?

A. Yes.

Q. And by the way, have you had a chance to read this?

A. Read what?

Q. This statement, the sworn statement you gave to me back in January of 1992?

A. No. I read it at the last trial, but I haven't read it since.

Q. Okay. Let's go to Page 4, Angela, if I could read this to you and see if this refreshes your recollection.

Do you remember being asked this question: And back about a week ago or so, I guess it was about a week ago Saturday, which would have made it January 19 or January 18th somewhere, a Saturday?

Your answer was: Yeah.

The question: Do you remember the whole group being present at your house?

Your answer was: Yes.

And we're talking about the boys I just mentioned plus a boy named John Hill?

Your answer was: Yes. Hill.

I asked you: Did you know all these boys?

And you said: Yes.

I said: Were you present along with a girlfriend?

You said: Yes.

I said: Who was the girlfriend?

You said: My best friend, Victoria Fitch.

I said: Did you hear a conversation which was kind of unusual, did you hear something?

And your answer was: Not just overhear it, they told us about it.

And I asked you: Who actually was telling you?

And your answer was: Mainly my brother. He was bragging about what he was going to do.

And I asked you: What room of the house were you in?

You said: My brother's bedroom.
I asked you: What did you hear him say?
And you said: He was going to break into a house that had a satellite and a swimming pool and steal stuff, and if the old people caused anything he would kill them, then he would burn down the house so there would be no evidence.
Remember that?
A. I remember bits and pieces of that. Yes.
Q. Does that refresh your recollection a little bit?
A. Yes.
Q. And he a week or so before the murder asked you to drive the car and if you would he would give you a TV and a VCR, and you told him you didn't want to have anything to do with that; do you remember that.
A. Yes. I do remember that.

[V 515-17] Defense counsel did not object. [V 515-17]

Defense exhibit 1, a prison report of force used dated 6/12/98, was admitted into evidence.[3] [V 518]

Wilhelmina Pisters, a retired mental health counselor, [VI 524-28, 546-47] determined that Alvin Morton suffered from an antisocial personality disorder which resulted from his early childhood experiences, including lack of contact with his mother when he was hospitalized at birth, the absence of religious practice in the home, family violence and fear, frequent moves by the family, difficulties in school, poor health, lack of friendships, his mother's failure to enforce rules, and his mother's guilt-driven need to give her children everything. [VI 531-37,

[3] The prosecutor read this document to the jury during closing argument. It described an incident on June 12, 1998, in which a corrections officer pushed Morton after the officer's finger was injured when he tried to tighten a chain around Morton's waist. [VII 738]

540-41, 543-45, 585-86] Alvin's behavior in being cruel to animals, setting fires, and wetting the bed were strong indications of a person developing personality problems which can have a very serious impact on their future conduct. [IV 537-39] In her first two interviews with Alvin in 1994, he did not show any emotion, remorse, or conscience. [VI 544-45, 592-94] He did not care about the possibility of a death sentence. [VI 598] Alvin satisfied all the criteria for a diagnosis of antisocial personality disorder contained in the DSM-4, including truancy from school, suspension from school for misbehavior, delinquency, running away from home, persistent lying, theft and vandalism, school grades below expectations for his average IQ, chronic violation of rules at home or school, and initiation of fights. [VI 580-85]

The essential feature of an antisocial personality disorder is a history of continuous and chronic antisocial behavior in which the rights of others are violated. [VI 581] People with antisocial personality disorders follow behavior patterns which facilitate acting out in the community. They can make decisions, but tend to make the wrong decisions. They are not guided by an intellectual concept of what is good and bad and what they should or should not do. Alvin was not mentally ill, but his ability to make decisions was impaired. [VI 541-42, 592] Pisters agreed with the prosecutor's assertion that "when we say antisocial behavior, we mean somebody can't conform themselves to the rules of society ...." [VI 582] Alvin could appreciate the criminality of his conduct. [VI 593]

Although Alvin and his sister lived through the same or similar experiences and did not turn out the same, Angela may have felt a greater degree of protection from her mother and Alvin, and not everybody reacts to the same circumstances the same way. [VI 536] The prosecutor elicited Mrs. Pisters testimony that she was opposed to capital punishment. [VI 549]

Dr. Donald Delbeato, a clinical and forensic psychologist, [VI 606] evaluated Alvin Morton in 1994 and determined that he suffered from a mixed personality disorder, including antisocial personality disorder. Alvin was emotionally unstable, suspicious, and had a loner-type nature. [VI 610] An antisocial personality disorder is a mental disorder. [VI 629] About 50% of the criminal defendants Dr. Delbeato had examined had antisocial personality disorders, and most of those were males who were not bonding. [VI 630] Two to three times as many males than females develop antisocial personality disorders. The disorder is more common with first degree biological relatives, such as father/son or mother/daughter. [VI 611] The disorder results from a combination of heredity and environment, as does personality in general. [VI 611-12, 619] Alvin characterized his family as, "Not being close." He said he did not have much contact with his natural father and did not like his stepfather. He denied any physical abuse in his early years. [VI 613] Kids who have actually been abused by their parents frequently deny the abuse. [VI 613-14] Alvin said he did not have any supervision and pretty much went his own way. Alvin's life was not stable and was devoid of guidance and goals. Cruelty to

animals, setting fires, and wetting the bed are significant signs that a person will develop antisocial behavior. [VI 614] Alvin said he had been in trouble since the age of 14, he was truant, had disciplinary problems in school, and felt no remorse for the victims. [VI 632-33, 636] Alvin had a deficit in conscience. [VI 635] His personality disorder was an impairment of behavior and conscience. [VI 637]

Dr. Delbeato found Alvin to be competent and to have mid-average intelligence, with an IQ of 96. [VI 615-16, 624-25, 627] Alvin was sane at the time of the crime; he knew the difference between right and wrong. [VI 624-25] He was not under the substantial domination of another; he was probably the leader. [VI 625-26, 632] He liked to associate with younger people because they were less rejecting and easier to manipulate. He was a dominating type person. [VI 633-34] There was no evidence that he was under the influence of extreme mental or emotional disturbance. [VI 626] A Rorschach test did not suggest that Alvin was schizophrenic or had any major depression or mental illness. It suggested that he was not very imaginative or creative and had low self-esteem, suppressed anger, passive/aggressive, suspicious thinking, and sensitivity to criticism and rejection. [VI 616-17, 627-29] MMPI test results suggested an emotionally unstable and antisocial type, passive/aggressive, situational depression, a loner, chronically anxious and nervous, somewhat obsessive, and sensitive to criticism. [VI 617] In its worst form, passive/aggressive behavior is aggression or violence towards a

passive object. [VI 608] Alvin's cruelty to animals and the murders in this case were passive/aggressive acts. [VI 634] There was no evidence of organic brain dysfunction. [VI 628-29]

Personality disorders are resistant to treatment after the age of 19, but antisocial personality disorders burn out with advancing age, and more aggressive behaviors decrease by age 40. [VI 637-38] In response to the prosecutor's hypothetical incorporating his version of the facts in this case, Dr. Delbeato would not expect Alvin to be devoid of antisocial personality traits by age 40, and he would not bother treating the disorder. [VI 638-42]

Kathy Dufoe, Barbara Stacy's sister and Alvin Morton's aunt, testified that Barbara saw Alvin every day after his birth. She did not remember Barbara having problems getting to the hospital. [VI 643-44] Dufoe saw Virgil hit Alvin and knock him off a chair when he was three years old because there was no beer in the refrigerator. [VI 644] She saw Virgil hit Alvin "upside the head" a couple of other times. [VI 646] Virgil was drunk every day. [VI 644-45] A couple of times Virgil asked Barbara to ask her mother for money for food. If her mother refused, Virgil became upset and called her names. Once when her mother gave Barbara money for food for the kids, Dufoe saw Virgil sitting in a bar. Virgil was rude and nasty to the children. He called them names and never showed any affection for them. [VI 645] Dufoe never saw Virgil do anything nice for the children. [VI 646] After Barbara divorced Virgil, she married Melvin Stacy, who was a good stepfather and liked to spend time with Alvin. [VI 646-47] Dufoe

never saw any evidence of alcohol or drug abuse by Alvin. She was not aware that he had a knife collection or a sawed-off shotgun. [VI 647] He spent a lot of time in his room. [VI 648]

Paula Trepp, Virgil Morton's sister, testified that Virgil had not had any contact with Alvin for about ten years. [VI 648-49] Virgil was an alcoholic. [VI 649] Virgil was a strict disciplinarian. Trepp saw him hit Alvin in the face one time when he was just a little boy running around. Virgil was cruel to Alvin. [VI 650] Barbara was a very good mother. She provided most of Alvin's care when he was a baby, and he appeared to be a happy baby. Mr. Stacy was a good stepfather. They tried to do the best they could with Alvin. They gave him affection. [VI 650, 653-554]

Patricia Boutwell, Barbara's sister, testified that when Alvin was an infant, Barbara was holding Alvin in her arms, standing on the front steps to their mobile home. Virgil pushed Barbara face first into the door, causing her to fall to the floor. [VI 655]

C. The State's Rebuttal

Dr. Arturo Gonzalez, a psychiatrist, interviewed Alvin Morton in 1998. [VII 661-64, 679-80] Dr. Gonzalez determined that Alvin had an antisocial personality disorder. [VII 671, 673] Dr. Gonzalez had reviewed the work of Dr. Delbeato and Mrs. Pisters. He agreed with their diagnosis. He also agreed that the roots of this antisocial personality disorder are in childhood. [VII 681] In Dr. Gonzalez's opinion, Alvin's capacity to appreciate the

criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired. [VII 671, 676] Dr. Gonzalez thought Alvin was a "bright guy" whose intelligence was in the higher range. [VII 672] An unattached child who has been abused and had no male role model might have a disposition to do antisocial things. [VII 674] Nothing in Alvin's background would have compelled him to commit a double murder. He had the intellect to make intelligent choices. [VII 676, 684] However, his ability to make those choices was impaired by his personality disorder. [VII 684] Angela was also exposed to "all the dysfunctional family affairs," but she seemed to be a solid citizen. Psychiatrists do not know why some people go one way and some people go the other way. "It's not because they come from a dysfunctional family, many people are abused and they are good citizens." [VII 677] There is no evidence that coming from a single parent home with only the mother present prevents bonding by a male sibling. [VII 678] However, antisocial personality disorders are three times more prevalent among males than among females. [VII 687] Moving frequently does not predispose someone to commit such crimes. [VII 678] Dr. Gonzalez found no sign that Alvin felt any regret, any remorse, or any conscience. [VII 679] Antisocial personality disorders become less evident as people grow older. They "mellow out" in their forties and do not engage in criminal behavior. [VII 687-88]

D. Closing Arguments

In arguing that the murders were cold, calculated, and premeditated, the prosecutor relied in part on Angela White's prior statement which he read to her on cross-examination:

> What did Angela Morton tell us about what was going on? Recall the questions that I asked of her on cross-examination:
>
> Did you overhear a conversation that was unusual? And this is going back about a week before the murder. And she said, yes. And what was -- who was telling you this? Mainly my brother, he was bragging about what he was going to do. What room in the house were you in? My brother's room. And what did you hear him say? That he was going to break into a house that had a satellite dish and a swimming pool and steal some stuff, and if the old people caused anything he would kill them and burn the house down so there would be no evidence. He told me I could drive the car to get a TV and a VCR. But she turned him down. Right.
>
> What does that show? This shows a careful prearranged plan, doesn't it? And if you have any doubt what she was talking about, look at the photograph, the photograph shows that home on 6730 Sanderling Drive. It shows the swimming pool, it shows the satellite dish.
>
> So, a week before this case, this defendant planned to kill the two old people that were in that house, planned to kill Mr. Bowers, planned to kill Mrs. Weisser.

[VII 712-13] Defense counsel did not object. [VII 712-13]

In arguing against the mitigating evidence concerning the abuse Morton suffered in early childhood, the prosecutor remarked,

> Is that mitigation, folks? Is that mitigation? The fact that a child was abused when he was a little child? Well, see now, Counsel knows that's not mitigation, the fact that when he was five or six or seven he was hit with a fork on the top of the head, that he was thrown into a lake.

[VII 727] Defense counsel did not object. [VII 727]

The prosecutor then argued that Ms. Pisters, the social worker, was biased because she opposed capital punishment:

> Let's look at Mimi Pisters, a social worker. She opposes capital punishment. Once again, you are going to know this is a biased witness. She doesn't believe in it, so she has got to make this somehow a mitigation. Right? There's got to be a mitigating factor.

[VII 727] Defense counsel did not object. [VII 727] The prosecutor repeated the allegation, again without objection: "First of all, we know why she opined the way she did. She's opposed to capital punishment." [VII 729]

The prosecutor commented on Morton's failure to confess to the state's expert, Dr. Gonzalez:

> Plus he's cunning. Why? He knows Dr. Gonzalez is going to testify against him. He isn't going to spit out a confession to Dr. Gonzalez and tell him here's what I did, I kicked in the door, I had a gun, I had a knife, I shot these people, I stabbed her, then I cut off his finger, then I threw it on the bed and I brought it back to my buddy, to Jeff Madden, to show him what a tough guy I am. He's not going to tell that to Dr. Gonzalez, Dr. Gonzalez is a State witness. So he says, I don't recall.

[VII 740] Defense counsel did not object. [VII 740]

The prosecutor concluded his remarks by arguing that the people of the State of Florida have a right to a death penalty in this case:

> But the People of the State of Florida, the people who I have the honor of representing, enjoy certain rights also. The right to have a verdict that is consistent with the evidence. The right to have a recommendation that's consistent with justice.

> And I submit to you, folks, that the only recommendation here, the only recommendation that's consistent with the evidence and consistent with justice, is that this defendant deserves the death penalty for what he did to Mr. Bowers and Mrs. Weisser. Thank you.

[VII 746] Defense counsel did not object. [VII 746]

Defense counsel argued, inter alia, that Morton's antisocial personality disorder was "the most important" mitigating factor to be considered. [VII 768-70]

E. The Presentencing Hearing

At the Spencer hearing on February 19, 1999, [SR 301] defense counsel asked the court to consider the deposition of Timothy Kane[4], a letter from Morton's mother, Barbara Stacy[5], and a written statement to be prepared by Morton's sister, Angela[6]. [SR 305-06]

F. The Death Sentence

At the final sentencing hearing on March 1, 1999, the court indicated that it had reviewed the presentence investigation

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[4] Kane's deposition is included in the supplemental record; it sets forth Kane's version of how the murders occurred. [SR 189-223] Kane heard Morton talk about breaking into someone's house a week or more prior to the commission of the burglary and murders, but he claimed not to have heard any discussion about killing someone prior to the burglary. [SR 193-97]

[5] Mrs. Stacy's letter indicated that Alvin Morton wanted to die and begged the court not to sentence him to death. [I 148-49]

[6] There is no indication in the record that any written statement by Angela White was ever presented to the court.

report[7], the deposition of Timothy Kane, the testimony of Dr. Delbeato, and a petition on behalf of Morton signed by a number of people who urged the court to impose a life sentence. [I 169-76; VII 792, 794] The court sentenced Alvin Morton to death for each of the two murders. [I 152-61; VII 795-809; A 8-17]

The court found three aggravating circumstances which applied to both murders: (1) The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. [I 153-54, 156; VII 797-98, 801-02; A 9, 10, 12] (2) The homicide was committed while the defendant was engaged in the commission of or an attempt to commit a robbery and/or burglary. [I 154, 157; VII 798, 802; A 10, 13] (3) The homicide was committed for the dominant purpose of avoiding or preventing a lawful arrest. [I 154-55, 157; VII 798-99, 802-03; A 154-55, 157] The court found two additional aggravating circumstances which applied solely to the murder of Mrs. Weisser: (4) The homicide was committed in an especially heinous, atrocious, or cruel manner (HAC). [I 155-56; VII 800; A 11-12] (5) Morton was previously convicted of another capital felony, the murder of John Bowers. [I 156; VII 800-01; A 12]

The court considered the following mitigating circumstances: (1) Morton was 19 years old at the time of the murders. The court gave this factor little weight because it concluded that his

[7] The presentence investigation report is set forth in the second supplemental record. [2dSR 328-36] It contained requests to impose the death sentence from four relatives of the deceased. [2dSR 334] There is no record of any objection to those requests by defense counsel.

emotional age was consistent with his actual age based on evidence that his IQ was normal. [I 158; VII 804; A 14] (2) Morton had no significant history of prior criminal activity, which the court gave some weight because his only record was as a juvenile. [I 158; VII 804; A 14] (3) The court rejected the substantially impaired capacity mitigating circumstance, finding that the evidence established that Morton did appreciate the criminality of his conduct and could have conformed his conduct to the requirements of law. [I 158; VII 804-05; A 14] (4) Regarding the murder of Mrs. Weisser, the court rejected the mitigating circumstance that Morton was an accomplice whose participation was minor, finding it was not established by credible evidence. [I 159; VII 805-06; A 15] (5) The court identified four nonstatutory mitigating circumstances concerning Morton's character: (a) family background, (b) mental problems, (c) physical or mental abuse of Morton by his parents, and (d) voluntary confession and cooperation of Morton. [I 159; VII 806; A 15] The court found that Morton was "a product of a highly dysfunctional family at least through age eight" and "was repeatedly physically abused by his alcoholic father" until the age of eight, but the court gave this circumstance "little weight." [I 159-60; VII 806-07; A 15-16] The court made no separate findings concerning mental problems. [I 159-60; VII 806-807; A 15-16] The court found that Morton's only cooperation came from his voluntary confession and gave this factor little weight because the confession followed an extensive manhunt

on two occasions before he was apprehended. [I 160; VII 807; A 16]

SUMMARY OF THE ARGUMENT

ISSUE I The resentencing judge adopted the original sentencing judge's findings of fact regarding the aggravating and mitigating circumstances. Some of the "facts" included in the findings were not proved during the resentencing proceedings. The resentencing proceeding was an entirely new proceeding at which the State was required to prove aggravating circumstances beyond a reasonable doubt, and the resentencing judge was not bound to make the same findings as the original sentencing judge. By adopting the original findings of fact, the resentencing judge violated the requirement that he make an independent, reasoned judgment upon a thoughtful, deliberate, and knowledgeable weighing of the aggravating and mitigating circumstances proved in the resentencing proceedings. The death sentences should be vacated and the case remanded for imposition of life sentences, or in the alternative, for resentencing proceedings before a new judge.

ISSUE II The prosecutor has a duty to refrain from inflammatory and abusive argument. The prosecutor in this case violated that duty with repeated improper and unethical remarks during closing argument. He argued "facts" contained in Angela White's prior out-of-court statement which were never proved at the resentencing trial to support the cold, calculated, and premeditated aggravating circumstance. He misled the jury on the law by arguing that child abuse was not a mitigating factor. He improperly stated his opinion of the credibility of defense expert Mimi Pisters based upon her opposition to capital punishment. He

commented on Morton's exercise of his constitutional right against self-incrimination by arguing that Morton failed to confess to the State's expert, Dr. Gonzalez. He again misled the jury on the law by arguing that the people of the State of Florida have a right to a death recommendation. Although defense counsel failed to object to the prosecutor's improper and unethical arguments, those arguments violated Morton's constitutional right to a fair trial and constituted fundamental, reversible error requiring a new penalty phase trial with a new jury.

ISSUE III The trial court violated the Eighth Amendment by failing to consider, find, and weigh the uncontroverted and overwhelming mitigating evidence that Morton suffered from an antisocial personality disorder. Defense counsel argued that this was the most important mitigating circumstance in this case. The trial court's failure to consider this circumstance deprives this Court of the ability to meaningfully review the sentencing order. This error requires resentencing.

ISSUE IV The trial court abused its discretion and violated the Eighth Amendment by giving diminished weight to the mitigating circumstances of Morton's age of 19 and his history of having been abused as a child. The court erroneously relied upon Morton's average IQ to establish his maturity despite compelling evidence that he was emotionally unstable and extremely immature for his age. The court erroneously relied upon Morton's sister's good conduct to diminish the weight given to the history of child abuse despite compelling evidence of the nature and extent of the abuse

inflicted upon Morton by his father and evidence that showed why Morton and his sister responded differently to that abuse. This error also requires resentencing.

ARGUMENT

ISSUE I

THE RESENTENCING JUDGE ERRED BY ADOPTING THE FACTS FOUND BY THE PRIOR SENTENCING JUDGE REGARDING THE AGGRAVATING AND MITIGATING CIRCUMSTANCES.

A comparison of the sentencing order entered by Judge Robert E. Beach when he resentenced Morton to death for the murders of John Bowers and Madeline Weisser on March 1, 1999, [I 152-61; A 1-17] with the prior sentencing order entered by Judge Craig C. Villanti when he sentenced Morton to death for the same murders on March 18, 1994,[8] [A 18-28] reveals that, with only minor exceptions,[9] Judge Beach essentially adopted Judge Villanti's

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[8] Judge Villanti's sentencing order is contained in the record on appeal for Morton v. State, 689 So. 2d 259 (Fla. 1997), this Court's Case No. 83,422, pages R 656-66, and is reproduced in the Appendix to this brief. [A 18-28] This Court "may" take judicial notice of its own records under section 90.202(6), Florida Statutes (1999). Appellant has filed a separate Motion Requesting Judicial Notice of Prior Sentencing Order asking this Court to take judicial notice of Judge Villanti's prior sentencing order contemporaneously with the filing of this brief. This Court "shall" take judicial notice of any matter in section 90.202 upon a party's request when the party provides timely written notice to each adverse party and furnishes this Court with sufficient information to enable it to take judicial notice of the matter.

[9] The exceptions noted by counsel for appellant are: (1) In the findings in support of the cold, calculated, and premeditated aggravating circumstance, Judge Beach found an additional fact not found by Judge Villanti -- "having worn gloves to avoid leaving fingerprints ...." [I 154, 156; A 10, 12, 20, 23] (2) Judge Beach's findings concerning the no significant history of prior criminal activity mitigating factor are different from Judge Villanti's findings on the same factor. [I 158; A 14, A 25] (3) Regarding the substantial impairment mitigating factor, Judge Beach omitted Judge Villanti's finding that Morton "was not disillusioned, suffered no drug abuse, nor inpatient psychiatric

findings of fact regarding the aggravating and mitigating circumstances in this case. In doing this, Judge Beach found "facts" not supported by the evidence presented in the resentencing proceedings.

First, the court's findings in support of the cold, calculated, and premeditated aggravating circumstance included that Morton "solicited suggestions of what proof would be needed to establish the murder -- such as a human body part as a trophy;" that Morton had "extra ammunition;" and Morton "expressed a hope that the killing would produce a rush ...." [I 153, 154, 156; A 9, 10, 12] Second, the court's findings in support of the felony murder aggravator included that "ample evidence of ransacking to the contents of the dwelling, which was terminated when a car was heard outside. This finding is independent to the Defendant's confession and statements to others on this issue." [I 154, 157; A 10, 13] Third, the court gave the voluntary cooperation with police mitigating factor little weight because Morton's voluntary confession "followed an extensive manhunt on two occasions before the Defendant was apprehended ...." [I 160; A 16] Those "facts" may or may not have been proved in Morton's original trial and sentencing proceedings, but do not appear in the evidence presented in the resentencing proceedings.

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care." [I 158; A 14, 25] (4) Regarding the abused childhood mitigating circumstance, Judge Beach gave a more complete explanation than Judge Villanti for giving little weight to this circumstance -- "there has been no showing that this experience caused the Defendant to have a diminished capacity to know right from wrong or not know the seriousness and grave consequences of his acts ...." [I 160; A 16, 27]

"This Court has applied the 'clean slate' rule to resentencing proceedings." Preston v. State, 607 So. 2d 404, 408 (Fla. 1992), cert. denied, 507 U.S. 999 (1993).

> Because this was a resentencing proceeding, the jury initially knew nothing about the facts of this case. The basic premise of sentencing procedure is that the sentencer is to consider all relevant evidence regarding the nature of the crime and the character of the defendant to determine appropriate punishment. Preston v. State, 607 So. 2d 404 (Fla. 1992). This can be accomplished only by allowing a resentencing to proceed in every respect as an entirely new proceeding.

Wike v. State, 698 So. 2d 817, 821 (Fla. 1997); see also Bonifay v. State, 680 So. 2d 413, 419 (Fla. 1996). "[R]esentencing should proceed de novo on all issues bearing on the proper sentence." Preston, at 408; Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986).

As a consequence of proceeding de novo on resentencing,

> a death sentence which has been vacated by this Court should not play a significant role in resentencing proceedings.... A prior sentence, vacated on appeal, is a nullity. It offers the sentencing jury no probative information on any of the aggravating or mitigating factors weighed in such proceedings and could conceivably be highly prejudicial to a defendant.

Teffeteller, at 745. Just as the prior sentence offers the resentencing jury no probative information on the aggravating and mitigating factors, it also offers the resentencing judge no probative information on those factors because the evidence presented in the resentencing proceedings may be, and often is, different from the evidence presented in the original trial and

sentencing proceedings. Thus, the resentencing judge was "under no obligation to make the same findings as those made in [the defendant's] prior sentencing proceeding." Phillips v. State, 705 So. 2d 1320, 1322 (Fla. 1997).

"[A] resentencing judge is not obligated to find mitigating circumstances found by the first judge." Preston, at 408; see King v. Dugger, 555 So. 2d 355, 358 (Fla. 1990). Conversely, the resentencing judge must not reject mitigating factors supported by a reasonable quantum of competent evidence which is uncontroverted in the resentencing proceedings. See Mahn v. State, 714 So. 2d 391, 400 (Fla. 1998); Spencer v. State, 645 So. 2d 377, 384-85 (Fla. 1994); Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). In this case, the resentencing judge should not have relied upon unproven "facts" that Morton's confession "followed an extensive manhunt on two occasions before the Defendant was apprehended" [I 160; A 16] to diminish the weight given to the confession as a mitigating circumstance.

Moreover, the State is required to prove aggravating circumstances beyond a reasonable doubt during the resentencing proceedings. Bonifay, at 419; Valle v. State, 581 So. 2d 40, 45 (Fla. 1991); King v. State, 514 So. 2d 354 (Fla. 1987), cert. denied, 487 U.S. 1241 (1988). Therefore, the resentencing judge cannot rely upon the original sentencing judge's factual findings based upon the evidence presented in the original trial and sentencing proceedings. Although the State may have proved facts supporting the aggravating factors in the prior proceedings, that

does not satisfy the State's burden of proof in the resentencing proceedings. Thus, the resentencing judge should not have relied upon unproven "facts" that Morton "solicited suggestions of what proof would be needed to establish the murder -- such as a human body part asa trophy," Morton had "extra ammunition," and Morton "expressed a hope that the killing would produce a rush" [I 154, 156; A 10, 12] to support the CCP aggravating factor. Nor should the judge have relied upon the unproven "facts" that "ample evidence of ransacking to the contents of the dwelling, which was terminated when a car was heard outside" [I 154, 157; A 10, 13] to support the felony murder aggravating factor.

If the resentencing judge relied upon some source for those unproven "facts" other than the evidence presented in the resentencing proceedings, he was required, as a matter of due process of law, to give Morton notice and an opportunity to rebut or explain the extra-record evidence he was considering. Gardner v. Florida, 430 U.S. 349 (1977); Lockhart v. State, 655 So. 2d 69, 73-74 (Fla. 1995); Porter v. State, 400 So. 2d 5, 7 (Fla. 1981). In Porter, at 7, this Court ruled, "Should a sentencing judge intend to use any information not presented in open court as a factual basis for a sentence, he must advise the defendant of what it is and afford the defendant an opportunity to rebut it." In this case the resentencing judge did not comply with the notice and opportunity to rebut requirements. It cannot be determined from the record in this case whether the judge considered any extra-record evidence to support the unproven "facts" in the resentencing

order. If he did so without providing notice and an opportunity to rebut, he violated Morton's constitutional right to due process of law.

It is well-established that the sentencing judge's duty to set forth in writing the reasons for imposing the death sentence is an essential component of the capital sentencing process. See Spencer v. State, 615 So. 2d 688, 691 (Fla. 1993); § 921.141(3), Fla. Stat. (1999). In Spencer, at 691, this Court stated:

> It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed. Capital proceedings are sensitive and emotional proceedings in which the trial judge plays an extremely critical role.

Thus, "even though a jury determination is entitled to great weight, 'the judge is required to make an independent determination based on the aggravating and mitigating factors.'" King v. State, 623 So. 2d 486, 489 (Fla. 1993) (quoting Grossman v. State, 525 So. 2d 833, 840 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989). In King, at 489 (quoting Holmes v. State, 374 So. 2d 944, 950 (Fla. 1979), cert. denied, 446 U.S. 913 (1980)), this Court explained:

> The primary purpose of requiring these findings to be in writing is to provide an opportunity for meaningful review by this Court so that it may be determined that the trial judge viewed the issue of life or death within the framework of the rules provided by statute. It must appear that the sentence imposed was the result of reasoned judgment.

In Grossman, at 841, this Court mandated that "all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the

pronouncement." In Hernandez v. State, 621 So. 2d 1353, 1357 (Fla. 1993), this Court explained:

> The purpose of this requirement is to ensure that each death sentence handed down in Florida results from a thoughtful, deliberate, and knowledgeable weighing by the trial judge of all aggravating and mitigating circumstances surrounding both the criminal and the crime, as dictated by the United States Supreme Court and our own state constitution.

The requirement of contemporaneous written findings in support of a death sentence is so important that its violation mandates vacating the death sentence and remanding for the imposition of a life sentence. Gibson v. State, 661 So. 2d 288, 293 (Fla. 1995); Perez v. State, 648 So. 2d 715, 720 (Fla. 1995); Hernandez, at 1357.

In this case, the resentencing judge's adoption of the original sentencing judge's findings of fact regarding the aggravating and mitigating circumstances was tantamount to a complete failure to provide contemporaneous written findings in support of the death sentences. In reviewing the resentencing order, this Court cannot be assured that the death sentences represent the independent, reasoned judgment of the resentencing judge nor that the sentences resulted from the requisite thoughtful, deliberate, and knowledgeable weighing of the aggravating and mitigating circumstances. This is especially so where the resentencing judge put such little thought into his sentencing order that he adopted findings of "facts" not proved by the evidence presented in the resentencing proceedings. Under

these circumstances, this Court should vacate the death sentences and remand for imposition of a life sentence.

If this Court does not find that life sentences are required under the circumstances of this case, this Court should remand for resentencing proceedings before a different judge. Judge Beach demonstrated that he was predisposed to sentence Morton to death by adopting the factual findings from Judge Villanti's prior sentencing order with little or no regard for the evidence presented in the resentencing proceedings. Morton is constitutionally entitled, as a matter of due process of law under the federal and state constitutions, to be sentenced by an impartial judge who will engage in the thoughtful, deliberate, and knowledgeable weighing of the aggravating and mitigating circumstances to reach an independent, reasoned judgment concerning the sentences to be imposed. Porter v. State, 723 So. 2d 191, 195-96 (Fla. 1998).

ISSUE II

THE PROSECUTOR'S IMPROPER CLOSING ARGUMENTS VIOLATED APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL.

In Stewart v. State, 51 So. 2d 494 (Fla. 1951), this Court stated the duties of counsel and the trial court concerning closing arguments:

> We have not only held that it is the duty of counsel to refrain from inflammatory and abusive argument but that it is the duty of the trial court on its own motion to restrain and rebuke counsel from indulging in such argument.

This Court further explained the special duty owed by a prosecutor:

> Under our system of jurisprudence, prosecuting officers are clothed with quasi judicial powers and it is consonant with the oath they take to conduct a fair and impartial trial. The trial of one charged with crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament.

Id., at 495; accord Gore v. State, 719 So. 2d 1197, 1202 (Fla. 1998).

In Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985), this Court again condemned improper arguments by prosecutors, stating, "It ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the precepts of their profession and their office." This Court explained, id., at 134,

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the

> defendant rather than the logical analysis of the evidence in light of the applicable law.

Further, in Gore v. State, 719 So. 2d at 1202, this Court declared:

> While prosecutors should be encouraged to prosecute cases with earnestness and vigor, the should not be at liberty to strike "foul blows." See Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). As the United States Supreme Court observed over sixty years ago, "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Id.

In the present case, the prosecutor made five types of remarks in his closing argument which were improper. First, he argued "facts" not established by the evidence admitted at the resentencing trial to support the cold, calculated, and premeditated (CCP) aggravating circumstance:

> What did Angela Morton tell us about what was going on? Recall the questions that I asked of her on cross-examination:
>
> Did you overhear a conversation that was unusual? And this is going back about a week before the murder. And she said, yes. And what was -- who was telling you this? Mainly my brother, he was bragging about what he was going to do. What room in the house were you in? My brother's room. And what did you hear him say? That he was going to break into a house that had a satellite dish and a swimming pool and steal some stuff, and if the old people caused anything he would kill them and burn the house down so there would be no evidence. He told me I could drive the car to get a TV and a VCR. But she turned him down. Right.
>
> What does that show? This shows a careful prearranged plan, doesn't it? And if you have any doubt what she was talking about, look at the photograph, the photograph shows that home on 6730 Sanderling Drive. It shows

> the swimming pool, it shows the satellite dish.
>
> So, a week before this case, this defendant planned to kill the two old people that were in that house, planned to kill Mr. Bowers, planned to kill Mrs. Weisser.

[VII 712-13] Defense counsel did not object. [VII 712-13]

These "facts" came from Angela White's out-of-court statement which the prosecutor read to her during cross-examination under the guise of refreshing her recollection:

> Q. Okay. Do you remember on the 27th day of the year 1992 coming to the State Attorney's office?
>
> A. Yes.
>
> Q. And speaking with myself?
>
> A. Yes.
>
> Q. And there was a court reporter there, correct?
>
> A. Yes.
>
> Q. And the day after all this happened I guess the facts would be clearest in your mind?
>
> A. Yes.
>
> Q. More clear than they are today, seven years later?
>
> A. Correct.
>
> Q. And do you remember being placed under oath?
>
> A. Yes.
>
> Q. And by the way, have you had a chance to read this?
>
> A. Read what?
>
> Q. This statement, the sworn statement you gave to me back in January of 1992?
>
> A. No. I read it at the last trial, but I haven't read it since.
>
> Q. Okay. Let's go to Page 4, Angela, if I could read this to you and see if this refreshes your recollection.
>
> Do you remember being asked this question: And back about a week ago or so, I guess it was about a week ago Saturday, which would have made it January 19 or January 18th somewhere, a Saturday?
>
> Your answer was: Yeah.
>
> The question: Do you remember the whole group being present at your house?

Your answer was: Yes.

And we're talking about the boys I just mentioned plus a boy named John Hill?

Your answer was: Yes. Hill.

I asked you: Did you know all these boys?

And you said: Yes.

I said: Were you present along with a girlfriend?

You said: Yes.

I said: Who was the girlfriend?

You said: My best friend, Victoria Fitch.

I said: Did you hear a conversation which was kind of unusual, did you hear something?

And your answer was: Not just overhear it, they told us about it.

And I asked you: Who actually was telling you?

And your answer was: Mainly my brother. He was bragging about what he was going to do.

And I asked you: What room of the house were you in?

You said: My brother's bedroom.

I asked you: What did you hear him say?

And you said: He was going to break into a house that had a satellite and a swimming pool and steal stuff, and if the old people caused anything he would kill them, then he would burn down the house so there would be no evidence.

Remember that?

A. I remember bits and pieces of that. Yes.

Q. Does that refresh your recollection a little bit?

A. Yes.

Q. And he a week or so before the murder asked you to drive the car and if you would he would give you a TV and a VCR, and you told him you didn't want to have anything to do with that; do you remember that.

A. Yes. I do remember that.

[V 515-17]

Defense counsel did not object to the prosecutor's method of refreshing Ms. White's recollection. [V 515-17] However, this

Court expressly disapproved of this practice in its decision on Morton's prior appeal:

> We reject the State's alternative position that the prior statements were properly admitted to refresh the witnesses' memories. Section 90.613 does not contemplate that evidence which might otherwise be inadmissible will be paraded in front of the jury in the course of refreshing the witness's memory. Rather, the witness should be shown the statement and asked if it refreshed the witness's recollection. See Auletta v. Fried, 388 So. 2d 1067 (Fla. 4th DCA 1980); Hill v. State, 355 So. 2d 116 (Fla. 4th DCA 1978); Oliver v. State, 239 So. 2d 637 (Fla. 1st DCA 1970), quashed on other grounds, 250 So. 2d 888 (Fla. 1971).
>
> We also reject the argument that the statements were properly admitted under the past recollection recorded exception to the hearsay rule, section 90.803(5). The State made no effort to lay the proper predicate for this exception.

Morton v. State, 689 So. 2d 259, 264-65 n. 5 (Fla. 1997), receded from on other grounds, Rodriguez v. State, 25 Fla. L. Weekly S89, S95 (Fla. Feb. 3, 2000). [I 16; A 5, 7]

During the resentencing trial, the prosecutor never requested that Ms. White's prior statement be admitted into evidence, the court did not admit the prior statement into evidence, Ms. White did not testify to the "facts" contained in the prior statement, and neither the prosecutor nor any other witness testified to the "facts" contained in the prior statement. Thus, the statement was never admitted into evidence at the resentencing trial, and the "facts" contained in the statement were never proved at the resentencing trial.

Morton's resentencing trial was a "completely new proceeding." Phillips v. State, 705 So. 2d 1320, 1322 (Fla. 1997), cert. denied, 119 S. Ct. 187, 142 L. Ed. 2d 152 (1998). In Wike v. State, 698 So. 2d 817, 821 (Fla. 1997), cert. denied, 522 U.S. 1058 (1998), this Court explained,

> Because this was a resentencing proceeding, the jury initially knew nothing about the facts of this case. The basic premise of sentencing procedure is that the sentencer is to consider all relevant evidence regarding the nature of the crime and the character of the defendant to determine appropriate punishment. Preston v. State, 607 So. 2d 404 (Fla. 1992). This can be accomplished only by allowing a resentencing to proceed in every respect as an entirely new proceeding. Id.

Because the resentencing trial was an entirely new proceeding, the prosecutor had to prove the facts supporting his claim that the murders were CCP beyond a reasonable doubt in that proceeding. Bonifay v. State, 680 So. 2d 413, 419 (Fla. 1996); Valle v. State, 581 So. 2d 40, 45 (Fla. 1991).

Having failed to prove the "facts" contained in Ms. White's prior statement during the resentencing proceeding, the prosecutor was not permitted to argue the existence of such "facts" to the jury in his closing argument. It is legally improper to argue facts not in evidence. Ruiz v. State, 743 So. 2d 1, 4 (Fla. 1999); Knight v. State, 672 So. 2d 590, 591 (Fla. 4th DCA 1996); Pacifico v. State, 642 So. 2d 1178, 1184 (Fla. 1st DCA 1994). It is also unethical for a lawyer to "allude to any matter ... that will not be supported by admissible evidence, [or] assert personal knowledge

of facts in issue except when testifying as a witness ...." Fla. Bar Rule 4-3.4(e).

Second, the prosecutor misled the jury concerning the law on mitigating circumstances. In arguing against the mitigating evidence concerning the abuse Morton suffered in early childhood, the prosecutor remarked,

> Is that mitigation, folks? Is that mitigation? The fact that a child was abused when he was a little child? Well, see now, Counsel knows that's not mitigation, the fact that when he was five or six or seven he was hit with a fork on the top of the head, that he was thrown into a lake.

[VII 727] Defense counsel did not object. [VII 727]

It is well-established that the sentencer in a capital case must consider mitigating evidence concerning the defendant's background. See Hitchcock v. Dugger, 481 U.S. 393, 394 (1987); Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982); Jackson v. State, 704 So. 2d 500, 506 (Fla. 1997); Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990); § 921.141(6)(h). Abuse suffered by the defendant as a child is a mitigating circumstance which must be considered. Penry v. Lynaugh, 492 U.S. 302, 322, 328 (1989); Walker v. State, 707 So. 2d 300, 318 (Fla. 1998); Elledge v. State, 613 So. 2d 434, 436 (Fla. 1993). Moreover, the fact that the abuse came to an end does not diminish the mitigating nature of child abuse suffered by the defendant during the formative years of his life. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990).

Thus, by arguing that defense counsel knew that the child abuse suffered by Morton was not mitigating, the prosecutor misled

the jury about the law on the consideration of mitigating circumstances. It is legally improper for the prosecutor to misstate the law in his argument to the jury. Rhodes v. State, 547 So. 2d 1201, 1206 (Fla. 1989); Garron v. State, 528 So. 2d 353, 359 n. 7 (Fla. 1988); see also Urbin v. State, 714 So. 2d 411, 420 (Fla. 1998) ("First and foremost, we are particularly concerned that the prosecutor invited the jury to disregard the law."). It is also unethical for the prosecutor to mislead the jury about the law:

> The Oath of Admission to the Florida Bar states, in part, that an attorney "will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law." Rules of the Supreme Court, 145 Fla. 763, 797 (Fla. 1941). Under these standards, the conduct of the prosecutor here was clearly improper.

Craig v. State, 685 So. 2d 1224, 1229 (Fla. 1996). "A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal ...." Fla. Bar Rule 4-3.3(a)(1).

Third, the prosecutor improperly denigrated the credibility of the testimony of a defense expert witness. The prosecutor argued that Ms. Pisters, the social worker, was biased because she opposed capital punishment:

> Let's look at Mimi Pisters, a social worker. She opposes capital punishment. Once again, you are going to know this is a biased witness. She doesn't believe in it, so she has got to make this somehow a mitigation. Right? There's got to be a mitigating factor.

[VII 727] Defense counsel did not object. [VII 727] The prosecutor repeated the allegation, again without objection: "First of all, we know why she opined the way she did. She's opposed to capital punishment." [VII 729]

"It is clearly improper for the prosecutor to engage in vituperative or pejorative characterizations of a defendant or witness." Gore v. State, 719 So. 2d at 1201; see also Nowitzke v. State, 572 So. 2d 1346, 1350-52 (Fla. 1990) (improper cross-examination and argument about defense expert being called "hired gun"). It is reversible error for the prosecutor to make it clear that "in his opinion, the defense was a fabrication." Huff v. State, 544 So. 2d 1143 (Fla. 4th DCA 1989). The prosecutor "may not express his personal opinion on ... the credibility of witnesses." Ruiz v. State, 743 So. 2d at 4 (quoting United States v. Garza, 608 F.2d 659, 662 (5th Cir. 1979)). It is also unethical for any lawyer to "state a personal opinion as to ... the credibility of a witness ...." Fla. Bar Rule 4-3.4(e).

Fourth, the prosecutor improperly commented upon Morton's constitutional right against self-incrimination by commenting on his failure to confess to the state's expert, Dr. Gonzalez:

> Plus he's cunning. Why? He knows Dr. Gonzalez is going to testify against him. He isn't going to spit out a confession to Dr. Gonzalez and tell him here's what I did, I kicked in the door, I had a gun, I had a knife, I shot these people, I stabbed her, then I cut off his finger, then I threw it on the bed and I brought it back to my buddy, to Jeff Madden, to show him what a tough guy I am. He's not going to tell that to Dr. Gonzalez, Dr. Gonzalez is a State witness. So he says, I don't recall.

[VII 740] Defense counsel did not object. [VII 740]

In Estelle v. Smith, 451 U.S. 454 (1981), the United States Supreme Court ruled that the protections of the Fifth Amendment to the United States Constitution extend to the penalty phase of a capital trial and barred the state's use of the defendant's statements to a court-appointed psychiatrist who did not warn the defendant that his statements could be used against him while conducting a competency evaluation. In Burns v. State, 699 So. 2d 646, 651 (Fla. 1997), cert. denied, 522 U.S. 1121 (1998), this Court agreed that the Fifth Amendment right against self-incrimination continues through the sentencing phase of a capital murder trial. In this case, the prosecutor violated the Fifth Amendment by commenting upon Morton's failure to confess to Dr. Gonzalez. Prosecutors are forbidden from commenting upon the defendant's exercise of his Fifth Amendment right to remain silent. Griffin v. California, 380 U.S. 609, 615 (1965); State v. Marshall, 476 So. 2d 150, 153 (Fla. 1985). A prosecutor violates this rule when he makes any comment which is fairly susceptible of being interpreted by the jury as comment upon the defendant's exercise of his Fifth Amendment privilege. State v. Marshall, at 153; State v. Kinchen, 490 So. 2d 21, 22 (Fla. 1985). Moreover, Florida law under article I, section 9, Florida Constitution, prohibits all evidence and argument that is fairly susceptible of being interpreted by the jury as a comment on silence. State v. Hoggins, 718 So. 2d 761, 769 (Fla. 1998).

Fifth, the prosecutor concluded his remarks by arguing that the people of the State of Florida have a right to a death penalty in this case:

> But the People of the State of Florida, the people who I have the honor of representing, enjoy certain rights also. The right to have a verdict that is consistent with the evidence. The right to have a recommendation that's consistent with justice.
>
> And I submit to you, folks, that the only recommendation here, the only recommendation that's consistent with the evidence and consistent with justice, is that this defendant deserves the death penalty for what he did to Mr. Bowers and Mrs. Weisser. Thank you.

[VII 746] Defense counsel did not object. [VII 746]

This Court has condemned arguments that jurors have a sworn duty to recommend death. Urbin v. State, 714 So. 2d at 420-21; Garron v. State, 528 So. 2d at 359. The prosecutor's argument that the people of Florida have a right to a recommendation of death is no different in substantive effect than arguing that the jurors have a duty to recommend death. Both arguments are legally improper, unethical misstatements of the law. See Craig v. State, 685 So. 2d at 1229; Rhodes v. State, 547 So. 2d at 1206; Garron v. State, 528 So. 2d at 359 n. 7; Fla. Bar Rule 4-3.3(a)(1).

Appellant acknowledges that ordinarily counsel must contemporaneously object to preserve a claim of improper comments in closing argument for appellate review. Nixon v. State, 572 So. 2d 1336, 1340 (Fla. 1990), cert. denied, 502 U.S. 854 (1991). However, this Court has long recognized that there are situations where the prosecutor's remarks in closing argument are so improper

that they constitute fundamental error. In Pait v. State, 112 So. 2d 380, 385 (Fla. 1959), this Court ruled,

> when an improper remark to the jury can be said to be so prejudicial to the rights of an accused that neither rebuke nor retraction cold eradicate its evil influence, then it may be considered as ground for reversal despite the absence of an objection below, or even in the presence of a rebuke by the trial judge.

See also, Robinson v. State, 520 So. 2d 1, 7 (Fla. 1988).

Because of the prosecutor's repeated improper remarks during closing argument, this Court should apply the Pait rule to find fundamental error in this case. The district courts have found fundamental, reversible error in cases involving multiple improper remarks by the prosecutor during closing argument similar to the improper remarks in the present case. Knight v. State, 672 So. 2d at 591 (attacks on defense counsel and his credibility, arguing facts not in evidence, comments on right to silence) ; Pacifico v. State, 642 So. 2d at 1182-85 (telling jury they have duty to convict, attacks on defendant's character, arguing facts not in evidence); see also, Fuller v. State, 540 So. 2d 182, 184-85 (Fla. 5th DCA 1989) (attacks on defendant and defense counsel).

Morton is entitled to raise fundamental error for the first time on appeal. See § 924.051(3), Fla. Stat. (1997). This Court has defined fundamental error as

> "error which goes to the foundation of the case or goes to the merits of the cause of action." Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970).... "[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and

> equivalent to a denial of due process." State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993).

Hopkins v. State, 632 So. 2d 1372, 1374 (Fla. 1994).

The prosecutor's repeated improper and unethical remarks during closing argument in this case went to the foundation of the case because he relied on unproven "facts" to support the CCP aggravating circumstance, misled the jury on the law concerning mitigating circumstances, gave his personal opinion on the credibility of a defense expert, improperly commented on the constitutional right against self-incrimination, and misled the jury on the law by arguing that the people of the State of Florida have a right to a death recommendation. As in Gore v. State, 719 So. 2d at 1202,

> The prosecutor in this case exceeded the bounds of proper conduct and professionalism and provided a "textbook" example of overzealous advocacy. This type of excess is especially egregious in this, a death case, where both the prosecutors and courts are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects.

The prosecutor's improper and unethical arguments deprived Morton of his essential due process right to a fair trial under the Fourteenth Amendment to the United States Constitution and article I, section 9 of the Florida Constitution and therefore constituted fundamental error. This Court must reverse Morton's death sentence and remand for a new penalty phase trial with a new jury.

ISSUE III

THE TRIAL COURT ERRED BY FAILING TO FIND THAT MORTON'S ANTISOCIAL PERSONALITY DISORDER WAS A MITIGATING CIRCUMSTANCE.

The Eighth Amendment requires individualized consideration of the character and record of the defendant and any circumstances of the offense which may provide a basis for a sentence less than death. Sumner v. Shuman, 483 U.S. 66, 72-76 (1987); Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Thus, the Supreme Court has held that "in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." Hitchcock v. Dugger, 481 U.S. 393, 394 (1987); Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982). This requirement is not satisfied solely by allowing the presentation of mitigating evidence. The sentencer is required to "listen" to the evidence and to give it some weight in determining the appropriate sentence. Eddings, 455 U.S. at 113-14 & n. 10.

The Eighth and Fourteenth Amendments require that capital punishment be imposed fairly, and with reasonable consistency, or not at all. Eddings, 455 U.S. at 114. To insure fairness and consistency, this Court must conduct a meaningful independent review of the defendant's record and cannot ignore evidence of mitigating circumstances. Parker v. Dugger, 498 U.S. 308, 321 (1991).

In Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990), this Court ruled:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature.... The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence .... The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. [Citations and footnotes omitted; emphasis added.]

Accord Jackson v. State, 704 So. 2d 500, 506 Fla. 1997). "Once established, a mitigating circumstance may not be given no weight at all." Dailey v. State, 594 So. 2d 254, 259 (Fla. 1991).

To satisfy the requirements of Campbell,

> The result of this weighing process must be detailed in the written sentencing order and supported by sufficient competent evidence in the record. The absence of any of the enumerated requirements deprives this Court of the opportunity for meaningful review.

Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995); accord Hudson v. State, 708 So. 2d 256, 259 (Fla. 1998); Walker v. State, 707 So. 2d 300, 319 (Fla. 1997). In Walker, at 318-19, this Court further explained:

> This Court has repeatedly held that all mitigating evidence, found anywhere in the record, must be considered and weighed by the trial court in its determination of whether to impose a sentence of death. See Robinson v. State, 684 So. 2d 175 (Fla. 1996); Farr v. State, 621 So. 2d 1368 (Fla. 1993); Santos v. State, 591 So. 2d 160 (Fla. 1991); Campbell v. State, 571 So. 2d 415 (Fla. 1990); Rogers v. State, 511 So. 2d 526 (Fla. 1987).... The

> policy rationale behind our holdings is very simple yet powerful:
>
> > While all judicial proceedings require fair and deliberate consideration by a trial judge, this is particularly important in a capital case because, as we have said, death is different.

Furthermore, in Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990), this Court ruled that "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Accord Mahn v. State, 714 So. 2d 391, 400 (Fla. 1998); Spencer v. State, 645 So. 2d 377, 384-85 (Fla. 1994).

In this case, defense counsel argued in closing that Morton's antisocial personality disorder was "the most important" mitigating factor to be considered. [VII 768-70] This argument satisfied the requirement that defense counsel identify the nonstatutory mitigating factors to be considered. See Nelson v. State, 748 So. 2d 237, 243-44 (Fla. 1999), cert. denied, 120 S. Ct. 950 (2000); Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990).

The United States Supreme Court ruled that the Eighth Amendment mandated consideration of evidence of the defendant's antisocial personality disorder in mitigation in Eddings v. Oklahoma, 455 U.S. at 107, 115. This Court has also recognized that an antisocial personality disorder is a mitigating factor to be considered. Robinson v. State, 684 So. 2d 175, 179 (Fla. 1996); Wournos v. State, 676 So. 2d 966, 968, 971 (Fla. 1995), cert. denied, 117 S. Ct. 395, 136 L. Ed. 2d 310 (1996); see also,

Marguard v. State, 641 So. 2d 54, 56 n. 2 (Fla. 1994), cert. denied, 513 U.S. 1132 (1995).

The evidence overwhelmingly supported a finding that Morton suffered from an antisocial personality disorder. All three mental health experts, Ms. Pisters, Dr. Delbeato, and the state's psychiatrist, Dr. Gonzalez, agreed on this diagnosis. [VI 531-37, 540-41, 543-45, 580-86, 610, 617; VII 671, 673, 681] A personality disorder is a serious psychiatric diagnosis. "In any scheme that tries to classify persons in terms of relative mental health, those with personality disorder would fall near the bottom." Comprehensive Textbook of Psychiatry (4th Ed. 1985), p. 958.

Ms. Pisters, upon cross-examination by the prosecutor, explained that Morton satisfied all the criteria for a diagnosis of antisocial personality disorder contained in the DSM-4, including truancy from school, suspension from school for misbehavior, delinquency, running away from home, persistent lying, theft and vandalism, school grades below expectations for his average IQ, chronic violation of rules at home or school, and initiation of fights. [VI 580-85] People with antisocial personality disorders follow behavior patterns which facilitate acting out in the community. They can make decisions, but tend to make the wrong decisions. They are not guided by an intellectual concept of what is good and bad and what they should or should not do. Morton was not mentally ill, but his ability to make decisions was impaired. [VI 541-42, 592] Ms. Pisters agreed with the prosecutor's

assertion that "when we say antisocial behavior, we mean somebody can't conform themselves to the rules of society ...." [VI 582]

Dr. Delbeato explained that Morton was emotionally unstable, suspicious, and had a loner-type nature. [VI 610] An antisocial personality disorder is a mental disorder. [VI 629] Morton had a deficit in conscience. [VI 635] His personality disorder was an impairment of behavior and conscience. [VI 637]

Dr. Gonzalez agreed that the roots of this antisocial personality disorder are in childhood. [VII 681] He explained that an unattached child who has been abused and had no male role model might have a disposition to do antisocial things. [VII 674] Nothing in Alvin's background would have compelled him to commit a double murder; he had the intellect to make intelligent choices. [VII 676, 684] However, his ability to make those choices was impaired by his personality disorder. [VII 684] Antisocial personality disorders become less evident as people grow older. They "mellow out" in their forties and do not engage in criminal behavior. [VII 687-88]

Notwithstanding the overwhelming evidence in support of the antisocial personality disorder mitigating circumstance, the trial court's sentencing order never even mentions the existence of this personality disorder in its discussion of mitigating circumstances. [I 158-60; A 14-16] The trial court's failure to expressly evaluate, find, and weigh the most important mitigating circumstance in the case is a violation of the court's obligations under the Eighth Amendment as explained in Eddings v. Oklahoma, 455

U.S. at 107, 113-15, and this Court's requirements for the consideration of evidence of mitigating circumstances in Campbell v. State, 571 So. 2d at 419, Nibert v. State, 574 So. 2d at 1062, and their progeny. The trial court's failure to fulfill its obligations in the consideration of the mitigating circumstances precludes this Court "from meaningfully reviewing the sentencing order." Walker v. State, 707 So. 2d at 319. Therefore, this Court "must vacate the sentence[s] of death and remand for a proper evaluation and weighing of all nonstatutory mitigating evidence ...." Id.

ISSUE IV

THE TRIAL COURT ABUSED ITS DISCRETION BY ASSIGNING LITTLE WEIGHT TO THE MITIGATING CIRCUMSTANCES OF MORTON'S AGE AND ABUSED CHILDHOOD.

As argued in Issue III, supra, the Eighth Amendment requires individualized consideration of the character and record of the defendant and any circumstances of the offense which may provide a basis for a sentence less than death. Sumner v. Shuman, 483 U.S. 66, 72-76 (1987); Woodson v. North Carolina, 428, U.S. 280, 304 (1976). This requirement is not satisfied solely by allowing the presentation of mitigating evidence. The sentencer is required to "listen" to the evidence and to give it some weight in determining the appropriate sentence. Eddings v. Oklahoma, 455 U.S. 104, 113-14 & n. 10 (1982); Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990).

"[T]he weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard." Cave v. State, 727 So. 2d 227, 230 (Fla. 1998) (quoting Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997)). This Court has also asserted that the weight to be given to a mitigating circumstance "is within the trial court's discretion and will not be disturbed if supported by competent substantial evidence." Bryan v. State, 533 So. 2d 744, 749 (Fla. 1988), cert. denied, 490 U.S. 1028 (1989); State v. Bolender, 503 So. 2d 1247, 1249 (Fla.), cert. denied, 484 U.S. 873 (1987). The "reasonableness" test for

abuse of discretion contained in Canakaris v. Canakaris, 382, So. 2d 1197, 1203 (Fla. 1980), places a limitation on discretion:

> The discretionary power that is exercised by a trial judge is not, however, without limitation .... The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result. The trial court's discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result.

Applying the Canakaris limitation on the reasonableness test for abuse of discretion to this case, the trial court abused its discretion in assigning little weight to the mitigating circumstances of age, childhood abuse, and voluntary confession. [I 158-60; A 14-16]

The age of the defendant at the time of the crime is a statutory mitigating circumstance provided by section 921.141(6)(g), Florida Statutes (1999). In Mahn v. State, 714 So. 2d 391, 400 (Fla. 1998), this Court explained the proper application of this circumstance:

> We have long held that the fact that a defendant is youthful, "without more, is not significant." Garcia v. State, 492 So. 2d 360, 367 (Fla.), cert. denied, 479 U.S. 1022, 107 S. Ct. 680, 93 L. Ed. 2d 730 (1986). Therefore, if a defendant's age is to be accorded any significant weight as a mitigating factor, "it must be linked with some other characteristic of the defendant or the crime such as immaturity." Echols v. State, 484 So. 2d 568, 575 (Fla. 1985) ....

See also, Campbell v. State, 679 So. 2d 720, 726 (Fla. 1996).

In considering Morton's age as a mitigating circumstance, the trial court found:

> At the time this murder was committed, the Defendant was nineteen years old. Relevant expert testimony in the regard, in particular Dr. Delbeato, indicates that the Defendant's IQ was normal, and he was in no way retarded. Lay testimony also corroborates the foregoing. Accordingly, the Defendant's emotional age is consistent with his actual age; therefore, the Defendant's age at the time of the crime, while a mitigating factor, is given little weight.

[I 158; A 14]

While it is true that Dr. Delbeato tested Morton's IQ and found that it was within the normal range at 96, [VI 616] that testimony was not competent, substantial evidence of the level of Morton's maturity. Other evidence showed that he was emotionally unstable and immature. All three mental health experts agreed that Morton suffers from an antisocial personality disorder. [VI 531-37, 540-41, 543-45, 585-86, 610; VII 671, 673, 681] Morton showed early signs of developing antisocial behavior through cruelty to animals, setting fires, and bed wetting. [V 494-95, 497, 499-500; VI 537-39, 614] Ms. Pisters testified that Morton satisfied all the criteria for a diagnosis of antisocial personality disorder contained in the DSM-4, including truancy from school, suspension from school for misbehavior, delinquency, running away from home, persistent lying, theft and vandalism, school grades below expectations for his average IQ, chronic violation of rules at home or school, and initiation of fights. [VI 580-85] Dr. Delbeato found that Morton was emotionally unstable, suspicious, and had a

loner-type nature. [VI 610] He had been in trouble since the age of 14, he was truant, and had disciplinary problems in school. [VI 632-33, 636] MMPI test results suggested an emotionally unstable and antisocial type, passive/aggressive, situational depression, a loner, chronically anxious and nervous, somewhat obsessive, and sensitive to criticism. [VI 617] Morton's mother testified that as a teenager, Morton and his stepsister stole the family car. He was unresponsive when taken for counseling. [V 472, 479-80] He quit school at age 16 against his mother's advice. [V 482-83, 485] He had only two jobs, and only kept them for short periods of time. [V 483, 485-87, 491] He quit doing chores at home. [V 472, 482] In the months preceding the murders he spent his time in his room playing Dungeons and Dragons or video games with his friends, riding his bicycle, or sleeping. [V 471-72, 511, 514]

In Mahn, 714 So. 2d at 400, the trial court refused to find Mahn's age as a mitigating factor and made findings similar to those in the present case:

> The double murder took place on the Defendant's 20th birthday. None of the doctors that testified said that the Defendant was retarded. The Defendant had recently received his GED. The Defendant knew the difference between right and wrong. The Defendant's age at the time of the crime is not a mitigating factor.

This Court found that the trial court abused its discretion in rejecting Mahn's age as a mitigating circumstance because he "was far from a normal nineteen-year old boy at the time of the killings." Id. Instead,

> Mahn's unrefuted, long-term substance abuse, chronic mental and emotional instability, and extreme passivity in the face of unremitting physical and mental abuse provided the essential link between his youthful age and immaturity which should have been considered a mitigating factor in this case.

Id. Similarly, the evidence in this case shows that Morton was nineteen, emotionally unstable, and behaved extremely immaturely for his age. Thus, the trial court abused its discretion in assigning little weight to the mitigating factor of Morton's age and immaturity.

"The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty," is a statutory mitigating circumstance provided by section 921.141(6)(h), Florida Statutes (1999). Abuse suffered by the defendant as a child is a mitigating circumstance which must be considered. Penry v. Lynaugh, 492 U.S. 302, 322, 328 (1989); Walker v. State, 707 So. 2d 300, 318 (Fla. 1998); Elledge v. State, 613 So. 2d 434, 436 (Fla. 1993). Moreover, the fact that the abuse came to an end does not diminish the mitigating nature of child abuse suffered by the defendant during the formative years of his life. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990).

The evidence in this case demonstrated that Alvin Morton's father, Virgil Morton, physically and emotionally abused Alvin, his mother, Barbara Stacy, and his sister, Angela White, until his mother finally took the children and left Virgil when Alvin was seven or eight years old. Mrs. Stacy testified that Virgil frequently told the children that he had murdered somebody, and he

would murder them, too. [V 449-50, 454][10] Virgil began abusing Barbara about three months after they were married. The abuse continued until she "finally got the kids out of there." [V 454] Virgil was an alcoholic who drank every day, got drunk 90% of the time, and became both verbally and physically abusive of Barbara and their two children. [V 455-57] There was so much verbal and physical abuse, Barbara had difficulty explaining what happened; she could not remember all the beatings. At the end, Virgil threw knives at her when she walked through the house. [V 467-68] Barbara did not report the abuse because she was afraid of Virgil, who told her he would kill her and her family. [V 463-66]

Virgil never showed any love or affection for Alvin. He told Alvin he had to be tough, and tough boys don't cry. [V 470] When Alvin was only six or seven months old, Virgil threw him on the bed and "smacked his butt so hard that his back bowed." [V 466] When Alvin was one, Virgil put him in an inner-tube and pushed him out into the middle of a lake, then tried to prevent Barbara from rescuing Alvin, who was screaming. [V 468-69] Virgil hit the children on the head with a spoon hard enough to cause lumps on their heads if they did not sit properly at the table. [V 466] He hit them with a wound-up dish towel hard enough to leave bruises. [V 467] When Alvin tried to step in for his sister, he was hit harder. [V 463] Virgil sent the children to bed without supper because he did not want to see or hear them. [V 457] Barbara

[10] When Virgil was in the Navy, he killed someone in a bar fight and pled guilty to manslaughter. [V 474]

believed that Virgil's abuse made Alvin very hard and unemotional. [V 498] Virgil forbade any religious practice in the home and burned Barbara's Bibles and other religious books. She was a Jehovah's Witness who tried to instill religious values in the children when Virgil was not present. [V 457-59] Virgil kept Barbara away from her family as much as possible. He only allowed her to go to her mother when he wanted her to borrow money. [V 469] The family moved frequently and with little advance notice. Virgil would come home drunk at 2:00 or 3:00 a.m. and require them to move with only what Barbara could put in the car. [V 459-60] Mrs. Stacy separated from Virgil in 1980 because she caught him in bed having sex with Angela. [V 461, 474-75, 496] Alvin was in his own bed in the same room. [V 496-97]

Angela White testified that she could recall Virgil being violent from the time she was three until they left when she was five. [V 500-02] Virgil drank beer every day and became enraged and abusive. Her mother usually sent the children to their bedroom. She could hear Virgil calling her mother names, yelling at her, hitting her, pushing her, and throwing things. [V 503] Virgil sexually molested Angela quite a few times, beginning when she was four. She did not remember Alvin being in the same room. [V 505, 514] Virgil hit her and Alvin on the head with a spoon for putting their elbows on the dining table. [V 506] When Angela knocked a picture off the wall, Virgil kicked Alvin around the living room. [V 506-07] Alvin was punished for things Angela did about three-quarters of the time. [V 507] Virgil never displayed

any affection for either of them. [V 508] In one incident, their mother caught Virgil in bed with another woman and threw his clothes outside. Virgil began beating her, and she fell on top of the children, who were lying on the couch. Virgil continued beating her until the police came. [V 509-10] Other times, Virgil smacked, punched, and kicked Alvin. Virgil constantly yelled at the children. [V 509]

Kathy Dufoe, Barbara Stacy's sister and Alvin Morton's aunt, saw Virgil hit Alvin and knock him off a chair when he was three years old because there was no beer in the refrigerator. [VI 643-44] She saw Virgil hit Alvin "upside the head" a couple of other times. [VI 646] Virgil was drunk every day. [VI 644-45] A couple of times Virgil asked Barbara to ask her mother for money for food. If her mother refused, Virgil became upset and called her names. Once when her mother gave Barbara money for food for the kids, Dufoe saw Virgil sitting in a bar. Virgil was rude and nasty to the children. He called them names and never showed any affection for them. [VI 645] Dufoe never saw Virgil do anything nice for the children. [VI 646]

Paula Trepp, Virgil Morton's sister, testified that Virgil was an alcoholic. [VI 648-49] Virgil was a strict disciplinarian. Trepp saw him hit Alvin in the face one time when he was just a little boy running around. Virgil was cruel to Alvin. [VI 650]

Patricia Boutwell, Barbara's sister, testified that when Alvin was an infant, Barbara was holding Alvin in her arms, standing on

the front steps to their mobile home. Virgil pushed Barbara face first into the door, causing her to fall to the floor. [VI 655]

Despite this extensive evidence of abuse, the trial court found that it was entitled to little weight:

> [T]he evidence clearly reveals that the Defendant was a product of a highly dysfunctional family at least through age eight. The Defendant did not bond with his family and had minimal physical contact with his mother during the first four weeks of his life. Moreover, this family moved in and out of the state on a regular basis, disrupting any stable home and social life. The Defendant was repeatedly physically abused by his alcoholic father. This abuse stopped at about age eight when the mother took refuge at a shelter, divorced, and later remarried, thereby providing a substitute stable father figure for the Defendant. The Defendant's sister, Angela Morton, also sustained sexual abuse in the presence of the Defendant by the same alcoholic father. However, this sibling has never been arrested for any crime and has led a normal productive life. While the Court has considered the Defendant's turbulent childhood as a possible mitigating circumstance, there has been no showing that this experience caused the Defendant to have a diminished capacity to know right from wrong or not know the seriousness and grave consequences of his acts and, therefore, the Court gives little weight to his childhood experience in deciding to impose the death penalty.

[I 159-60; VII 806-07; A 15-16]

Counsel is aware that this Court has approved similar findings regarding a history of child abuse where the defendant's siblings became productive members of society in Shellito v. State, 701 So. 2d 837, 844 (Fla. 1997), and Williamson v. State, 681 So. 2d 688, 698 (Fla. 1996), cert. denied, 520 U.S. 1200 (1997). Counsel

respectfully requests this Court to reconsider this point in this case.

The trial court overlooked evidence that Angela White was caught shoplifting a bathing suit and was put on probation for it. [V 495-96] This fact directly contradicted the court's finding that Angela had never been arrested.

More importantly, the court overlooked or failed to understand evidence which explained why Angela turned out better than her brother. First, Angela was about 19 months younger than Alvin, [V 449, 459-63] so she had less time to be exposed to their father's abuse.

Second, Alvin, not Angela, was born prematurely and remained in the hospital for a month. Because of transportation problems, their mother was able to see him only three to five times, and only for short periods of time, about an hour for each visit. She was not allowed to hold him for the first two weeks. [V 449-52] Also, Alvin was a very sick baby who suffered from many allergies. His right lung filled with fluid and collapsed when he was nine months old. He had a double hernia and was not allowed to cry, crawl, climb, or pull himself up for three months while the doctors got his allergies under control so they could operate. [V 453] According to Ms. Pisters, Alvin's failure to bond and other early childhood experiences contributed to his antisocial personality disorder. [VI 531, 543-44, 585-86] Dr. Gonzalez agreed that the roots of this antisocial personality disorder are in childhood. [VII 681] Dr. Gonzalez said an unattached child who has been

abused and had no male role model might have a disposition to do antisocial things. [VII 674]

Third, Ms. Pisters testified that although Alvin and his sister lived through the same or similar experiences and did not turn out the same, Angela may have felt a greater degree of protection from her mother and Alvin, and not everybody reacts to the same circumstances the same way. [VI 536] This opinion was supported by Mrs. Stacy's testimony that when Alvin tried to step in for his sister, he was hit harder. [V 463] Also, Angela testified that when she knocked a picture off the wall, Virgil kicked Alvin around the living room. [V 506-07] Alvin was punished for things Angela did about three-quarters of the time. [V 507]

Fourth, Dr. Delbeato testified that antisocial personality disorder is two or three times more prevalent among males than among females. [VI 610-11] Dr. Gonzalez agreed that it is three times more prevalent among males than among females. [VII 687] Dr. Delbeato also said the disorder is more common with first degree biological relatives such as father/son or mother/daughter. [VI 611] Moreover, the impact of experiencing or witnessing violence in early childhood often varies depending upon the child's gender; girls tend to be more likely to grow up to become victims, while boys tend to become abusers. Walker, "Abused Women and Survivor Therapy" (American Psychological Association, 1994), p. 66. Thus, Alvin was more likely than Angela to acquire and display their father's violent, abusive personality traits.

Not only does the Eighth Amendment require individualized consideration of the character and record of the defendant, Sumner v. Shuman, 483 U.S. at 72-76; Woodson v. North Carolina, 428 U.S. at 304, it also requires reliability in capital sentencing. Sumner, at 72; Caldwell v. Mississippi, 472 U.S. 320, 329-30 (1985); Zant v. Stephens, 462 U.S. 862, 884-85 (1983). "[M]any of the limits that [the U.S. Supreme] Court placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." Caldwell, at 329. The effects of Morton's youthful age, immaturity, and abused childhood are relevant in mitigation because they shed light on his character and record, not on someone else's character and record. It is arbitrary and unreasonable to devalue a legitimate mitigator on the basis that other people with similar life experiences have not committed crimes. No matter what the mitigating circumstance under consideration may be, there will always be many more people who share that characteristic who have not committed a murder. One purpose of individualized consideration of mitigating circumstances is to determine what factors in the defendant's character or record may have contributed to, and may diminish his moral culpability for his crime. What other people may or may not have done under similar circumstances is not relevant to that individualized determination.

Alvin Morton was 19 years old and very immature. He had no significant criminal history. [I 158; A 14] He suffers from a

severe personality disorder. See Issue III, supra. That antisocial personality disorder was caused in part by his early childhood experiences, including illness and lack of proper bonding with his mother in his infancy, his unstable home life, the abuse he saw his father inflict on his mother and sister, and especially the abuse his father inflicted upon him. The trial court's abuse of discretion in giving diminished weight to the mitigating circumstances of age and child abuse violated the Eighth Amendment requirements of individualized consideration of mitigating circumstances and reliability in capital sentencing. Under the facts of this case, the State cannot establish beyond a reasonable doubt that the court's errors did not affect the court's weighing of aggravating and mitigating circumstances and its decision to impose the death penalty. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). The death sentences must be vacated, and this case must be remanded for resentencing.

CONCLUSION

Appellant respectfully requests this Honorable Court to vacate the death sentences and remand this case to the trial court for imposition of life sentences (Issue I), a new penalty phase trial with a new jury (Issue II), or in the alternative, for resentencing by the court (Issues III and IV).

APPENDIX

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of June, 2001.

Respectfully submitted,

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