IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2366

LLOYD DUEST,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is the direct appeal of the circuit court's imposition of a sentence of death at Mr. Duest's re-sentencing. The re-sentencing had been ordered by the Eleventh Circuit Court of Appeals. Duest v. Singletary, 997 F.2d 1336 (11th Cir 1993).

Mr. Duest was originally tried and sentenced to death in 1983. This Court affirmed on appeal. Duest v. State, 462 So.2d 446, 448 (Fla. 1985). Subsequently, Mr. Duest sought Rule 3.850 relief. After conducting an evidentiary hearing, the circuit court denied relief, and this Court affirmed. Duest v. Dugger, 555 So.2d 849, 850 (Fla. 1990). In subsequent federal habeas proceedings, the re-sentencing was ordered. Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"R1. ___" - Record on appeal to this Court in 1985 direct appeal;

"PC-R. ___" - Record on appeal to this Court from 1990 denial of the Motion to Vacate Judgment and Sentence;

"R2. ___" - Record on appeal to this Court from 2000 re-imposition of sentence of death;

"T2 ___" - Transcript of re-sentencing proceedings;

"TS2 ___" - Supplemental transcripts.

All other citations will be self-explanatory or will otherwise be explained.

REQUEST FOR ORAL ARGUMENT

This is an appeal from the imposition of a sentence of death. This Court has allowed oral argument in other direct appeals of death sentences. A full opportunity to air the issues through oral argument is necessary given the seriousness of the claims and the issues raised here. Mr. Duest, through counsel, respectfully urges the Court to permit oral argument.

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INTRODUCTION

This appeal arises from the reimposition of a death sentence at a re-sentencing that occurred 15 years after the original trial at which the defense had presented 11 alibi witnesses and vigorously pursued a innocence defense. The conviction rested on circumstantial evidence presented through the testimony of eight witnesses who identified Mr. Duest as the person they had seen on the weekend of the murder in Ft. Lauderdale that they knew as "Danny." The original trial was a classic credibility battle that resulted in a conviction of one count, premeditated murder.

Between the original trial and the re-sentencing, Brady material surfaced, but was held by this Court to not sufficiently undermine confidence in the outcome to warrant a new trial.[1] At the re-sentencing, the State's medical examiner revealed that his trial testimony had been "incorrect." The change in his testimony led the re-sentencing judge to conclude that the previously found cold,

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[1]On May 9, 2001, while this appeal was pending before this Court, Mr. Duest sought a relinquishment based on newspaper accounts indicating that the Broward County Sheriff's Office had ordered DNA testing in Mr. Duest's case. Mr. Duest sought the opportunity to institute Rule 3.850 proceedings to challenge his conviction. On May 24, 2001, the State opposed Mr. Duest's motion. On June 18, 2001, this Court denied Mr. Duest's motion.

calculated and premeditated aggravator did not apply, and that in fact, there had been no intent to kill.

At the re-sentencing, the State sought to prove aggravating circumstances through the presentation of several of the witnesses who had identified Mr. Duest as the individual they knew as "Danny." The State then sought to preclude the defense from challenging the reliability of the identification of Mr. Duest through the presentation witnesses who would have impeached the identification. The re-sentencing judge granted the State's request and precluded the defense from presenting any evidence "about the facts of this case." The defense was thus unable to challenge the State witnesses identification of Mr. Duest.

As a result, Mr. Duest has never had cumulatively consideration of the exculpatory evidence that the State failed to disclose at the time of the original trial. And at the re-sentencing, he was denied the right to defend, challenge the State's case, and present favorable evidence relevant to determination of whether the aggravating circumstances urged by the State, in fact existed.[2] The

[2]For example, Mr. Duest was never indicted nor convicted of robbing Mr. Pope, the deceased. The State sought to prove that Mr. Duest committed such a robbery through the presentation of witnesses identifying Mr. Duest as the person who was observed doing certain acts on the weekend of February

adversarial process has not worked In Mr. Duest's case in a manner consistent with the requirements of due process.

STATEMENT OF THE CASE

On February 15, 1982, 64 year-old John Pope was found dead from multiple stab wounds. David Shifflett, Mr. Pope's roommate of six months, arrived home at 6:15 p.m. (T2. 428).[3] He notice Mr. Pope's car, a gold Camero, was gone and the front door open (T2. 413, 429). It was not until after 8:00 p.m. when a friend arrived that Mr. Shifflet noticed a light on in Mr. Pope's bathroom and his bed covered with blood (T2. 419). At that point, the police were called. The police discovered Mr. Pope's body in his bathroom (T2. 419).[4]

Neil O'Donnell was the bar manager at Lefty's, which he described as "a neighborhood gay bar" (T2. 444). He knew Mr. Pope, but not by name, as a regular customer (T2. 447). He saw Mr. Pope arrive at Lefty's on Monday, February 15, 1982, at "[a]pproximately 2:30, 3 o'clock in the afternoon" (T2.

13-15, 1982, which the State asserted constituted circumstantial evidence of the robbery. By virtue of the Court's ruling, Mr. Duest was precluded from presenting a defense to the robbery allegation.

[3]Mr. Shifflet was "approximately forty years younger than Mr. Pope" (T2. 577).

[4]When the police arrived, they found the clothes dryer running with clothes inside (R1. 474).

448). Mr. Pope came into the bar and sat next to an individual that Mr. O'Donnell described as "[a]pproximately five foot eight, five foot nine; medium brown hair, sort of long; 25 to 32, something like that" (T2. 450). He "believe[d]" the hair was "bushy" (T2. 474). This individual was wearing "a gray jogging suit" (T2. 451). Mr. O'Donnell had seen this individual once before, in the bar the previous night wearing the same jogging suit (T2. 452). He believed he heard someone use the name "Danny, but I mean I'm not sure. I couldn't swear to that." (T2. 453). Within ten minutes of Mr. Pope's arrival, Mr. Pope left with the man in the jogging suit (T2, 454).

On February 17, 1982, Mr. O'Donnell helped prepare a composite sketch of the person who departed Lefty's with Mr. Pope (T2. 455). On April 20, 1982, the police asked Mr. O'Donnell to look at a photo-array. He picked out one of the photos and signed an affidavit (T2. 457). A week later, the police then asked Mr. O'Donnell to look at a live line-up (T2. 475). At the line-up, there was only one of the individuals from the photo-array; that was the person whose photograph he had identified a week before. That individual was Lloyd Duest. Mr. O'Donnell again identified him, even though he looked "a little different" (T2. 473). His hair was shorter;

it was straight, not bushy; and he was wearing glasses (T2. 463, 473-74).[5]

Meanwhile, the police had talked to Michael Demizio. He had traveled from Albany, New York, to Ft. Lauderdale by bus beginning on February 11, 1982 (T2. 522). On the trip he met an individual who identified himself as "Danny" (T2. 522). They started sitting with each other "around Washington, D.C." (T2. 523). Danny told Demizio that "he used to beat up fags, roll fags, take them back to their house and rob them" (T2. 524). They arrived in Ft. Lauderdale on Saturday, February 13th at around 6:00p.m. (T2. 523). They went looking for a place to stay. They "ran into a guy that was sitting on a car, his name was John" (T2. 525). He invited them to stay at his place. They went there briefly where they met his roommate Joanne Wioncek, before going out to "a party" (T2. 527). At the party, Demizio met a girl, Tammy Dugan (T2. 528). At the time, Tammy was 15 years old (T2. 516). During the "party," all of the participants drank alcohol and consumed "pot and Quaaludes." (T2. 539). The participants returned to John's place "at 5 o'clock in the morning or whatever" (T2. 539). There, the "party" continued (T2. 540).

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[5]Mr. Duest is also 5' 10" (R1. 1811), and not 5'7" as Mr. O'Donnell originally described "Danny" (R1. 1704).

They “just hung out, relaxed, sat around” (T2. 528).

On Monday, February 15, 1982, Demizio left the apartment in order to try and get a job at a restaurant (T2. 528). When he returned to the apartment at “3:30, 4 o’clock,” “Danny pulled up in a brown Camero” (T2. 529). Danny was wearing a jogging suit, “[g]ray, dark brown, brown with stripes on it” (T2. 530). Demizio saw some blood on the collar and the sleeve (R2. 531). Danny had a scratch on his face (T2. 531). Danny then “took off” (T2. 531). No one else from the apartment came down to the car before Danny took off (T2. 542). Demizio identified Lloyd Duest as Danny (T2. 524).

Tammy Dugan remembered that she “met three people at a bar and we had had a party” (T2. 498). The three were “a man named Danny, a man named Michael Demizio, and a man named John Scarpano.” The bar was named “Andy’s” (T2. 500). The foursome “started partying together, and it ended up into an all-night thing and carried on into the next day” (T2. 498). They were joined by Joanne Wioncek and a girlfriend of Tammy’s from New York named LaDonna, “I don’t know her last name” (T2. 499). Tammy was drinking and “on drugs” (T2. 512).

Tammy described Danny as “five seven-five, five-eight, sandy hair parted to the side, mustache, medium build” (T2. 501). He only wore “a gray sweat suit” (T2. 502). He had “a

tattoo on his arm and I remember a scar" (T2. 502). However, Tammy was unsure where Danny had the scar ("Q. You don't know where the scar was?" "A. Right. Correct." T2. 502). Tammy "had had a lot Saturday night. It was a very heavy night" (T2. 503). Tammy explained that "Sunday I don't remember, you know" (T2. 503).

Tammy "like[d] Michael [Demizio]" (T2. 501). She ended up staying with him at the apartment "for about a week, two weeks" (T2. 502). On Monday while Demizio was gone, she remembered Danny saying "he was going to go to a gay bar and, you know, pretend that he was gay and pick up a guy and go home with him and then, you know, steal his money" (T2. 503). Danny left "for sometime until he returned with an older man" (T2. 504). Joanne Wioneck was in the apartment too. Tammy "was introduced to the old man. I don't remember his name" (T2. 505). Danny and the old man soon left in a gold Camero (T2. 505). Danny returned alone in the Camero "between four and five" (T2. 505). He was tense, but he had been told to leave the apartment (T2. 506).

Tammy was subsequently shown "a photograph of the lineup" that included Lloyd Duest (T2. 508). She selected the photograph of Mr. Duest as the person she "believed to be Danny' (T2. 508). She subsequently identified Mr. Duest at

his trial as “Danny.”

In February of 1982, Joanne Wioncek lived with John Scarpano in an efficiency (T2. 481, 486). On Saturday, February 13, 1982, when she got home, she found Mike Demizio, Tammy Dugan and Danny were staying at the apartment (T2. 482). “[T]hey all went out partying about fifteen minutes after [Joanne] got home” (T2. 493). Later, she was awakened “by people coming through my house and whatever they were doing in it” (T2. 493). The people were very spaced out. “They were totaled” (T2. 493). A window in the apartment door was broken.

On Monday, Joanne called her employer and reported she was sick because of “lack of sleep” (T2. 483). Danny came into the apartment at 3 o’clock (T2. 483). Joanne and Tammy were watching General Hospital. Danny was accompanied by a bald gentleman that she identified, based upon a photograph, as Mr. Pope (T2. 484). They had arrived in a gold Camero (T2. 485). Danny went into the closet for a short time, then turned around and left (T2. 487). At about 4:30, he returned alone in the gold Camero (T2. 488). Danny showed Joanne, Demizio and Tammy some jewelry (T2. 489). At that time, Joanne said “we were in the process of asking Danny to leave our home” (T2. 490). So he left. She was subsequently shown

a composite which she said resembled Danny (T2. 490). Later, she identified Lloyd Duest as Danny (T2. 486).

On April 18, 1982, Lloyd Duest was picked up for questioning in Ft. Lauderdale (R1. 836). He was asked to voluntarily accompany a police officer to the station for questioning regarding a homicide (R1. 844). Mr. Duest voluntarily went with the police; he was not under arrest. During questioning, he indicated that "he just arrived [in Ft. Lauderdale] approximately a week ago via [a] Trailways bus" (R1. 877).

Mr. Duest identified himself as Robert Brigida. When the police ran a check on the name, they found that there was a warrant from Massachusetts for Robert Brigida (R1. 37-38). Mr. Duest was advised that he was "under arrest for warrants in Massachusetts, at which time he replied, 'I was afraid you were going to find out about those'" (R1. 882). Unbeknownst to the Ft. Lauderdale police, Mr. Duest was also wanted. Nineteen months before, he had escaped while awaiting trial in Massachusetts and was using an alias (R1. 1809). After being fingerprinted on April 18th, Mr. Duest tried to flee (R1. 882). He was located at approximately 6:00 a.m. the next morning. The State presented this attempted flight as evidence establishing Mr. Duest's consciousness of guilt (The

prosecutor argued, “All the man had to do was say I am not Bobby Brigida and then he would be clear.” R1. 1448). However, the defense could not respond without revealing the fact that such a revelation would have led to the discovery of numerous outstanding charges for Mr. Duest in Massachusetts (R1. 37-38).[6]

The police attempted to check out Mr. Duest’s claim to have arrived in Ft. Lauderdale in early April. A police officer went to the Trailways Bus Station to look for Mr. Duest’s belongings that he said he had left there in a locker when he arrived (R1. 888). According to the police, the search was unsuccessful; it produced no evidence corroborating Mr. Duest’s claim that he had arrived in Ft. Lauderdale a week before he was stopped for questioning (R1. 895).

On April 20, 1982, an arrest warrant issued against “Robert S. Brigida, aka Danny, aka Bob, aka Bobby S. Brigida (R1. 1702). The warrant was issued on the basis of the affidavit executed by Deputy Feltgen. According to Deputy

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[6]The State’s use of this evidence in this fashion seems to violate this Court’s decision in Merritt v. State, 523 So.2d 573 (Fla. 1988). However, when the issue was raised as appellate ineffective assistance of counsel in Mr. Duest habeas petition, this Court did not address Merritt. It simply held that appellate counsel was not ineffective because relief would have been denied under the rationale of Bundy v. State, 471 So.2d 9 (Fla. 1985). Duest v. Dugger, 555 So.2d 849 (Fla. 849).

Feltgen, Mr. Pope had been last seen at Lefty's Bar by Neil O'Donnell who reported that Mr. Pope "left the bar in the company of a white male, approximately twenty-five to thirty years of age, 5'7" - 5'8", with bushy brown hair, bushy sideburns, and a mustache."[7] Deputy Feltgen reported that "Neil O'Donnell stated that the said white male had been observed inside Lefty's on the past three evenings" (R1. 1704).[8] Deputy Feltgen further reported that on April 20, 1982, he displayed a photo line-up to Demizio and O'Donnell and that they both identified Robert Brigida (R1. 1706).

When he was arrested, Mr. Duest advised the police that he had just traveled from Boston, Massachusetts, to the Ft. Lauderdale area on April 5, 1982. Deputies from the Broward County Sheriff's Office testified that they attempted to corroborate Mr. Duest's claim that he had recently arrived in Ft. Lauderdale via a bus. However, Deputy Feltgen testified that when law enforcement personnel sought to verify Mr. Duest's arrival via a Trailways bus in early April of 1982, no

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[7]According to the presentence investigation prepared in Mr. Duest's case, Mr. Duest "stands 5'10" and weighs 175 lbs" and he was born on 10-27-51 (R1. 1811).

[8]This was not O'Donnell's trial testimony. And it was inconsistent with Demizio's testimony that "Danny" traveled with Demizio on a bus and arrived in Ft. Lauderdale at 6:00 p.m. on Saturday, February 13, 1982.

physical evidence to support the claim could be found (R1. 887-88, 895).[9]

On April 30, 1982, Mr. Duest was picked out of a live lineup by Neil O'Donnell and Mike Demizio (R1. 990-91). On May 12, 1982, Mr. Duest was indicted for the premeditated murder of Mr. Pope (R1. 1701). The indictment only contained the one count. There was no charge of robbery. The indictment contained no reference to a finding of probable cause regarding any aggravating circumstances.

Mr. Duest's trial began March 7, 1983. Mr. Duest was not matched to any physical evidence was found at the crime scene. Five latent fingerprints were lifted from the bathroom door alone (R1. 471). The lifted prints were submitted to a fingerprint examiner (R1. 473). There was some hearsay testimony that the examiner found the majority of the prints not suitable for comparison, no evidence was presented regarding the results of any comparison as to the usable latent print (R1. 472). A forensic serologist testified, but gave no testimony that any of Mr Duest's blood was found at the crime scene (R1. 862-73).

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[9]What was not revealed until public records were provided in post-conviction proceedings was the fact that in the personal effects taken from Mr. Duest at the time of his arrest was a bus ticket reflecting travel from Boston, Massachusetts, to Miami commencing April 5, 1982 (PC-R. 193).

The focus of the trial was on the issue of identity, i.e. whether Lloyd Duest was the person known as “Danny” who was in Ft. Lauderdale on February 15, 1982. During the trial, the State called Neil O’Donnell to identify Lloyd Duest as the person seen leaving Lefty’s with Mr. Pope. Michael Demizio (R1. 642), Tammy Dugan (R1. 807), and Joanne Wioncek (R1. 929) were called and identified Mr. Duest as Danny” and testified to seeing items in “Danny’s” possession after the time the homicide would have occurred, which fit the description of items missing from Mr. Pope’s residence.

At the conclusion of the State’s case, Mr. Duest’s counsel argued a “motion for judgment of acquittal as to the murder in the first degree” (R1. 1851). In support of the motion, counsel stated:

> Judge, all I can say, the State has proceeded on, admittedly in their opening argument and throughout the case, that there are circumstantial evidence. I will submit that the evidence has not been presented concerning a premeditated act does not exclude every reasonable hypothesis of innocence as concerning premeditation, insofar as his state of mind at the time that the incident occurred.

(R1. 1854). The prosecutor responded by citing the evidence that he believed supported premeditation. He concluded, “I think as to sufficiency, I think it is a compelling - quite honestly I feel it is an extremely strong case against this. At least it is a sufficient” (R1. 1855). The judge responded,

“I think at this point it is at least sufficient. I am going to deny your motion” (R1. 1855-56).

In his defense, Mr. Duest presented a number of witnesses from Watertown, Massachusetts, to testify that during President’s Day weekend in 1982, Mr. Duest had been in Watertown. Mr. Duest had previously escaped from incarceration in Massachusetts and was hiding from law enforcement in the family home (PC-R. 169-72). Because he was an escapee, his family undertook to hide his presence from all but trusted friends. However, the jury was not advised that Mr. Duest was on the lam. The defense witnesses were thus unable to explain the reason for Mr. Duest’s seemingly odd behavior that they described in there testimony. The prosecutor in his closing described it as “cameo appearances” that were similar to those employed by movie director, “Alfred Hitchcock” (R1. 1396-97).

Mr. Duest’s mother testified that she saw her son on Saturday, February 13th (R1. 1195). However, she was unaware of his whereabouts for the following two days (R1. 1200). She also recalled, as part of her testimony, that she and her husband had taken Lloyd to the bus station to catch a bus to Ft. Lauderdale in early April (R1. 1192-95).

Richard Duest (Lloyd’s father) testified that he saw

Lloyd Duest cleaning his van on February 15th and Lloyd gave his dad a yellow sales slip from an auto parts store (R1. 1235). Richard Duest recalled taking Lloyd to the Boston bus station on April 5, 1982 (R1. 1232).

Also testifying for Lloyd Duest at his trial were: Debra Duest (Lloyd's sister)(R1. 1018, 1022), Eddie Lavache (her fiancé)(R1. 1914), Paul Duest (Lloyd's brother)(R1. 1074, 1078), Nancy Kerrigan (Lloyd's other sister)(R1. 1992), Matthew and Diane Turner (family friends)(R1. 1863, 1887), Frank Duest (Lloyd's uncle)(R1. 1095), Mark Duest (Lloyd's cousin)(R1. 1115), and Stephen Fralick (the owner of an auto parts store who testified that Lloyd purchased a fan belt on February 15th and produced a receipt)(R1. 1954). They each reported seeing Lloyd Duest in Watertown, Massachusetts on February 14th and/or February 15th.

In rebuttal, the State called William Long on March 17, 1983 (R1. 1300).[10] Mr. Long was the individual who tipped the police off on April 18, 1982, that the suspect was in Ft. Lauderdale (R1. 1302). However, Mr. Long gave the police a false name for himself (R1. 1312). During Mr. Duest's trial,

[10]The prosecutor noted while the parties argued the defense' motion for judgment of acquittal at the end of the State's case, that he had received a phone call from a potential witness that turned out to be Richard Long (R1. 1858).

the police ran an ad in a gay magazine in Ft. Lauderdale seeking to locate the April 18th tipster (R1. 1313). The manager at Lefty's, who was aware of the progress Mr. Duest's trial told Mr. Long, "I think this might be you" (R1. 1313). The manager told Mr. Long "that this guy that was with you killed somebody" (R1. 1329).

Mr. Long called the prosecutor and informed that he was the man who provided the tip on April 18th. He identified Lloyd Duest in the courtroom and indicated that he first seen the defendant in Lefty's in the early morning hours of February 14, 1982.[11] They began talking "some time between 12:00 and 2:30 in the morning" (R1. 1303). After Lefty's closed at 3:00 a.m., they went Mr. Long's residence, eight miles away (R1. 1309). They were there for about twenty minutes during which time Mr. Duest used the phone (R1. 1310-11). Mr. Long then "drove him back to his residence," which was near Lefty's (R1. 1310). Mr. Long did indicate that the composite sketch "didn't even look that much like [Mr. Duest] (R1. 1329).

The State also called Edward Heffelman in rebuttal (R1. 1278). He testified that in December of 1981 he started

[11]Of course, this placed Mr. Duest in Lefty's at precisely the same time he was supposedly partying with Demizio, Tammy and Joanne.

working in an adult bookstore in Ft. Lauderdale. On February 18, 1982, he was shown a composite sketch of the suspect in the Pope homicide (R1. 1269). The police lost contact with Mr. Heffelman, relocating him after the trial had started in March of 1983. At that time, he identified Mr. Duest from a photo lineup (R1. 1270). He reported that it looked like a guy that used to frequent the bookstore (R1. 1282). He believed the guys name was “Bobby or Donny. I can’t be sure” (R1. 1283). When asked if the guy was in court, Mr. Heffelman said “He looks something like that fellow over there but --” (R1. 1282). When asked to explain, Mr. Heffelman said, “It looks like that guy over there. A little different, though.” (R1. 1283). Mr. Heffelman also testified that Mr. Duest “[d]oesn’t look like that picture” (R1. 1282). As to Mr. Duest, he said “[h]e looks a little different today” (R1. 1283).

Thus, the jury was presented with a classic credibility battle. The State presented a circumstantial evidence case that “Danny” had committed the murder and had several witnesses identify Lloyd Duest as Danny. On the other side were the family and friends of Mr. Duest who testified that Mr. Duest was in Massachusetts at the time of homicide.

Dr. Wright, a medical examiner was called as a witness

against Mr. Duest in the 1983 trial. Dr. Wright testified he conducted an autopsy on Mr. Pope at about 9:30 p.m. on February 15th (R1. 913). He determined that Mr. Pope had been dead at least four hours (R1. 913). He found that Mr. Pope "died of multiple stab wounds" (R1. 905). Dr. Wright, in a pretrial deposition on January 13, 1983, opined that Mr. Pope died somewhere between fifteen seconds and five minutes after being stabbed (T2. 404-06).[12] The sentencing judge said that according to Dr. Wright there were eleven stab wounds "some of which were inflicted in the bedroom and some inflicted in the bathroom" (R1. 1834, Judge's findings in support of heinous, atrocious and cruel aggravator).[13]

Dr. Wright's testimony was used by the State as

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[12]Since the focus of the trial was upon identity, neither party elicited from Dr. Wright testimony regarding his opinion that Mr. Pope died somewhere between fifteen seconds and five minutes after being stabbed. However, Dr. Wright indicated noted that Mr. Pope's body was found in the bathroom and that the laceration to the back of the head was "consistent with the individual having fallen after being stabbed to death" (R1. 910). However, Dr. Wright refused to express an opinion as to whether "a majority of the wounds that were inflicted were, in fact, inflicted in the bathroom" (R1. 915-16).

[13]At Mr. Duest's re-sentencing in 1998, Dr. Wright indicated that his 1983 testimony was "incorrect" (T2. 399-400). In 1998, Dr. Wright concluded that Mr. Pope was stabbed on the bed. He then managed to stop the blood flow and go into the bathroom to clean-up. While there, the blood flow resumed. Mr. Pope passed out and died, up to thirty minutes after being stabbed (T2. 402-06). As Dr. Wright explained in 1998, if Mr. Pope had called the police during the first minutes, he would have likely survived (T2. 406).

circumstantial evidence of premeditation. In fact, on direct appeal Mr. Duest challenged the sufficiency of the evidence of premeditation, arguing that his motion judgment of acquittal should have been granted (R1. 1851, 1856, 1204, 1295). In finding "that there was sufficient evidence of to sustain defendant's conviction of premeditated murder," this Court relied upon Dr. Wright's finding that "[t]he cause of death in this case was multiple stab wounds." Duest v. State, 462 So.2d 446, 448 (Fla. 1985).

On March 19, 1983, Mr. Duest was convicted of premeditated murder (R1. 1792).[14] That same day, the penalty phase proceedings were conducted. The jury returned a 7 to 5 death recommendation (R1. 1802). On April 14, 1983, the judge imposed a sentence of death. She found five aggravating circumstances, but merged two of them: 1) prior conviction of violent felony, 2) the homicide committed in the course of a felony, 3) the homicide was committed for pecuniary gain, 4) the homicide was especially heinous, atrocious or cruel, and 5) the homicide was committed in a cold, calculated and premeditated manner without the any pretense of moral or legal justification (R1. 1833-34). The second and third aggravators

[14]Since there was no robbery count in the indictment, there was no conviction on a robbery count (R1. 1792, 1833).

were merged. The judge found no statutory mitigator applied (R1. 1835). She did not address non-statutory mitigators. This Court on direct appeal upheld these findings. Duest v. State, 462 So.2d at 449-50.

In post-conviction proceedings, it was learned that the State had failed to disclose its possession of the bus ticket that corroborated Mr. and Mrs. Duest's testimony that they took Lloyd to the Boston bus station on April 5, 1982. This Court found that "the state inadvertently failed to furnish the ticket to the defense." Duest v. Dugger, 555 So.2d 849, 850 (Fla. 1990). However, this Court noted that the jury had heard and "chose to believe the state's witnesses rather than the witnesses introduced by the defense concerning Duest's whereabouts on the date of the murder." Id. Accordingly, this Court concluded that "the introduction of the bus ticket would have done little to enhance the credibility of Duest's parents" given the other evidence of guilt, and therefore, confidence was not undermined in the outcome.[15] Id.

The Eleventh Circuit vacated Mr. Duest's sentence of death and ordered a re-sentencing on Johnson v. Mississippi

[15]The bus ticket would have also corroborated Mr. Duest's initial statement to law enforcement on April 18, 1982, that he had just arrived in town (R1. 877). The State introduced this statement and suggested that it was not true.

grounds. Duest v. Singletary, 997 F.2d 1336 (11th Cir 1993). The Court did address the Brady claim and said "[a]dmittedly, the existence of the ticket serves to corroborate the testimony of Duest's parents that they put him on a Ft. Lauderdale-bound bus in Boston on April 5." Duest v. Singletary, 967 F.2d 472, 479 (11th Cir. 1992).[16] However, the Eleventh Circuit denied relief on the Brady claim noting that "[t]he jury failed to be swayed by introduction of an auto parts store receipt from Watertown, Massachusetts, dated February 15, bearing the name of 'Duest.'" Id.

Following the Eleventh Circuit's ruling vacating Mr. Duest's sentence of death, the State opted at the direction of the victim's family to again seek a death sentence. Counsel was appointed for Mr. Duest on September 20, 1994 (R2. 4). On October 17, 1994, counsel filed a discovery demand requesting among other things that "the prosecution disclose to the defense counsel any material information within the State's possession or control which tends to establish, the existence of any of those 'mitigating circumstances' set forth in Section 921.141(6)(a) through (g) or any other fact or

[16]After the initial Eleventh Circuit decision reported at 967 F.2d 472, the United States Supreme Court vacated the grant of relief and ordered reconsideration. The Eleventh Circuit again granted habeas relief in the decision reported at 997 F.3d 1336.

circumstance tending to mitigate culpability for the offense charged which is known to the State or its agents." (R2. 18). Counsel further explained, "[t]he above demanded information being relevant to an extremely critical stage of the proceedings, it must be provided well in advance of trial of this cause in order that counsel for the Defendant might effectively make use of the mitigating evidence, comment upon, deny, explain rebut or present evidence challenging the accuracy and/or materiality of the identified alleged aggravating circumstances." (R2. 18). On October 23, 1995, another Motion to Compel Disclosure of Mitigating Circumstances was filed on behalf of Mr. Duest (R2. 106). It sought to compel the State "to disclose all favorable evidence" in the State's possession (R2. 109). Counsel also filed a Motion to Produce Criminal Records of State Witnesses (R2. 103).

The State filed a response to these and other motions on May 19, 1998. The State asserted:

> with regard to the information that is discoverable, the State would submit that the defendant has the initial burden of trying to discover such evidence. Medina v. State, 466 So.2d 1046 (Fla. 1985). The State is not required to prepare the defense's case and is under no duty to furnish the defense with information that is otherwise reasonably attainable. Id.; State v. Crawford, 257 So.2d 898 (Fla. 1972); Martinez v. State, 346 So.2d 1209 (Fla. 3d DCA 1977). Only after the defendant demonstrates that

> he has been unable to independently obtain the information, sought through the exercise of due diligence, is the State required to provide the defendant with information in its possession. State v. Coney, 294 So.2d 82 (Fla. 1974). A prosecutor has no duty to undertake a fishing expedition in other jurisdictions in an effort to find potentially impeaching information every time a criminal Defendant makes a request for information regarding a state witness. United States v. Meros, 866 F.2d 1304 (11th Cir. 1989). Therefore, because Defendant has failed to establish the necessary predicate that he has been unable, through the exercise of due diligence, to obtain the information requested, the State should not be ordered to provide Defendant with the information requested.

(R2. 219-20).

When the motion was heard on June 29, 1998, the prosecutor stated:

> We are on a continuance duty there, but as far as confabulating thing which is what the defense invariably does on mitigating circumstances upon anything about his prior background, which they can gush up and bring it to court, whether the kindergarten teacher gave her an apple, whether he attended school in third grade.
>
> These are all things that come in. I am oblivious to those things. I don't even think they're mitigating, but they're invariably allowed in and the appellate court wants all of this brought to bed.
>
> THE COURT: Do you have any - - you're under an ongoing disclosure, if you come across any Brady evidence, so I don't know that this is really - -
>
> MR. CAVANAUGH: I think it essentially is a motion for reduction of favorable Brady evidence and I will certainly will provide it, if I know of any.
>
> THE COURT: So we'll just put down that it's granted. If you have any, you will disclose it.

(TS2. 119-20).

The trial court then took up Mr. Duest's motion for disclosure of criminal records of State witnesses. As to this motion, the prosecutor argued:

> I don't have them. The State of Florida is not Big Brother. We don't check the lives of all of these people and all –

(TS2. 122). Mr. Duest's counsel argued that given the lifestyle of the witnesses involved, it was very possible that they criminal convictions in other states and "the State is readily able to pull out an NCIC on these individuals where as I - -" (TS2. 124). The judge denied the motion without prejudice saying:

> If you can come in and show some - - if you had some reason to believe that a certain witness has a criminal, you know, has committed some criminal offense and that there's a record, I will order the State to give it to you.

(TS2. 123).

During the same hearing, the judge brought up Mr. Duest's motion to preclude various aggravating circumstances. The parties addressed "heinous, atrocious, or cruel." The prosecutor that Dr. Wright's testimony would establish a basis for this aggravator:

> Here's a man who suffered multiple upon multiple stab wounds in a manner in which he's turning, he gets it in the front, he gets in the back, he gets

> it in the head.
>
> There is a room that's literally covered with blood all over as this man frantically tried to preserve his life where this man was endeavoring to take [it] [i]n effect, unfortunately was successful in taking it.
>
> In fact, there's evidence to show the heinous nature of this is that even after the man was dead, after he apparently, this defendant had rifled through and gotten his jewelry, jewelry box, **he then slashes the man in the back of the head as he lay on the bathroom floor because there is a wound inflicted post mortem. It's like one extra for good measure**.

(TS2. 110-11)(emphasis added).[17] After listening to this description of the evidence to be presented, the judge denied the motion to preclude the "heinous, atrocious, or cruel" aggravator (TS2. 111).

The judge then took a short recess. When she returned, she noted that this Court had upheld the aggravators in the direct appeal. She then permitted Mr. Duest's counsel to argue its motion regarding "cold, calculated and premeditated." (TS2. 112-15). The judge then announced she would reserve the motion for the time being (TS2. 116). Later, in the hearing she returned to the motion in limine "to preclude introduction of evidence and/or application [of] cold, calculated and premeditated. That is denied, assuming I hear evidence, you know." (TS2. 127).

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[17]The prosecutor's statement was revealed to be false when the medical examiner testified as the State's first witness.

During this hearing, the prosecutor never revealed that Dr. Wright had reviewed his prior testimony and determined that he had been in error. The prosecutor did not reveal that Dr. Wright had re-examined the evidence and determined that the assailant had left Mr. Pope alive and with the means to save himself (T2. 406). In fact, he falsely argued that the assailant was still there after Mr. Pope's death and inflicted post-mortem injuries (TS2. 111).

On October 5, 1998, jury selection commenced. The next day, a jury was empaneled in circuit court to hear the aggravating and mitigating circumstances in the above-entitled case.

On October 7, 1998, the parties gave opening statements. During the defenses opening statement the State objected when defense counsel told the jury:

> When he was in trial he maintained his innocence and maintained his plea of not guilty. When he was sentenced he maintained his plea of not guilty and his innocence [ ], he maintained his plea of not guilty and innocence and today that is the case as well.

(T2. 328). The prosecutor at a side bar said, "Judge, that is totally outrageous and the State of Florida moves for a mistrial" (T2. 328). The motion for a mistrial was denied, but the judge sustained the objection explaining "client's been found guilty" (T2. 328). After the side bar was after,

the judge advised defense counsel in front of the jury, “Mr. Llorente, your client’s been tried, found guilty. Proceed with the penalty phase” (T2. 328).

The State’s first witness was Dr. Wright. He indicated that he had conducted an autopsy on Mr. Pope in 1982. He testified that there was approximately 750 mls. Of blood present in Mr. Pope’s bed (T2. 343). He indicated that the loss of that amount of blood was not life threatening (T2. 383). Dr. Wright testified that Mr. Pope was stabbed on the bed.[18] At some point, he got up off the bed and went in the bathroom (T2. 384). “None of [the stab wounds] would have cause him to stay [on the bed]. He has nothing that will make him, either in the early part of this episode that will make him unconscious or can’t move” (T2. 370). When he got up, he did not leave a trail blood as he moved into the bathroom. There was no blood droplets “on the rug between the bed and the bathroom” (T2. 391). Dr. Wright testified that this was explained by the ease with which Mr. Pope could have stopped the bleeding by “holding his temple” (T2. 358, 392).

Once in the bathroom, Mr. Pope sat on the commode (“No

[18]Dr. Wright specifically testified that there was no evidence that another person was present holding him down on the bed. Dr. Wright saw no signs of a “transfer” of blood that would suggest the presence of another person (T2. 388).

question about it." T2. 402, 347). There was evidence that he tore off some toilet paper, perhaps to clean himself (T2. 384). At some point, he must have let go of his temple. When he did there was an immediately blood flow (T2. 392). At some point, he attempted "to stand up then fell over" (T2. 364). This was because with his blood loss "[w]hen you shift, put your legs that much lower than your heart, boom, the lights go out pretty much instantaneously" (T2. 364). Dr. Wright testified that "when he finally collapsed in the bathroom and hit his head either on the bath tub or the, probably the floor of the bathroom [it] produc[ed] [a] laceration" (T2. 363). The abrasion on the back of Mr. Pope's head "matche[d] up with the edge of the bathtub or his with his final collapse, either the edge of the tub or the floor" (T2. 395). This was Dr. Wright's explanation of the injury that the State had previously suggested was inflicted by the assailant post-mortem. He saw no evidence of struggle of any type in the bathroom (T2. 395-96).

As to the stab wounds, Dr Wright explained "[n]one of these blows are any that will kill you very fast" (T2. 386). According to Dr. Wright, Mr. Pope was conscious fifteen to twenty minutes, "[y]eah, maybe even more" (T2. 388, 406). He may have lived "up to half an hour" (T2. 406). During that

time, if Mr. Pope had sought help, “there [was] an outrageously high probability that” he would have been saved (T2. 393). Dr. Wright concluded that if Mr. Pope had picked up the phone and telephoned for help, “if he had done that during the first five minutes. There’s really just no, he would have done fine” (T2. 406). Had he called after fifteen minutes, “it raises the possibility that he could not be resuscitated but he’s not going to cross over 50/50 until pretty late, that in that time period” (T2. 406).

Dr. Wright explained that in his opinion the likely reason that Mr. Pope did not seek treatment was because “he was apparently a bisexual or homosexual male who had been a heterosexual male” (T2. 393). “[I]t’s well known in the medical literature as well because they don’t want people asking them about their sexual behavior. They don’t call the police” (T2. 393).[19]

During his testimony, Dr. Wright acknowledged that his prior testimony in 1983 was in error. He indicated that

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[19]Dr. Wright’s testimony began on Wednesday, October 7, 1998. After the direct examination was concluded, the court recessed for the weekend (T2. 372). Before the cross-examination was conducted on Monday, October 12, 1998, the defense asked the judge to inquire of the jury regarding “the publicity surrounding the Wyoming murder” (T2. 377). The Matthew Shephard homicide in Wyoming had been discovered during the weekend recess and was making national headlines.

"between the time, back in 19 hundred and '83 and 19 hundred and '98 when I had a chance to sit down and go over the photographs and the autopsy report again" (T2. 390). In reading his deposition and prior testimony, Dr Wright "realized that I was incorrect" (T2. 399-400). He explained he had been incorrect "[b]ack then," referring to his testimony in 1983 (T2. 400).

The State's next witness was David Shifflett, Mr. Pope's housemate. Because he was deceased, his 1983 testimony was read to jury in 1998 (T2. 409). His testimony generally concerned the discovery of Mr. Pope's body. He also indicated that the only items he noticed that were missing were Mr. Pope's car and his jewelry box (T2. 413, 422).

The State's third witness was Neil O'Donnell. Mr. O'Donnell was also deceased (T2. 442). His 1983 guilt phase testimony was read to the jury in 1998. After his testimony had been read in its entirety, the judge excused the jury (T2. 476). Thereupon, the following occurred:

> THE COURT: Mr. Cavanagh, between being late and having this transcript read, I feel you have wasted about a - - there was nothing in this testimony that went to the penalty phase of this proceeding.
>
> MR. CAVANAGH: It goes - -
>
> THE COURT: It only dealt with identification.
>
> MR. CAVANAGH: He picked him up at a gay bar and

it relates to the testimony of the witnesses of what they saw, where they were going, it was at Lefty's bar. It's all interrelated, Judge, I can't try it in a vacuum.

THE COURT: You sure better have some reason to take up an hour of my time. What are you, what aggravator does that go to?

MR. CAVANAGH: **To the robbery, Judge**.

THE COURT: **You better have evidence of a robbery**.

MR. CAVANAGH: But it ties into Lefty's bar and the other, my next witness will talk about Lefty's bar.

THE COURT: Mr. Cavanagh, you're not going to make a focus of these proceedings the guilt phase and the identification. This man has already been found guilty, go to those aggravating factors, that's it. The medical examiner was totally relevant, everything he had to say regarding an aggravating circumstance was absolutely relevant. I'm still waiting to hear other relevant testimony in regards to this man being identified at a bar. It doesn't make any difference, the testimony the other witness had. You read in the roommate, he could identify things were taken, the car wasn't there, that's fine, that's relevant. Don't give me anymore of this stuff that's not relevant.

MR. CAVANAGH: I have the people now who were at the house around the corner from the bar to talk about his appearances, the property that he had, the car that belonged to the victim.

THE COURT: That is relevant, the car and the property.

MR. CAVANAGH: It's all tied into this Lefty's bar, the location of Lefty's bar.

THE COURT: Do you understand what I'm saying?

> These people don’t need to know anything more than what the penalty relates to, the aggravating circumstances. It does not matter to them. **What happened and how did they prove this was the person who did it, that’s not relevant**.
>
> MR. CAVANAGH: The problem I had with this witness, Judge, because - -
>
> THE COURT: I’m just telling you what I found, that’s it.
>
> MR. CAVANAGH: The relevant portion, if I call him back, if he was alive we could have had a similar, a portion of that was read back but unfortunately we had the full right of cross examination and confrontation. I couldn’t ignore that but the proximity of Lefty’s bar, the location of Lefty’s bar.
>
> THE COURT: Has nothing to do with an aggravating circumstance in this case. It does not go to prove anything as far as an aggravating circumstance, that is what I am telling you. It was not relevant. You better call relevant witnesses, stop wasting the time of this Court.
>
> MR. CAVANAGH: I will explain the relevance, will become relevant through the next witness.

(T2. 477-79)(emphasis added).

The State’s fourth witness was Joanne Wioncek Avery. She testified live in 1998, regarding her encounters with “Danny” during the weekend of February 13, 1982. She was specifically asked by the State if she could identify “Danny” in the courtroom (R2. 485). Thereupon, she pointed to Mr. Duest indicating that he was “Danny” (T2. 485).

The State’s fifth witness was Tammy Dugan. Because she

was deceased, her 1983 guilt phase testimony was read to the jury in 1998 (T2. 496). Her testimony concerned her memories of the weekend of February 13, 1982, and her identification of Mr. Duest as "Danny."

The State's sixth witness was Michael Demizio. He testified live in 1998, regarding his contact with "Danny" in February of 1982. He was asked by the State if he could identify "Danny" in the courtroom (T2. 524). Thereupon, he identified Mr. Duest as "Danny." During the cross-examination of Demizio, defense counsel attempted to bring out the fact a number of the details that Demizio provided in his testimony had not been provided to the police when he had been questioned on February 17, 1982 (T2. 537). He had not advised the police that "Danny" had blood on his clothing. The prosecutor objected to the questioning. At a side bar, the judge called the questioning "[n]egative impeachment, counsel" (T2. 537). The judge ruled, "I'm making the ruling here it is negative impeachment, can't come in" (T2. 538). Thereupon, the judge advised the jury that the objection was "sustained" (T2. 538).

After a recess, the cross-examination continued. Regarding Demizio's testimony that he had seen blood on "Danny's" clothing, defense counsel asked Demizio, "[d]o you

recall that your statement to [the detective] was that I really didn't pay that much attention to him?" (T2. 538). The State objected, and the judge again said "[s]ustained, it's not impeachment" (R2. 538). After an overnight recess, cross-examination continued. When asked if "Danny" had been around on Sunday, February 14th, Demizio said he couldn't be sure. "I would have to look at the testimony again" (T2. 553). Thereupon, Demizio reviewed his 1983 testimony in order to remember the events of February 14th (T2. 553).

The State's seventh witness was Robert Harris (T2. 567). He was asked to explain "Mr. John Pope's uniqueness as an individual human being" (T2. 573). Mr. Harris also testified that the gold Camero was found in the parking lot of the Galleria Mall and that he took custody of it (T2. 570). Mr. Harris also revealed that Mr. Pope's roommate, Mr. Schifflet used drugs and was not required to pay rent, although "[h]e did pay when he could" (T2. 578).

The State's eighth witness was Broward County Deputy Sheriff Rene Robes. Deputy Robes testified that the missing jewelry box was never recovered (T2. 628). Deputy Robes also testified that Mr. Duest escaped from custody in July of 1982 (T2. 630). Deputy Robes frisked Mr. Duest when his was arrested following the escape. When Deputy Robes frisked Mr.

Duest, he found “a homemade knife” (T2. 631).

The State then presented the transcript of Mr. Duest’s April, 1987, guilty plea to an escape charge arising from the July, 1982, incident (T2. 643). The transcript included the prosecutor’s allegation as to the factual basis for the charged which included to Mr. Duest’s display of “a homemade knife” (T2. 643).[20]

Next, the State presented Mr. Duest’s 1970 conviction for armed robbery in the State of Massachusetts (T2. 645).

The State’s ninth witness was David Pope, John Pope’s son (T2. 647). He testified to his memories of his father. He described his father’s uniqueness as an individual (T2. 651). During Mr. Pope’s testimony, he “had several episodes of emotion” which prompted the defense to make a motion for mistrial (T2. 655). The motion was denied, although the judge instructed the prosecutor that as to his next witness, John Pope’s daughter (Lillian Pope), “please focus her a little more because the issue is really the impact and not the history of what a good father over all those years and

[20]Prior to the re-sentencing proceedings, Mr. Duest filed motion seeking to set aside the escape conviction and challenging its admissibility (T2. 231). Mr. Duest asserted that he pled guilty to the escape charge five years after the imposition of a death sentence because he was advised by his defense attorney and the presiding judge that the plea would have no affect in his death case (T2. 233, 634, 636).

everything" (T2. 655).

The State's final witness was Lillian Pope. Ms. Pope testified as her memories of her father (T2. 659).

In anticipation of the defense's case, the prosecutor moved to preclude the defense from presenting any testimony from Mr. Duest's family members regarding his guilt phase defense that he had been in Massachusetts at the time of the murder (T2. 656). Thereupon, the following occurred:

> THE COURT: No, no, this goes to penalty. This is only as to mitigating, what kind of kid he was, background, that kind of stuff. **Nothing about the facts of this case or else you're out of here**.
>
> MR. LLORENTE: Yes. For the record, Judge, it would be my contention that the State is [sic] opened the door to bring in the fact that he's always maintained his innocence numerous times by bringing in his bad deeds into issue and - -
>
> THE COURT: No.

(T2. 657)(emphasis added).

Later when proceedings resumed the next day, the prosecution again raised the matter:

> MR. CAVANAGH: I still have my ongoing motion in limine about not resurrecting matters pertaining to residual doubt or anything like that.
>
> THE COURT: I think that we have fully discussed that and Mr. Llorente understands that should the defense raise an issue, an alibi or something of that nature that you're, they're only opening up a whole proceeding.

> MR. LLORENTE: Well, I understand the Court's ruling, although again I argue, renew my motion. I should be entitled to bring up evidence to that because the State opened the door with the presentation of identification of witnesses and evidence, **but the Court has precluded me from going into that**, obviously I have to abide by the Court's ruling.
>
> THE COURT: **Right**.

(T2. 748)(emphasis added).

In his case, Mr. Duest called eleven witnesses to testify regarding mitigating circumstances. John Boone, an expert in the field of corrections, testified regarding Mr. Duest's incarceration in the State of Massachusetts and to its effects upon Mr. Duest who was 18 years old at the time (T2. 590). John Gelosi, an employee of the Broward County Jail, testified to the assistance Mr. Duest had provided him in translating sign language and facilitating communication with another jail inmate (T2. 625). Robert Huber, an employee of Wooden Rogers Education Center in Ft. Lauderdale, testified to Mr. Duest's artistic ability which was discovered while Mr. Duest was an art student while in the Broward County Jail awaiting the re-sentencing (T2. 663).[21] Michael Lynch, a Broward County

[21]Mr. Cavanagh's cross of Mr. Huber consisted of Mr. Cavanagh reaching for a crime scene photograph and saying, "I'd like to show you, Mr. Huber, some other work done by that very same student." (T2. 665). Mr. Duest's objection was sustained, although his motion for a mistrial was denied (T2. 665-66).

Sheriff's Corrections Officer, testified that Mr. Duest warned him of another inmate's plan to kill Officer Lynch and thus saved his life (T2. 668).

Family members and friends from Massachusetts also testified regarding Mr. Duest's background. These witnesses included: Clare Guzzetti, Mr. Duest's cousin (T2. 669), Richard Duest, Mr. Duest's father (T2. 731), Nancy Duest, Mr. Duest's mother (T2. 738), Nancy Kerrigan, Mr. Duest's sister (T2. 750), Joseph Deaveau, a boyhood friend (T2. 776), and Maria Craig, a pen pal of Mr. Duest's (T2. 782).

Also testifying was Dr. Patricia Fleming, who was qualified as a mental health expert. She had conducted an evaluation of Mr. Duest in 1989 (T2. 693). During Dr. Fleming's direct examination, the following occurred:

> Q. Based upon your evaluation back then, did you find any mitigating circumstances?
>
> A. Yes, I did.
>
> MR. CAVANAGH: Woe, woe, we object to a legal conclusion here.
>
> THE COURT: The objection is sustained, that is a legal term and I will be explaining to the jurors, you may ask her what her evaluation found psychologically.
>
> BY MR. LLORENTE:
>
> Q. What did your evaluations find?
>
> A. When - - may I explain the evaluation?

Q. Sure.

A. The evaluation, since it is, it was, my goal was to find out why he ended up where he was. And so, and as I, and when I did that I asked him a lot of detailed questions about his background and read the affidavit from the family and other things. But there ware about four very significant facts [that] emerged[.] [O]ne was the, both the psychological and physical abuse, that in which he grew up. And the information that I gathered and that I heard today was very consistent, that about the abuse, the physical abuse. That was an outstanding finding. The other was that as a result of this that he was a very, had low self-esteem, was a very shy child, introverted child who had little self-confidence, but who learned through the training and teachings of the father. And I can explain that in detail that the way that they survive in this world is by being a real man and being tough and that [ ] was a second feature. The third was that a strong, strong alcohol and drugs influenced him that began in the junior high years, which is not unusual for children in d[y]s[fu]nctional, you know, abusive families, but that increased significantly when he got addicted when he was sentenced to prison. So the fo[u]rth outstanding feature was that the, really a lack of attention, the neglect of this child he when he was born. He had significant problems. He had, I don't know all of the details, but he had some kind of brain d[y]sfunction that required injections. He came into the world with some difficulties.

(T2. 693-95).

Dr. Fleming was also asked about Mr. Duest's incarceration at Walpold, a maximum security prison in the State of Massachusetts:[22]

[22]Dr. Fleming had been permitted to listen to the prior testimony from John Boone, the former Commissioner of Corrections for the State of Massachusetts. He had served in

> Q. Doctor, within a reasonable degree of psychological certainty, could you tell us whether or not you have an opinion as to whether Lloyd's stay at Walpold affected him or have a negative impact?
>
> A. Yes.
>
> * * *
>
> Q. What would say the affects on Lloyd were on his stay at Walpold?
>
> * * *
>
> A. Similar to those Dr. Grassio found. He was, he found the very difficult, Lloyd found it was very difficult to focus, had poor attention. He had some hallucinations, he was allergic [sic], I mean, super sensitive to sounds. He was paranoid, which is not unusual in prisons but more than what's typical, isolation, poor relationships. Now, this was due to

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that capacity from 1971 to 1993. Mr. Boone was qualified as an expert in the filed of corrections and permitted to give opinion testimony (T2. 596). He described the deplorable conditions at the Walpold and Concord prisons in the early 1970's. He recalled meeting an incarcerated Lloyd Duest when Mr. Duest was 18 years old (T2. 593). He learned that Mr. Duest in his first incarceration "was initially placed at Walpold State Prison, a maximum security facility reserved for the most hardened criminals in Massachusetts" (T2. 597). After several months there "he was transferred to Concord" (T2. 597). Mr. Boone indicated that "To have been incarcerated for the first time at Walpold State Prison, a young aged man, as Lloyd was, is like throwing a baby to wolves. Frankly, I am surprised that Lloyd even survived at all and knowing the condition at that time I am sure that Lloyd suffered significant abuse at the hands of inmate, gangs who routinely threatened and controlled younger men" (T2. 599). Mr. Boone concluded that "the inmates who made it through Walpold and Concord without being killed were none the less destroyed mentally, emotionally, psychologically and really physically. There were, we actually destroyed them" (T2. 600).

In cross-examination, the State argued unsuccessfully that Mr. Boone's testimony opened the door for the presentation of Mr. Duest's entire criminal record, not just prior crimes of violence (T2. 618-20).

the segregation.

(T2. 704-05).

In cross-examination of Dr. Fleming, the State was permitted to ask Dr. Fleming if she had considered Mr. Duest's criminal record when conducting her evaluation (T2. 712). When she answered, "yes," indicating she had been aware of Mr. Duest's criminal record, the State argued that it was entitled to bring out Mr. Duest's entire criminal record in her testimony. The judge ruled that since Dr. Fleming indicated that the criminal history was "part of the information that I read," the State could question her regarding Mr. Duest's nonviolent criminal felonies. Defense counsel objected arguing that Dr. Fleming was merely considering the fact that Mr. Duest had a criminal history as corroborative of his dysfunction; she did not rely upon the facts and circumstances of each individual offense (T2. 722). Defense counsel argued that the prosecutor using his cross-examination of Dr. Fleming to introduce a laundry list of criminal charges "as aggravating circumstances" (T2. 724). Defense counsel also pointed out that the offenses that the State would be eliciting, "all those offenses were dismissed" (T2. 725).

Before the jury, the following occurred:

> Q. In formulating your evaluation of Mr. Duest, did you refer to his criminal history?

A Yes.

Q. Did that include a larceny?

A. Larceny, a theft.

* * *

Q. What's one, larceny?

A. Yes.

Q. Was one. Was there another larceny?

A. Yes.

Q. Was there a B and E or breaking and entering and larceny of a building during the daytime?

A. I don't see - - yes.

Q. Was there a breaking and entering of a building at nighttime and a larceny?

A. Yes.

Q. Was there a firearm possession?

A. Yes.

Q. Was there?

A. No - - yes.

Q. Was there breaking and entering with the intent to commit a felony?

A. Yes.

(T2. 726-27).

After the presentation of Mr. Duest's case, the trial court found sufficient evidence was presented to warrant instructing the jurors over objection regarding to four

aggravating circumstances: 1) the homicide occurred during the course of a robbery or was committed for pecuniary gain, 2) Mr. Duest had previously been convicted of a felony involving violence, 3) the crime was extremely heinous, atrocious, or cruel, and 4) the crime was committed in a cold, calculated and premeditated manner without the pretense of moral justification (T2. 798-99, 897-99). The circuit court denied Mr. Duest's objection to instructing these aggravating circumstances because this Court had affirmed the finding of the four aggravating circumstances after they were found in the prior penalty phase findings. However, the State introduced Dr. Wright's testimony revealing that his prior testimony was incorrect. The new evidence in 1998 directly contradicted and refuted evidence presented in 1983.

The trial court also decided to instruct the jurors regarding fourteen non-statutory mitigating factors:

> one, the defendant did not plan or intend to kill John Pope at the time he began his criminal conduct. Two, the defendant was under the influence of drugs or alcohol at the time the offense was committed. Three, the defendant was under mental or emotional disturbance at the time the offense was committed. Four, the defendant has family and friends who care and love him. Five, the defendant had a troubled childhood, was treated in an unfavorable fashion by others. Six, the defendant was severely beaten and abused as a child. Seven, the defendant was did not receive nurturing, love and attention he needed as a child and was traumatized at home, school and in the neighborhood. Eight, the defendant was subjected to

> bad peer group influence at a young age. Nine, the defendant was subjected to institutional abuse and corruption at a young age. Ten, the capacity to conform, has peace [sic], his conduct to the requirements of the law may have been impaired. Eleven, the defendant has demonstrated a willingness and ability for rehabilitation. Twelve, the defendant has excelled as an artist during his confinement. Thirteen, the defendant has demonstrated care and concern for the well-being of others. Fourteen, any other factor based on your common sense and life experience which you believe should be considered as mitigation.

T99-900). Mr. Duest's request to have the jury instructed on statutory mitigators was denied (T2. 803-05). The judge initially refused to instruct the jury on a non-statutory basis that Mr. Duest's capacity was impaired, but ultimately relented, "as a non-statutory, okay" (T2. 812).

After the instruction conference was completed, the defense reported information regarding juror misconduct (T2. 827). Nancy Kerrigan who had testified earlier in the day reported that while she was in the hallway two jurors walked past her. One of them said to the other in reference to her, "so she loves to eat, she got big, she loves to eat and her husband's wealthy" (T2. 829). A person who was with Ms. Kerrigan was called and reported hearing one of the jurors make reference to "loves to eat" and "wealthy husband" (T2. 832). Inquiry was made of three male jurors. Though they corroborated the fact that they were in the area that Ms.

Kerrigan testified the statements were made, they did not recall any conversation (T2. 835-39, 844). The judge denied Mr. Duest's motion for a mistrial (T2. 839).

The prosecutor in his closing argument denigrated the concept of mitigating circumstances. He indicated a mitigating circumstance was merely an "excuse" (T2. 846). He said "certainly not no combination [of] so-called mitigating circumstances or excuses serve in any way to outweigh the aggravating circumstances" (T2. 847). Later, he said, "[y]ou heard a litany of excuses" (T2. 864). "What kind of human being, regardless of the causation, regardless of whether he was beaten as a child is this sort of thing, it was cold, calculated and premeditated" (T2. 865).

The prosecutor argued the four aggravating circumstances submitted in the instructions to the jury were present. As to the in the course of a felony aggravator, the prosecutor relied upon Demizio's testimony describing the statements made by "Danny" during a bus trip and Demizio's identification of Mr. Duest as "Danny" (T2. 853-59). He argued that from the testimony of Tammy and Joanne identifying Mr. Duest as "Danny," it was established that Mr. Duest had the opportunity to take Demizio's missing dagger which was never found (T2. 854-55). He argued that Neil O'Donnell had "identified" Mr.

Duest as the person who was with Mr. Pope at Lefty's Bar shortly before his death (T2. 856). The prosecutor told the jury "what's important for purposes of this proceeding, it's not a guilt face [phase], it is the penalty phase and what relates to the robbery" (T2. 857). "I suggest to you he robbed this man of his car. He robbed this man of his jewelry as well as robbing this man of his life" (T2. 859).

As to heinous, atrocious or cruel, the prosecutor acknowledged that Mr. Pope died "thinking [ ] that it would be too embarrassing for people to know that he was a homosexual" to call for help (T2. 863). "What kind of a heinous and atrocious death was this for a man suffering the amability [sic] of not being stabbed but contemplating his being learned by others to be a homosexual. His embarrassment, a man with children who you heard, he had raised with much dignity and decency" (T2. 864).

As to cold, calculated and premeditated, the prosecutor relied on Demizio's testimony that "Danny" had told him that he robbed "homosexuals" to support himself (T2. 865). "This was more than just beating, this was cold, calculated, premeditated" (T2. 865).

During defense counsel's closing, the prosecutor objected to counsel's argument that by the State's own evidence "did he

know that he was going to kill Mr. Pope" (T2. 882). The prosecutor asserted the argument was a "misapplication of the law" (T2. 882). The judge merely indicated that she would instruct the jury on the law.

When defense counsel argued the presence of mitigation that humanized Mr. Duest, the prosecutor injected in front of the jury "[o]bjection to this verbiage, Judge" (T2. 892). The judge responded by simply saying, "[c]ounsel, proceed" (T2. 892).

The jury returned a recommendation, by a vote of 10 to 2, that Lloyd Duest be sentenced to death.

The sentencing hearing was held on December 10, 1998 (T2. 922). During that proceeding, Mr. Duest's counsel argued that the jury had been inflamed by Mathew Shepherd story that had made national news during Mr. Duest's re-sentencing (T2. 924). Mr. Duest also introduced video depositions of seven family members who had not testified before the jury (T2. 926). Also presented was a certified letter from a police officer in Massachusetts who had been a boyhood friend of Mr. Duest's (T2. 929).

Judge Lebow was also advised that Mr. Duest had just been diagnosed with throat cancer (T2. 930). Mr. Duest's counsel indicated that he would keep the court apprised Mr. Duest's

condition and would provide her records as the developed (R2. 930). After the videotaped depositions were played, the circuit court recessed to await sentencing memoranda (T2. 986).

Mr. Duest submitted his sentencing memorandum on February 1, 1999. In his memorandum, Mr. Duest argued that Judge Lebow was required to independently weigh the aggravation and the mitigation (R2. 355, 367). He argued that the sentencing recommendation of death was not entitled to great weight.

On October 26, 2000, proceedings were reconvened for sentencing (T2. 986). At that time, Judge Lebow read her findings into the record. In the findings in support of the death sentence, Judge Lebow found three aggravating circumstances had been established by the State. These were: 1) Mr. Duest had previously been convicted a violent felony; 2) the homicide was committed in the course of a robbery or for pecuniary gain; and 3) the homicide was especially heinous, atrocious or cruel (R2. 393-95). Judge Lebow specifically rejected as unproven the cold, calculated and premeditated aggravating circumstance (R2. 396).

Judge Lebow addressed the statutory mitigating circumstances. She considered the testimony of Dr. Fleming and John Boone regarding the mitigator concerning whether the

homicide was committed under the influence of an extreme mental or emotional disturbance (R2. 396). As to Dr. Fleming, Judge Lebow stated:

> Dr. Fleming's findings that the Defendant had suffered physical and emotional abuse by his father were confirmed by the testimony of the Defendant's father, mother, and the Defendant's siblings, most notably, Nancy Kerrigan. Dr. Fleming's analysis of the impact on the Defendant's mental or emotional health was based upon various studies published about the institution and not upon any circumstances confided to her by the Defendant.

(R2. 396). As to Mr. Boone, Judge Lebow said, "The testimony presented vividly depicted the general conditions that he (Mr. Boone) observed in that prison system, but he could not enlighten these proceedings with any specifics as to the Defendant's "problems" (R2. 397). As a result, Judge Lebow concluded that "the testimony did not reasonably convince me that the Defendant was under the influence of extreme mental or emotional disturbance at the time the crime was committed" (R2. 397).

As to the statutory mitigating circumstance concerning whether the defendant's capacity to appreciate the criminality of his conduct was substantially impaired, Judge Lebow relied on the previously set forth statements from Dr. Fleming and John Boone. Judge Lebow concluded:

> Although there was certainly evidence that the Defendant had used drugs and alcohol for a period of

> time before the crime, and consumed some alcohol just prior to the commission of the crime, this evidence did not reasonably convince me that the circumstance existed and therefore will not be considered as a statutory mitigating circumstance.

(R2. 397).

Judge Lebow then found the following non-statutory mitigating factors (R2. 397-99): 1) "Defendant's history of drug and alcohol abuse;" 2) "Defendant was under the influence of drugs or alcohol at the time of the crime;" 3) Defendant suffered physical and emotional abuse as a child;" 4) "Defendant suffered institutional abuse and corruption;" 5) "Defendant was traumatized as child, lacked nurturing love, had a troubled childhood and was treated unfavorable by others;" 6) "Defendant was influenced by his peer group, especially his cousin, to commit crimes;" 7) "Defendant has family and friends who love and care about him, and he has demonstrated care and concern for them;" 8) "Defendant demonstrated willingness and ability for rehabilitation, that he helped Deputy Gelousi and warned Deputy Lynch;" 9) "Defendant participated in drug abuse treatment and anger management while in jail;" 10) "Defendant has artistic ability and excelled as an artist while confined;" 11) "defendant has a terminal illness;" and 12) regarding a mitigating circumstance concerning the offense Judge Lebow stated:

> The defense argues that the Defendant did not have an intent to kill Mr. Pope at the beginning of the crime, that the victim was alive when the Defendant left his residence and could have lived had he called for help. The testimony of Dr. Wright established that Mr. Pope probably lived for fifteen to twenty minutes after being stabbed, and in his (Dr. Wright's) opinion could have been saved had help arrived in time. Accordingly, I have considered this, but have given it very little weight.

(R2. 399).

Judge Lebow after discussing the aggravating and mitigating circumstances then indicated "great weight [was] given to the recommendation of the jury" (R2. 399).[23] Thereupon she imposed a sentence of death saying, "Every one of the aggravating factors in this case, standing alone, would be sufficient to outweigh the mitigating circumstances" (R2. 399).

SUMMARY OF THE ARGUMENTS

1. Mr. Duest was deprived of a constitutionally adequate adversarial testing determination of his guilt. The State withheld exculpatory evidence, evidence that was favorable to the defense. Not just a bus ticket in Mr. Duest's possession at the time of his arrest was withheld.

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[23]In his sentencing memorandum, Mr. Duest had specifically argued that Florida law required that in case where a death recommendation had been returned, the judge was obligated to conduct an independent weighing without giving deference to the jury recommendation of death (R2. 355).

This Court previously determined that the bus ticket alone was not sufficient to caste the case in a whole new light and warrant a new trial. However, at the re-sentencing the State's medical examiner revealed that his trial testimony had been false. Under this Court's jurisprudence, Mr. Duest is entitled to have cumulatively consideration of these non-disclosures when the Court determines whether confidence is undermined in the outcome and a new trial is warranted. Such cumulatively consideration establishes that Mr. Duest's conviction must be vacated and his case remanded for a new trial.

2. The re-sentencing judge erroneously held that the State need not reveal the criminal records of the State witnesses unless and until Mr. Duest presented evidence that "a certain witness has [ ] committed some criminal offense" (TS2. 123). Imposing upon Mr. Duest an obligation to learn of the evidence sought to be discovered, but discovery is required violates due process.

3. Mr. Duest was deprived of his constitutional right to present a defense, to confront the State's witnesses, and to present favorable evidence when the re-sentencing judge at the State's urging precluded the defense from presenting evidence challenging the State's evidence. Judge Lebow

instruct Mr. Duest's counsel, "[n]othing about the facts of this case or else you're out of here" (T2. 657). Defense counsel indicated on the record that his understanding that the judge was precluding him from presenting evidence in opposition to the State's identification evidence. The judge responded that his understanding was "[r]ight" (T. 748). These rulings deprived Mr. Duest of an adversarial testing as guaranteed by due process.

4. This Court should reconsider its rulings that evidence and argument of lingering or residual doubt is not proper mitigating evidence. This Court has recognized that "credibility problems" with a State's guilt phase witness may serve as a reasonable basis for a life recommendation. Moreover under the Eighth Amendment, Florida is obligated to provide procedural protections against the execution of the innocent. Lingering or residual doubt evidence and argument should recognized as valid mitigation.

5. The re-sentencing judge erroneously refused to instruct the jury on statutory mitigating factors as requested and erroneously overruled the defense's objection to instructing the jury regarding cold, calculated and premeditated when there was no evidence supporting an intent to kill in the record.

6. The re-sentencing judge erroneously precluded the defense' mental health expert from testifying to her findings of mitigating circumstances in Mr. Duest's case.

7. The re-sentencing court erroneously permitted the State to elicit from the defense' mental health expert Mr. Duest's non-violent criminal record simply because in her evaluation she had been aware that the record existed.

8. The re-sentencing judge erroneously applied the Tedder standard to a death recommendation, thereby depriving Mr. Duest of full consideration of the mitigation presented only to the judge and depriving Mr. Duest of an independent sentencing determination.

9. The sentencing judge erroneously find the heinous, atrocious or cruel aggravating circumstance and erroneously refused to find mental health mitigation.

10. Mr. Duest's sentence of death is disproportionate under Florida law and under the Eighth Amendment.

11. Florida law deprived Mr. Duest of his constitutional right to trial by jury of all of factual elements of his crime necessary to increase the allowable penalty for first degree murder from life imprisonment to a death sentence.

ARGUMENT I

MR. DUEST WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AS

WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE EITHER THE STATE FAILED TO DISCLOSE EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE.

A. Introduction.

Mr. Duest first alleged that he had been denied an adequate adversarial testing when he litigated his Rule 3.850 in 1990. Even though this Court found that exculpatory evidence was not disclosed, it concluded that a new trial was not warranted.[24] Duest v. Dugger, 555 So.2d 849 (Fla. 1990). During Mr. Duest's re-sentencing proceedings, he invoked his rights under Brady v. Maryland and requested that the State be required to disclose exculpatory evidence. However, it was not until the State called its first witness, Dr. Wright, that it revealed to Mr. Duest that Dr. Wright's testimony at the 1983 trial was "incorrect" (T2. 399-400).

Dr. Wright's erroneous testimony in 1983 indicated that Mr. Pope died somewhere between fifteen seconds and five minutes after being stabbed (T2. 404-06). Dr. Wright indicated in 1983 that the Mr. Pope's body was found in the

[24]At issue in the 3.850 motion was the State's failure to disclose the bus ticket that was seized from Mr. Duest, reflecting travel from Boston to Miami in early April, 1982. This ticket provided corroboration for Mr. Duest's statement to the police and the testimony of his mother and father at trial.

bathroom and that the laceration to the back of Mr. Pope's head was "consistent with the individual having fallen after being stabbed to death" (R1. 910). In 1983, the sentencing judge relied on Dr. Wright's testimony to find that Mr. Pope was stabbed in the bedroom and in the bathroom (R1. 1834). This Court rejected Mr. Duest's challenge to the sufficiency of the evidence in support of premeditation saying, "there was sufficient circumstantial evidence to sustain defendant's conviction of premeditated murder." Duest v. State, 462 So.2d 446 (Fla. 1985).[25]

In 1998, Dr. Wright revealed that if Mr. Pope had picked up the phone and telephoned for help, "if he had done that during the first five minutes. There's really just no, he would have done fine" (T2. 406). This testimony caused the sentencing judge to specifically reject the "cold, calculated and premeditated" aggravating circumstances as unproven (T2. 396). The sentencing judge also found the mitigating circumstances urged by Mr. Duest, that there was no intent to kill (T2. 399).

Clearly, Dr. Wright's 1998 testimony seriously undermined

[25]The fact that this Court found sufficient evidence on a record that contained Dr. Wright's "incorrect" testimony does not establish that this Court would find sufficient evidence containing Dr. Wright's testimony that the injuries were not so serious that Mr. Pope could not have saved himself.

the State case for premeditation. The assailant left Mr. Pope with the power to save himself by calling 911. This fact is inconsistent with an intent to kill, an element of premeditation. Undoubtedly, Dr. Wright's revelation in 1998 was exculpatory. Undeniably, it had not been disclosed previously. When the previously undisclosed evidence is considered cumulatively the other Brady material, the case is caste in new light and confidence is undermined in the reliability of guilt verdict.

B. Standard of Review.

The evidence is not in dispute that Dr. Wright testified that his prior testimony was incorrect. The question presented here is what is the legal ramification of the disclosure. That raises a question of law. Such questions are to be considered by this Court on a de novo basis.

In Stephens v. State, 748 So.2d 1028, 1034 (Fla. 1999), this Court explained that under the standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984), "both the performance and prejudice prongs are mixed question of law and fact." As a result, "alleged ineffective assistance of counsel claim[s are] mixed question[s] of law and fact, subject to plenary review." Stephens, 748 So.2d at 1034. This is equality true of the standard of review of a Brady

claim. In United States v. Bagley, 473 U.S. 667, 682 (1985), the Supreme Court adopted the Strickland prejudice prong standard as the standard to review the materiality prong of a Brady claim. See Duest v. Singletary, 967 F. 2d 472, 478 (11th Cir. 1992), vacated on other grounds, 113 S. Ct. 1940, adhered to on remand, 997 F.2d 1326 (1993)("This issue presents a mixed question of law, reviewable de novo."). Rogers v. State, 782 So.2d 373, 377 (Fla. 2001)("[t]he standard requires an independent review of the legal question of prejudice").

C. The Legal Basis for the Claim.

In Giglio v. United States, 405 U.S. 150, 153 (1972), the Supreme Court recognized that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice." This Court has stated, "Truth is critical in the operation of our judicial system. . . ." The Florida Bar v. Feinberg, 760 So.2d 933, 939 (Fla. 2000); The Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001). Where the State presents false or misleading evidence or argument in order to obtain a conviction or sentence of death, due process is violated and the conviction and/or death sentence must be set aside unless the error is harmless beyond a reasonable doubt. Kyles v.

Whitley, 514 U.S. 419, 433 n.7 (1995). The prosecution has a duty to alert the defense when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. 264 (1959); and, to refrain from deception of either the court or the jury. A prosecutor must not knowingly rely on false impressions to obtain a conviction. Alcorta v. Texas, 355 U.S. 28 (1957).

To insure that a constitutionally adequate adversarial testing, and hence a fair trial, occur, the prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment'". United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). In Strickler v. Greene, 119 S.Ct. 1936, 1948 (1999), the Supreme Court reiterated the "special role played by the American prosecutor" as one "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." See Hoffman v. State, 800 So.2d 174 (Fla. 2001); State v. Hugins, 788 So.2d 238 (Fla. 2001); Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001). The State's duty to disclose exculpatory evidence is applicable even though there has been

no request by the defendant. Strickler, 119 S.Ct. at 280.[26] The State has a duty to learn of any favorable evidence known to individuals acting on the government's behalf.

Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Garcia v. State, 622 So. 2d 1325, 1330-31 (Fla. 1993). This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. at 434; Strickler v. Greene, 119 S,Ct. at 1952.

This Court has indicated that the question is whether the State possessed exculpatory "information" that it did not

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[26]This Court has recognized that the United States Supreme Court in Strickler explained that there was not a due diligence element to a Brady claim. Occhicone v. State, 768 So.2d 1037, 1042 (Fla. 2000); Way v. State, 760 So.2d 903 (Fla. 2000).

reveal to the defendant. Young v. State, 739 So.2d at 553. If it did and it did not disclose this information, a new trial is warranted where confidence is undermined in the outcome of the trial. In making this determination “courts should consider not only how the State’s suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant’s ability to investigate or present other aspects of the case.” Rogers v. State, 782 So.2d at 385. This includes impeachment presentable through cross-examination challenging the “thoroughness and even good faith of the [police] investigation.” Kyles v. Whitley, 514 U.S. at 446.[27]

In the Brady context, the United States Supreme Court and this Court have explained that the materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." Kyles v. Whitley, 514 U.S. 419, 436 (1995); Young v. State, 739 So.2d 553, 559 (Fla. 1999). Thus, the analysis is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 1566 (footnote

[27]In this case, the undisclosed evidence when considered cumulatively provides a powerful testament to the sloppy and inadequate investigation conducted by law enforcement. Such impeachment taints the rest of the State’s case.

omitted).

In Lightbourne v. State, 742 So. 238 (Fla. 1999), this Court explained the analysis to be used when evaluating a Brady claim:

> This cumulative analysis must be conducted so that the trial court has a "total picture" of the case. Such an analysis is similar to the cumulative analysis that must be conducted when considering the materiality prong of a Brady claim. See Kyles v. Whitley, 514 U.S. 419, 436 (1995).

Lightbourne, 742 So. 2d at 247-248(empahsis added)(citations omitted).

Accordingly, Dr. Wright's new revelation that his trial testimony was "incorrect," not only establishes that exculpatory evidence was withheld, but it requires cumulative consideration of all the withheld evidence when conducting the prejudice analysis under Kyles.

D. Cumulative Analysis.

1. Dr. Wright's false testimony.

Dr. Wright was the Chief Medical Examiner of Broward County when he conducted an autopsy of John Pope. In his official capacity as an agent of the State, he testified at Mr. Duest's 1983 trial (R1. 902). According to his 1998 testimony, his 1983 testimony was "incorrect" (T2. 400); he had been "wrong" in his 1983 testimony (T2. 405). Thus, a state agent in Mr. Duest's 1983 trial provide false testimony

at Mr. Duest's trial.

At a minimum, Dr. Wright's 1998 testimony revealed impeachment of his 1983 testimony. However, the 1998 disclosure had much more exculpatory value than simply impeaching the prior false testimony. Dr. Wright revealed in 1998 that Mr. Pope died because he did not seek help after his assailant left. Mr. Pope would not have died had he sought treatment. According to Dr. Wright, Mr. Pope did not seek treatment because he did not want to be questioned about his "sexual behavior" (T2. 393). But for Mr. Pope's decision not to seek help, "there's an outrageously high probability" that Mr. Pope would have survived (T2. 393). None of his wounds were such that they "will kill you very fast" (T. 386).

Certainly, Dr. Wright's 1998 testimony can be said to cast "the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. at 435. It negates the presence of an intent to kill.[28] This in turn would support a contention that the homicide was the result of an emotionally charged encounter and/or one involving the usage of drugs and alcohol. Such a

[28]In fact in her sentencing order, Judge Lebow not only refused to find that cold, calculated and premeditated, have been proved beyond a reasonable doubt, but she further acknowledged that the defense had established that there was no intent to kill.

possibilities significantly alter the possible profile of the assailant because the picture of the assailant's motives is completely changed.

However strong the argument is that Dr. Wright's new testimony in 1998 warrants a new trial, the proper analysis requires that the presentation of false evidence at Mr. Duest's trial must be evaluated cumulative with the previously established non-disclosure of other exculpatory evidence.

2. The Bus Ticket.

From the moment of his arrest, Lloyd Duest maintained that he had traveled to Florida via a Trailways bus which departed Boston on April 5, l982, almost two months after the offense. He further maintained that at the time of his arrest, he had a bus ticket in his possession. Throughout pretrial discovery, when the defense attempted to ascertain the existence of such a ticket, the State denied any knowledge of any personal property seized from Mr. Duest (Deposition of Rene Robes, July 15, 1982: "Q. And was anything of his personal property taken into evidence that you felt was important? A. Just for safekeeping." Page 18. "Q. You don't have any other personal belongings within your custody? A. No." Page 19).

The State's circumstantial evidence case was premised

upon Mr. Duest being in Ft. Lauderdale on President's Day weekend, 1982. Mr. Duest presented an alibi defense. He called eleven (11) witnesses to testify that he was in Massachusetts in February and March of 1982, and that he left Boston, Massachusetts, on April 5, 1982, via a Trailways bus bound for Miami. The State responded at trial to this evidence by calling Deputy Feltgen. He testified that law enforcement personnel attempted to verify Mr. Duest's arrival via a Trailways bus in early April of 1982, but could uncover no physical evidence to support Mr. Duest's claim (R1. 887-88, 895).[29] The prosecutor in his closing argument focused upon the absence of physical evidence to support Mr. Duest's statement that he left Boston for Florida on April 5, 1982. Mr. Garfield suggested that Mr. Duest's mother had taken Mr. Duest to the bus station in early February and not on April 5 (R1. 1403, 1405).

The prosecutor and the police misrepresented facts known to the State. When Mr. Duest was arrested, he did in fact have a bus ticket in his possession documenting that he had

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[29]This testimony was misleading on another score. It implied that the police had contacted the bus company and after a search, could find no evidence confirming Mr. Duest's claim. Yet, the whole time the State had in its possession that Mr. Duest had been speaking the truth at the time that he was first questioned.

left Boston on April 5, l982, as he contended. This bus ticket was taken from Mr. Duest at the time of his arrest and held by the Broward County Sheriff's Department. This critical evidence, which would have corroborated his alibi and the veracity of his witnesses, was never provided to the defense. This would have undermined the credibility of the police officers who testified regarding the failure to find any evidence to corroborate Mr. Duest's statement. It would have also impeached the adequacy of law enforcement's entire investigation. This impeachment value is significantly enhanced by the revelation that Dr. Wright's trial testimony was "incorrect" and that his evaluation of the case in 1982 was not well done.

3. Confidence Undermined.

The cumulative effect must undermine confidence in Mr. Duest's conviction. The State rebutted the alibi defense by presenting testimony that officers had in fact investigated whether Mr. Duest had traveled to Florida on April 5, 1982. This testimony left the judge and jury with the clear impression that the investigation had proved fruitless. Again, this was contrary to the facts known to the State. The State had in its possession the bus ticket, which established that Mr. Duest indeed had traveled to Florida on April 5,

1982.

Moreover, the homicide did not happen the way it was portrayed at trial. Mr. Pope did not simply keel over when the assailant inflicted the last knife wound. He was left alone with injuries that were not life threatening if help was sought. Mr. Pope was left with the ability to move about on his own power. And he did.

This new revelation demonstrates a woefully inadequate investigation by law enforcement. It changes the potential profile of the assailant, but altering the picture as to motive. It provides ammunition to challenge the police work as to all of the State's witnesses. The case is put into an entirely new light. Confidence is undermined in the guilt determination. A new trial is required.

ARGUMENT II

MR. DUEST WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, WHEN THE CIRCUIT COURT RULE THAT THE STATE HAD NO OBLIGATION TO DISCLOSE THE OUT-OF-STATE CRIMINAL RECORDS OF STATE WITNESSES UNLESS MR. DUEST PRESENT EVIDENCE THAT "A CERTAIN WITNESS HAS [ ] COMMITTED SOME CRIMINAL OFFENSE."

A. Introduction.

On October 23, 1995, Mr. Duest filed a motion seeking to compel disclosure by the State of criminals records of State

witnesses. Section 90.610 of the Evidence Code provides in pertinent part:

> A party may attack the credibility of any witness, including the accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, or if the crime involved dishonesty or a false statement regardless of the punishment[.]

Mr. Duest sought access to records that would reveal whether the witnesses to be called by the State had prior convictions that could be used for impeachment purposes. Mr. Duest's counsel noted that given the background of a number of the witnesses who testified at trial, he expected that it was reasonably likely "that some or all of the State witnesses have criminal records" (R2. 104). Counsel noted that the State had access to the information through an NCIC check on the witnesses.

At the pre-trial hearing on the motion, the prosecutor argued, "[t]he State of Florida is not Big Brother. We don't check the lives of all of these people" (TS2. 121).[30] Accordingly, Judge Lebow denied the motion without prejudice saying:

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[30]In a written response, the prosecutor maintained that he was relieved of any duty to disclose "because Defendant has failed to establish the necessary predicate that he has been unable, through the exercise of due diligence, to obtain the information requested" (R2. 220).

> If you can come in and show some - - if you had some reason to believe that a certain witness has a criminal, you know, has committed some criminal offense and that there's a record, I will order the State to give it you.

(TS2. 123).[31]

B. Standard of Review.

Judge Lebow's determination that the State could not be compelled to run an NCIC check on its witnesses without a specific showing by the defense that the witness had a criminal record was a legal determination. It is therefore, reviewable de novo in this appeal.

C. The Law.

Certainly counsel is aware of the decision by this Court in State v. Crawford, 257 So.2d 898 (Fla. 1972). At that time, this Court ruled:

> We therefore hold that the prosecuting attorney may be required to disclose to defense counsel any record of prior criminal convictions of defendant or of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, if such material and information is within his possession. If not in his possession, the prosecuting attorney should not be required to secure this information for defense counsel.

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[31]Judge Lebow specifically noted that she would not admit any criminal records regarding deceased witnesses whose testimony was to be read to the jury (TS2. 122). Since 15 years had passed since the original testimony, Judge Lebow's position was not supportable under Sec. 90.610 of the Evidence Code. A qualifying conviction should still be admissible for impeachment purposes.

Crawford, 257 So.2d at 901. This decision was construed by the Third DCA in Martinez v. State, 346 So.2d 1209,1210 (Fla 3rd DCA 1977), as not requiring reversal where:

> It is apparent that the prosecution did not have within its actual or constructive possession any rap sheet on the victim nor did the prosecutor have any knowledge thereof.

However, these decisions must be evaluated in light of Kyles v. Whitley, 514 U.S. 419, 437 (1995), and the development of the National Crime Information Center (NCIC) and its availability law enforcement. See Lightbourne v. State, 742 So.2d 238, 246 (Fla. 1999).

In Kyles, the United States Supreme Court noted that a prosecutor had a duty under Brady v. Maryland to "learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." 514 U.S. at 437. A prosecutor has access to the NCIC computer and can conduct a criminal records check at any time.

Moreover, it is hard to imagine that a prosecutor would not run a NCIC check on the State's witnesses before they are called to the stand in order to know whether Sec. 90.610 evidence may become admissible. See The Florida Bar v. Cox, 794 So.2d 1278, 1280 (Fla. 2001)(prosecutor suspended for knowingly presenting a witness under a false name in order to withhold witness' criminal record from the defense). A

criminal prosecution "is not a game where the prosecutor can declare, "It's for me to know and for you to find out." Craig v. State, 685 So.2d 1278 (Fla. 1996).

Here, three State witnesses were deceased and there prior testimony was read to the jury. Two other witnesses were called to identify "Danny" as Mr. Duest who counsel believed may have criminal histories given their backgrounds. Yet, Judge Lebow relieved the State of any obligation to disclose by the judge who ruled it was the defense's burden to first establish that there was a criminal record to discover. This violated Strickler v. Greene, 119 S.Ct. 1936 (1999). See Occhicone v. State, 768 So.2d 1037, 1042 (Fla. 2000); Way v. State, 760 So.2d 903 (Fla. 2000).

ARGUMENT III

MR. DUEST WAS DEPRIVED OF HIS RIGHT TO PRESENT HIS DEFENSE AND TO CONFRONT WITNESSES AGAINST HIM WHEN THE CIRCUIT COURT PRECLUDED PRESENTATION ANY EVIDENCE REGARDING THE FACTS OF THE CASE OR IMPEACHMENT OF THE IDENTIFYING WITNESSES.

A. Introduction.

At the re-sentencing, the State repeatedly objected to the introduction by the defense of any evidence that impeached the State's case regarding Mr. Duest's guilt. For example, during the defense' opening statement, the State objected to the assertion that Mr. Duest had pled not guilty and always

maintained his innocence (T2. 328). In fact, the prosecutor argued to the judge at a side bar, "that is totally outrageous and the State of Florida moves for a mistrial" (T2. 328). The judge denied the mistrial request, but sustained the State's objection saying, "client's been found guilty" (T2. 328).

When the State asked in limine to preclude the defense from presenting any testimony regarding his guilt phase defense, the judge granted the State's motion and instructed Mr. Duest's counsel, "Nothing about the facts of this case or else you're out of here" (T2. 657).[32] Later, defense counsel explained that he wished to renew his request to be permitted to bring in evidence challenging the State's evidence and witnesses identifying Mr. Duest and serving the basis for

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[32]Clearly, the basis for the State's motion and Judge Lebow's ruling was this Court jurisprudence precluding the presentation of lingering or residual doubt as a non-statutory mitigating circumstances. King v. State, 514 So.2d 354, 358 (Fla. 1987). However, this Court has applied this prohibition in the re-sentencing context when it found "[t]he only relevance of the testimony was to suggest that someone else committed the murder, thereby creating residual doubt about the defendant's guilt of the crime. Residual doubt is not an appropriate nonstatutory mitigating circumstance." Preston v. State, 607 So.2d 404 (Fla. 1992). However, Mr. Duest argued that the evidence was relevant to rebut the State's evidence and to challenge the reliability of the State's witnesses. Thus in this argument, Mr. Duest contends that this Court's ruling barring evidence of residual doubt cannot be used to defeat Mr. Duest's constitutional right to due process. Mr. Duest, in Argument IV of this brief, separately challenges the prohibition on residual doubt as mitigation in and of its self.

aggravating circumstances. Defense counsel observed that the State and opened the door to the evidence in its presentation of its case. He noted that he understood that "the Court has precluded me from going into that" (T2. 748). The judge responded, "Right" (T2. 748). She refused the defense' request and permitted the defense to present only evidence that went "as to mitigating, what kind of kid he was, background, that kind of stuff" (T2. 657).

However, the State did present evidence in its case to establish that the homicide occurred in the course of a robbery. Several witnesses were called to report on observations of "Danny" during the weekend of the homicide and to identify Mr. Duest as "Danny" (T2. 473, 486, 508, 524). When the judge challenged the prosecutor to explain why this evidence was relevant at the re-sentencing, the prosecutor explained that the evidence went "[t]o the robbery" (T2. 477). In order to establish the in the course of a felony aggravating circumstance, the State presented evidence to prove that Mr. Duest committed the robbery. The State was obligated to prove this aggravating circumstance beyond a reasonable doubt (R2. 897-99). Yet, Mr. Duest was preclude from presenting any evidence to challenge the State's case on this aggravating circumstance or any other "fact [ ] of this

case" (T2. 657).[33]

Mr. Duest was deprived of his Sixth Amendment right to present a defense. Specifically on a robbery charge that no verdict of guilty was ever returned, Mr. Duest was precluded not just of a right to a trial by a unanimous jury, but the opportunity to even present evidence challenging the State's case.

B. Standard of Review.

Judge Lebow's determination that Mr. Duest could not present a defense to the robbery (or any other aggravating circumstance) was a legal determination. It is therefore, reviewable de novo in this appeal.

C. The Sixth Amendment Right to Trial.

The Sixth Amendment guarantees a right to a fair trial. Included in that Sixth Amendment guarantee is a criminal defendant's rights to present a defense and to confront and cross-examine the witnesses against him. These guarantees are fundamental safeguards "essential to a fair trial in a

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[33]Ironically, during the defense' presentation of mitigating evidence regarding Mr. Duest's background, the prosecutor argued that he was being denied his right to contest the mitigation by stating, "[i]t's fundamentally unfair to the people of the State of Florida to paint a one sided picture of this defendant" (T2. 621). Yet, it was Mr. Duest who was precluded from challenging the State's presentation of the facts of the case ("Nothing about the facts of this case or else you're out of here" T2. 657).

criminal prosecution." Pointer v. Texas, 380 U.S. 400, 404 (1965). Mr. Duest was denied his right to a fair trial when counsel was instructed that he could not present evidence concerning the facts of the case, "Nothing about the facts of this case or else you're out of here" (T2. 657). His counsel specifically noted that he wished to challenge the identification evidence presented by the State "but the Court has precluded me from going into that" (T2. 748). The prosecutor had justified the presentation of the identification evidence by arguing it was necessary to prove "the robbery" (T2. 477).[34]

Mr. Duest was never indicted or charged with a robbery arising the events of February 15, 1982. No verdict was ever returned finding him guilty of a robbery. The United States Supreme Court has indicated that "to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be –

[34]It should also be noted that, though Judge Lebow ultimately rejected "cold, calculated and premeditated" as unproven, the jury was instructed on the aggravator and the State argued the aggravator extensively in its closing. The State argued that Demizio's testimony proved this aggravator. Again, if Demizio's identification of Mr. Duest was in error or unreliable, the State's case for this aggravator was defeated. Thus, available evidence from other witnesses that impeached Demizio's identification was favorable and exculpatory.

would violate the jury-trial guarantee." Sullivan v. Louisiana, 508 U.S. 275, 279 (1993). Therefore, the State was precluded from hypothesizing a guilty verdict for the crime of robbery at Mr. Duest's re-sentencing.

The State was required at the re-sentencing to actually prove that Mr. Duest committed a robbery on February 15, 1982.[35] A Florida capital sentencing proceeding before a jury must comport with due process. Engle v. State, 438 So.2d 803, 813 (Fla. 1983). As this Court explained:

> Although defendant has no substantive right to a particular sentence within the range authorized by statute, sentencing is a critical stage of the criminal proceeding.

Engle, 438 So.2d at 813. Thus, the Sixth Amendment right of confrontation was found to apply in capital sentencing proceedings. The right carries with it the right to impeach the State's witnesses. Olden v. Kentucky, 488 U.S. 227

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[35]Mr. Duest recognizes that at the time that this brief is being prepared, there are questions regarding whether Apprendi v. New Jersey, 530 U.S. 466 (2001), applies to Florida capital sentencing proceedings. See State v. Ring, 25 P.3d 1139 (Ariz. 2001, cert granted, 122 S.Ct. 865 (2002). Mr. Duest does present in a Argument XI his claim that Apprendi does apply and that his re-sentencing violated the Sixth Amendment principles discussion therein. However within this specific argument, Mr. Duest does not address the Apprendi implications. His argument is that even if this Court has correctly found Apprendi inapplicable to Florida capital proceedings the proceedings at his re-sentencing nonetheless violated the Sixth Amendment.

(1989). This right requires that a defendant be allowed to impeach the credibility of the prosecution's witnesses by showing the witnesses' possible biases or by showing that there may be other reasons to doubt the State's reliance upon the witnesses' testimony. In Olden, Kentucky's Rape Shield Law precluded cross-examination on the victim's sexual history. Here, Mr. Duest was precluded from attacking the reliability of the witnesses identification of Mr. Duest as the person they knew as "Danny." The Supreme Court's summary reversal of Olden's conviction was premised upon that Court's conclusion that the Kentucky court had "failed to accord proper weight to petitioner's Sixth Amendment right 'to be confronted with the witnesses against him.'" Olden, 488 U.S. at 231. The Court found error saying:

> It is plain to us that "[a[reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination." Delaware v. Van Arsdall, supra, 475 U.S., at 680.

Olden, 488 U.S. at 232. Here, Mr. Duest was precluded from introducing evidence that the State's witnesses were mistaken in the identification of him as the person that the State argued committed a robbery.

However, the rights implicated by the circuit court's refusal to permit the defense to challenge the facts of the

case extended beyond just the right of confrontation. In Bullington v. Missouri, 451 U.S. 430, 446 (1981), the Supreme Court stated:

> The Court already has held that many of the protections available to a defendant at a criminal trial also are available at a sentencing hearing similar to that required by Missouri in a capital case. See, e.g., Sprecht v. Patterson, 386 U.S. 605 (1967)(due process protections such as right to counsel, right to confront witnesses, and right to present favorable evidence are available at hearing at which sentence may be imposed upon "a new finding of fact . . . that was not an ingredient of the offense charged," id., at 608).

Bullington, 451 U.S. at 446. Thus, there is a right to "present favorable evidence."

This Court found Bullington applied to penalty phase proceedings before a jury, "because the Florida procedure is comparable to a trial for double jeopardy purposes." Wright v. State, 586 So.2d 1024, 1032 (Fla. 1991). This Court has found that a capital defendant is entitled to the effective assistance of counsel in the penalty phase proceeding before a jury. Rose v. State, 675 So.2d 567 (Fla. 1996). This obviously is to insure and the protect the defendant's right to present favorable evidence. However, not only must defense counsel provide effective assistance, the State must disclose exculpatory evidence that may impeach or undermine the State's penalty phase case for death. Garcia v. State, 622 So.2d 1325

(Fla. 1993). Again, this is designed to protect the right to present favorable evidence at a penalty phase proceeding.

This Court has ordered a re-sentencing where the State failed to disclose evidence that the defense could have used to negate an aggravating factor. Young v. State, 739 So.2d 553 (Fla. 1999). It would have been an empty gesture for this Court to require the State to disclose evidence that could be used to negate the presence of an aggravating circumstance, but not guarantee the defense the right to present the evidence. But yet, here that is what occurred. The defense was instructed, "[n]othing about the facts of this case or else you're out of here" (T2. 657).

D. Reversal is Required.

In Mr. Duest's case, there was a wealth of evidence available to the defense to impeach Neal O'Donnell, Michael Demizio, Tammy Dugan and Joanne Wioneck, the witnesses that the State relied upon to establish aggravating circumstances.[36] First, there was no physical evidence linking Mr. Duest to

[36] However according to this Court's precedent, more is at stake here than simply the opportunity to present impeachment of the testimony that the State was relying to establish aggravating circumstances. This Court has said that "credibility problems could have served to mitigate [a capital defendant's] crime." Keen v. State, 775 So.2d 263, 286 (Fla. 2000); Pomeranz v. State, 703 So.2d 465, 472 (Fla. 1997). Here, Mr. Duest was precluded from pursuing such "credibility problems" as mitigation.

John Pope, or the items reportedly taken from his residence. Eleven witnesses testified that Mr. Duest was seen in the State of Massachusetts on February 13, 14 and 15, 1982. One of the witnesses produced a receipt for a fan belt that he said Lloyd Duest purchased on February 15th (R1. 1954). Mr. Duest's statement when he was first stopped on April 18, 1982, indicated that he had just arrived in Ft. Lauderdale approximately a week before via Trailways bus. A bus ticket, not disclosed at the original trial, was seized from Mr. Duest confirmed the veracity of that statement.

This evidence rebuts the case in support of the tried robbery charge. Yet, none of this could be presented by virtue of the court's ruling. Mr. Duest could not present a defense.

Beyond this evidence, there was impeachment evidence the State had presented at the trial. In rebuttal, the State had called witnesses at Mr. Duest's trial that contradicted the testimony of Demizio, Tammy and Joanne. Richard Long was called and he indicated that he was the person who tipped the police off to Mr. Duest's presence in Ft. Lauderdale on April 18th because he recognized him from Lefty's. Mr. Long testified that Mr. Duest was in Lefty's Bar between 12:30 a.m. and 3:00 a.m., the morning of February 14, 1982, talking to

Mr. Long (R1. 1303). Then after 3:00 a.m., Mr. Long drove Mr. Duest to his residence, eight miles away (R1. 1309). They remained at Mr. Long's residence for twenty minutes or so, during which time Mr. Duest used the phone (R1. 1310). Then, Mr. Long dropped Mr. Duest off at the North Lauderdale Hotel (R1. 1307).

This testimony was in complete conflict with Demizio and Tammy's claim that they "partied" with Mr. Duest ("Danny") at a bar named "Andy's" during the early morning hours of February 14th, until "Danny" accompanied them back to the apartment in which they were all staying (T2. 498-500, 539). Further, despite taking Mr. Duest to his home, Mr. Long was not rolled, robbed or murdered by Mr. Duest. This was inconsistent with Demizio's claim that Mr. Duest said that's what he did to homosexuals.

Mr. Long also testified that the composite sketch did not look like Mr. Duest (R1. 1329). This certainly raises the possibility that there was some one else in Ft. Lauderdale who matched the composite and was "Danny."

The testimony of the State's other rebuttal witness at trial would certainly support such a contention. Edward Heffelman testified that he was shown the composite sketch in February of 1982 (R1. 1269). He indicated that he seen

someone resembling the person in the sketch in the adult bookstore that he worked at around the time of the homicide. At trial, he indicated that Mr. Duest looked like a guy who had frequented the adult book store during the two months before the homicide that Mr. Heffelman worked there (R1. 1282). Mr. Heffelman explained that the guy he remembered looked "like that guy over there [Mr. Duest]. A little different, though." (R1. 1283).

By virtue of the re-sentencing court's ruling, Mr. Duest was precluded from presenting testimony from Mr. Long or Mr. Heffelman to challenge the reliability of the testimony from Demizio, Tammy and Joanne. He was deprived of his most because due process rights, the right to defend, the right confront, the right to present favorable evidence. The proceedings were not an adequate adversarial testing as is required by the constitution. Mr. Duest's death sentence must be vacated, and the matter remanded for new proceedings.

ARGUMENT IV

THE SENTENCING COURT IMPERMISSIBLY PROHIBITED MR. DUEST FROM INTRODUCING RELEVANT MITIGATING EVIDENCE AND REFUSED TO INSTRUCT THAT RESIDUAL DOUBT CONSTITUTED A MITIGATING CIRCUMSTANCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. Introduction.

Judge Lebow, at the State's request, ruled that Mr. Duest could not at the re-sentencing present any evidence regarding his guilt. Obviously, the basis for the motion and the ruling was this Court's precedent that lingering or residual doubt is not a valid mitigating circumstance. Mr. Duest has argued in his third argument in this brief that Judge Lebow's ruling was deprived Mr. Duest of his due process rights. Here, Mr. Duest challenges the continued validity of this Court's prior ruling precluding the presentation of residual doubt as a mitigating circumstance.

Based on this Court's rule precluding lingering doubt as a mitigating circumstance, Judge Lebow refused to provide the jury with the defense's proposed instruction, "20. If you have a remaining doubt, whether reasonable or not, as to whether the Murder was in the First Degree, the [ ] remaining doubts may be considered a mitigating circumstance." (R2. 298). Judge Lebow ruled "number 20 is not appropriate, is denied." (R2. 813).

B. Standard of Review.

Judge Lebow's rulings to exclude evidence and to refuse the request instruction were premised upon this Court's prior decisions precluding residual doubt as a mitigating circumstance. The court's rulings were legal determination.

They are therefore, reviewable de novo in this appeal.

C. Legal Analysis.

This Court has previously ruled in a re-sentencing case:

> The only relevance of the testimony was to suggest that someone else committed the murder, thereby creating residual doubt about the defendant's guilt of the crime. Residual doubt is not an appropriate nonstatutory mitigating circumstance King v. State, 514 So.2d 354 (Fla. 1987), cert. denied, 487 U.S. 1241 (1988). The trial court properly excluded this testimony.

Preston v. State, 607 So. 2d 404, 411 (Fla. 1992).[37] The rulings in Preston and King should be reconsidered by this Court.

In Furman v. Georgia, 408 U.S. 238 (1972), all capital sentencings statutes in the United States were struck down as violative of the Eighth Amendment. As Justice Stewart explained in his concurring opinion, "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." Furman, 408 U.S. at 310. Justice Marshall in his concurring opinion wrote:

> No matter how careful courts are, the

[37]Again, that was not the only basis advanced by Mr. Duest is support of his request to be permitted the evidence here as was explained in the previous argument.

> possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed but we can be certain that there were some. Whether there were many is an open question made difficult by the loss of those who were most knowledgeable about the crime for which they were convicted. Surely, there will be more as long as capital punishment remains part of our penal law.
>
> While it is difficult to ascertain with certainty the degree to which the death penalty is discriminatorily imposed or the number of innocent persons sentenced to die, there is one conclusion about the penalty that is universally accepted – i.e., it "tends to distort the course of the criminal law."

Furman, 408 U.S. at 367-68.

In Proffitt v. Florida, 428 U.S. 242 (1976), the United States Supreme Court considered the Florida capital sentencing scheme adopted by the legislature in response to Furman. The Supreme Court found that the statute certainly tried to address the problems identified in Furman and "serve[d] to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed." Proffitt, 428 U.S. at 260.

In the years since Proffitt, this Court adopted its position that residual or lingering doubt was not a proper sentencing consideration. Also in the years since Proffitt, it has become clear that the Florida capital sentencing scheme does not preclude the imposition of a sentence of death upon an innocent defendant. Certainly, this Court is aware of the

high number of exonerations of death sentenced defendants in Florida.

Jurors, who have sat through the guilt phase and convicted a defendant, are aware of the strength of the State's case and certainly factor that into their recommendation. Presumably, such consideration would serve to reduce the risk that an innocent person receives a death sentence. Certainly, a number of prospective jurors at Mr. Duest's re-sentencing expressed concern over the judge's admonition to accept a prior jury's determination that Mr. Duest was guilty of first degree murder. (Juror Edwards, "I would like to go back, retry it" T2. 194)(Juror Miller, "I was wondering why the sentence wasn't decided by the jury that found him guilty" T2. 228)(Juror Demizio, "Is this typical of the way the system goes," "The jury that convicted the defendant, why weren't they, why didn't they do the sentencing?" T2. 256)(Juror Butterworth,[38] "I can follow the Judge's instruction but I believe having been through a trial it would be more difficult for me to do it rather than sitting through the entire trial." T2. 258)(Juror Leiser, "I have a lot of difficulty in myself in going through a sentencing

[38]Juror Butterworth indicated that "[m]y brother is attorney general State of Florida" (T2. 119).

phase of a trial where another jury convicted this man of first degree murder without having, without being able to hear all the facts" T2. 270)(Juror Bates, "the jury that found him guilty should have been the jury that gave him his sentence . . .[b]ecause they got to hear all of the evidence" T2. 272)(Juror Dunoy, "did they find him guilty knowing that they would not be passing sentence on him?" T2. 273).

The prospective jurors difficulty with the concept of being required to simple accept guilt without question is understandable. This Court has recognized that jurors may reasonably rely on "credibility problems" with the State's guilt phase witnesses as providing a reasonable basis for a life recommendation. Keen v. State, 775 So.2d at 285; Pomeranz v. State, 703 So.2d at 472. This Court's historic preclusion of "residual doubt" as a mitigator flies squarely in the face of common sense, and it seems contrary to basic concepts of fairness. Brookings v. State, 495 So.2d 135, 143 (Fla. 1986)(recognizing that where "where reasonable people could differ as to the propriety of the death penalty," a life recommendation could not be overridden).

The unfairness of precluding the defense from presenting the countervailing evidence can be seen by the prosecutor's argument at a side bar during the defense' presentation of

mitigating evidence regarding Mr. Duest's background. The prosecutor argued that he was being denied his right to contest the mitigation by stating, "[i]t's fundamentally unfair to the people of the State of Florida to paint a one sided picture of this defendant" (T2. 621). Yet, that is precisely what is encouraged by this Court's ruling that lingering doubt is not a mitigating circumstance that can be presented at a re-sentencing. As a result, this Court's rule encourages the imposition of unreliable death sentences in violation of Furman.

The Eighth and Fourteenth Amendments to the United States Constitution require that "the sentencer not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 605-06 (1978) (emphasis in original). In Mr. Duest's case, the sentencing court's ruling prevented the co-sentencer, the jury, from considering the weakness in the State's case as a basis for a life recommendation. The sentencer may determine what weight to give to mitigating evidence, but may not give it no weight by excluding such evidence from consideration. Eddings, 455 U.S. at 115-6. There should be no question that

evidence that Mr. Duest did not commit the murder is mitigating in that it might serve "as a basis for a sentence less than death." Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986). The ruling that lingering doubt is not a mitigator denied Mr. Duest a meaningful opportunity to present a complete defense, in violation of the Due Process Clause of the Fourteenth Amendment. Crane v. Kentucky, 476 U.S. 693, 690 (1986). In addition, under the Eighth Amendment, exclusion of this mitigating evidence renders Mr. Duest's death sentence invalid. See Hitchcock v. Florida, 481 U.S. 393, 399 (1987).

This Court's rulings in Preston and King should be overturned, particular given that they are inconsistent with Keen and Pomeranz. This Court should hold that Mr. Duest was denied a reliable sentencing proceeding, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

ARGUMENT V

THE SENTENCING COURT ERRONEOUSLY REFUSED TO INSTRUCT THE PENALTY PHASE JURY ON THE STATUTORY MITIGATING CIRCUMSTANCES AND ERRONEOUSLY INSTRUCTED THE JURY ON THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF

THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. Introduction.

During the charged conference, Mr. Duest's counsel requested that the jury be instructed regarding statutory mitigating circumstances. First, counsel request an instruction regarding the mitigator that provides "[t]he victim was a participant in the defendant's conduct" (T2. 803). Counsel argued that the victim's decision to not "seek treatment and help" came within the scope of this statutorily defined mitigator (T2. 804). Judge Lebow denied the request.

Defense counsel then requested an instruction on the statutory mitigator, "capital felony was committed while the defendant was under the influence of extreme or emotional duress" (T2. 805). Judge Lebow denied the request saying, "[y]ou can come in as non-statutory later, you know, but not as a statutory mitigator" (T2. 806).

Defense counsel then indicated he was requesting an instruction on the mitigator of impaired capacity (T2. 806). Judge Lebow denied the request saying, "[t]here's no testimony that I can recall and there certainly was no expert testimony that the defendant was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, was substantially impaired and that request is denied"

(T2. 806).[39] Judge Lebow did allow an instruction impaired capacity "as a non-statutory" mitigator (T2. 812).

Meanwhile, Judge Lebow overruled Mr. Duest's objection to the CCP aggravator (T2. 801). Mr. Duest's counsel argued that the medical examiner's testimony that Mr. Pope had been left alive with the ability to save himself indicated that there was not an intent to kill, a necessary element of cold, calculated and premeditated. Counsel noted that the medical examiner's testimony was "not even close to what happened on the first, on the first hearing" (T2. 801). Therefore, the affirmance of the CCP aggravator in the initial direct appeal was not controlling.

In her sentencing order, Judge Lebow concluded that "[t]he evidence did not establish th[e CCP] aggravator beyond a reasonable doubt" (R2. 396). In fact, she accepted as a mitigator, Mr. Duest's contention that there had been no intent to kill (R2. 399).

As to statutory mitigating factors, Judge Lebow did not find either "under the influence of extreme mental or

---

[39]However, Judge Lebow had ruled that the mental health expert called by the defense could not testify to the mitigating circumstances that she had found. Judge Lebow indicated, "that is a legal term and I will be explaining to the jurors, you may ask her what her evaluation found psychologically" (T2. 694).

emotional disturbance" or "substantially impaired" capacity (R2. 396-97). But, she did find as to both of these statutory mitigating factors that evidence had been presented to support them. She simply concluded that the evidence "did not reasonably convince me" that the circumstances existed (R2. 397).

B. Standard of Review.

Judge Lebow's decision as to what instructions to provide the jury regarding statutory aggravating and mitigating circumstances was a legal determination. As such, it is reviewable de novo in this appeal. This Court must determine whether the decision to instruct on the CCP aggravating circumstance and not on the three statutory mitigating circumstances proposed by the defense was a correct legal determination.

C. Legal Analysis.

It is error for the sentencing judge to instruct on aggravating circumstances that have no support in the record. In Omelus v. State, 584 So.2d 563 (Fla. 1991), this Court reversed a death sentence for error in instructing the jury on an aggravating circumstance that had no record support. There, the jury had been instructed on heinous, atrocious or cruel. The defendant had hired someone else to commit a

murder; however, no evidence was presented that the defendant had any knowledge of the manner in which the murder would be committed. The sentencing judge correctly applied the law and determine in his sentencing order that the aggravating circumstance could not be considered. Accordingly, this Court stated, "We must agree with Omelus that the trial court erred in instructing the jury that it could consider this factor in determining its recommendation." Omelus, 584 So.2d at 566.

Here, the sentencing judge correctly found that murder was not cold, calculated and premeditated.[40] Yet, the jury was instructed that it could consider "the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification" (R2. 898). As in Omelus, this was error.

While granting the prosecution's request for an instruction on aggravating circumstance that had no record support, the judge denied Mr. Duest's requested instructions on statutory mitigating circumstances that did have record support. This Court has held that no error occurs where "the record contains competent substantial evidence supporting the

[40]In fact, the judge further found that the mitigating circumstance argued by the defense that "the Defendant did not have an intent to kill Mr. Pope" (R2. 399).

trial judge's refusal to instruct the jury on and his refusal to find statutory mental mitigators." Jones v. State, 612 So.2d 1370, 1375 (Fla. 1992). Here however, Judge Lebow indicated in her sentencing order that the evidence in the record did support the mental health mitigators, the evidence just did not reasonably convince her that the statutory mitigators existed (R2. 396-97). Judge Lebow discussed the evidence that the defense had presented in support of the statutory mental health mitigating circumstances. She acknowledged that evidence supporting the mitigators was present. She discussed the testimony from Dr. Fleming, but noted that her testimony in support of the mitigators was not based "upon any circumstances confided to her by the Defendant" (R2. 396).[41] Since Judge Lebow acknowledged that the defense had presented evidence which supported the mental health statutory mitigators, it was error to not instruct the jury regarding statutory mitigation in conformity with Mr. Duest's request.

In addition, evidence was present which supported the request for an instruction on the statutory mitigating circumstance that "the victim was a participant in the

[41]The statutory definition of the mitigators does not contain the requirement that evidence supporting them must be based upon the defendant's statements or shared confidences.

defendant's conduct." The evidence was that the victim was left with the means to save himself by calling for help. However, the victim did not avail himself of the opportunity. The victim by his own conduct contributed to his death. The facts here are qualitatively different than those in Wuornos v. State, 676 So.2d 972 (Fla. 1996), the case on which Judge Lebow relied in denying the requested jury instruction.

The instructional error that occurred here was not harmless beyond a reasonable doubt, the standard recognized in Omelus. Accordingly, Mr. Duest's sentence of death must be vacated, and the matter remanded for another penalty phase proceeding before a properly instructed jury.

ARGUMENT VI

THE SENTENCING JUDGE ERRONEOUSLY PRECLUDED THE DEFENSE' MENTAL HEALTH EXPERT FROM TESTIFYING TO HER FINDINGS THAT MITIGATING CIRCUMSTANCES WERE PRESENT, IN VIOLATION OF THE EIGHTH AMENDMENT.

A. Introduction.

During Dr. Fleming's direct examination, the following occurred:

> Q. Based upon your evaluation back then, did you find any mitigating circumstances?
>
> A. Yes, I did.
>
> MR. CAVANAGH: Woe, woe, we object to a legal conclusion here.

> THE COURT: The objection is sustained, that is a legal term and I will be explaining to the jurors, you may ask her what her evaluation found psychologically.
>
> BY MR. LLORENTE:
>
> Q. What did your evaluations find?
>
> A. When - - may I explain the evaluation?
>
> Q. Sure.

(T2. 693-94). Dr. Fleming was precluded from expressing an opinion as to whether she found mitigating circumstances present. The defense was forced to simply have her explain her evaluation and then argue for a finding of mitigation. The judge's ruling deprived Mr. Duest of his right to present expert opinion as to the presence of mitigating evidence.

B. Standard of Review.

Judge Lebow's decision to exclude evidence is normally subject to an abuse of discretion standard of review. However, where Mr. Duest was arbitrarily deprived of the opportunity to present evidence routinely presented in other cases, the ruling violates the Eighth Amendment and must be evaluated de novo.

C. Legal Analysis.

In Lockett v. Ohio, 438 U.S. 586 (1978) and Skipper v. South Carolina, 476 U.S. 1 (1986), the Supreme Court ruled that under the Eighth Amendment a criminal defendant can not

be precluded from presenting evidence of mitigating circumstances -- any aspect of the defendant's character or background calling for a sentence of less than death. The Supreme Court has not hesitated to reverse where evidentiary rulings or state action have encroached upon a defendant's fundamental constitutional right to present a defense. See, Chambers v. Mississippi, 410 U.S. 284 (1973); Rock v. Arkansas, 483 U.S. 44 (1987); Crane v. Kentucky, 476 U.S. 693 (1986). Presentation of evidence in mitigation during the penalty phase of a capital trial is every bit as crucial as presenting a defense during the guilt phase of a trial.

Mental health experts are routinely permitted to testify regarding their opinion as to the presence of mitigating circumstances. Rose v. State, 787 So.2d 786, 802 (Fla. 2001); Larkins v. State, 739 So.2d 90, 94 (Fla. 1999). Here, Mr. Duest was arbitrarily denied the opportunity to present expert testimony as to the mitigating factors that were present. Mr. Duest was prejudiced by this ruling when the judge used the absence of such testimony to justify her refusal to instruct the jury on statutory mental health mitigating circumstances and to justify her conclusion in her sentencing order that mental health mitigation had not been proven. Mr. Duest's resulting sentence of death must be vacated.

ARGUMENT VII

THE CIRCUIT COURT ERRED IN PERMITTING THE STATE TO ELICIT FROM THE DEFENSE'S MENTAL HEALTH EXPERT MR. DUEST'S ENTIRE CRIMINAL HISTORY.

A. Introduction.

During the testimony of Dr. Fleming, Judge Lebow ruled that the State could elicit from Dr. Fleming, Mr. Duest's entire criminal record, including non-violent felonies not admissible as aggravation in the case. Judge Lebow ruled that such evidence was properly presented because Dr. Fleming indicated that she had considered it during her evaluation. However, as defense counsel clarified, Dr. Fleming only considered the fact that there was a criminal record, not the individual charges or their underlying facts. After the prosecutor was permitted to elicit the testimony regarding numerous non-violent felonies, he made no use of the record as impeaching Dr. Fleming's testimony in any way. It was clearly introduce for the sole purpose of prejudicing Mr. Duest before the jury.

B. Standard of Review.

Judge Lebow's evidentiary rulings are normally subject to an abuse of discretion standard of review. The ruling here, however, violated Mr. Duest's due process rights.

C. Legal Analysis.

The introduction of irrelevant prior non-violent felonies

violated Mr. Duest's rights to due process. The evidence was introduced for no purpose other than to prejudice Mr. Duest before the jury. The State had attempted to elicit the evidence from Mr. Boone who testified as an expert and was also aware of the criminal record. Judge Lebow ruled that the State could not elicit the criminal record from Mr. Boone during its cross-examination.

Subsequently, Judge Lebow unexpectedly permitted the inquiry of Dr. Fleming and the presentation of the numerous to the jury. This was permitted despite Mr. Duest's objection that State's sole purpose was to present the criminal charges "as aggravating circumstances" (T2. 724). Since Dr. Fleming did not rely upon the non-violent felonies as a basis for finding mitigation circumstances,[42] the existence of a criminal record was not relevant to any contention by the State. It did not rebut any mitigating circumstance argued by the defense. It was introduced simply to present improper non-statutory aggravation. Due process was violated. Mr. Duest's sentence of death is the resulting prejudice. It should be

[42]Of course, Judge Lebow refused to permit Dr. Fleming state her findings in the form of an opinion as to the presence of mitigating circumstances. She was forced to testify to a nebulous evaluation in which she had Mr. Duest's criminal record. She did not specifically rely upon any of the specific charges to make her finding of mitigation, that she was precluded from sharing with the jury.

vacated and the matter remanded for a new penalty phase untainted by the error.

ARGUMENT VIII

THE CIRCUIT COURT FAILED TO CONDUCT AN INDEPENDENT SENTENCING WHEN IN THE COURSE OF WEIGHING THE AGGRAVATION AND THE MITIGATION, IT GAVE A JURY DEATH RECOMMENDATION GREAT WEIGHT.

A. Introduction.

This Court has repeatedly held that Florida law requires "the trial judge to independently weigh the aggravating and mitigating circumstances to determine what penalty should be imposed upon the defendant." State v. Riechmann, 777 So.2d 342 (Fla. 2000). See Maharj v. State, 778 So.2d 944, 947 (Fla. 2000)(this Court noted that the State had not appealed the circuit court determination that sentencing judge "failed to conduct an independent review of the aggravating and mitigator factors" which required a re-sentencing); Card v. State, 652 So.2d 344, 345 (Fla. 1995)(an evidentiary hearing was required to determine whether Card had been deprived of his right to "an independent weighing of the aggravators and mitigators"). In the context of a sentencing following a life recommendation, this Court has explained that the judge may not independently weigh the aggravation and the mitigation, but must give great weight to a jury's life recommendation

under Tedder v. State, 322 So.2d 908, 910 (Fla. 1975):

> In other words, the trial judge disagreed with their recommendation based on his view of the mix of aggravators and mitigators, rather than through the prism of a Tedder analysis. This was error, because just as a Tedder inquiry has no place in a death recommendation case, see Franqui v. State, 699 So.2d 1312, 1327 (Fla. 1997)(rejecting reliance on jury override cases in death recommendation case because such cases "entail[ ] a wholly different legal principle and analysis"); Watts v. State, 593 So.2d 198, 204 (Fla. 1992)(same), the reciprocal hold true when a jury life recommendation is independently analyzed by the trial court and independently reviewed by this Court. In other words, the jury's life recommendation changes the analytical dynamic and magnified the ultimate effect of mitigation on the defendant's sentence.

Keen v. State, 775 So.2d 263, 285 (Fla. 2000). As this Court explained in Franqui v. State, cases involving "an override of a jury recommendation of life imprisonment [ ] entail[ ] a wholly different legal principle and analysis." Franqui, 699 So.2d at 1327. Thus, the independent weighing that occurs after a death recommendation has been returned does not include giving the death recommendation "great weight," as Tedder requires for a life recommendation.

In his sentencing memorandum, Mr. Duest informed Judge Lebow that the jury's death recommendation should not be given great weight under Florida law. Mr. Duest cited Thompson v. State, 328 So.2d 1 (Fla. 1976), which it held:

> It stands to reason that the trial court must express more concise and particular reasons, based

> on evidence which cannot be reasonably interpreted to favor mitigation, to overrule a jury's advisory opinion of life imprisonment and enter a sentence of death than to overrule an advisory opinion recommending death and enter a sentence of life imprisonment.

Thompson, 328 So.2d at 5.

Mr. Duest also cited Layman v. State, 652 So.2d 373, 375-76 (Fla. 1995), as indicating that the sentencing judge is obligated to independently weigh the aggravating and mitigating circumstances when reviewing a death recommendation (R2. 355). In the Layman opinion, this Court cited Spencer v. State, 615 So.2d 688, 691 (Fla. 1993), in which this Court stated, "It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed."

Despite Mr. Duest's position and his recitation of law in his sentencing memorandum, Judge Lebow stated in her findings, "All the aggravating circumstances and mitigating circumstances that have been presented and argued have now been discussed, and great weight given to the recommendation of the jury." (R2. 399). Thereupon, Judge Lebow imposed a sentence of death.

B. Standard of Review.

Judge Lebow's decision to give the jury's death recommendation great weight was a legal determination. As

such, it is reviewable de novo in this appeal. This Court must determine whether a jury's death recommendation should be given great weight when the sentencing judge independently weighs the aggravation and mitigation and determines the sentence to impose.

C. Legal Analysis.

This Court has long recognized that "a Tedder inquiry has no place in a death recommendation case." Keen v. State, 775 So.2d at 285. Different standards govern the sentencing judge's consideration of a death recommendation than govern consideration of a life recommendation. Thompson v. State, 328 So.2d at 5. In fact, this Court recently recognized that "[r]eversible error occurred in [a death recommendation] case due to the trial court's decision to afford 'great weight' to the jury's recommendation." Muhammad v. State, 782 So.2d 343, 363 (Fla. 2001). In Muhammad, this Court did note that mitigation had been presented to the judge that was not presented to the jury during the penalty phase proceedings.

And in fact, that occurred in Mr. Duest's case as well. At the Spencer hearing, Mr. Duest argued that the jury had been inflamed by the Mathew Shepherd story which broke the

weekend dividing Dr. Wright's testimony.[43] Mr. Duest then presented video depositions of seven family members in Massachusetts who had been unable to attend the penalty phase proceeding in Ft. Lauderdale. The jury had not heard these witnesses. Finally, Mr. Duest presented as mitigation the fact that after the penalty phase proceeding, he was diagnosed with throat cancer. As to this, Judge Lebow specifically found that this evidence established a mitigating factor that was not heard by the jury, and was entitled to some weight (R2. 399).

A determination to impose a death sentence is not independent as required by Florida law when the sentencing judge gives "great weight" to a jury's death recommendation. Such deference to the jury's determination violates the principle of an independent weighing. Moreover, the mitigation that was presented to the judge is thus not fully factored into the weighing process as required by the Eighth Amendment. Riley v. Wainwright, 517 So.2d 656 (Fla. 1987)(mere presentation does not satisfy the decision in

[43]Dr. Wright was the State's first witness. His cross-examination occurred the Monday morning after the Mathew Shepherd case made national news. In that case, Mathew Shepherd was murdered in Wyoming because he was gay. In the cross-examination of Dr. Wright, he opined that Mr. Pope had not sought treatment for his injuries because of his embarrassment over his sexual orientation.

Hitchcock v. Dugger, 481 U.S. 393 (1987)); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987)(same).

Because Judge Lebow gave "great weight" to the jury's death recommendation, Mr. Duest's sentence of death violates Florida law and the Eighth Amendment. The sentence of death must be vacated and the matter remanded for an independent weighing of the aggravation and mitigation.

ARGUMENT IX

THE SENTENCING JUDGE ERRONEOUSLY FOUND THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATOR EVEN THOUGHT THE STATE HAD FAILED TO PROVE AN INTENT TO KILL BEYOND A REASONABLE DOUBT AND ERRONEOUSLY REFUSED TO FIND MENTAL HEALTH MITIGATORS SINCE THERE WAS NO INDICATION THAT MR. DUEST CONFIDED ANY INFORMATION REGARDING THE CRIME IN THE MENTAL HEALTH EXPERT.

This Court in Omelus v. State, 584 So.2d at 566, held that heinous, atrocious or cruel could not be applied in a case where the defendant did not know the manner in which the killing would be carried by the person hired to commit the murder. By analogy, this aggravator should not apply where the State has been unable to prove an intent to kill beyond a reasonable doubt.

In arguing to the jury that this murder was committed in a heinous, atrocious or cruel manner, the prosecutor's only argument was the mental anguish Mr. Pope felt when he refused

to save himself and call for help because of the embarrassment he felt in possible having to reveal his sexual orientation (T2. 863). The prosecutor argued for this aggravator because of the embarrassment Mr. Pope felt as he lay dying, knowing that his death would reveal his orientation.[44] The sentencing judge's finding was erroneous.

Similar, he refusal to find mental health mitigation was in error. Judge Lebow indicated Dr. Fleming's analysis was not based "upon any circumstances confided to her by the Defendant." (R2. 396). The judge erroneous engrafted on to the mental health mitigating circumstances a requirement that evidence in support arise from a disclosure of confidences by the Defendant. This is tantamount to requiring a defendant to confess in order to present mental health mitigation. Such a requirement violates the Eighth Amendment.

The finding of heinous, atrocious or cruel showed by set aside. The refusal to find mental health mitigation should be

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[44]The prosecutor ignored the more logically import of Dr. Wright's testimony that Mr. Pope did not call for help because he did not want to reveal he was homosexual. Mr. Pope did not perceive his injuries as life threatening. Such a belief on Mr. Pope's part would seem to be inconsistent with the holding in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), that this aggravator is meant to apply in cases where the homicide is "accompanied by such additional act to set the crime apart from the norm of capital felonies– the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

set aside. The death sentence should be vacated and the matter remanded for a new sentencing.

ARGUMENT X

MR. DUEST'S SENTENCE OF DEATH IS DISPROPORTIONATE AND A LIFE SENTENCE SHOULD BE IMPOSED.

This Court is required to analysis each death sentence and determine whether the sentence is proportionate. Porter v. State, 564 So.2d 1060 (Fla. 1990). Such an analysis in this case reveals that the sentence of death imposed upon Mr. Duest is not proportionate.

This Court has recently had occasion to address the proper proportionality review required in case in which there was no intent to kill present. Stephens v. State, 787 So.2d 747 (Fla. 2001); Lukehart v. State, 776 So.2d 906 (Fla. 2000). Unlike those cases, the victim here was not a helpless child. Here, Mr. Pope was left with the means to save his life. This case does not involve the "worst of the worst." There are many more mitigators present here than were present in either Stephens or Lukehart. Imposition of a death sentence is not proportional under Florida law, and not proportional under Eighth Amendment law. The requirements of Tison v. Arizona, 481 U.S. 137 (1987), are not satisfied here. There has been no finding of an adequate mens rea to warrant the imposition

of a death sentence.

ARGUMENT XI

FLORIDA LAW DEPRIVED MR. DUEST OF HIS RIGHT TO HIS SIXTH AMENDMENT RIGHT TO HAVE ALL ELEMENTS OF HIS CRIME TO A FULL AND FAIR TRIAL BEFORE A JURY.

Florida law provides that capital crimes must be charged by presentment or indictment of a grand jury. Fla. Const. Art. I, § 15(a) (1980). This Court has held that indictments need not state the aggravating circumstances upon which the State may rely to establish that a crime is eligible for the death penalty. State v. Sireci, 399 So.2d 964, 970 (Fla. 1981).

Early in the history of the State's post-1972 death penalty law, the Florida Supreme Court explained in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), what constitutes a capital crime, and where the definition comes from:

> The aggravating circumstances of Fla. Stat. § 921.141(6), F.S.A., actually define those crimes–when read in conjunction with Fla. Stat. § § 782.04(1) and 794.01(1), F.S.A.–to which the death penalty is applicable in the absence of mitigating circumstances.

The sentence for first-degree murder is specified in section 775.082, Florida Statutes:

> A person who has been convicted of a capital felony ***shall*** **be punished by life imprisonment** and shall be required to serve no less than 25 years before

> becoming eligible for parole ***unless*** **the proceedings held to determine sentence** according to the procedure set forth in § 921.141 **result in *a finding by the court* that such person shall be punished by death**, and in the latter event such person shall be punished by death. Fla. Stat. § 775.082 (1979) (emphasis added).

The jury's advisory recommendation does not specify what, if any, aggravating circumstances the jurors found to have been proved. Neither the consideration of an aggravating circumstance nor the return of the jury's advisory recommendation requires a unanimous vote of the jurors.

Florida law violates the principles recognized as applicable to the States in Apprendi v. New Jersey, 530 U.S. 466 (2001). As a result, the Florida death penalty scheme under which petitioner was sentenced violates the Sixth and Fourteenth Amendments. Florida's scheme violates the Sixth Amendment because the maximum sentence allowed upon the jury's finding of guilt is life imprisonment. A death sentence is only authorized upon the finding of additional facts. Since under Florida, there is no requirement of a jury trial to determine the existence of those necessary facts, the Sixth Amendment is violated.

Mr. Duest acknowledges that the United States Supreme Court has granted a petition for a writ of certiorari to decide how the decision in Apprendi impacts capital cases.

State v. Ring, 25 P.3d 1139 (Ariz. 2001), cert granted, 122 S.Ct. 865 (2002). Nonetheless, Mr. Duest asserts that under Apprendi, he is entitled to habeas relief from his sentence of death.

CONCLUSION

For the reasons stated herein, Mr. Duest respectfully requests that this Court vacate his conviction and order a new trial as to Argument I. As to the remaining arguments, he asks that his sentence of death be vacated and the matter remanded for a new sentencing proceeding.

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition has been furnished by United States Mail, first class postage prepaid, to Debra Rescigno, Assistant Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401-5099, on February 25, 2002.

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CERTIFICATE OF COMPLIANCE

This is to certify that the Initial Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

By:_____
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