

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-253

JOHN C. MARQUARD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR ST. JOHNS COUNTY, STATE OF FLORIDA**

SUPPLEMENTAL INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This is a supplement to initial brief in the appeal of the circuit court's denial of Mr. Marquard's motion for post-conviction relief which was brought pursuant to Fla. R. Crim. P. 3.850. This supplemental appeal is brought in accordance with this Court's order, after the circuit court ruled on the issue of proportionality on remand. This supplemental brief supplements Arguments I and II of Mr. Marquard's initial brief. Mr. Marquard relies on his initial brief for arguments on the remaining issues.

The following symbols designate references to the record in this appeal: The record on appeal concerning the original court proceedings shall be referred to as "M ___" followed by the appropriate volume and page numbers. The postconviction record on appeal will be referred to by the appropriate volume and page numbers. The supplemental postconviction record on appeal will be referred to as "S ___" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Marquard has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar

procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Mr. Marquard, through counsel, accordingly urges that the Court permit oral argument.

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SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

Michael Abshire's jury trial commenced September 29, 1992, and concluded October 3, 1992. The jury found Abshire guilty of first degree murder and armed robbery and recommended death. The court did not sentence Michael Abshire until February 5, 1993, after Abshire testified at John Marquard's trial. John Marquard's jury trial commenced January 11, 1993, and concluded January 15, 1993 (M V4-V11, 696-1785). The jury found John Marquard guilty of first degree murder and armed robbery and recommended death. (MV9, 1465-66, V11, 1780). The circuit court sentenced both John Marquard and his co-perpetrator, Michael Abshire, to death on February 5, 1993 (M V3, 538). On direct appeal, this Court affirmed John Marquard's conviction and sentence and vacated Michael Abshire's conviction and death sentence. Marquard v. State, 641 So.2d 542 (Fla. 1994). Abshire v. State, 642 So.2d 542 (Fla. 1994). Upon remand, Abshire plead guilty and received a life sentence after a penalty phase at which he waived the right to a jury recommendation. The Fifth District Court of Appeal upheld Abshire's life sentence on November 7, 1995, more than one year after this Court denied rehearing on John Marquard's direct appeal. Abshire v. State, 663 So.2d 639 (Fla.App. 5th DCA 1995).

Mr. Marquard filed a 3.850 motion to vacate judgment of convictions and sentence on March 17, 1997, in conformance with the March 24, 1997, due date

established by this Court (M V1, 1-42). Mr. Marquard filed an amended motion to vacate judgment of conviction and sentence with special request for leave to amend on February 22, 1999 (V3, 443-507). The trial court found this amended motion to be legally sufficient and entered an order for the State Attorney to file an answer to the motion by May 7, 1999 (V3, R509). On May 7, 1999, the State filed its response (V3, R577-585).

On May 12, 1999, the trial court issued an order on Mr. Marquard's amended motion to vacate judgment of conviction and sentence (V3, R585-586). The court granted an evidentiary hearing on Claims one and two, which were ineffective assistance of counsel claims. The court held that Claims three, four, five, and eight were procedurally barred (V3, R585, 586). The court denied Claims six and seven (V3, R585, 586).

Mr. Marquard filed an amended motion to vacate judgment of conviction and sentence on November 16, 1999, adding the claim that the co-defendant's life sentence should be considered as newly discovered evidence of mitigation for proportionality consideration (V4, R647-656). Mr. Marquard's attempt to file a separate pro se motion was denied, but the court did allow the separate pro-se motion to be filed and made a part of the record.(V4, R657-660).

The court held an evidentiary hearing on Claims one and two on November 16

and 18, 1999 (M V6 and 7, 1078, 1079,1080; V2 and 3, R1-355).

Prior to closing arguments at the evidentiary hearing, the trial court granted John Marquard's motion to amend the pleadings to conform to the evidence (V7, R287; V4, R661-663). John Marquard filed a third amended motion to vacate judgment of conviction and sentence with special request for leave to amend on December 6, 1999 (V4,R664-722). On December 10, 1999, the state filed a response to the second and third amended motions to vacate judgment of conviction and sentence with special request for leave to amend (V4,R723–726).

The court denied Mr. Marquard's 3.850 motion on December 21, 2000, but reserved jurisdiction on "the latest amendment which alleges that the sentence was not proportional" (V3 R585). Mr. Marquard timely filed his appeal on July 28, 2000. On October 10, 2000, in response to the state's motion, this Court held the appellate proceedings in abeyance and relinquished jurisdiction to the circuit court for circuit court to enter an order on the issue of proportionality (S V2, 182). The circuit court entered an order on the issue of proportionality on October 27, 2000 (S V2, 183-84).

On December 8, 2000, Mr. Marquard filed a Motion to Supplement the Record, Motion to File Supplemental Brief, and Motion to Toll Time, in order to address the circuit court's ruling on proportionality (S V2, 243-53). On February 5, 2001, this Court entered an Order granting, in part, Mr. Marquard's Motion to Supplement the

Record and granting his Motion to File a Supplemental Brief (S V2, 283). This Supplemental Initial Brief timely follows, in accordance with this Court's March 22, 2001, briefing schedule.

SUMMARY OF ARGUMENT

Newly discovered evidence of Michael Abshire's recanted testimony and life sentence establishes that John Marquard's death sentence is disparate and disproportional in violation of the Eighth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution because Abshire is at least as culpable as John Marquard.

ARGUMENT I

NEWLY DISCOVERED EVIDENCE ESTABLISHES JOHN MARQUARD'S DEATH SENTENCE IS DISPROPORTIONATE, DISPARATE, AND INVALID IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

A. Standard of Review

Disparate sentencing of equally culpable codefendants violates the Eighth and Fourteenth Amendments of the United States Constitution. *See Slater v. State*, 316 So.2d 539, 542 (Fla.1975); *Furman v. Georgia*, 408 U.S. 238 (1972). Because disparate sentencing is an issue of constitutional magnitude, it is a mixed question of

law and fact subject to de novo review. See Stephens v. State, 748 So.2d 1028, 1032-34 (Fla.1999); United States v. Bajakajian, 524 U.S. 321, 326 n.10 (Fla.1998); Ornelas v. United States, 517 U.S. 690, 697, 699 (1996). “This obligation stems from the appellate court’s responsibilities to ensure that the law is applied uniformly in decisions based on similar facts.” Stephens, 748 So.2d at 1034. Under de novo review, discretion is given to the trial court’s findings of fact. “A trial court’s determination concerning the relative culpability of the co-perpetrators in a first degree murder case is a finding of fact and will be sustained on review if supported by competent substantial evidence.” Puccio v. State, 701 So.2d 858, 860 (Fla. 1997).

B. Newly discovered evidence

1. Abshire’s change in testimony is newly discovered evidence which the evidentiary hearing court erroneously failed to consider in evaluating John Marquard’s disparate sentence.

At John Marquard’s 1999, evidentiary hearing, Abshire recanted much of his 1993, trial testimony, wherein Abshire minimized his involvement in the murder as well as his and John Marquard’s drug and alcohol use that evening. This is newly discovered evidence which the evidentiary hearing court erroneously failed to consider in deciding that John Marquard’s death sentence is not disparate.

The evidentiary hearing court erroneously refused to consider this newly

discovered evidence, stating:

The Defendant has also filed a Motion to Amend Pleadings to conform with the evidence which alleges that the new version of events, testified to by co-defendant Abshire at the evidentiary hearing, is newly discovered evidence and therefore trial counsel was ineffective in failing to discover and introduce this evidence. The Court finds that this is not newly discovered evidence, this is simply the latest version of the events surrounding the homicide which is in direct conflict with Abshire's prior testimony and other evidence presented at the Defendant's trial. Therefore, there is no probability there would have been a different result at trial.

(V5, R734). The court dismissed the newly discovered evidence of Abshire's recanted testimony without making factual findings or legal analysis and conclusions regarding its significance. The evidentiary hearing court therefore, failed to consider the newly discovered evidence when addressing the issue of John Marquard's disparate sentence (S V2, 183-84). Because the court failed to make any factual findings regarding Abshire's recanted testimony, this Court must consider the issue de novo, with no discretion given to the court.

Abshire's change in testimony is newly discovered evidence. This Court outlined two requirements to receive relief based on newly discovered evidence.

First, the asserted facts "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." Hallman, 371 So. 2d at 485. Second, "the newly discovered evidence must be of such nature that it would probably produce an

acquittal on retrial." Jones v. State, 591 So. 2d 911, 915 (Fla. 1991). The Jones standard is also applicable where the issue is whether a life or death sentence should have been imposed. *Id.*

Scott, 604 So. 2d 465, 468 (Fla.1992). *See also* Robinson v. State, 707 So.2d 688, 691 n.4 (Fla. 1998); Jones v. State, 591 So. 2d 911, 914-915 (Fla. 1991).

Abshire's evidentiary hearing testimony meets both requirements. First, it was unknown by the court and counsel at trial, and they could not have known of the change in testimony using diligence. Robinson v. State, 707 So.2d 691. At the evidentiary hearing, Abshire testified that, at the time of trial, he would not have cooperated with John Marquard's counsel. "If either one of them would have spoke to me, I would have been rather rude to them. I had no rap what so ever with them." (V 6, R51). Before John's trial, Abshire's jury recommended that he be sentenced to death, and Abshire's testimony in John's trial was motivated by vengeance because he wanted John Marquard to be sentenced to death also (V6, R50). "I knew I was going to death row. I knew I was going to die. And I felt like I deserved to die and I felt like he did too." (V6, R50). Because Abshire testified he would not have cooperated with John's counsel, and he wanted John Marquard to receive a death sentence, Abshire's more truthful evidentiary hearing testimony was not available at the time of trial. Second, Abshire's evidentiary hearing testimony proves John Marquard's death sentence is unconstitutionally disparate, so John Marquard probably

would receive a life sentence on retrial or appeal. Thus, it is newly discovered evidence. Robinson, 707 So.2d at 691 n.4; Jones, 591 So. 2d at 914-915.

Abshire's testimony at John Marquard's evidentiary hearing revealed that Abshire was much more culpable than his trial testimony indicated. Abshire testified at John's trial that the victim was dead before Abshire stabbed her and tried to decapitate her (M V7, 1126). At the evidentiary hearing however, Abshire testified that the victim was alive when he chopped her neck, trying to kill her:

Q. That night, the knife, How did you use it?

A. Just like you would chopping wood.

Q. Did you use it on Stacey?

A. Yes, sir.

Q. How did you do that?

A. **I thought she might still be alive, might still be hurting, and I hit her as hard as I could with it on the neck, and I just didn't want to hear her hurt any more.**

(V6, R36)(*emphasis added*).

“In assessing recanted testimony, we have stressed caution, noting that it may be unreliable and trial judges must “examine all of the circumstances in the case.”“

Robinson v. State, 707 So.2d at 691 (Fla. 1998) (citing State v. Spaziano, 692 So.2d 174, 176 (Fla.1997)). The circumstances of this case clearly indicate that Abshire's

testimony at the evidentiary hearing was much closer to the truth than Abshire's trial testimony.

First, Michael Abshire's recanted testimony was subject to adversarial testing.

The state cross-examined Abshire on this testimony:

- Q. Now, you stated in your direct testimony that you hit Stacey with the knife to put her out of her misery, basically; is that correct?
- A. Yes ma'am. I thought she was still alive, and . . .

(V6, R45). This Court has held that recanted testimony is more credible when the person recanting is subject to cross examination. *See Robinson*, 707 So.2d at 691 (“Fields’ new version of events has never been subjected to adversarial testing since he has pointedly refused on several occasions to expose himself to cross-examination. The absence of direct testimony by the alleged recanting witness is fatal to this claim.”). Because Abshire’s recantation of his trial testimony, that the victim was dead when he cut her head off, was consistent throughout both direct and cross examination, it is credible.

Second, Abshire’s testimony that the victim was alive when he chopped her neck is independently corroborated by Hobart Harrison’s testimony which *the state* presented at Abshire’s trial.¹ Mr. Harrison was Abshire’s cell mate at St. John

¹In assessing recanted testimony, the court must “examine all circumstances in the case”. *Robinson v. State*, 707 So.2d at 691; *State v. Spaziano*; 692 So.2d at

County Jail, and Abshire confessed to him.

A. **He said he cut her head off and left a piece of skin to hold it on.**

Q. **He said who cut her head off?**

A. **He did, Michael Abshire.**

Q. Did he tell you any of the details of the attack that lead to the death of Stacey Willets?

A. Well, no. He just said that **the girl was coming between him and John** and John – he was sitting on the hood of the car and John stabbed her in the side and **John couldn't kill her. He said, "You fucking pussy, let me show you how to do it and I'll finish it."**

Q. Is that a direct quote?

A. Yes, sir.

(Appendix A at 1409-10)(*emphasis added*).

Mr. Harrison, though unwillingly brought to court, confirmed this testimony at John's evidentiary hearing:

Q. How do you know who did the crime?

A. Because the man who did the crime told me.

176; Armstrong v. State, 642 So.2d 730, 735 (Fla.1994). However, in this case the evidentiary hearing judge failed to address any circumstances in the case, including the independent corroborating evidence of Mr. Harrison's testimony. Therefore, Mr. Harrison's testimony is included as Appendix A for this Court's consideration.

Q. And who was that?

A. Michael Gene Abshire.

(V7, R161)

A. We'll just put it this way, he told me he did the crime, he killed the girl, and that's as far as I want to go with that. I really don't want to be here.

(V7, R162).

Q. He said he cut her head off and left a piece of skin to hold it on; do you remember saying that?

A. Yeah, I remember saying that but last Friday when you came to see me at the prison, I told you I didn't want no part of this case and I would rather not go into the past with Mr. Abshire because that's over and done with. I appreciate y'all asking me to come up here and help the man, but like I told you, he ain't the one that did it. That's as far as I want to go with it. I would appreciate it if you'd leave me out of this.

(V7, R163). Abshire's evidentiary hearing testimony, that the victim was alive when he cut her head, is consistent with what he told Mr. Harrison in 1992. This independent corroborating evidence supports Abshire's evidentiary hearing version of events. Robinson, 707 So.2d at 691; Spaziano, 692 So.2d at 176.

Moreover, Abshire's recantation is consistent with his motives to lie at John's trial. Though Abshire was tried before John Marquard, the court delayed Abshire's sentencing until after he testified at John Marquard's trial. While testifying at John

Marquard's trial, Abshire had every motivation to minimize his culpability and exaggerate John's. Through his testimony at John's trial, Abshire could offer as mitigating circumstances that he did not kill the victim and was merely an accomplice under Enmund/Tison, he cooperated in the case against John Marquard, and the statutory mitigating circumstances that he was an accomplice in the offense and his participation was relatively minor, and he acted under extreme duress or the substantial domination of another person § 921.141(6)(d)(e) Fla. Stat.

Abshire's recantation is further corroborated by his recantation of other facts which are consistent with all the circumstances of the offense. At trial, Abshire testified that he and John drove for 20 or 30 minutes after leaving Miss Rosa's, returned to the motel room, showered and changed, and then left for the woods to kill the victim (M V7, 1114-1116). He testified they drank beer in the motel room before leaving (M V7, 1117, 1209). At the evidentiary hearing, Abshire testified that after 5:00 that evening he and John drank tequila and beer at the motel (V 6, R 31-34, 51-53). After 8:30 that evening, they left the victim at the motel and went to a bar called Scarlett O'Hara's. (V6,R 31-34, 51-53) There, Abshire watched John drink two longneck beers, and then they separated for about an hour. (V6, R31-34, 51-53) They then went to the Tradewinds bar where they each drank approximately one pint of Killians beer every ten to fifteen minutes while listening to a band's entire set (V6,

R31-34, 51-53). Throughout that day and evening, Abshire and John took great quantities of ephedrine, and they smoked marijuana (V 6, R31-34, 51-53). John did manage to avoid a car accident while driving intoxicated that evening, but Abshire testified that he did not pay attention to the driving, and few if any other people were driving in the rain that late at night. (V6, R44-45, 54).

Abshire affirmatively recanted his prior statements that he and John did not go out to the bars that night.

Q. And at your trial testimony, you didn't mention anything about going to the Tradewinds or Scarlett O'Hara's on Wednesday night?

A. That had to have been when we went because that's when I met the other girl.

Q. Are you sure it's not Tuesday night that you went?

A. No ma'am, because John and I were—I met her when John and I were alone looking for work. Stacey wasn't with us. If I said that, I was mistaken.

(V6, R42).

* * * *

Q. She was just asking you whether you were sure it was Wednesday night.

A. It was definitely Wednesday night.

(V6, R51).

Abshire testified at both the trial and the evidentiary hearing that he and John Marquard showered and changed after returning from their job hunting expedition but before going to the woods. This corroborates Abshire's evidentiary hearing testimony. Abshire and John probably showered and changed before going to bars where Abshire planned to meet a girl. Common sense dictates however, that they would not shower if, as Abshire testified at John's trial, they planned to hike in the dark, rainy, and muddy woods where they planned to stab the victim.

Abshire's recanted testimony is credible. It was subject to adversarial testing, supported by independent corroborating evidence which the state presented, was consistent with other recanted testimony, and is much more credible than Abshire's testimony at John's trial because Abshire used John's trial as an opportunity to present mitigating evidence for his own sentencing and for vengeance. Because Abshire's recanted testimony is credible evidence that was not available at the time of John Marquard's trial, and it proves John's death sentence is unconstitutionally disparate in light of Abshire's life sentence, it is newly discovered evidence. Spaziano, 692 So.2d at 176. The court erred in not considering Abshire's recanted testimony.

2. Michael Abshire's life sentence is newly discovered evidence which proves John Marquard's death sentence is unconstitutional.

The trial court sentenced both John Marquard and his co-defendant, Michael

Abshire, to death on February 5, 1993 (M V3, 538). This Court vacated Michael Abshire's conviction and death sentence in 1994. Abshire v. State, 642 So.2d 542 (Fla. 1994). Upon remand, Abshire plead guilty and received a life sentence after a penalty phase, before the same trial judge, at which he waived the right to a jury recommendation. The Fifth District Court of Appeal upheld Abshire's life sentence on November 7, 1995, more than one year after this Court denied rehearing on John Marquard's direct appeal. Abshire v. State, 663 So.2d 639 (Fla.App. 5th DCA 1995); Marquard v. State, 641 So.2d 542 (Fla. 1994). Because Abshire received a life sentence after this Court considered John Marquard's death sentence on direct appeal, Abshire's life sentence is newly discovered evidence which proves John Marquard's death sentence is disproportionate, disparate, and invalid under the Eighth and Fourteenth Amendments of the United States Constitution and the corresponding provision of the Florida Constitution.

In Scott v. Dugger, this Court held that a codefendant's life sentenced imposed after this Court reviews a defendant's death sentence on direct appeal constitutes newly discovered evidence:

Even when a codefendant has been sentenced subsequent to the sentencing of the defendant seeking review on direct appeal, it is proper for this Court to consider the propriety of the disparate sentences in order to determine whether a death sentence is appropriate given the conduct of all participants in committing the crime. Witt v. State, 342 So.

2d 497 (Fla.), cert. denied, 434 U.S. 935, 98 S. Ct. 422, 54 L.Ed.2d 294 (1977). While Witt involved review of a death sentence on direct appeal, this case involves review in a 3.850 proceeding. Scott characterizes Robinson's life sentence, which was imposed after this Court affirmed Scott's conviction and death sentence, as "newly discovered evidence" and, thus, cognizable under Rule 3.850.

Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992).

In Mr. Marquard's case, both requirements needed to receive relief based on newly discovered evidence are met, and relief is necessary. Michael Abshire's life sentence was not imposed until after John Marquard's direct appeal was completed. Thus, Abshire's life sentence could neither be known nor discovered at the time this Court reviewed Mr. Marquard's death sentence on direct appeal. *See Scott* 604 So. 2d at 468.

However, the evidentiary hearing court denied this claim on remand:

The defendant, John Marquard, was, in fact, the dominant person in this entire course of events. It was John C. Marquard who made the decision that they should kill Stacey Willetts. John Marquard drove Willetts and Abshire to the wooded area, where they eventually took her life. Marquard took both individuals through the woods to the eventual location, where he caused the death of Stacey Willetts. The defendant, John Marquard, was the individual who had the knife, who cut Stacey Willetts throat, and attempted to decapitate her, and who then handed the knife to his co-defendant Michael Abshire, and ordered him to stab the victim. The court finds that Michael Abshire had no intention to kill the victim, and was merely an accomplice. The court further finds that

Abshire was acting under the substantial domination and extreme duress from the defendant Marquard.

(S V2, 183-84). The evidentiary hearing court's findings are specifically refuted by the record and not supported by competent and substantial evidence. *See Blanco v. State*, 702 So.2d 1250, 1252 (1997). Accordingly, the evidentiary hearing court erred.

In finding that John Marquard made the decision to kill the victim, the court ignored Abshire's testimony at John Marquard's trial that both he and John Marquard made the plans.

A. Did you come up with some ideas on how to do this, as well?

A. Yes, sir. We did.

Q. Okay. What did you suggest?

A. Pretty much a basic consensus. I couldn't really say who thought of what particular thing. I mean, it's like a ... a general scenario, you know, go back in the woods somewhere, I mean, because there's a guy we knew who did it exactly that way before – or, I knew. I'm not sure if John knows him.

(M V7, 1113). Thus, this finding is refuted by the record.

The evidentiary hearing court found that John Marquard drove Abshire and the victim to the woods. However, Abshire testified at John's trial that he guided John into the woods:

John pulled over, and I had the – I got – I got his flashlight, and I had a poncho, so I got out in the rain. He was driving.

I was trying to find – make sure he wouldn't get stuck when he pulled in there.

(M V7, 1119-20)

* * *

Okay. So he pulls in. I'm pretty much guiding him in, you know, with the flashlight, . . . And so the next thing we're looking for is either a turnoff or a road that's going towards the water.

(M V7, 1120). It was not a matter of domination.²

The evidentiary hearing court's finding that John Marquard "took both individuals through the woods to the eventual location" is clearly refuted by the record and supported by no evidence. In fact, Michael Abshire testified that he led the group through the woods.

Q. Now, you said that you . . . the two of you and Stacey went out into the woods and that I believe you said you had the flashlight?

A. Yes, sir, most of the time.

Q. Okay. And you were in the lead, then.

A. Yes, sir.

Q. Okay.

²This is consistent with Abshire's testimony at the evidentiary hearing that John always drove when they drank alcohol because John drove better than Abshire when they were intoxicated (V6, R44-45).

A. I was at point.

Q. Or you were on point.

A. Yes, sir.

Q. Is this typical for you to be on point when you're trekking through the woods with John?

A. Usually.

(M V7, 1210). Abshire led the way. He also led the way back to the car.

Q. When you all turned around, did — while you were out in the woods, did your positions change? You had said initially that you were in the lead, Stacey was in the middle, and John was behind her.

A. Sometimes John came up to the front, you know, and we'd discuss which way we were going to go —

(M V7, 1214). Thus, this finding is also refuted by the record.

The evidentiary hearing court found that John gave Abshire his knife which Abshire used to kill the victim. This finding is refuted by the record. Abshire testified at John's trial that he used his own Bowie knife to cut the victim (M V7, 1220).³

The court also found that Abshire had no intention to kill the victim and was merely an accomplice. Again, this is specifically refuted by the record and not

³This is consistent with Abshire's testimony at John's evidentiary hearing. Abshire testified at the hearing that he used his own Bowie knife to kill the victim (V6, R36).

supported by competent and substantial evidence. Abshire planned the attack with John, led the way, and admitted to Hobart Harrison that he killed the victim:

A. Well, no. He just said that **the girl was coming between him and John** and John – he was sitting on the hood of the car and John stabbed her in the side and **John couldn't kill her. He said, "You fucking pussy, let me show you how to do it and I'll finish it."**

Q. Is that a direct quote?

A. Yes, sir.

(Appendix A at 1409-10)(*emphasis added*)(MV7, 1113, 1123-24).⁴

The evidentiary hearing court's finding is also a legal impossibility, inconsistent with the findings of the trial judge who actually presided over both John Marquard's and Abshire's trials. In both John Marquard's and Abshire's cases, the court specifically found that the crime was cold, calculated, and premeditated (M V5, 538-540). This Court has repeatedly held that cold, calculated, and premeditated requires

⁴ This is consistent with Abshire's testimony at John's evidentiary hearing. Abshire testified he chopped the victim, intending to kill her.

A. **I thought she might still be alive, might still be hurting, and I hit her as hard as I could with it on the neck, and I just didn't want to hear her hurt any more.**

(V6, R36, 45)(*emphasis added*).

a premeditated intent to kill.

Cold, calculated, and premeditated applies only to “murders more cold-blooded, more ruthless, and **more plotting than the ordinarily reprehensible crime of premeditated first-degree murder.**” Porter v. State, 564 So.2d 1060, 1064 (Fla.1990)(*emphasis added*). The killing involves “calm and cool reflection”. Richardson v. State, 604 So.2d 1107, 1109 (Fla.1992). “Calculated” mandates a special plan or pre-arranged design. Rogers, 511 So.2d at 533. Premeditation is a “heightened premeditation” which distinguishes the aggravating circumstance from the element of first-degree premeditated murder. Id.

Therefore, the evidentiary hearing court’s (which was a different judge than the judge who presided over the trials) finding that Michael Abshire had no intention to kill the victim and was merely an accomplice clearly conflicts with all the facts adduced during John Marquard’s and Abshire’s trials and is legally impossible. Because the trial court, who had the superior vantage point in assessing the credibility of witnesses and in making findings of fact, adjudicated Abshire guilty of first degree murder with the special finding that the murder was cold, calculated, and premeditated and did not recant that finding at Abshire’s resentencing, the different judge sitting in the evidentiary hearing court’s finding that Abshire had no intention to kill the victim is legally impossible. Stephens, 748 So.2d at 1034.

Clearly, Abshire was not acting under John Marquard's substantial domination and extreme duress. This finding is also refuted by the record and not supported by competent and substantial evidence. At the time of the incident, Abshire weighed 200 pounds and lifted weights (M V7, 1218). Abshire was rough. He testified he carried John's money because, "we figured between the three of us, I'm the least person – if one of us was by ourselves, I was the least person that was going to get mugged." (M V7, 1194). Abshire based the plan to kill the victim on a plan that a friend of his used (M V7, 1113). He carried two knives into the woods (M V7, 1121). Abshire led John Marquard and the victim into and out of the woods (M V7, 1123-24). Abshire intended to kill the victim (V6, R36) (*See* Appendix A at 1409-10). The victim's car was in Abshire's control when he was arrested (M V7, 1225).

Only Abshire's testimony at John Marquard's trial tends to establish that he acted under John Marquard's domination. At the time he testified to that, he had not been sentenced and was trying to establish mitigation he could present at his sentencing. Abshire also wanted John Marquard to be sentenced to death (V6, R50). "I knew I was going to death row. I knew I was going to die. And I felt like I deserved to die and I felt like he did too." (V6, R50). Abshire's trial testimony is clearly not competent and substantial evidence. It was motivated by self interest and is refuted by the record.

The facts revealed during Abshire's and John Marquard's trials prove that Abshire was completely involved in all aspects of the crime, and that Abshire is as culpable as John Marquard. Thus, newly discovered evidence of Abshire's life sentence would result in a life sentence for John Marquard on retrial or appeal. *See Scott* 604 So. 2d at 468. The court erred in denying this claim.

C. In light of the newly discovered evidence of Abshire's recanted testimony and Abshire's life sentence, John Marquard's death sentence is disparate in violation of the Eighth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution.

In light of the newly discovered evidence that Abshire admitted he chopped the victim's neck while she was alive, Abshire's admitted involvement in the entire murder, and newly discovered evidence of Abshire's life sentence, John Marquard's death sentence is clearly disparate and disproportionate.

This Court has recognized that disparate sentencing of equally culpable codefendants in capital cases violates the Eighth Amendment of the United States Constitution. *Slater v. State*, 316 So.2d at 542.

We pride ourselves on a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same.

Id. In furtherance of this principle, this Court has vacated death sentences in cases

where an equally or more culpable co-perpetrator received a life sentence.

In Scott v. Dugger, this Court vacated Mr. Scott's death sentence after his equally culpable codefendant received a life sentence. Scott, 604 So2d at 468. "[T]he record in this case shows that Scott and Robinson had similar criminal records, were about the same age, had comparable low IQs, and were equally culpable participants in the crime." Scott, 604 So.2d at 468. John Marquard's case is indistinguishable. Like Scott and Robinson, both Abshire and John Marquard used the property they stole from the victim, planned the murder, led the victim to the woods, and Abshire, like Robinson, inflicted the final death wound (M V7, 1113, 1123-24)(V6, R36, 45)(Appendix A at 1409-10). Scott, 604 So.2d at 468. "[T]here is little to separate out the joint conduct of the codefendants which culminated in the death of the decedent." Id. In Slater v. State, this Court vacated Mr Slater's death sentence because the trial court that sentenced Mr. Slater to death allowed the triggerman to plea to a life sentence. Slater, 316 So.2d at 542. This Court held that "the imposition of the death penalty under the facts of this case would be an unconstitutional application under Furman v. Georgia" Id. In Curtis v. State, this Court vacated Curtis' death sentence, in part, because the evidence showed that the codefendant, who plead guilty to first degree murder and received a life sentence, was the triggerman. Curtis v. State, 685 So.2d 1234, 1237 (1996). In Hazen v. State, three men committed a

burglary during which one of the men shot and killed one victim, and all three men raped another victim. Hazen v. State, 700 So.2d 1207, 1207-8 (Fla. 1997). The facts revealed during Hazen's trial proved that he did not kill the victim. Id. Another burglar, who did not kill the first victim, plead guilty and received a life sentence in exchange for his testimony at the other's trials. Id. Hazen was tried, convicted of first degree murder, and sentenced to death. Id. On appeal, this Court vacated Hazen's death sentence, holding it was unconstitutionally disparate because the other non-triggerman was a prime instigator and received a life sentence. Hazen, 700 So.2d at 1214.

In Puccio v. State, several people planned a murder, and, according to the plan, Puccio and two other men stabbed and beat a man to death. Puccio v. State, 701 So.2d 858, 862 (Fla. 1997). Only Puccio was sentenced to death. Id. On direct appeal, this Court vacated Puccio's death sentence, holding that the trial court erred in imposing the death sentence when equally culpable co-perpetrators were sentenced to lesser punishments.

Nothing in the trial court's findings above indicates that Puccio played a greater role in the planning and killing of Kent than the others. . . . Puccio also played no greater role in the actual killing than either Semenec or Kaufman— it was Semenec who initiated the melee with the stab wound to the neck and Kaufman who finished it with the coup de grace with the bat.

Puccio, 701 So.2d at 862-63. John Marquard's case is indistinguishable. Both John Marquard and Abshire schemed to kill the victim according to Abshire's plan (MV7, 1113). John Marquard initiated the attack, but Abshire finished it with the coup de grace wound to the neck (V6, R36, 45)(Appendix A at 1409-10). Because Abshire, like Puccio's co-perpetrators, was sentenced to life, John Marquard's death sentence is unconstitutionally disparate, and it should be vacated and a life sentence imposed.

"Florida law is well settled that death is not a proper penalty when a co-perpetrator of equal or greater culpability has received less than death." Scott v. State, 657 So.2d 1129, 1132 (Fla.1995)(Kogan, J. concurring). According to Abshire's trial testimony, both Michael Abshire and John Marquard planned the incident, lured the victim into the woods, stabbed or chopped her, and took her car and personal property (MV7, 1113, 1123-24)(V6, R36, 45)(Appendix A at 1409-10). Two of Abshire's three on-the-record versions of the facts of the actual murder state that Abshire stabbed and chopped the victim while she was alive (Appendix A at 1409-10) (V6, R36, 45). Abshire is at least as culpable as John Marquard who, according to the version Michael Abshire told Hobart Harrison, stabbed the victim in the side but could not kill her⁵. (See Appendix A at 1409-10). Imposition of the death penalty under

⁵Moreover, John Marquard has less aggravation and more weighty nonstatutory mitigation than Michael Abshire. In John Marquard's Judgement and Sentence, the sentencing court found four statutory aggravating circumstances: 1.

the facts of this case is unconstitutional under Furman v. Georgia, 408 U.S. 238, 92 (1972); Slater, 316 So.2d at 539. If this evidence was available at the time of John Marquard's sentencing, he probably would have received a life sentence.

The evidentiary hearing court's finding that John Marquard's sentence is not unconstitutionally disparate and disproportionate is refuted by the record and not supported by any competent and substantial evidence. In finding that John Marquard's sentence was not disparate, the evidentiary hearing court utterly failed to

John Marquard was under a sentence of imprisonment or placed on community control, 2. the crime was committed while he was engaged in the commission of a robbery or committed for financial gain, 3. the crime was especially heinous, atrocious, or cruel, and 4. the crime was cold, calculated, and premeditated (M V5, 538-540). The court found no statutory mitigating circumstances and noted four possible non-statutory mitigating circumstances (M V5, 540-543).

In Michael Abshire's 1993 Judgement and Sentence, the sentencing court found five statutory aggravating circumstances: 1. Abshire was under a sentence of imprisonment, 2. **Abshire was previously convicted of a threat or use of violence to some person**, 3. the crime was committed while Abshire was engaged in the commission of a robbery or committed for financial gain, 4. the crime was especially heinous, atrocious, or cruel, and 5. the crime was cold, calculated, and premeditated (A V3, 481-484)(*emphasis added*). The court found some evidence of the statutory mitigating circumstance that Abshire acted under extreme duress or under the substantial domination of another person, but then stated, "That evidence is weak, self-serving, inconsistent with the other evidence as to their relationship before and after the murder." (A V3, 485). The court also noted three possible non-statutory mitigating circumstances. During Abshire's 1995 penalty phase the state presented no new evidence except for the victim's mother as victim impact evidence (A 1995, 5-33). Abshire testified on his own behalf (A 1995, 39-53). The state argued for the five aggravating circumstances the court found to have been proven beyond a reasonable doubt in 1993 (A 1995, 54-55).

analyze or consider Abshire's recanted evidence and clearly disregarded the record.

This Court has vacated death sentences when the trial court's findings of culpability are refuted by the record and unsupported by competent and substantial evidence. Puccio, 701 So.2d at 863; Scott, 604 So.2d at 468-69; *See also Spivey v. State*, 529 So.2d 1088, 1095 (Fla.1988)(reversing death sentence because jury's life recommendation could have been based on equally and more culpable participants' sentences of considerably less severity); Caillier v. State, 523 So.2d 158, 160 (Fla.1988)(vacating death sentence because, "We have recognized that disparate treatment of an equally culpable accomplice can serve as a basis for a jury's recommendation of life.") Brookings v. State, 495 So.2d 135, 143 (Fla.1986)(reversing death sentence when jury's life recommendation could have been based on treatment accorded an equally culpable coperpetrator); Messer v. State, 330 So.2d 137, 142 (1976)(remanding the case for a new penalty phase because "There is little to separate out the joint conduct of the co-defendants which culminated in the death of the decedent. The sentence afforded to Brown certainly is not determinative of the sentence which appellant should receive; however, the jury should have had the benefit of the consequences suffered by the accomplice in arriving at its recommendation").

John Marquard's death sentence is no longer valid in light of Michael

Abshire's life sentence entered post-trial and post-direct appeal and his recanted testimony which proves he is at least as culpable as John Marquard. "Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same." Slater v. State, 316 So.2d at 542. Accordingly, the evidentiary hearing court erred, and this Court should vacate John Marquard's death sentence and remand the case with directions that a life sentence be imposed.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Marquard's rule 3.850 relief. This Court should order that his convictions and sentences be vacated and remand the case with directions that a life sentence be imposed or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Supplemental Initial Brief has been has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this _____ day of _____, 2001.

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APPENDIX A

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Testimony of Hobart Owen Harrison in the trial transcript of the State of Florida v. Michael Gene Abshire, October 1, 1992, from Florida Supreme Court, Record on Appeal 81,326.