IN THE SUPREME COURT OF FLORIDA

TROY MERCK, JR.,

Appellant,

v. Case No. SC04-1902

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

(a) Procedural History:

Merck was tried and convicted of first degree murder of the victim James Anthony Newton. Initially, the case went to trial and ended in a mistrial on November 6, 1992 because the jury was unable to reach a verdict. After the second trial he was found guilty as charged and the jury recommended death by a nine to three vote. On appeal this Court affirmed the judgment but remanded for resentencing because the jury had heard evidence pertaining to a North Carolina juvenile adjudication which was not a conviction within the meaning of F.S. 921.141(5)(b). Merck v. State, 664 So. 2d 939 (Fla. 1995). Merck's resentencing took place and the jury unanimously recommended a sentence of death. This Court reversed and remanded for a new penalty phase proceeding because the trial court had failed to properly find, evaluate and weigh evidence of Appellant's alcohol abuse within the list of nonstatutory mitigators and retroactive application of the felony probation aggravator violated the ex post facto clause. Merck v. State, 763 So. 2d 295 (Fla. 2000).

(b) The Instant Proceedings:

Following jury selection, the trial court instructed the jury that Merck had been found guilty of murder in the first

degree, that an appellate court had reviewed and affirmed the conviction and had sent the case back "to decide what sentence should be imposed. Consequently, you will not concern yourselves with the question of his guilt." (V. 2dAdd. II, R.254).

(1) Katherine Sullivan, a bartender at the City Lights on October 11, 1991, testified that she and friends were there to celebrate the birthday of victim Jim Newton. (V. 2dAdd. II, R.265). They arrived about 10:00 or 10:30 and left at closing at 2:00. (V. 2dAdd. II, R.266). After the bar closed, she and her boyfriend Glenn went to the car and talked; she was in the driver's seat and he was in the passenger seat. Another friend, Don Ward, was standing by the passenger side of her car. (V. 2dAdd. II, R.268). One of two men leaned against her car and her boyfriend asked them not to do so and they apologized sarcastically. (V. 2dAdd. II, R.268). Jim Newton moved his car around and walked with Don to the car and asked if everything was all right. She got out of the car and congratulated him on his birthday. Someone said "congradu—fucken—lations". (V. 2dAdd. II, R.269-270). The one who made the snide comment was trying to egg Newton into a fight. Jim said he would not fight and the man called him a pussy. Jim said he was a pussy but still was not going to fight. (V. 2dAdd. II, R.270). The man

said he was going to teach him how to bleed, walked back to their car and asked his friend to throw him the keys. The man unlocked his car and threw his shirt into the back of the car. The man was able to catch the car keys and walk to his car and unlock it without any trouble. (V. 2dAdd. II, R.271). He fumbled between the seat and door for something, walked back and handed the keys to his friend. (V. 2dAdd. II, R.272). He broke into a run as he approached Newton and started punching him; she saw blood on the victim's back and realized he wasn't just being punched. She thought she saw a glint off the street light on something in his hand. She ran inside and said someone has been stabbed, call 911. (V. 2dAdd. II, R.274). Newton didn't do anything to defend himself. The witness identified Appellant in court as the killer. (V. 2dAdd. II, R.276).

(2) Neil Thomas, Appellant's companion, met him in Ocala a couple of weeks before this incident. (V. 2dAdd. II, R.299). He went with Merck to North Carolina to visit the latter's relatives and drove from there to Pinellas County in a red Mercury Bobcat. He thought Merck was about nineteen at the time. (V. 2dAdd. II, R.300). Thomas had five or six beers and a couple of shots at the City Lights and he gave about the same amount of liquor to Merck. (V. 2dAdd. II, R.301). Merck had a fixed handle buck knife in his possession. While they were

inside the bar Merck had no trouble walking or talking. (V. 2dAdd. II, R.302). He and Merck leaned up against a blue Camaro. They were asked sarcastically to get off the car and Thomas responded with a smart remark. Thomas called the guy a pussy. (V. 2dAdd. II, R.303). Appellant got aggravated and put his shirt in the Bobcat. Troy charged around the car and began punching him in the back. (V. 2dAdd. II, R.304). Appellant ran back to the car and said we have to go. Thomas drove out of the parking lot. (V. 2dAdd. II, R.305). He looked back and Newton's shirt looked shiny in the back. He recalled Merck when running back to the car held his arm very stiff and it looked like he was concealing something in his hand. Thomas remembered having heard a soft popping noise, like a screwdriver going through a carpet during the fight. (V. 2dAdd. II, R.306). He asked Merck if he had stabbed the guy and Appellant held up his hand holding the knife with blood all over his hand and arm. Merck said he killed him and that if he didn't kill him, he would find him in the hospital and finish the job. (V. 2dAdd. II, R.307). Merck recounted how he stabbed the victim, that he was not sure if he was going to kill him so he decided to stick him in the neck and once he stuck him in the neck he actually twisted the knife and was trying to rip his throat out. Merck repeated the story a half dozen times. (V. 2dAdd. II, R.312).

Merck said he saw the victim's blood squirt out and stop like a squirt gun. They drove for five minutes and abandoned the car. (V. 2dAdd. II, R.313). They changed their clothes and removed the car tag. (V. 2dAdd. II, R.314). They walked for an hour to a bowling alley and Merck had no problem walking and running. They played pool and Merck won. (V. 2dAdd. II, R.316-317). He and Merck were in a Clearwater motel when Merck was arrested. Thomas had eleven convictions. (V. 2dAdd. II, R.317).

(3) Salvatore Pensiero was a disk jockey at the City Lights Nightclub and while they were closing up one of the off duty employees came screaming in and said someone was stabbed in the parking lot. He saw a man on the ground holding his throat gasping for air. (V. 2dAdd. II, R.344).

(4) Donald Ward was present when Jim Newton was stabbed and killed. (V. 2dAdd. II, R.348). He heard the assailant say happy birthday. (V. 2dAdd. II, R.349). He didn't actually see the knife. (V. 2dAdd. II, R.351).

(5) James David Carter was in charge of security at the club; he went outside when he heard the report of a stabbing and wrote down the tag number of the fleeing vehicle. (V. 2dAdd. II, R.354).

(6) Detective Thomas Nestor identified pictures of the scene where the attack occurred. (V. 2dAdd. II, R.361). The

abandoned red Mercury Bobcat was found two miles away; a knife and sheath were in the back seat. (V. 2dAdd. II, R.364-65). Newton's blood was found inside the vehicle. (V. 2dAdd. II, R.366) and Merck's fingerprints were found in and around the car. (V. 2dAdd. II, R.367). Katherine Sullivan identified Neil Thomas from a photopack. (V. 2dAdd. II, R.368).[1] Det. Nestor received a phone call from Neil Thomas's grandmother and his department was able to locate Thomas and Merck. Merck gave a false name at the time of his arrest. (V. 2dAdd. II, R.369).

(7) Detective Mike Madden arrived at the hospital at about the time Newton was pronounced dead. He observed preliminarily four stab wounds to the left back, one to the left neck, one underneath the left armpit area and one to the lest chest area. (V. 2dAdd. II, R.375). Later at the autopsy he noticed wounds to the face. (V. 2dAdd. II, R.376). Det. Madden observed defensive wound injuries on the left hand. (V. 2dAdd. II, R.380).

(8) Dr. Noel Palma, a medical examiner, reviewed the autopsy report done by Dr. Davis and reviewed the various photographs of James Newton. (V. 2dAdd. II, R.388-389). The cause of death was multiple stab wounds of the neck and trunk.

[1] Katherine Sullivan also testified she had identified Merck from a photopack. (V. 2dAdd. II, R.287), which was corroborated by Detective Nestor. (V. 2dAdd. II, R.372).

(V. 2dAdd. II, R.390). There were seven stab wounds and multiple incise wounds. (V. 2dAdd. II, R.391). There were at least thirteen or fourteen incise wounds for a total of twenty various inflicted wounds . (V. 2dAdd. II, R.399). Stab wound (referred to as number six) was on the left side of the ear and went through the skull and even penetrated the bone. (V. 2dAdd. III, R.402). The injuries would cause pain. (V. 2dAdd. III, R.404). The most significant stab wound that can cause death went through the soft tissue of the neck, the carotid artery, jugular vein and esophagus. (V. 2dAdd. III, R.406). He would survive for about a minute or so; his movement of the hands toward the neck was purposeful and meaningful, a sign of consciousness – as well as the defensive wounds observed. (V. 2dAdd. III, R.407-408). The wounds were not survivable. (V. 2dAdd. III, R.409). The manner of death was homicide. (V. 2dAdd. III, R.413).

The parties stipulated that Appellant had five prior convictions: State's Exhibit No. 8 is a 1989 judgment for robbery with a deadly weapon; State's Exhibit No. 9 is another 1989 conviction for robbery with a deadly weapon; State's Exhibit No. 10 is a 1989 conviction for robbery with a deadly weapon; State's Exhibit No. 11 is a 1989 conviction for robbery with a deadly weapon; and State's Exhibit No. 12 is a 1990

conviction for robbery. The exhibits were renumbered 39 through 43. (V. 2dAdd. III, R.429-432). The State rested.

Upon the State's objection, the court ruled that it would not allow the testimony of Felix Ruiz of the Parole Commission that the potential length of sentence would be about eight hundred years. (V. 2dAdd. III, R.432-433). A proffer of Ruiz's testimony was taken. (V. 2dAdd. III, R.435-441).

After making an opening statement (V. 2dAdd. III, R.443-449), the defense played a videotape of school psychologist Nancy Pate, Defense Exhibit 12. (V. 2dAdd. III, R.449). A videotape of special education teacher George Olbon was also played to the jury. (V. 2dAdd. III, R.451-452)(see also Defendant's Exhibit 12 at V. Supp. V, R.738 and Defendant's Exhibit 16 at V. Supp. V, R.739).

Nancy Pate testified via videotape. (V. Supp. V, R.687-716). Ms. Pate has been a school psychologist since 1978 and was employed by the county schools in South Carolina. (V. Supp. V, R.689). She met Merck when he was seven years old at the beginning of his second grade; his first grade teacher had referred him for testing. (V. Supp. V, R.691). She visited his home and saw newspapers stapled to walls; she understood it was done for insulation. (V. Supp. V, R.693-694). Merck had drooping eyelids and his teeth needed attention. (V. Supp. V,

R.695). She tested him and concluded he needed a highly structured classroom setting. (V. Supp. V, R.696). He responded well to praise. (V. Supp. V, R.697). Much later in Florida after speaking to his sister Stacy, Pate heard there was physical abuse at home. (V. Supp. V, R.697). She evaluated Merck later that year. (V. Supp. V, R.698). It seem Merck failed to profit from school instruction and had an extremely low self-concept. (V. Supp. V, R.700). She recommended placement for students with emotional disabilities. (V. Supp. V, R.700-701). She tested Merck again in September of 1982 and she contacted Merck's teacher, Mr. Olbon. (V. Supp. V, R.701-702). Her testing in 1982 showed indications of mental confusion, withdrawing, impulsiveness. (V. Supp. V, R.705). She also gave him a personality test which indicated low self-reliance. (V. Supp. V, R.706). Some of his responses were reflective of a violent content. (V. Supp. V, R.707). On cross-examination, Pate conceded Merck basically had an average level of intelligence. (V. Supp. V, R.710). She had made a notation that he often talks of doing violence. (V. Supp. V, R.713). She did not have a degree in psychology. (V. Supp. V, R.714).

Special education teacher George Olbon testified he met Merck when the latter was a fourth grade student about ten or

eleven years old. (V. Supp. V, R.721). Merck was better prepared after he had gone to the Collins Home for Children. (V. Supp. V, R.722). Merck made good progress with Olbon; Merck's attitude with him was good and he got along most of the time with other students. Sometimes children made fun of his eye condition. His self-esteem improved. The structure helped. (V. Supp. V, R.724). He was headed for the mainstream at the end of the school year, but then he did not return. (V. Supp. V, R.725).[2]

Appellant's sister Stacy France testified that when her mother was pregnant with Appellant she tried to hide it because Stacy's future step-father was in Vietnam and she didn't want him to know she was pregnant before he got home; he figured out it was not his child. The mother tried to abort Appellant and after he was born blamed him for losing Hubert. The mother was mentally and physically abusive to Appellant. (V. 2dAdd. III, R.454-455). The defense introduced a number of photographs. (V. 2dAdd. III, R.456-459). Stacy France was put in a boarding school for two or three years beginning in about her fourth grade. (V. 2dAdd. III, R.459). She went back from time to time

[2] While the court reporter in preparing the supplemental record of the videotape has transcribed the testimony of witnesses Pate and Olbon, the court reporter has also included that of Jason Louis Eller. The undersigned counsel has been advised that Mr. Eller's videotaped testimony was not introduced and submitted as evidence to the jury.

for holidays and summers and the mother's treatment of Appellant continued. (V. 2dAdd. III, R.460). The witness has kept in touch with him while he's been in prison, and he is positive and encouraging as a counselor. (V. 2dAdd. III, R.460). She testified that her mother took turpentine and rubbed it on her stomach in an effort to abort Appellant. (V. 2dAdd. III, R.461). The witness acknowledged that her mother had also beaten her, that she was able to turn her life around from being in this impoverished condition – she works at a community college now and has in the past been a paralegal and worked for a law firm – and she has children of her own and has let her mother baby-sit the children while she worked in the daytime. (V. 2dAdd. III, R.463-465). The defense introduced Merck's birth certificate listing the date of birth as January 9, 1972. (V. 2dAdd. III, R.471-472).

Ann Rackley, co-founder of the Collins Children's Home, testified that Appellant and his family were referred to her by the school system, school psychologist, teachers and principal. (V. 2dAdd. III, R.474). She testified that Appellant came from a very troubled, dysfunctional home; the mother lacked parenting skills. Appellant came to her before he turned eleven years old; his high school teacher was George Olbon. Appellant thrived well in the structured environment. (V. 2dAdd. III,

R.476-477). However, when the summer started Appellant's mother took him home to live with her. (V. 2dAdd. III, R.482-483).

Linda Snyder, Appellant's foster mother in 1984 in North Carolina, testified that Merck did very well with her – did not get into trouble, or misbehave, he made friends easily and did well in school. (V. 2dAdd. III, R.493). She noticed a pattern that Appellant's mother expected him to express her hostility to society. (V. 2dAdd. III, R.494). When Appellant had home visits when he returned he would be disturbed. He had not been in a loving environment. (V. 2dAdd. III, R.495). Merck stayed in her home only four months. (V. 2dAdd. III, R.495). They became close friends during his incarceration. (V. 2dAdd. III, R.497).

Tara Wilkinson met Appellant in 1998 when she was living in Texas; her boyfriend was visiting another inmate and she came along as company and support. She and Merck have now been pen pals for five and one-half years. (V. 2dAdd. III, R.504-505). She has seen maturity, he is a creative and intelligent person. (V. 2dAdd. III, R.506). She drove all the way from Dallas, Texas to meet him in jail. (V. 2dAdd. III, R.508).

Nora McClure, an assistant public defender who represented Merck in 1991, testified that he has become more mature in the last thirteen years. (V. 2dAdd. III, R.514). He is a very

social person and he has been kept in a solitary cell. (V. 2dAdd. III, R.517).

The defense announced that they were excusing Ron Bell as a witness without his testimony and Dr. Maher would not be used. (V. 2dAdd. III, R.512). When the defense announced that Appellant Merck would be the last defense witness, the court conducted a colloquy wherein Appellant acknowledged that it had been explained to him that the defense team would not be calling Ron Bell as a witness and that no mental health expert would be called. (V. 2dAdd. III, R.522). The court noted that if such testimony were not presented the jury could not hear it. The State added that the defense was choosing not to call Bell, Dr. Maher and a pathologist Dr. Willy – but that a Spencer hearing was available subsequently. (V. 2dAdd. III, R.524). After a recess, Merck and his counsel agreed to proceed with Merck being the remaining last witness and that no one was forcing him to testify. (V. 2dAdd. III, R.526). Merck was aware that the prosecutor could cross-examine him. (V. 2dAdd. III, R.527).

Appellant testified that alcohol had been part of his life since he was a baby. A couple of years ago when his attorneys informed him that he had a relatively high IQ, he decided to develop himself through books. (V. 2dAdd. III, R.530-531). He has a better understanding of patterns that develop and can

understand what is going on with himself and other people. (V. 2dAdd. III, R.532). On cross-examination Merck acknowledged that aside from this case he had been convicted of a felony five or six times. (V. 2dAdd. III, R.536). Merck admitted that he had a tolerance for alcohol, that is he could function, walk, talk and operate machinery. His lifestyle changed in the last two years. (V. 2dAdd. III, R.537-538).

Following closing arguments the jury returned with a recommendation of death by a vote of nine to three. (V. 2dAdd. IV, R.606-609).

At the Spencer hearing on May 28, 2004, Merck and his counsel agreed that victim impact statements could be read. (V. 2dAdd. IV, R.618) and the victim's father Ron Cheek read statements from the victim's wife Carrie Newton, the victim's daughter Amanda Newton, and the victim's sister. (V. 2dAdd. IV, R.621-627).

The defense introduced as Exhibit 1 the prior testimony of toxicologist Ron Bell. (V. 2dAdd. IV, R.628-629). Bell performed the toxicological analysis in James Newton's autopsy; he had a .18 heart blood alcohol and .21 vitreous blood alcohol. (V. 2dSupp. IV, R.504, Defense Exhibit 1). He also reviewed the previous testimony of Neil Thomas and estimated Thomas had a blood alcohol concentration of .15 grams per deciliter and that

based on Thomas's testimony, Merck's would have been .21 grams per deciliter. Variable parameters would include the individual's absorption rate of alcohol, the elimination rate and distribution volume. Someone with this concentration would have the ability to drive an automobile and may not exhibit symptoms of intoxication, based on tolerance level. (V. 2dSupp. IV, R.504, Defense Exhibit 1).

Defense witness, Dr. Maher, a psychiatrist, testified that Appellant was exposed to alcohol as a very young child and that it led to a pattern of significant alcohol use and abuse during his teenage years and continuing during his late teenage years. (V. 2dAdd. IV, R.634). He also had a very disordered neglectful and abusive childhood. Merck had a history of impulsivity, hostility and violence toward others. (V. 2dAdd. IV, R.635). The time spent at Collins Children's Home was the highest level of stability and reasonable nurturing – a structured environment. (V. 2dAdd. IV, R.636). Dr. Maher opined that both statutory mental mitigators were present. (V. 2dAdd. IV, R.636-637). Merck's value system was that kindness or gentleness were weaknesses but Dr. Maher thought that Appellant has matured considerably. (V. 2dAdd. IV, R.638-641). On cross-examination Dr. Maher opined that he didn't think Merck now meets the behavioral diagnosis of antisocial personality, but he did not

believe that if Merck maintained a website on the internet blaming Neil Thomas for the homicide would constitute a legitimate display of remorse. (V. 2dAdd. IV, R.644). Merck would have equated his striking the victim first with earning the respect of people. (V. 2dAdd. IV, R.646). Dr. Maher acknowledged that Merck had recently obtained a full scale IQ of 128 on the WAIS-III and in 1992 had received a score of 110 which he characterized as normal to slightly above normal. (V. 2dAdd. IV, R.648). Merck had been placed in programs for emotionally challenged children. While alcohol is not a prerequisite for him to react to a situation in a violent way, Dr. Maher opined that Merck would not have killed Jim Newton absent alcohol. (V. 2dAdd. IV, R.649-650).

State witness Dr. Vincent Sloman, a psychologist, testified that he had reviewed various materials and conducted his own clinical interview of Merck and administered a Minnesota Multiphasic Personality Inventory. (V. 2dAdd. IV, R.657-660). Dr. Sloman opined that Appellant suffered from an antisocial personality disorder which is a basic pattern of disregard for other's rights and liberties usually beginning at or about the age of fifteen. (V. 2dAdd. IV, R.661). Characteristics include the failure to conform to the norms of society, aggressive, violent acts, impulsiveness, a reckless disregard for the safety

of self or others, lack of remorse or indifference toward the consequences of one's actions and usually substance abuse involving alcohol or drugs. (V. 2dAdd. IV, R.661-662). Dr. Sloman found no changes between 1993 and the present time; Merck has not developed a new value system or conscience during his incarceration. (V. 2dAdd. IV, R.661-662). Conscience is formulated in the early years up to five years of age and reinforced as one moves through childhood into adolescence and adulthood – not formulated or built in a setting of incarceration. Dr. Sloman took umbrage at Merck's described maturity level, noting that his confinement in isolation had not been a test of interaction with other individuals in or outside a prison setting. (V. 2dAdd. IV, R.663). The MMPIs in both 1992 and 2004 indicated antisocial personality disorder. His IQ level of 128 is in the superior range at the 92nd to 93rd percentile with only seven percent of the population ahead of him. (V. 2dAdd. IV, R.663-664). His impulsivity is part of or within the antisocial personality disorder. Dr. Sloman opined that neither statutory mental mitigator was present, nor was post-traumatic stress disorder. (V. 2dAdd. IV, R.665). Dr. Sloman did not believe that the purported alcohol use that night would rise to the level of causing him to be under the influence of extreme mental or emotional disturbance or cause his capacity

to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law to be substantially impaired. Dr. Sloman believed that Merck had had educational opportunities afforded to him that he did not avail himself upon in the school systems of North Carolina, including special programs. He had operations to assist him with the eye condition that caused problems with peers and there had been people who cared for him. (V. 2dAdd. IV, R.667-668). His ongoing conduct had been a series of choices he made in his life. The use of alcohol did not cause him to act out in the various ways he has done. Merck has a self-serving rationalization found in people who are narcissists – a part of the fabric of an antisocial personality or conduct disorder. (V. 2dAdd. IV, R.668-669).

Appellant filed a motion for new trial (V. II, R.261) and a hearing on the motion was held August 25, 2004 (V. III, R.570-600). The defense reiterated the complaint about exclusion of the Felix Ruiz testimony, argued that Merck previously had been "a son of a bitch" but had now changed. (V. III, R.582-583). The prosecutor responded that Simmons v. South Carolina, 512 U.S. 154 (1994) was inapposite as indicated by this Court in Franqui v. State, 699 So. 2d 1312 (Fla. 1997) (V. III, R.586) and elicited testimony from Pinellas County Corporal Christine

Nichowich to respond to paragraph 4 of the motion (V. III, R.587-595). She was one of the bailiffs assigned to courtroom security in this penalty phase proceeding. Merck had previously displayed himself as being aggressive throughout his time at the jail which included being cuffed and shackled at all times at the jail. Death Row inmates are a red dot classification at the jail. While at the courthouse Merck was not cuffed and shackled so they place one extra bailiff within the courtroom for extra security since he did not have the cuffs and shackles on. (V. III, R.588-589). There was a time at the jail that Merck had more freedom than his most recent stay – before he was put on red dot status – where he would have more contact with other inmates. But there were always problems in the cells, fights would break out and detention personnel would have to go in, break up fights and use force on him. Merck was also considered an escape risk because of his flexibility with cuffs. Pinellas County jail documents list the disciplinary problems and escape-type situations with Merck. (V. III, R.590). Nichowich testified that in a prior court appearance they were notified Merck had jumped up at one point and became belligerent towards the judge and the victim's family. To avoid a repetition, there were a total of four bailiffs present for the trial. She did not observe any drastic physical movements that would call any

more attention to the bailiffs. There was no sudden outburst that caused them any concern in front of the jury. (V. III, R.591). They did not have to place their hands on Merck and hold him in his seat or threaten him with any type of security devices. There were no ill words spoken. The only additional security was one more bailiff. (V. III, R.591-592).

During the penalty phase of trial she and other deputies were attired with a blazer jacket which conceals her taser and 9mm. gun. During the course of the trial the bailiffs did not have to produce any tasers, handcuffs or anything. Merck was not cuffed or shackled or in any way restrained in the presence of the jury. He was not restrained while being escorted from counsel table to the holding cell and he was not restrained during penalty phase while at counsel table. (V. III, R.593-595).

The trial court noted that the bailiffs' presence in the penalty phase proceedings were perfectly appropriate and that Merck was not restrained in the presence of the jury. The court added that its non-response to the jury question was dictated by Florida Supreme Court precedent and that the instant case was different from Simmons. The motion for new trial was denied. (V. III, R.597-599).

The court imposed a sentence of death on August 6, 2004, finding the HAC and prior violent felony convictions aggravators. (V. II, R.310-315).

Merck now appeals.

SUMMARY OF THE ARGUMENT

Issue I: The lower court did not abuse its discretion in excluding the testimony of Felix Ruiz of the Parole Commission as to speculation on potential length of the term of imprisonment on a life sentence. Such testimony was not required by Simmons v. South Carolina, 512 U.S. 154 (1994), as was subsequently explained in Ramdass v. Angelone, 530 U.S. 156 (2000).

Issue II: The lower court did not abuse its discretion in excluding evidence that Neil Thomas rather than Troy Merck was the real killer of Jim Newton since lingering or residual doubt does not constitute appropriate mitigation at the penalty phase. Duest v. State, 855 So. 2d 33, 40 (Fla. 2003); Darling v. State, 808 So. 2d 145, 162 (Fla. 2002); Way v. State, 760 So. 2d 903, 918 (Fla. 2000); Ibar v. State, 31 Fla. L. Weekly S 149 (Fla. March 9, 2006). Moreover, there is no basis either factually or legally for a judgment that Merck's involvement in the homicide was relatively minor since Merck acted alone in the premeditated killing of Mr. Newton. His companion Mr. Thomas was merely present as a bystander in the parking lot with other witnesses and had no culpability in the homicide.

Issue III: The prosecutor did not commit reversible error in his closing argument. Appellant has preserved for appellate

review only the singular objection to a remark that the defense would talk in mitigation about things they believed should warrant affording some mercy that was not given to the victim. Other challenged comments raised here were unpreserved by objection in the trial court and thus are procedurally barred. The remarks do not rise to the level of fundamental error, i.e. they are not so prejudicial that the recommendation of death could not have been made without reliance on them. Peterka v. State, 890 So. 2d 219, 243 (Fla. 2004). The trial court did not abuse its discretion. Moore v. State, 701 So. 2d 545, 551 (Fla. 1997).

Issue IV: The weight to be accorded an aggravating or mitigating circumstance at the penalty phase of a capital trial is within the trial court's discretion and will be affirmed if based on competent, substantial evidence and reversal of the trial court's determination is not warranted simply because a defendant draws a different conclusion. In the instant case the trial court addressed the proffered mitigation and explained its reasons for the findings and the weight afforded. Appellant may not predicate reversal merely because his expert offers a differing opinion than that given by the State's expert.

Issue V: The death sentence in the instant case is a proportionate penalty. The court found and gave great weight to

two extremely weighty aggravators – HAC and prior violent felony convictions (five prior armed robberies) and the mitigation is not extensive.

Issue VI: The death penalty statute is constitutional. Appellant's arguments predicated on Ring v. Arizona, 536 U.S. 584 (2002) have been rejected. See Hodges v. State, 885 So. 2d 338 (Fla. 2004); Blackwelder v. State, 851 So. 2d 650 (Fla. 2003); Porter v. Crosby, 840 So. 2d 981 (Fla. 2003); Floyd v. State, 913 So. 2d 564 (Fla. 2005). The instant case includes the aggravator of a prior violent felony conviction. See Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003); Lugo v. State, 845 So. 2d 74, 119 (Fla. 2003).

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE RELATING TO APPELLANT'S PRESUMPTIVE PAROLE DATE IN THE PENALTY PHASE.

A trial court's ruling excluding or admitting evidence is subject to an abuse of discretion standard of review. See Simmons v. State, 2006 Fla. LEXIS 813 (Fla. May 11, 2006) citing Johnson v. State, 438 So. 2d 774 (Fla. 1983) and McMullen v. State, 714 So. 2d 368 (Fla. 1998) (holding that trial judge did not abuse his discretion in disallowing Dr. Brigham's testimony). When presenting expert testimony a trial court has broad discretion concerning its admission and the range of subjects on which the expert can testify and absent a clear showing of error, the lower court's ruling will be upheld. Pagan v. State, 830 So. 2d 792 (Fla. 2002); Holland v. State, 773 So. 2d 1065 (Fla. 2000); Jones v. State, 748 So. 2d 1012 (Fla. 1999).

The defense announced below its desire to call Felix Ruiz from the Parole Commission in Tampa to testify about the potential length of a sentence of imprisonment. The prosecutor objected that it was wildly speculative and the court ruled it would not allow its presentation to the jury. The court indicated that it would permit a proffer of the testimony. The

defense responded that the prosecutor was exactly right that Ruiz's testimony was wildly speculative and the defense asserted it was relying on a dissenting opinion in Simmons v. South Carolina, 512 U.S. 154 (1994). The defense expressed concern that the prosecutor would argue the possibility of parole would occur in thirteen years (twenty-five minus twelve). The prosecutor responded that it intended to make no such argument – he would not argue any release date – but only say the choice is death or life sentence with twenty-five years without the possibility of parole (V. 2dAdd. III, R.432-435).

On Ruiz's proffer, the witness testified that part of his job is to render advisory opinions to the Parole Commission for capital life sentences where the crime occurred prior to 1994 and there is a possibility of parole. Reviewing the matrix, at the first initial interview they would establish a proposed parole release date. The salient factor score came up to eight points and Ruiz calculated the time would be 833 years. (V. 2dAdd. III, R.435-438). On cross-examination the witness indicated that the prisoner would have to serve twenty-five years and the witness could not answer whether there were individuals on parole after serving the minimum mandatory. Ruiz stated that he was going by the matrix which he didn't design. (V. 2dAdd. III, R.438-441).

At the hearing on the motion for new trial on August 25, 2004, the defense renewed its complaint on the exclusion of Ruiz's testimony and the State repeated that the testimony was speculative and the witness could not say he would never be released. (V. III, R.576-587). The court denied the motion for new trial. (V. III, R.599).

During its deliberations the jury submitted a question to the court whether life without parole for twenty-five years meant the time should count from this date forward or does time served count. The defense complained this was why they had tendered Ruiz as a witness and relied on Justice Anstead's dissent in Bates v. State, 750 So. 2d 6 (Fla. 1999). (V. 2dAdd. IV, R.601-602). The State and defense agreed the court should tell the jury to rely on the previous instructions and the prosecutor added that the State had not argued any kind of release in the future and Ruiz's testimony was speculative. (V. 2dAdd. IV, R.603-604). The court informed the jury:

> You have asked a question that I cannot answer directly. My response must be that in reaching your recommendation you are to rely only upon the evidence and the testimony that has been presented, the arguments of the lawyers, and the instructions that I have now given you each a copy of. Further response to your question, I cannot make.
>
> (V. 2dAdd. IV, R.603-604).

The lower court had previously instructed the jury "If you find the aggravating circumstances do not justify the imposition of the death penalty, your advisory opinion should be one of life imprisonment without the possibility of parole for 25 years." (V. 2dAdd. III, R.589).[3]

Appellant contends that the defense should have been allowed to present the speculative testimony of Felix Ruiz that under the matrix Merck might not have been subject to release for eight hundred years, that the State provided "limited" evidence of Merck's future dangerousness because it argued the unquestionably valid and applicable aggravating factors of multiple prior violent felony convictions and that the instant homicide satisfied the HAC factor. Appellant's argument is totally without merit. The prosecutor did not urge future dangerousness; it is not a valid statutory aggravator unlike in some other states such as South Carolina. Appellee submits that a prosecutor in a capital case is an advocate and if he is not permitted to argue that the evidence supports the applicability of valid aggravating circumstances authorized by the legislature and that Merck's crime merits the imposition of a death

[3] The record reflects that the jury initially retired for deliberations at 2:55 p.m. (V. 2dAdd. III, R.599), returned to the courtroom with a question at 3:12 p.m. (V. 2dAdd. IV, R.604), retired to deliberate again at 3:15 p.m. following the trial court's response (V. 2dAdd. IV, R.605) and returned with its recommendation at 5:10 p.m. (V. 2dAdd. IV, R.606).

sentence, we seek guidance as to what a prosecutor may argue in a penalty procedure – since nonstatutory factors in aggravation are impermissible. For the reasons explained below, relief must be denied.

To the extent that Appellant may be complaining about the trial court's response to the jury question about credit for time served by referring to the previously-given instructions, no claim of error can be sustained. Initially, Appellee would note that such an "error" has not been preserved for appellate review since the court followed the recommendation advanced by both prosecutor and defense counsel – that the jury should rely on the prior instruction. (V. 2dAdd. IV, R.603-605). Even if preserved, the caselaw is abundantly clear that the trial court did not abuse its discretion in its response to the jury inquiry. See Downs v. State, 572 So. 2d 895, 900-901 (Fla. 1990) (trial court did not abuse discretion in answering question that defendant would receive credit for time served); Waterhouse v. State, 596 So. 2d 1008, 1015 (Fla. 1992) (finding no abuse of discretion in refusing to answer jury's propounded question whether defendant would be eligible for parole if sentenced to life imprisonment because jury instructions adequately informed the jury that a life sentence carried a minimum mandatory sentence of twenty-five years); Whitfield v.

State, 706 So. 2d 1, 5 (Fla. 1997) (trial judge did not abuse discretion by rereading instruction and declining to give affirmative response to jury inquiry whether under no parole defendant would never be allowed back into society again since instruction adequately informed jury that life sentence carried minimum mandatory sentence of twenty-five years and jury was told punishment was either death or life imprisonment without the possibility of parole); Bates v. State, 750 So. 2d 6, 10 (Fla. 1999) (trial court's response that jury refer to the given instructions was appropriate to inquiry whether jury was limited to two alternatives); Booker v. State, 773 So. 2d 1079, 1087-1088 (Fla. 2000) (rejecting challenge to trial court's refusing to instruct jury regarding defendant's other consecutive sentences and citing Bates, *supra*, that: "These other sentences are not relevant mitigation on the issue of whether appellant will actually remain in prison for the length of those sentences. The length of actual prison time is affected by many factors other than the length of the sentence imposed by the sentencing court. The introduction of this evidence would open the door to conjecture and speculation as to how much time a prisoner serves of a sentence and distract jurors from the relevant issue of what is the appropriate sentence for the murder conviction."); Green v. State, 907 So. 2d 489, 496-499

(Fla. 2005) (trial judge did not abuse its discretion by answering jury inquiry that defendant would be entitled to credit for all jail time served against a life sentence but that there was no guarantee the defendant would be granted parole at or after 25 years and noting that trial judge would not have abused his discretion if he had simply reread the initial instructions to the jury).[4] Since abuse of discretion has been described as "when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court" Green, *supra*, at 496, and since this Court has repeatedly approved trial court's responses to rely on the instructions previously given, there can be no merit to a claim that the judge committed error here.

The contention that exclusion of the Ruiz speculative testimony was error is also meritless. Appellant's reliance on Simmons v. South Carolina, 512 U.S. 154 (1994) is unavailing. As this Court explained in Franqui v. State, 699 So. 2d 1312, 1326 n.10 (Fla. 1997) "Simmons is inapposite here since this case does not involve any direct effort to impose the death penalty based on the defendant's future dangerousness."

[4] Even dissenting Justice Anstead in Green acknowledged that "it might have been the wiser choice for the trial court not to speculate at all, but to leave the jurors where they were with the instructions previously given." Id. at 505.

Additionally, the Supreme Court subsequent to Simmons has taught that Simmons is not to be extended beyond its facts. In Ramdass v. Angelone, 530 U.S. 156, 169-170 (2000) the Court articulated:

> Ramdass contends the Virginia Supreme Court nevertheless was bound to extend Simmons to cover his circumstances. He urges us to ignore the legal rules dictating his parole eligibility under state law in favor of what he calls a functional approach, under which, it seems, a court evaluates whether it looks like the defendant will turn out to be parole ineligible. We do not agree that the extension of Simmons is either necessary or workable; and we are confident in saying that the Virginia Supreme Court was not unreasonable in refusing the requested extension.
>
> Simmons applies only to instances where, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison. Petitioner's proposed rule would require courts to evaluate the probability of future events in cases where a three-strikes law is the issue. Among other matters, a court will have to consider whether a trial court in an unrelated proceeding will grant postverdict relief, whether a conviction will be reversed on appeal, or whether the defendant will be prosecuted for fully investigated yet uncharged crimes. If the inquiry is to include whether a defendant will, at some point, be released from prison, even the age or health of a prisoner facing a long period of incarceration would seem relevant. The possibilities are many, the certainties few. If the Simmons rule is extended beyond when a defendant is, as a matter of state law, parole ineligible at the time of his trial, the State might well conclude that the jury would be distracted from the other vital issues in the case.

> The States are entitled to some latitude in this field, for the admissibility of evidence at capital sentencing was, and remains, an issue left to the States, subject of course to federal requirements, especially, as relevant here, those related to the admission of mitigating evidence. Id. at 168, 129 L.Ed.2d 133, 114 S.Ct. 2187; California v. Ramos, 463 U.S. 992, 77 L.Ed.2d 1171, 103 S.Ct. 3446 (1983).
>
> By eliminating Simmons' well-understood rule, petitioner's approach would give rise to litigation on a peripheral point. Parole eligibility may be unrelated to the circumstances of the crime the jury is considering or the character of the defendant, except in an indirect way. Evidence of potential parole ineligibility is of uncertain materiality, as it can be overcome if a jury concludes that even if the defendant might not be paroled, he may escape to murder again, see Garner v. Jones, 529 U.S. 244, 120 S.Ct. 1362, 146 L.Ed.2d 236 (2000); he may be pardoned; he may benefit from a change in parole laws; some other change in the law might operate to invalidate a conviction once thought beyond review, see Bousley v. United States, 523 U.S. 614, 140 L.Ed.2d 828, 118 S.Ct. 1604 (1998); or he may be no less a risk to society in prison, see United States v. Battle, 173 F.3d 1343 (CA11 1999), cert. denied, 529 U.S. 1022, 120 S.Ct. 1428, 146 L.Ed.2d 318 (2000). The Virginia Supreme Court had good reason not to extend Simmons beyond the circumstances of that case, which included conclusive proof of parole ineligibility under state law at the time of sentencing.

No lengthy response is mandated to Appellant's meritless contention that the prosecutor's closing argument to the jury impermissibly interjected future dangerousness as an aggravator.

Rather, the prosecutor discussed the evidence that demonstrated the unprovoked assault with a hidden knife resulted in a homicide that was especially heinous, atrocious or cruel – one of the recognized statutorily-authorized factors warranting the death penalty. (V. 2dAdd. III, R.557-558, 561-562, 566-570). The prosecutor also argued as he should the presence of the prior violent felony conviction aggravator as proven by Merck's five armed robberies. (V. 2dAdd. III, R.559, 565-566). The prosecutor did not argue that Merck's continued existence in prison would represent a future danger to anyone or threaten anyone that he would be released early. As stated in Bates v. State, 750 So. 2d 6, 9-10 (Fla. 1999):

> Moreover, after reviewing the record, we do not agree that the State's cross-examination or argument raised the specter of appellant's future dangerousness.

Appellant's assertion that the prosecutor improperly interjected future dangerousness in his cross-examination is more than meritless – it is frivolous which may explain the absence of any objection entered in the trial court. The now-complained of cross-examination of such witnesses as Anne Rackley, Linda Snyder, Tara Wilkinson, Nora McClure and Merck obviously pertains to the witnesses' knowledge and the context of their meetings with the Appellant, i.e. that their perceptions were limited in seeing Merck in a controlled

environment rather than while at liberty. The cross-examination of Anne Rackley (V. 2dAdd. III, R.490) established that she had not had face-to-face contact with Merck since he left the Children's Home except for brief visits while he was incarcerated – not when he has not been confined. The cross-examination of foster mother Linda Snyder (V. 2dAdd. III, R.500-501) established that she had visited with him for about a year while he was in Union Correctional Institution and through letters and with others who have communicated with him while he has been in jail. She was not aware of the facts of Merck stabbing the victim saying happy birthday. (V. 2dAdd. III, R.502). Tara Wilkinson admitted driving from Dallas, Texas to meet the defendant in jail; she had never met him prior to visiting him while he was incarcerated (V. 2dAdd. III, R.508). Assistant Public Defender Nora McClure who had represented Merck in an earlier trial also acknowledged having seen him in the very structured environment of jail, not outside in a social or personal context. (V. 2dAdd. III, R.516-518). Merck acknowledged that he had been confined in a solitary cell the entire time of his lockup. (V. 2dAdd. III, R.538). None of this testimony relates to future dangerousness.

Appellant's argument on this point does not warrant reversal.

ISSUE II

WHETHER THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE RELEVANT TO THE NATURE AND CIRCUMSTANCE OF THE OFFENSE.

The admissibility of evidence is within the trial court's discretion and a reviewing court will not disturb a trial court's ruling unless an abuse of discretion is shown. King v. State, 514 So. 2d 354, 357 (Fla. 1987); Bogle v. State, 655 So. 2d 1103, 1107 (Fla. 1995); Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000).

Appellant filed pre-trial motion in limine number 1, seeking admissibility of evidence that Appellant was not the individual who stabbed James Newton to death, the Appellant's participation was minor, that Neil Thomas was not prosecuted and has received preferential treatment. (V. II, R.212). At a hearing on the motion on March 1, 2004, defense counsel contended that there was contradictory evidence as to the individual who caused the death of Mr. Newton which should be allowed before the jury. (V. Add., R.618). The defense argued that Neil Thomas was the older companion and provided alcohol to Merck on the night Newton died. (V. Add., R.619). Counsel argued that Thomas had not been prosecuted as an accomplice in this matter and that Thomas had received preferential treatment (that after giving favorable testimony probation was dismissed).

(V. Add., R.620). Counsel thought the jury should know about this and suggested Merck's participation was minor. (V. Add., R.624).

The prosecutor responded that Judge Khouzam had previously heard this motion in July 1997 and had denied it, that the case had been appealed to the Florida Supreme Court and this Court had not overturned any of the motions in limine, adding:

> I think that what Defense Counsel is trying to do here is to reiterate the guilt phase in an effort to somehow convince some members of the jury that possibly Mr. Merck is not the person responsible for the crime. And the Supreme Court settled that when they let the convictions in.
>
> So I think the Court should follow what has previously been done before and what has worked on this case.
>
> (V. Add., R.625).

The defense answered that in the prior appeal this Court did not expressly uphold Judge Khouzam's ruling, that ". . . they felt that they didn't need to get to it since it was just a re—sentencing issue." (V. Add., R.626).

The trial court denied the motion, opining that Judge Khouzam's ruling had not been overruled and the matters were law of the case. (V. Add., R.626). The defense inquired whether the court's ruling foreclosed Merck from arguing the statutory mitigator that Merck's role in this crime was relatively minor. (V. Add., R.628). The court agreed that since Merck was the

only one charged and convicted Merck could not argue that his participation was minor. (V. Add., R.630). Defense counsel asserted that Merck had informed him that the statutory mitigator "was never taken up the Supreme Court;" that it "was never brought up" and "[h]e never got to argue or he's never had the opportunity to argue the statutory mitigation that his participation was relatively minor." (V. Add., R.632-633). The court repeated that it would not allow Merck to argue his participation was minor:

> Because to allow you to do so, in my opinion, would be allowing the Defense to indirectly relitigate the trial phase of this trial, which is not within the opinion of the Supreme Court and will not be the purview of the recommending jury.
>
> (V. Add., R.632-633).

At penalty phase defense counsel cross-examined Neil Thomas and elicited that he had purchased alcohol for Appellant at the City Lights (V. 2dAdd. II, R.320-321), that he had called Newton a pussy prior to Merck's killing the victim (V. 2dAdd. II, R.323), that Thomas had not been charged with anything in this case, that Thomas did not know Merck had stabbed the victim until they were driving away from the scene (V. 2dAdd. II, R.330-331), that he had not received preferential treatment from the State in return for his testimony, that he had turned himself in on an outstanding warrant in 1997 and the bond was

withdrawn at the request of the prosecutor (V. 2dAdd. II, R.335-336). On redirect examination Thomas testified that when he phoned prosecutor Daniels in 1997 and indicated that he was wanted on a warrant for violation of probation Daniels told him to turn himself in, which he did. After released from jail on bond, Thomas made his court appearances. (V. 2dAdd. II, R.341).

It would appear that both defense counsel and the trial court were mistaken below. The defense was mistaken in asserting Merck's insistence that the issue had not been taken up to this Court, since it is clear that in Issue V of his appeal in Case No. 91,581 Appellant raised the claim that "the trial court erred in excluding evidence tending to show that Neil Thomas was the person who stabbed the victim, as the evidence pertaining to penalty and the evidence pertaining to guilt are inextricably intertwined."

The trial court was mistaken in concluding that the law of the case doctrine precluded litigation of whether Thomas was the killer since this Court did not decide the issue raised in the prior appeal. See State v. McBride, 848 So. 2d 287, 289-290 (Fla. 2003) ("Law of the case principles do not apply unless the issues are decided *on appeal*.").

However, a trial court's ruling will be affirmed on appeal if it is correct for any reason, pursuant to the tipsy coachman

rule. See Dade County School Board v. Radio Station WQBA, 731 So. 2d 638, 644-645 (Fla. 1999); Robertson v. State, 829 So. 2d 901, 906 (Fla. 2002).

Both this Court and the United States Supreme Court have repeatedly acknowledged that lingering or residual doubt does not constitute appropriate mitigation at the penalty phase. See, e.g., Reynolds v. State, 2006 Fla. LEXIS 888 (Fla. May 18, 2006) ("Reynolds asserts that the trial court's refusal to consider residual doubt when sentencing Reynolds rendered his sentences of death unconstitutional. Reynolds' claim has been repeatedly rejected by this Court. [citations omitted] Based on the above, we conclude that the trial court appropriately excluded evidence offered to establish residual or lingering doubt from consideration when making its sentencing determination."); England v. State, 2006 Fla. LEXIS 942 (Fla. May 25, 2006)("Because England had already been found guilty during the guilt phase of the trial, he had no constitutional right to have evidence addressing his guilt heard during the penalty phase. The trial judge did not abuse his discretion in limiting this testimony."); Duest v. State, 855 So. 2d 33, 40 (Fla. 2003) (trial court correctly applied law in determining that alibi evidence was inadmissible; it was not relevant to rebut the robbery/pecuniary gain aggravator); Darling v. State,

808 So. 2d 145, 162 (Fla. 2002) ("We have repeatedly observed that residual doubt is not an appropriate mitigating circumstance."); Way v. State, 760 So. 2d 903, 918 (Fla. 2000) (approving trial court's ruling that defendant could not question detective concerning whether investigation had been properly conducted because issue "had already been decided adversely to Way when he was convicted of arson"); Sims v. State, 681 So. 2d 1112, 1117 (Fla. 1996); Preston v. State, 607 So. 2d 404, 411 (Fla. 1992); Bogle v. State, 655 So. 2d 1103, 1107 (Fla. 1995); Ibar v. State, 31 Fla. L. Weekly S 149 (Fla. March 9, 2006) ("It is improper for the court to consider lingering doubt or residual doubt as a mitigating factor. [citations omitted]. Moreover, it is improper for a defendant to relitigate the determination of his guilt by presenting evidence of or arguing lingering doubt. [citation omitted]. This principle has not changed since Ring, and there is nothing in the Ring decision that would require a different result."); Franklin v. Lynaugh, 487 U.S. 164, 173-174 (1988) (rejecting argument that Eighth Amendment requires capital sentencing jury to be instructed that it can consider lingering doubt evidence in mitigation); Oregon v. Guzek, 546 U.S. ___, 126 S.Ct. 1226, 1231-1232 (2006).

Obviously, a defendant cannot complain that his death sentence is disproportionate to a co-perpetrator where the latter is ineligible for the death penalty. See, e.g., Larzelere v. State, 676 So. 2d 394, 406 (Fla. 1996) (codefendant's acquittal exonerated him from culpability as a matter of law and thus irrelevant to a proportionality review of the defendant's death sentence); Henyard v. State, 689 So. 2d 239, 254 (Fla. 1996) (codefendant's age of fourteen rendered him ineligible for death sentence as a matter of law and his less severe sentence was irrelevant to Henyard's proportionality review); Mordenti v. State, 630 So. 2d 1080, 1085 (Fla. 1994) (contact person received immunity whereas hit man who carried out contract murder properly received death); Melendez v. State, 612 So. 2d 1366, 1368-1369 (Fla. 1992) (arguments relating to proportionality and disparate treatment are not appropriate where the prosecutor has not charged the alleged accomplice with a capital offense). Here, not only has Neil Thomas not been charged with a capital offense, the evidence in the record shows that he has committed no crime when Merck stabbed Newton in the parking lot. There is no basis factually or legally to support an assertion that Thomas is more culpable than Merck. Appellant declares that further evidence about the extent of Thomas' participation in the crime should have been admitted. But aside

from the brief comments made by defense counsel at the motion hearing before the penalty phase and the testimony cited herein, the record contains no proffer of the testimony intended to demonstrate that Merck was not the killer or that his involvement was relatively minor. See Lucas v. State, 568 So. 2d 18, 22 (Fla. 1990) ("A proffer is necessary to preserve a claim such as this because an appellate court will not otherwise speculate about the admissibility of such evidence."); Finney v. State, 660 So. 2d 674, 684 (Fla. 1995); Blackwood v. State, 777 So. 2d 399, 411 (Fla. 2000); Keen v. State, 775 So. 2d 263, 282 (Fla. 2000). Reversible error cannot be predicated on mere conjecture. Spencer v. State, 842 So. 2d 52, 63 (Fla. 2003); Jones v. State, 923 So. 2d 486 (Fla. 2006). In any event, the testimony cited here which the jury heard does not indicate that Merck was not the killer or that his participation was relatively minor under F.S. 921.141(6)(b).

In Hitchcock v. State, 578 So. 2d 685 (Fla. 1990) this Court distinguished Downs v. State, 572 So. 2d 895 (Fla. 1990). The Court held that the trial court did not err in excluding testimony from the defendant's sisters to create lingering doubt about his having committed the murder. Id. at 690. In a footnote the Court explained that the testimony in Downs was admissible at his resentencing because the disparity between his

actions and those of his accomplices and their resultant sentences might mitigate Downs' sentence. "Hitchcock, however, had no accomplices." 578 So. 2d at 690, n.7. In the instant case Merck too had no accomplices. While Neil Thomas was his companion at the City Lights he did nothing to warrant criminal liability during the homicide. He did not aid or assist Merck during the murder. Accordingly, the trial court ruled correctly in denying Appellant's request to relitigate Merck's guilt under the guise of showing mitigation.[5]

Merck's attempt to blame Neil Thomas for the murder of Jim Newton which he committed alone and unassisted gives the lie to his asserted new-found maturity urged on his behalf by former lawyers and pen pals. See Issue V. But perhaps his growth and maturity do not extend to such inconvenient matters, when there is a perceived benefit and hope that reviewing courts will forget his actions and remember only his contradictory assertions that he is a changed man.[6]

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[5] In light of the fact that this Court has repeatedly ruled that lingering doubt is not available and the defense repeatedly argues that relitigation of guilt will demonstrate the accused's involvement was relatively minor as a mitigator, perhaps it is best time to repudiate the language used in Downs since it is more conducive to confusion than to clarity.

[6] While unnecessary in this appeal, should the Court now decide that it is appropriate to allow relitigation of the previously-decided issue that Merck was the person who murdered Jim Newton, the prosecution would reintroduce the evidence already present in the records before this Court. Appellee would refer the

Appellant's claim is without merit and relief must be denied.

Court to Merck's admission that he was wearing the Exhibit 21 pants on which FBI expert Mertens testified that the blood matched the DNA profile of Jim Newton. (FSC Case No. 83,063, V. 23, T.576-579; V. 25, T.857). Appellee would also refer to the testimony of prior defense witness Roberta Connor that Merck announced to her that "I killed the mother fucker" and that he had cut a main artery (FSC Case No. 83,063, V. 26, T.930-932) and prior defense witness Rebecca Shuler testified Merck said he didn't give the victim a chance to hit him and that if she told anyone of the incident he'd take the closest thing to her (FSC Case No. 83,063, V. 26, T.977-978). Previous rebuttal witness Sandra Ledford testified Appellant admitted stabbing the victim and would take the closest thing to her if she told on him. (FSC Case No. 83,063, V. 26, T.1046).

ISSUE III

WHETHER PROSECUTORIAL REMARKS IN CLOSING ARGUMENT DENIED APPELLANT A FAIR PENALTY PHASE HEARING AND CONSTITUTED REVERSIBLE ERROR.

Trial courts have broad discretion in procedural conduct of trials. Moore v. State, 701 So. 2d 545, 549 (Fla. 1997). And it is within trial judge's discretion to control the comments made to a jury and the appellate court will not interfere unless an abuse of discretion is shown. Moore, at 551; Occhicone v. State, 570 So. 2d 902, 904 (Fla. 1990); Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982); Smith v. State, 866 So. 2d 51, 64 (Fla. 2004); Conde v. State, 860 So. 2d 930, 950 (Fla. 2003); Franqui v. State, 804 So. 2d 1185, 1195 (Fla. 2001).

Appellant contends that reversible error occurred in the prosecutor's closing argument. Appellee disagrees. The record reflects that after giving a preliminary statement in the closing argument that the homicide was heinous, atrocious or cruel and that there were convictions of five robberies involving the use or threat of violence, the prosecutor stated:

> The Defense will be talking to you about what we call mitigation. Things about his background they believe should warrant you affording him some mercy that he never afforded Mr. Newton.
>
> MR. SCHWARTZBERG: Objection, Your Honor. I would ask that be stricken from the record.

> THE COURT: Overruled. Continue.
> (V. 2dAdd. III, R.559).

This was the only objection interposed throughout the prosecutor's entire argument. Although Appellant filed a motion for new trial, he did not assert as a basis therefor that there had been improper closing argument. (V. II, R.261).

Now, and for the first time, Merck voices a complaint with the assertion that Appellant cared more for the condition of his shirt (which he took off before attacking Newton with a concealed knife) than for what happened to the victim. (V. 2dAdd. III, R.559, 570). Appellant also now objects, again for the first time, to the initial remark:

> The Defendant was described to you today as a kind man, a man with positive values. One has to wonder on October 11, 1991, how kind Jim Newton felt when the Defendant jabbed this into his throat and twisted it. Twisted it until blood squirted out of his neck, as the Defendant described it, like a squirt gun.
> (V. 2dAdd. III, R.556-557).

Appellant complains for the first time of the remark:

> Mr. Watts, when he made his opening remarks to you, said this is only for the most aggravated murders. I'm sure that —- I know that there are probably more painful and probably worse murders, but isn't this among the worst ways to die that anyone can imagine? This is one of the worst most aggravated murders.
> (emphasis supplied).
> (V. 2dAdd. III, R.568).

Merck complains for the first time in this Court about the prosecutor's assertion:

> First of all, he has the wounds to his back, then he gets them to the chest, and then he is jabbed in the throat and it is twisted. How did that feel to have a knife penetrate his skull? I don't care how much alcohol he has had. Then he just started slashing at his face. The doctor told you about the nerve endings.
>
> (emphasis supplied).
> (V. 2dAdd. III, R.569).

Appellant objects, for the first time in this appeal, to the argument:

> Now. That's one minute. How many thoughts went through your mind in that one minute? Did he live two minutes? Did he live three minutes? Four minutes? Enough time for his life to go, roll his eyes, to think about the people that he would never see again. Was that an unnecessarily torturous way for the man to lose his life that night for no good reason?
>
> (V. 2dAdd. III, R.570).

Appellant complains about the unobjected to comment:

> It is interesting to hear them all laying it on real thick of how bad the mother is, but he cannot even tell you here on the stand that he didn't love his mother. He got "mom" tattooed on his arm. He was visiting her in Sylva, South Carolina. He seen her every day in the house. This monster that they want you to blame for everything that happened here. She didn't do it. There are other brothers and sisters. Stacy France, you heard from. Did they turn out like him? She has gone on to be a paralegal, and I forget what other job she is doing right now. Seems to be having a normal life,

> raising a family. As monstrous as she wants to describe the mother, she would still leave her own children in her care while he [sic] was working.
>
> (V. 2dAdd. III, R.563).

Merck also complains for the first time in this forum for the comments:

> He is responsible for his actions. He used the alcohol, he chose to, and he did what he did. Alcohol in this case, ladies and gentlemen, is not mitigation, it is just an excuse.
>
> (V. 2dAdd. III, R.562).

and

> His eyes was [sic] a big problem and the kids made fun of him. He was able to have operations to make them better. I submit to you, ladies and gentlemen, that the way that his life has gone, it was by his own choice. The fact that he was not born with a silver spoon in his mouth, those factors cannot diminish what he did to Jim Newton, or any of these other aspects.
>
> (V. 2dAdd. III, R.565).

Appellant complains – only here not below – that the State portrayed Merck as a conscienceless person who attacked the victim without provocation and was unnecessarily torturous. Since that was what the evidence showed, the absence of objection is understandable.

Merck complains here, not below, that the State noted Merck had committed other crimes of violence to another person shortly before the instant crime. Since the prior violent felony

conviction aggravator is one specifically authorized by the legislature for placing in the life-death calculus, and since it is to be expected that prosecutors will argue the applicability of valid aggravators, this complaint is easily shown to be not only barred but meritless. Similarly, the Appellant's complaint initially here attacking the prosecutor's contention that the "changed man" testimony of defense witnesses as not being credible is unavailing. The prosecutor's argument was not improper; it merely argued the weight of the evidence.[7]

Attorneys are allowed wide latitude in closing argument. Ford v. State, 802 So. 2d 1121 (Fla. 2001); Thomas v. State, 748 So. 2d 970 (Fla. 1999). Logical inferences may be drawn and counsel is allowed to advance all legitimate arguments. Franqui v. State, 804 So. 2d 1185 (Fla. 2001). Merely arguing a

[7] Although not pertinent to the issue of alleged improper prosecutorial argument, Merck also alludes to the cross-examination of witnesses like Linda Snyder, Tara Wilkinson, Nora McClure and Merck (V. 2dAdd. III, R.490, 500-501, 566-517, 538, 501). It is not clear to Appellee what the complaint is, if there is one. If Merck is suggesting that such cross-examination impermissibly interjected a non-statutory aggravator of future dangerousness, it is plainly frivolous and would explain the absence of any objection by trial counsel. Obviously, the cross-examination was aimed at revealing the absence of any basis in the witnesses' knowledge of Merck's "maturity" in any other context than an incarcerated setting, i.e., that they had not seen him as an adult free in society, as well as Merck's acknowledgement that his lifestyle change had occurred while in solitary confinement. If there is an attempt to urge future dangerousness there, it has escaped the awareness of everyone else involved in the case.

conclusion that can be drawn from evidence is permissible fair comment in closing arguments. Griffin v. State, 866 So. 2d 1 (Fla. 2003); Conahan v. State, 844 So. 2d 629 (Fla. 2003).

Appellant also points to the unobjected to argument that:

> They want you to believe that this man that you heard testify today is the new Troy. This is not the Troy that taught Jim Newton how to bleed. He is reading books. He is not the only person in the jail that is of above average intelligence, he is not the first person to read a book in jail. He is reading Steinbeck now, books on science, great literature. It is interesting that his lawyer with 20 years of experience thought we have this proceeding coming up here, while we are waiting. Why don't you read these books. I'm sure that you are bored in your solitary cell there. I guess we can go and tell a jury that you are reading these books. Could I be so cynical to say that that was all by design? Maybe so. It is a strategy, is what I'm saying.
>
> Do you believe that he is a changed man from that night in a parking lot because of this lawyer who has invested a lot of time over the last 12 years or so, grew to appreciate him, talking to him in the very alcohol free safe environment?
>
> Are you confident that he is a changed man because this woman who for some reason likes to spend her free time talking to strange men in prisons comes and tells you what a great guy he is and how she thinks that he has changed? From her point of view he has change [sic] from what?
>
> Since 1991, how many books could Jim Newton have read? How many Penthouse [sic] could he have read?
>
> (V. 2dAdd. III, R.572-573).

Merck now also objects for the first time to the prosecutor's conclusion:

> They have shown you that he, like everyone else, was a child once. He grew and he made decisions, he had his lifestyle, and he is responsible for those decisions. I submit to you that reading a few books and having once been a child cannot outweigh the heinous, atrocious, and cruel nature of this offense that has been proven beyond a reasonable doubt. The fact that he has had other crimes involving violence or threats of violence to another person shortly before the crime. What he did here, there should be no mercy for a merciless crime, ladies and gentlemen. On behalf of the People of State of Florida and Jim Newton, I ask you all to recommend that he die.
>
> (V. 2dAdd. III, R.573).

(a) Appellant has preserved for appellate review by objection only the remark at V. 2dAdd. III, R.559. Appellee submits that it is not error or harmless error at most. Appellee would submit that in this comment the prosecutor was not urging the jury that they could not or should not consider mercy, nor was the prosecutor insisting his belief in the inapplicability of mercy. Rather, he was commenting that the defense would be urging as mitigation things about Merck's background that the defense believes should warrant their affording mercy that Appellant did not afford to Mr. Newton. It was a matter of fact assertion by the prosecutor not a legal analysis. See Lugo v. State, 845 So. 2d 74, 108 (Fla. 2003)

("In context, where the prosecutor is asserting that the horribleness of a defendant's conduct deserved the death penalty as a factual comment, not a legal analysis"); Miller v. State, 926 So. 2d 1243 (Fla. 2006) ("However, in the instant case, the prosecutor did not ask the jury to give the same mercy and sympathy that the defendant showed the victim. Moreover, the prosecutor did not make a 'golden rule' argument by asking the jurors to place themselves in the victim's position of terror or imagine how they would feel if the victim were a relative. [citation omitted] Instead, the prosecutor argued, '[Miller] didn't care that [the victim] had family and friends that loved and cared for him.'"); Conahan v. State, 844 So. 2d 629, 641 (Fla. 2003) ("In the present case, the prosecutor spoke of mercy; however, he did not urge the jury to show the defendant as much mercy as he showed his victim. The prosecutor made the statement that there is a balancing act between mercy for a defendant and justice for the victim. We find that the prosecutor's remark did not inflame or unnecessarily evoke the sympathies of the jury."); Lugo v. State, 845 So. 2d 74 (Fla. 2003) (prosecutor's brief no mercy argument in closing was at most harmless error).

The trial court did not abuse its discretion in overruling the defense counsel's sole objection. See Moore v. State, 701

So. 2d 545, 551 (Fla. 1997) ("It is within the judge's discretion to control the comments made to a jury, and we will not interfere unless an abuse of discretion is shown."); Occhicone v. State, 570 So. 2d 902, 904 (Fla. 1990); Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982).

Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000); Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990); Overton v. State, 801 So. 2d 877, 896 (Fla. 2001); Banks v. State, 732 So. 2d 1065, 1068 (Fla. 1999); Quince v. State, 732 So. 2d 1059, 1062 (Fla. 1999); Hawk v. State, 718 So. 2d 159, 162 (Fla. 1998); White v. State, 817 So. 2d 799, 806 (Fla. 2002).

Even if the lower court erred, such error would be harmless since the evidence presented to the jury included serious aggravation (HAC and five prior felony convictions) compared with the paucity of mitigation submitted to the jury, i.e., that he was a changed man from pen pals and a former attorney. See Rodriguez v. State, 919 So. 2d 1252, 1282 (Fla. 2005); Hitchcock v. State, 755 So. 2d 638, 643 (Fla. 2000).

(b) Appellant's challenge to the remaining prosecutorial arguments are procedurally barred for the failure to object in the lower court for preservation of appellate review and they do not constitute fundamental error.

The law is well settled that in order to preserve for appellate review a claim of improper prosecutorial comment there must be an objection asserted in the trial court specifically asserting the contended error. See Conahan v. State, 844 So. 2d 629, 641 (Fla. 2003); Evans v. State, 808 So. 2d 92, 107 (Fla. 2001); Morton v. State, 789 So. 2d 324, 329 (Fla. 2001); Lukehart v. State, 776 So. 2d 906, 927 (Fla. 2000); Chandler v. State, 702 So. 2d 186, 191 (Fla. 1997); Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996).

Since there was no objection below to preserve the issue for appellate review, Appellant to obtain relief must demonstrate that these now-challenged remarks constitute fundamental error. Fundamental error has been described as error that reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. Conahan, *supra*; Brooks v. State, 762 So. 2d 879, 899 (Fla. 2000). In the context of a penalty phase proceeding to constitute fundamental error it must be so prejudicial as to taint the jury's

recommended sentence, i.e., that the recommendation of death could not have been made without reliance on them. See Peterka v. State, 890 So. 2d 219, 243 (Fla. 2004); Doorbal v. State, 837 So. 2d 940, 958-959 (Fla. 2003). None of the challenged comments now argued arise to the level of fundamental error, whether considered alone or cumulatively. Remarks to the effect that Appellant cared more for the condition of his shirt or that he twisted the knife into the victim's throat until the blood squirted out like a squirt gun were not improper but rather a comment on the evidence. (See Thomas's testimony at V. 2dAdd. II, R.313). Comments asking if this was one of the worst ways to die or wondering how it felt for a knife to penetrate the skull were made in the context of describing the HAC aggravator. The prosecutor could legitimately argue that the mother was not a complete monster when other siblings have gone on to live a normal life and willing to leave their children with her. (See Stacy France's testimony at V. 2dAdd. III, R.463-465). The prosecutor could legitimately assert that Merck was responsible for his actions and alcohol was just an excuse. The prosecutor could properly advocate that Merck's eye problem had been ameliorated by operations, and could properly advance the argument that the evidence showed Merck was conscienceless, attacking without provocation, that the killing was

unnecessarily torturous (for HAC purposes) and that Merck had five violent felony convictions. The prosecutor could properly challenge the "changed man" testimony as non-credible, given in large part by those whose contact with him was in the limited setting of incarceration. This Court has rejected contentions of fundamental error under facts far more egregious than here. See Doorbal v. State, 837 So. 2d 940, 958 (Fla. 2003) (State's penalty phase closing argument that defendant deserved no mercy, leniency or respect did not rise to level of fundamental error); Lugo v. State, 845 So. 2d 74 (Fla. 2003) (noting that an assertion by prosecutor that the horribleness of conduct deserved the death penalty as a factual comment not a legal analysis was not erroneous; relief based on fundamental error was not warranted for the prosecutor's no mercy and religion arguments); Kearse v. State, 770 So. 2d 1119, 1129-30 (Fla. 2000) (single erroneous comment urging the jury to show the same mercy he showed the victim not so egregious as to require reversal of the entire resentencing proceeding); Rimmer v. State, 825 So. 2d 304, 325 (Fla. 2002) (no fundamental error in prosecutor's remarks: (1) describing shootings as vicious executions; (2) describing mental health expert's opinion as "legal mumbo-jumbo;" (3) asserting prison system is filled with individuals like defendant who suffer from antisocial

personality disorder; (4) telling jury to do its job and return "morally" correct death sentence; (5) at Spencer hearing describing defendant as "worthless piece of fecal matter . . . whose death should come prior to natural causes"); Carroll v. State, 815 So. 2d 601, 622 (Fla. 2002) (prosecutor's comments during penalty phase that defendant was the "boogie man," and a "creature that stalked the night" who "must die" did not rise to fundamental error); Fennie v. State, 855 So. 2d 597, 609 (Fla. 2003) (allegedly improper comments in penalty phase closing argument that jury should "send a message" to the community by sentencing defendant to death did not constitute fundamental error).

While Appellant contends that the prosecutor impermissibly argued in violation of the "golden rule," Appellee would submit such a contention is meritless. In Pagan v. State, 830 So. 2d 792, 812-813 (Fla. 2002) this Court reminded the Bench and Bar:

> "In general, a 'golden rule' argument encompasses requests that the jurors place themselves in the victim's position, that they imagine the victim's pain and terror, or that they imagine that their relative was the victim." [citations omitted] The argument Pagan complains of in no way violates the prohibition against such arguments. The prosecutor did not ask the jury to place themselves in the victim's position, to imagine the victim's pain and terror, or to imagine that their relative was the victim.

The prosecutor's description of Appellant's twisting the knife in the victim's throat was a fair comment on the testimony and evidence supporting the valid, relevant aggravating factor of especially heinous, atrocious or cruel (see Thomas's testimony at V. 2dAdd. II, R.312) – especially since the defense was contesting the applicability of this factor by arguing that the victim probably died quickly and that it should not be deemed torturous. Obviously, a prosecutor may describe the facts as elicited by the testimony and evidence in order that they make an informed decision regarding whether the crime qualifies as an applicable HAC aggravating factor and to determine the appropriate weight it should be given. See also Zack v. State, 911 So. 2d 1190, 1207-1208 (Fla. 2005) (rejecting claim of ineffective assistance of appellate counsel for failure to assert an improper "golden rule" argument when the prosecutor argued "Can any one of us imagine, except to look at the evidence, the terror that was coursing through the victim during her last few minutes of life? … Look at this, ladies and gentlemen, and ask yourselves whether or not this is torture in the classic sense."; the use of the term "imagine" did not rise to the level of fundamental error).

With regard to the unchallenged prosecutorial remark that Merck's interest in reading may have been by design or a

strategy, the comment arguably finds support in the record. Merck explained that his attorneys Ms. McClure and Ms. Hellinger had his IQ tested and the examiner told him that he had a relatively high IQ. From discussions with pen pals and relatives he decided to develop himself and "[t]his particular examiner, he laid some things out for me and just let me know that there was something to work with." (V. 2dAdd. III, R.531). He admitted that he changed his lifestyle within the last two years while confined in a solitary cell. (V. 2dAdd. III, R.538). Thus, perhaps his newfound interest in reading resulted from the defense team examiner's suggestion to him that there "was something to work with."

In any event, any error is harmless under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Two extremely powerful aggravators are present and the mitigation established is largely insubstantial. The major argument submitted below, i.e. that he is a "changed man" more mature and responsible now is negated by his persistent effort to place substantial blame on his companion Neil Thomas who was merely present.

Appellant's claim is meritless, whether considered individually or in total.

ISSUE IV

WHETHER THE TRIAL COURT ERRED REVERSIBLY IN FAILING TO FIND OR IN GIVING TOO LITTLE WEIGHT TO MITIGATING FACTORS.

Appellant next argues that the trial court failed to find or gave insufficient weight to the mitigating factors. With respect to statutory mitigating factors the trial court addressed: (1) Appellant's age at the time of the offense, finding it had been established and according it some weight (V. II, R.312);[8] (2) the trial court found that it was unproven that the capacity of the defendant to appreciate the criminality of his conduct or to conform to the requirements of law was substantially impaired (V. II, R.312-313); and (3) also found that it was not established that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance (V. II, R.313). Essentially, as

[8] With respect to the age mitigator the court found: "The Defendant was 19 at the time of the offense. There was testimony presented during the penalty phase that in terms of "maturity age" he might have been somewhat younger; but there was no testimony that he had a low IQ, but did, in fact, have a normal intelligence or that he was mentally impaired in any way. There was no testimony that he did not know what he was doing or that he was too young to appreciate the criminality of his actions. The Supreme Court in Merck I considered this point and ruled that this was an appropriate mitigating factor, but that the Defendant's age should not be the deciding factor on which to base a death sentence. He did suffer from somewhat of a deprived childhood and so this Court will find that this mitigating factor has been established and it will be given SOME weight." (V II, R.312).

to the statutory mental health mitigators Merck contends that the trial court should have accepted the opinions of defense expert Dr. Maher even though contradicted by State expert Dr. Sloman. Merck apparently also contends the trial court should have given greater weight to non-statutory mitigators family background; alcoholism/alcohol-abuse intoxication; and his capacity to form and maintain positive relationships and capacity for growth.

The weight to be accorded an aggravating or mitigating factor at the penalty phase of a capital murder trial is within the discretion of the trial court and will be affirmed if based on competent, substantial evidence. Globe v. State, 877 So. 2d 663, 676 (Fla. 2004); see also Rose v. State, 787 So. 2d 786, 802 (Fla. 2001) (decision as to whether a mitigating circumstance has been established is within trial court's discretion and will be upheld as long as the court considered all of the evidence); Kearse v. State, 770 So. 2d 1119, 1133 (Fla. 2000) (Supreme Court will not second guess judge's decision to accept age in mitigation but assign it only slight weight in death penalty proceeding); Conde v. State, 860 So. 2d 930, 956 (Fla. 2003) (a trial court's rejection of a mitigating circumstance at penalty phase of a capital case should be upheld where the record contains competent, substantial evidence to

support that rejection); Cox v. State, 819 So. 2d 705, 723 (Fla. 2002); Bryant v. State, 785 So. 2d 422, 435 (Fla. 2001) (reversal of trial court's determination that death penalty mitigating circumstance was not established is not warranted simply because defendant draws a different conclusion); Blackwood v. State, 777 So. 2d 399, 409 (Fla. 2000) (same); Foster v. State, 679 So. 2d 747, 756 (Fla. 1996). See also Schoenwetter v. State, 2006 Fla. LEXIS 668 (Fla. April 27, 2006) (observing: "The defendant, however, takes issue with the weight that was given to the four statutory mitigating circumstances, which were given little weight, and with the weight given to two of the nonstatutory mitigating circumstances. Although Schoenwetter maintains these mitigating factors were not accorded the proper weight, he has failed to even argue, much less demonstrate, why the weight given by the trial judge was not appropriate under the facts of this case. The weight given to these mitigators lies within the discretion of the trial court, and there has been no showing that the trial court abused its discretion. Therefore, we find no error in the trial court's consideration of these mitigating factors."). Additionally, this Court has held that any error by the trial court in rejecting as non-mitigating or in failing to assign any mitigating weight to evidence that defendant made friends

easily, enjoyed people, and had on occasion done good deeds for friends and even perfect strangers was harmless given the minimal amount of mitigation such evidence would have provided. Taylor v. State, 855 So. 2d 1, 32 (Fla. 2003); see also Evans v. State, 808 So. 2d 92, 108 (Fla. 2001) (trial court's failure to consider defendant's artistic ability as mitigating factor was harmless error as it was likely the mitigator would have been assigned little weight).

With respect to statutory mental mitigator F.S. 921.141(7)(e) – the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired – the court noted that it was not convinced that alcohol impairment existed at the time of the incident; although Merck had been drinking that night, his earlier start in life could have served to build up a tolerance to alcohol effects that other young men might not have. Merck's actions that night did not portray any difficulty in reacting to the innocent conduct of victim Newton by first obtaining the weapon in his car and then attacking him. (V. II, R.312-313). The trial court's rejection of this statutory mitigator is supported by the testimony of psychologist Dr. Vincent Sloman who opined that neither statutory mental mitigator was applicable and alcohol use did not rise to the level of

producing those factors. (V. 2dAdd. IV, R.667). Merck's unimpaired ability to function in the parking lot was supported by the testimony of Neil Thomas (V. 2dAdd. II, R.302, 317) and Katherine Sullivan (V. 2dAdd. II, R.271-273).

With respect to statutory mental mitigator F.S. 921.141(7)(b) – the capital felony was committed by defendant while under the influence of extreme mental or emotional disturbance – Appellant merely has announced his disagreement with the trial court's decision to credit the testimony of expert Dr. Sloman over that of Dr. Maher:

> Dr. Slomin testified that the Defendant suffered from an antisocial disorder, a disorder which the Supreme Court has repeatedly said is not a statutory mitigator. Dr. Slomin testified that an antisocial person may be impulsive, irritable and aggressive. He may have a lack of remorse and be indifferent to the consequences of his actions and may be an abuser of drugs and/or alcohol. Dr. Slomin diagnosed the Defendant as antisocial in 1992 and again this year. His IQ of 110 (as of 1992) was certainly within the normal range. He further stated that impulsivity was merely part of the antisocial disorder. . .
>
> (V. II, R.313).

The court's finding is supported by competent, substantial evidence. Sloman's testing and interviews demonstrated that Merck's personality disorder is a "basic pattern of disregard for other's rights and liberties" and that this diagnosis

applied both at the time of testing in 2004 and at the time of the offense. There was no change and Sloman rejected the Maher view that Appellant had developed a new value system or conscience while incarcerated. (V. 2dAdd. IV, R.661-665). Merck's impulsivity was part of the antisocial personality disorder (V. 2dAdd. IV, R.665) and the value system equating kindness with weakness and fear with respect was a "self—serving rationalization that we find certainly in people who are narcissists, but that is again part of the fabric of an antisocial personality or conduct disorder." (V. 2dAdd. IV, R.668-669). Perez v. State, 919 So. 2d 347 (Fla. 2005) (approving trial court's rejection of unable to confirm his conduct mitigator where State expert diagnosed antisocial personality disorder); Reed v. State, 875 So. 2d 415, 437 (Fla. 2004) ("this Court has acknowledged in the past that antisocial personality disorder is 'a trait most jurors tend to look disfavorably upon.'") (quoting Freeman v. State, 858 So. 2d 319, 327 (Fla. 2003)); Elledge v. State, 706 So. 2d 1340, 1346 (Fla. 1997) (affirming death sentence where trial court denied statutory mental health mitigator based on the expert testimony that defendant had antisocial personality disorder and that such disorder is not a mental illness, but a life long history of a

person who makes bad choices in life and that these choices are conscious and volitional).

Any effort by the defense to urge that the trial court was bound to accept the opinion testimony of defense expert Dr. Maher is unavailing. In Walls v. State, 641 So. 2d 381, 390-391 (Fla. 1994) this Court explained:

> Certain kinds of opinion testimony clearly are admissible--and especially qualified expert opinion testimony--but they are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking. A debatable link between fact and opinion relevant to a mitigating factor usually means, at most, that a question exists for judge and jury to resolve.

See also Conde v. State, 860 So. 2d 930, 954 (Fla. 2003); Nelson v. State, 850 So. 2d 514, 530 (Fla. 2003) (trial court was entitled to evaluate and disregard Dr. Dee's opinion if the trial court felt that the opinion was unsupported by facts; trial court basically rejected Dr. Dee's uncontroverted expert opinion); Bryant v. State, 785 So. 2d 422, 435 (Fla. 2001); Wuornos v. State, 676 So. 2d 972, 975 (Fla. 1996). In the instant case, the trial court could permissibly conclude that the testimony of expert Dr. Sloman was more credible than that of Dr. Maher. Reynolds v. State, *supra* ("It is clear from the trial court's sentencing order that it found Courtney's

testimony credible because the trial court relied on this testimony as support for this statutory aggravating circumstance. The trial court is in the best position to assess the credibility of a witness, and we are mindful to accord the appropriate deference to the trial court's assessment of this witness's testimony in our review of whether competent, substantial evidence exists to support this statutory aggravator.").

Appellant also argues that greater weight should have been given to the nonstatutory mitigators found.[9] The trial court did appropriately deal with the mitigation proffered. The trial court found and gave some weight to the abuse in the family by the mother:

> There was ample testimony that this Defendant was abused by his mother for the reasons stated above. He was singled-out for abuse by her. He was placed in a children's home, where he apparently thrived, but was removed, by his mother. He placed in emotionally handicapped classes in school and did well, again until he was removed by his mother. At 13, the Defendant was placed in foster care on a farm, but again was not allowed by his mother to stay long enough to adequately grow and prosper from the experience.
>
> (V. II, R.313-314).

[9] While Appellant notes decisions from out-of-state regarding love by victims for their abusers Appellant offered no such expert testimony in the instant case.

As for the alcohol abuse-intoxication mitigation the court noted, "No question that the Defendant was introduced to the use of alcohol at a very young age at home; he testified that he started drinking at age 11." (V. II, R.312). The court alluded to the testimony of toxicologist Ron Bell whose testimony was submitted at the Spencer hearing. (V. II, R.314). The court concluded:

> Due to the Defendants [sic] alcohol consumption on the night in question it can not be denied that he was under the influence of alcohol on the night in question and thus this factor has been established. . .
>
> (V. II, R.314).

The court assigned the factor little weight since the facts belie the seriousness of the problem. Merck acknowledged that he had a tolerance for alcohol and was able to function when he drank. (V. 2dAdd. III, R.537-538). While Dr. Maher testified that Merck was exposed to alcohol early in life, "Exactly when and to what extent, I don't think that I could testify with specificity." (V. 2dAdd. IV, R.634). Alcohol was not a prerequisite for Merck to react to a situation in a violent way. (V. 2dAdd. IV, R.649). Dr. Sloman opined that Merck's alcohol use did not result in an extreme mental or emotional disturbance or caused an impairment to his capacity to appreciate the criminality of his conduct or to conform his conduct to the

requirements of law; nor did his use of alcohol cause him to act out in the various ways that he has in his life. Rather, this is a learned response, a self-serving rationalization found in people who are narcissists – part of the fabric of an anti-social personality or character disorder. (V. 2dAdd. IV, R.667-669). Dr. Sloman added that maturity is the ability to take responsibility for one's actions. (V. 2dAdd. IV, R.672).[10] Appellant is not entitled to relief simply because he has a different view of the weight to be afforded mitigation. Bryant, *supra*; Blackwood, *supra*. The trial court considered all that was submitted. Rose, supra. There has been no abuse of discretion. Globe, *supra*; Conde, *supra*.

Appellant's claim is meritless.

[10] When Dr. Maher was asked, he answered that Merck "made it very clear to me in recent meetings that he has accepted responsibility for this," although he has never said he cut the man's throat and jacked a knife into his skull. (V. 2dAdd. IV, R.644-645). It is unclear how much responsibility Merck has accepted, as even now he seeks to urge Thomas is the real killer. See Issue II.

ISSUE V

WHETHER THE DEATH SENTENCE IMPOSED IS PROPORTIONATE.

The trial court in its Sentencing Order found in aggravation that Appellant had previously been convicted of a felony involving the use or threat of violence to the person, to wit: five separate robberies in three different counties, and that the capital felony was especially heinous, atrocious or cruel. The court assigned great weight to each. (V. II, R.310-311).

Appellee initially notes that in Merck's first direct appeal, this Court found the imposition of the death penalty not violative of this Court's proportionality jurisprudence. Merck v. State, 664 So. 2d 939, 943 (Fla. 1995).

> C. The death sentence is disproportionate.
>
> Merck bases this issue primarily upon the contention in point B that the heinous, atrocious, or cruel aggravator should be stricken. We have rejected that contention and likewise reject the contention that death is disproportionate in this stabbing murder. Whitton; Derrick v. State, 641 So. 2d 378 (Fla. 1994), cert. denied, 115 S. Ct. 943, 130 L. Ed. 2d 887 (1995); Taylor v. State, 630 So. 2d 1038 (Fla. 1993), cert. denied, 115 S. Ct. 107, 130 L. Ed. 2d 54 (1994); Atwater v. State, 626 So. 2d 1325 (Fla. 1993), cert. denied, 114 S. Ct. 1578, 128 L. Ed. 2d 221 (1994).
>
> (emphasis supplied)

Trial defense counsel in closing argument below appears to have acknowledged the felony convictions aggravator was shown:

> Mr. Ripplinger spent an awful lot of time talking to you about these five felony convictions committed by a 17-year-old. 17. I offer that for you when you look and make a determination as to the amount of weight to be assigned to that aggravating circumstance. Those documents exist. They are judgments and sentences. They are of Troy Merck at the age of 17. I cannot ask you not to consider them, to do so would be to ask you to disregard the law and we will not in any way, shape, or form urge you to do that. You may consider it. The mere fact of that certainly is not enough to impose the ultimate penalty, the imposition of death.
>
> (V. 2dAdd. III, R.576)
> (emphasis supplied)
>
> * * *
>
> Are there aggravating circumstances which have been proven beyond and to the exclusion of every reasonable doubt that will allow you to even consider the imposition of the death penalty? I cannot tell you that the felony convictions don't exist, they do. Are they in and of themselves enough for you to warrant or to consider the imposition of the death penalty? If you follow the law, they are. But are they of sufficient weight that you, as a member of this community, believes that this death for that individual warrants the imposition of death?
>
> (V. 2dAdd. III, R.579)
> (emphasis supplied)

In Merck's first appeal this Court additionally approved the finding of the presence of the HAC factor. Merck v. State, 664 So. 2d 939, 942 (Fla. 1995).

> The basis of Merck's argument regarding the second point is that this aggravator is not applicable because this was a sudden attack at a time when both Merck and the victim were intoxicated. The medical examiner testified that the fatal wound to the neck would have caused unconsciousness within two to five minutes and death within five to ten minutes. The victim had a blood alcohol level of .18. Likewise, there was substantial evidence that Merck had consumed a sufficient amount of alcohol to have been intoxicated at the time of the murder. However, there was also evidence that Merck had deliberately twisted the knife blade during the stabbing. Witnesses testified that this stabbing occurred after Merck said to the victim, "I'll show you how to bleed." Death was a result of multiple stab wounds.
>
> We recently rejected a challenge that the heinous, atrocious, or cruel aggravator was not applicable based upon a similar assertion in Whitton v. State, 649 So. 2d 861 (Fla. 1994), *petition for cert. filed*, No. 94-9356 (U.S. May 15, 1995). We believe that the heinous, atrocious, or cruel aggravator was applicable in this case and affirm on this issue.

In the Sentencing Order the trial court found as a prior violent felony conviction aggravator that Merck had five separate robberies in this counties involving the use of a knife, similar to such use in the instant homicide. (V. II, R.310). See also State Exhibits 39-43. (V. II, R.241; V. Supp., R.44-48; V. 2dAdd. III, R.427-432). These include an

October 9, 1989 Marion County conviction for robbery with a deadly weapon (case # 89-786), an October 31, 1989 Lake County conviction for robbery with a deadly weapon (case # 89-383), an October 31, 1989 Lake County conviction for robbery with a deadly weapon (case # 89-384), an October 31, 1989 Lake County conviction for robbery with a deadly weapon (case # 89-385), and a March 28, 1990 Pasco County conviction for robbery (case # 89-1617).[11]

The trial court also found in aggravation the especially heinous, atrocious or cruel factor (V. II, R.311):[12]

> This aggravating factor was addressed in Merck I by the Supreme Court at p. 942- 3 and was found "to be applicable in this case". The facts surrounding the killing were presented to the penalty phase jury and were the same as was outlined in Merck I and II. The defense argument that the crime was committed on the spur of the moment and did not take very long to commit is not well taken. The testimony of the medical examiner was clear and convincing that the victim would have been alive for 5 minutes or longer from the time of the first stab wound to his back and the testimony of the other eye witnesses, including the companion

[11] Appellant unsuccessfully attempted post-conviction challenges to the non-capital convictions. (V. I, R.45-46, 48-65, 66-68, 69-93).

[12] As an aside, the trial court's order noted that a problem that had occurred in Merck's second appeal – Merck v. State, 763 So. 2d 295 (Fla. 2000) – to wit: consideration of Appellant's adjudication as a delinquent in North Carolina and his felony probation for the five Florida robberies was corrected in the instant proceedings by not being presented to the jury and was given no weight by the court. (V. II, R.312).

of the Defendant, Neil Thomas, was that the knife slice to the victims [sic] neck was one of the later slashes made by the Defendant. Even considering the diversion of the testimony of some of the State witnesses as to how long a period of time passed from the start of the attack until the police and medical personnel arrived on the scene, it is uncontroversial [sic] and acknowledged by the defense that it was at least 5 minutes. The Supreme Court in Merck I acknowledged that this was a sufficient period of time for the victim of a stabbing to be alive to bring this factor into play. This fact, coupled with the Defendant's statements before, during and after the stabbing convince this Court that this factor exists.

This Court does not agree with the defense contention that this factor is totally shown by the testimony of Neil Thomas. The various eye witnesses all stated that the victim was gasping for air to breathe and groaning and that he was conscious for at least a short while, long enough in this Court's opinion that he (the victim) knew what had happened to him and that he was stabbed and in pain and was dying. This testimony is confirmed by the medical examiner. There were 13 separate stab wounds to the body of the victim and there was evidence that some twisting had taken place during the incident. Whether this was done by the Defendant twisting the knife (as he said he did after the killing to witness Thomas) or the victim moving while being stabbed is of no matter. Seven of the wounds were as deep as they were long. Thomas said the Defendant stated after the killing that he recalled pulling the victim's head back so he would be sure to slice his neck open, which he did according to the medical examiner. It is unrebutted that the victim was conscious throughout the attack and knew of his impending death.

> This killing was consciousness [sic] and pitiless, and it was outrageously wicked, and it was designed to inflict a high degree of pain on the victim, to the admitted enjoyment of the Defendant and was certainly unnecessarily torturous to the victim. This aggravating factor has been proved beyond a reasonable doubt and will be given GREAT weight.

Since this Court previously upheld the findings of the presence of the HAC and prior violent felony aggravators (the five robberies in three counties) in a prior appeal, the Court may permissibly conclude upon reconsideration in light of the new evidence and resentencing that any challenge now to the HAC and prior violent felony aggravators is also meritless. Robinson v. State, 761 So. 2d 269, 273 n.4 (Fla. 1999); Reese v. State, 768 So. 2d 1057, 1059 (Fla. 2000).

The aggravating factors found by the trial court are valid and the mere passage of time has not rendered the heinous, atrocious or cruel quality of the homicide any less so. This Court has on more than one occasion noted that the HAC aggravator is one of the most serious aggravators set out in the statutory sentencing scheme. Maxwell v. State, 603 So. 2d 490, 493 (Fla. 1992); Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999) ("We also note that neither the heinous, atrocious, or cruel nor the cold, calculated, and premeditated aggravators are present in this case. These, of course, are two of the most serious

aggravators set out in the statutory sentencing scheme, and, while their absence is not controlling, it is also not without some relevance to a proportionality analysis.").[13] Accord, Buzia v. State, 926 So. 2d 1203 (Fla. 2006); Simmons v. State, 2006 Fla. LEXIS 813 (Fla. May 11, 2006); Monlyn v. State, 894 So. 2d 832, 838 (Fla. 2004); Dessaure v. State, 891 So. 2d 455, 473 (Fla. 2004); Everett v. State, 893 So. 2d 1278, 1288 (Fla. 2004); Douglas v. State, 878 So. 2d 1246, 1262 (Fla. 2004); Globe v. State, 877 So. 2d 663, 677 (Fla. 2004); Owen v. State, 862 So. 2d 687, 703 (Fla. 2003); Nelson v. State, 850 So. 2d 514, 533 (Fla. 2003); Lynch v. State, 841 So. 2d 362, 377 (Fla. 2003); Cox v. State, 819 So. 2d 705, 723 (Fla. 2002); Card v. State, 803 So. 2d 613, 623 (Fla. 2001); Morton v. State, 789 So. 2d 324, 331 (Fla. 2001). See also Taylor v. State, 855 So. 2d 1, 31 (Fla. 2003) (function of state Supreme Court in conducting proportionality review of death sentence is not to reweigh the mitigating factors against the aggravating factors; that is the function of the trial court); Jeffries v. State, 797 So. 2d 573, 582 (Fla. 2001) (same); Holland v. State, 773 So. 2d 1065, 1078

[13] Indeed, this Court has even upheld on proportionality grounds a death sentence supported by the sole aggravating factor of HAC. See Butler v. State, 842 So. 2d 817 (Fla. 2003); it has also upheld a single aggravator case involving the prior violent felony conviction aggravator. Lamarca v. State, 785 So. 2d 1209 (Fla. 2001).

(Fla. 2000) (same); Reese v. State, 768 So. 2d 1057, 1059 (Fla. 2000).

Appellant first argues that the trial court improperly found that the two aggravating factors (HAC and prior violent felony convictions) outweighed the mitigating factors because the prior convictions occurred when he was seventeen years old and might be subject to collateral attack and the HAC quality is alleviated because Merck's unprovoked assault on the victim left little time for apprehension and the victim lost consciousness prior to death within minutes.

In response the State would point out that it is not for this Court to reweigh aggravators. See Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997) ("Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding."); Reynolds v. State, *supra* (same); Bonifay v. State, 680 So. 2d 413, 417 (Fla. 1996); Hutchinson v. State, 882 So. 2d 943, 958 (Fla. 2004); Douglas v. State, 878 So. 2d 1246, 1261 (Fla. 2004); Anderson v. State, 863 So. 2d 169, 176 (Fla. 2003); Davis v. State, 859 So. 2d 465, 478 (Fla. 2003); Duest v. State, 855 So. 2d 33, 46 (Fla. 2003); Lawrence v. State, 846 So. 2d

440, 450 (Fla. 2003); Ocha v. State, 826 So. 2d 956, 963 (Fla. 2002).

As to HAC, the trial court properly credited the testimony of Dr. Parma that there were seven major and another thirteen for a total of twenty inflicted wounds to the victim's body (V. 2dAdd. III, R.399; V. II, R.311). The wounds would cause pain. (V. 2dAdd. III, R.404). Merck told Neil Thomas afterward in recounting the incident since he was uncertain about the resulting death that when he stuck the knife in his neck he twisted it and was trying to rip his throat out. (V. 2dAdd. II, R.312). Merck said he had killed him and that if he hadn't, he would go to the hospital and finish the job. (V. 2dAdd. II, R.307). Witness Salvatore Pensiero recalled the victim was holding his throat gasping for air; he was on the ground, moving and kicking, trying to stay alive and saying a prayer "to please, God, ease his pain." (V. 2dAdd. II, R.345). He estimated the time period to be five to ten minutes. (V. 2dAdd. II, R.346). Similarly, Donald Ward estimated the time after the injuries were inflicted as five or six minutes. James David Carter thought he was on the ground moaning and coughing up blood for ten minutes. (V. 2dAdd. II, R.350, 356).

There can be no reasonable challenge to the trial court's determination that "[t]his killing was consciousness and

pitiless, and it was outrageously wicked, and it was designed to inflict a high degree of pain on the victim, to the admitted enjoyment of the Defendant and was certainly unnecessarily torturous to the victim." (V. II, R.311).

A multiple stabbing to a conscious victim satisfies the HAC aggravator. See Reynolds v. State, *supra*; Taylor v. State, 630 So. 2d 1038 (Fla. 1993); Pittman v. State, 646 So. 2d 167 (Fla. 1994); Atwater v. State, 626 So. 2d 1325 (Fla. 1993); Trotter v. State, 576 So. 2d 691 (Fla. 1990).

As to the assertion that there may be future challenges to the five robbery convictions, suffice it to say that Appellant attempted to have these convictions set aside and was unsuccessful in his efforts.[14]

Appellant emphasizes the alleged mitigation submitted to support his view that a death sentence is disproportionate. Merck points to: (1) the use of alcohol the night of the murder that may have diminished the ability to make rational decisions; (2) his neglected, disordered, abusive childhood; (3) his resulting emotional problems (impulsive, withdrawn and

[14] As noted below, the Fifth District Court of Appeal had affirmed the circuit courts of Lake and Marion counties denial of post-conviction relief. (V. Add., R.666-667, 672). Merck was using the alias Melton, see V. I, R. 49-51, 67-73, and the Court of Appeal issued table opinions at Melton v. State, 853 So. 2d 431 (Fla. 5th DCA, August 12, 2003) and Melton v. State, 866 So. 2d 1229 (Fla. 5th DCA, February 10, 2004).

antisocial); and (4) his age at the time of the crime and asserted growth in maturity during incarceration.

We turn first to the consideration of the asserted mitigation by the trial court in the Sentencing Order. As to age, the court noted that Merck was nineteen at the time of the offense, that he might have been somewhat younger in terms of maturity but he had a normal intelligence and was not mentally impaired, but since he did suffer from somewhat of a deprived childhood the court found and gave some weight to this mitigator. (V. II, R.312).

The trial court rejected the applicability of the two statutory mental mitigators. The court noted that with regard to testimony of Appellant's alcohol use that night, Merck's ability to catch the thrown car keys, obtain and conceal the knife and return without stumbling to a fight which he provoked with an unwilling victim demonstrated that he was not impaired. The court also credited the testimony of Dr. Sloman that Merck was not under the influence of extreme mental or emotional disturbance but instead exhibited an antisocial personality conduct disorder; Merck's impulsivity, lack of remorse, indifference to consequences, aggression and abuse of drugs and/or alcohol were aspects of this conduct disorder. (V. II, R.312-313).

With respect to non-statutory mitigation, the court found that Appellant had been abused by his mother and there was a dysfunctional family and afforded it some weight. The court acknowledged Appellant's use of alcohol on the night in question but gave it only little weight since the facts belied the seriousness of the problem. The court gave some weight to Merck's capacity to form and maintain positive relationships and capacity for growth. (V. II, R.313-314).

Merck is not aided by his reliance on Voorhees v. State, 699 So. 2d 602 (Fla. 1997) and Sager v. State, 699 So. 2d 619 (Fla. 1997). There it was unclear how the homicide occurred; here it is clear Merck made an unprovoked assault on victim Newton who refused to fight. In Sager, the Court emphasized the defendant suffered from mental illness and that Voorhees was the leader of the two. In Voorhees, the Court opined the defendant awoke to find Sager fighting the victim and mental stress and loss of emotional control mitigated the "spontaneous fight." In contrast, Merck committed a premeditated murder on a victim unwilling to fight and Merck has no mental illness. Appellant's reliance on Kramer v. State, 619 So. 2d 274 (Fla. 1993) is as unavailing now as it was when this Court previously considered and rejected it. Merck v. State, 664 So. 2d at 943. Nor is this case governed by Urbin v. State, 714 So. 2d 411 (Fla.

1998); there the avoid arrest aggravator was stricken, the prior conviction aggravator was for a crime that occurred after the homicide and the trial court had found in mitigation that Urbin's capacity to appreciate the criminality of his conduct was substantially impaired at the time of the shooting. 714 So. 2d at 417.

In contrast, in the instant case the trial court found neither statutory mental mitigator applicable and the evidence of Appellant's prior character before this killing included five armed robberies. Moreover, Urbin participated in the homicide with two other young men who received lesser sentences whereas Merck acted alone in retrieving the murder weapon from the car and initiating the fatal assault on the unsuspecting victim.[15]

The instant case is similar factually to Whitton v. State, 649 So. 2d 861 (Fla. 1994). There the defendant's aggravators included prior violent felony convictions and HAC where the victim sustained numerous stab wounds; there were defensive

[15] The victim's intoxication does not preclude a finding of the presence of the HAC aggravator. See Whitton v. State, 649 So. 2d 861 (Fla. 1994). Any suggestion that intoxicated victims deserve death for participation in alcohol consumption is meritless not only in light of the evidence that the victim refused Merck's invitation to fight, but also in light of this Court's jurisprudence. Cf. Thomas v. State, 618 So. 2d 155, 157 (Fla. 1993) (murder victim's attempt to purchase cocaine prior to the murder irrelevant to Thomas's culpability); Bolender v. State, 422 So. 2d 833, 837 (Fla. 1982) (approving jury override despite fact victims were armed cocaine dealers).

wounds present and the victim had a high blood alcohol level. The trial court had found numerous non-statutory mitigating factors including deprived childhood and poor upbringing, abuse as a child by two alcoholic parents, unstable personality and potential for rehabilitation. Upholding the death penalty would also be consistent with Bowden v. State, 588 So. 2d 225 (Fla. 1991) (HAC and prior violent felony weighed against terrible childhood and adolescence); Hayes v. State, 581 So. 2d 121 (Fla. 1991) (two aggravating factors weighed against mitigators of age, learning disabled, product of deprived environment); Freeman v. State, 563 So. 2d 73 (Fla. 1990) (death proportionate where two aggravating factors weighed against mitigation of low intelligence and abused childhood); Franqui v. State, 699 So. 2d 1332 (Fla. 1997); Guzman v. State, 721 So. 2d 1155 (Fla. 1998). That Appellant has now obtained prison pen pals or a prior attorney opines that he has matured in recent years does not render the death sentence disproportionate. This Court has noted in its proportionality jurisprudence that where more than one defendant was involved in the commission of a crime this Court performs an analysis of relative culpability to ensure that equally culpable codefendants were treated alike in capital sentencing and received equal punishment, although the Court's role is not to consider or reweigh evidence that led to a

codefendant conviction of lesser degree of murder than defendant. Caballero v. State, 851 So. 2d 655, 662-663 (Fla. 2003).

Merck is not aided by Caballero. Not only is it inappropriate to compare Merck to the conduct of his colleague Neil Thomas because the latter's culpability has not been found to be lesser by a jury, but also as the testimony has made clear Thomas has no criminal liability for Merck's sole criminal responsibility in fatally attacking and stabbing the hapless victim Jim Newton.

ISSUE VI

WHETHER THE DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Citing Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002), Merck contends that the death penalty statute is unconstitutional because: (1) the State is not required to provide notice of the aggravating circumstances it intends to establish at the penalty phase; (2) the jury is not required to make any specific findings regarding the existence of aggravating circumstances; (3) there is not requirement of jury unanimity for finding individual aggravating circumstances or for making a recommendation of death; and (4) the State is not required to prove the appropriateness of the death penalty beyond a reasonable doubt.

This Court has consistently rejected these and similar claims for relief predicated on alleged violations of Apprendi and Ring. See, e.g., England v. State, 2006 Fla. LEXIS 942 (Fla. May 25, 2006)(rejecting claim pursuant to Ring that "death sentence is unconstitutional because (1) the jury did not unanimously find him death-eligible; (2) the aggravating circumstances were not charged in the indictment; and (3) the aggravating circumstances were not found beyond a reasonable doubt by the jury"); Hodges v. State, 885 So. 2d 338, 359 n.9 (Fla. 2004); Blackwelder v. State, 851 So. 2d 650, 654 (Fla.

2003); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) (rejecting claims that Ring requires aggravating circumstances be individually found by a unanimous jury verdict); Floyd v. State, 913 So. 2d 564, 577 (Fla. 2005) ("As appellant concedes, this Court has repeatedly upheld the constitutionality of Florida's capital sentencing procedures in cases, such as this one, that include the prior violent felony aggravator."); Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003) (rejecting argument that death sentence unconstitutional by failing to request that aggravating circumstances be enumerated and charged in the indictment and by further failing to require specific unanimous jury findings of aggravating circumstances since one of the aggravators found was that Doorbal had been convicted of a prior violent felony); Lugo v. State, 845 So. 2d 74, 119 (Fla. 2003).

In the instant case as the trial court noted in its Sentencing Order Mr. Merck has previously been convicted of a felony involving the use or threat of violence to the person (V. II, R.310-311):

> The Defendant has been convicted of five separate robberies in 3 different Counties. Copies of the various Judgments and Sentences were placed into evidence. All five of these robberies involved a knife, the same type of weapon used in the instant case. In Merck I, the Supreme Court ruled that these "are proper aggravating

> factors" (at 943). The Defendant has attacked these convictions due to the age of the Defendant at the time of the offenses. It has been argued by the defense that the Defendant lied about his age at the time of his arrest on these offenses and should have been tried as a juvenile. Prior counsel for the Defendant has gone so far as to raise this issue in the 3 Counties in question, trying to withdraw the Defendant's plea in each of these cases. These efforts have been denied and affirmed on appeal. Therefore the convictions are valid. This aggravating factor has been proved beyond a reasonable doubt and will be given GREAT weight.

Appellant's complaint for relief on the basis of Ring, *supra*, is meritless.

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's order imposing a sentence of death should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Mail and U.S. Regular Mail to John C. Fisher, Assistant Public Defender, P. O. Box 9000, Drawer PD, Bartow, Florida 33831, this 11th day of July, 2006.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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