IN THE

Supreme Court of Florida

RONALD HEATH, Appellant, v. **STATE OF FLORIDA**, Appellee.	**Case No. SC07-771** Capital Case Eighth Circuit/Alachua County L.T. Case No. 1989-CF-3026

AMENDED INITIAL BRIEF OF APPELLANT

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1. Statement of the Case and Course of Trial Proceedings.

a. Statement of the Case.

The indictment herein was returned in the Eighth Judicial Circuit Court for Alachua County and filed on 12 July 1989 charging Appellant Ronald Palmer Heath and his brother Kenneth Heath with one count of first degree murder and one count of robbery with a firearm. (R-23). Later, the State filed an amended information charging both with one count of conspiracy to commit forgery, two counts of grand theft, nine counts of uttering a forged instrument, and nine counts of forgery by use of a credit card. (R-202-208). On motion of the defense, the charges were consolidated. (R-166-67, 193).

Appellant Heath alone proceeded to trial before the Honorable Robert P. Cates. At the close of the State's case, the court granted motion for judgment of acquittal as to one count of credit card forgery, one count of uttering, and two counts of grand theft. (R-310). The jury found Appellant Heath guilty of the first-degree premeditated murder, armed robbery, and the seven counts of forgery and seven counts of uttering a forgery. (R-313-317).

At the penalty phase of the trial, the jury, after hearing additional evidence, recommended a sentence of death. (R-427). At the sentencing hearing the trial judge, agreed with the recommendation. The judge concluded the following aggravators outweighed potential mitigators, and Appellant Heath:

> 1. Had a prior juvenile conviction for second degree murder;

> 2. Had committed the instant offense murder during the course of a robbery.

(R-456-60).

In mitigation, the court found:

> 1. Appellant Heath was under the influence of an extreme mental or emotional disturbance.
>
> 2. Appellant Heath had demonstrated good character while in prison.
>
> 3. The co-defendant, Kenneth Heath, had been the actual triggerman in the homicide but had been allowed to plead and avoid a death sentence.

As to the other convictions, the judge found Appellant Heath to be an habitual felon (T-2515-16), imposed consecutive sentences including a separate life sentence. (R-446-52, 525-40).

Appellant Heath pursued his direct appeal to the Supreme Court of Florida raising nine issues: (1) The court erred in overruling Heath's objection to the State's opening statement that the only person who could tell the jury about the murder was Kenny Heath, in violation of his Fifth and Fourteenth Amendment right to remain silent; (2) the trial judge erred in admitting evidence about the victim, Michael Sheridan, that he was a nice person, in violation of Heath's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair trial; (3) the court erred in admitting testimony that post arrest Appellant Heath wanted to escape from the Alachua Detention Center; (4) the court erred in refusing to let defense witness Lamar Stodghill testify regarding Heath's working for him, thus tending to establish that Heath had no motive to rob

Sheridan; (5) the judge erred in excluding testimony of witness Penny Powell that Heath said he did not know victim Sheridan's watch was in his suitcase because it was self-serving hearsay; (6) the judge erred in sentencing Appellant Heath to death because he was no more culpable of death than his brother, Kenneth, who plea bargained for a lesser sentence; (7) the trial court erred in giving penalty phase jury instructions which allegedly failed to adequately advise the jury as to the limitations and findings necessary to satisfy the heinous, atrocious or cruel aggravating circumstance; (8) the trial court erred in sentencing Heath as an habitual offender; and (9) § 775.084, Florida Stat. (1988), is impermissibly inequitable, irrational, and vague, in violation of Article I, Sections 9 and 16 of the Florida Constitution, and the Fourteenth Amendment to the United States Constitution. The Supreme Court affirmed. *Heath v. State*, 648 So. 2d 660 (Fla. 1994), *certiorari denied*, 515 U.S. 1162, 115 S. Ct. 2618, 132 L. Ed. 2d 860 (1995).[1]

b. Statement of the Trial Facts.

Appellant Heath and his brother, Kenneth Heath, left Jacksonville on Monday, 27 May 1989, for Gainesville. That evening the brothers went to the Purple Porpoise lounge where Appellant saw Jennifer Berquist, an old friend whom he had not seen for a couple of years. (T-786-87). Ms. Berquist was working as a waitress/manager. The brothers spent most of the evening there and by the time the close of business, both were very drunk. (T-790). Ms. Berquist invited them to stay with her.

The next evening, 23 May 1989, Appellant Heath and his brother Kenneth

[1]Case No. 77,234.

Heath returned to the Purple Porpoise about 10 p.m. (T-793, 984). Cynthia Golub was working as a waitress that evening. (T-816). Jennifer Zimble, was working that night as a bartender and gave the two brothers a pitcher of beer. (T-793, 799, 985).

Co-defendant Kenneth Heath sat next to the victim, Michael Sheridan, at the bar and struck up a conversation. (T-824, 986). They discussed baseball[2]. Michael Sheridan offered to buy Kenneth a drink. (T-986). He was in town on business and was driving a rental car. (T-987-90). Sheridan asked Kenneth whether he "got high" and whether he had any marijuana. Kenneth responded that he did not have any marijuana, but his brother, Appellant Heath did. (T-990). According to Kenneth, Appellant asked him where had he gotten his drink. Kenneth told him Michael Sheridan bought it. Sheridan then bought Appellant a drink. (T-999). Appellant Heath told Zimble to put their drinks on the victim's tab. (T-825). Michael Sheridan paid the bar tab with his credit card. (T-832-38). Zimble observed that neither Appellant, nor his co-defendant, were drunk, but that Michael Sheridan appeared to be drunk.

Allegedly, Kenneth informed Appellant Heath that Michael Sheridan wanted to smoke marijuana. Appellant Heath according to Kenneth, stated that if they could get the victim to leave with them, they could rob him of his jewelry. (T-1000). The three men left the bar together shortly after midnight, and Zimble did not see any of them again that night. (T-841).

According to Kenneth, they left Kenneth's car, Appellant driving. (T-1018-

[2]The testimony of co-defendant Heath was largely uncorroborated.

19). They parked on a dirt road, and got out and smoked a joint. Appellant, according to Kenneth, asked "did you get it?", and made a hand motion of a pistol. Kenneth responded, by retrieving a .22 calibre handgun from under the car seat. (T-1020). It was Kenneth, the brother, who pointed the gun at Michael Sheridan and told him that he was being robbed. He ordered Sheridan to take out his wallet and to remove his jewelry. Michael Sheridan stated, "Y'all aren't serious, are you?." According to Kenneth, both responded that they were serious. According to Kenneth, Appellant Heath, ordered Kenneth to "shoot the fucker in the head." But Kenneth went on to testify that it was only after Michael Sheridan lunged at him (Kenneth), that he (Kenneth) shot him in the chest. (T-1021).

According to Kenneth Heath, Michael Sheridan stood back, then sat down on the ground, and exclaimed that "it hurt." Appellant Heath allegedly told Sheridan to give him his wallet and chains. As Sheridan started moving as if he were trying to get his belongings, Appellant Heath, according to Kenneth, started kicking Sheridan. Appellant Heath removed Sheridan's wallet, chains, and watch, but could not find a certain bracelet. Appellant stated to the victim, "You give me the bracelet, and we'll get you to a hospital." (T-1022). Appellant allegedly asked Kenneth to help look for the bracelet. (T-1023).

According to Kenneth, Appellant went to the car to search for the bracelet and returned with a knife. Appellant walked up to Michael Sheridan and, according to Kenneth Heath, tried to cut Michael Sheridan's throat with the knife. Kenneth testified that Appellant jabbed the blade into the throat of Michael Sheridan and attempted to cut. According to Kenneth, Appellant Heath instructed Kenneth to shoot

the victim in the head. So Kenneth shot Michael Sheridan twice more in the head. (T-1023). According to Kenneth, Appellant suggested that they move Sheridan's body. They picked the body up and carried it into the woods. (T-1024-25). Appellant allegedly wiped the knife off and put it back in the car. (T-1025).

The two brothers returned to the Purple Porpoise where they saw Mr. Sheridan's rental car. (T-1026-29). According to Kenneth, Appellant gave Kenneth the car keys and told Kenneth to drive the rental car and follow him. (T-1030). Kenneth drove the rental car to a dirt road, where he and Defendant removed some items before cutting the gas line and setting the rental car afire. (T-1032). The knife, was left in the rental car. (T-1033).

On Wednesday, 24 May 1989, the brothers went to the mall in Gainesville and bought clothes, shoes, and other merchandise using Michael Sheridan's credit cards. (T-1033-36, 1663-96). According to Kenneth, Appellant told Kenneth to sign all of the credit card slips, because Appellant might mess up if he did it. (T-1034-35). Several clerks from the various stores testified about the purchases made by Kenneth Heath and their later identification of him. (T-1701-9, 1710-19, 1728-30, 1734-39). The two spent the night in Gainesville. (T-1037).

The next morning the two continued to use Michael Sheridan's credit card to buy merchandise. (T-1037). When a sales clerk at an audio store became suspicious, they left the store and returned to Jacksonville. (T-1039-40). Once in Jacksonville, according to Kenneth they tossed the handgun into the St. John's River. (T-1042).

Medical Examiner William Frank Hamilton, M.D., was dispatched to the scene of the homicide on 30 May 1989. The victim's body was in a moderately advanced

state of decomposition. (T-1346). Doctor Hamilton, an expert in forensic pathology, estimated the time of death as having been between three and ten days before discovery. He observed three gunshot wounds on the body; two to the head and one to the torso. (T-1336). The next day, Dr. Hamilton performed an autopsy, and determined that the two bullet wounds to the head entered from the front above Michael Sheridan's left eyebrow. The projectiles were recovered from the back of the skull. The third shot was high in the victim's mid-abdomen, just below his chest. That bullet was found at the scene, under the body. (T-1349). Due to the advanced state of decomposition and animal predation, the medical examiner was unable to determine the precise path of the bullet. Considering the location of the wound, he was able to state that it was an extremely important injury. The wound to the torso, was fatal, but perhaps not immediately fatal. (T-1359). Dr. Hamilton opined that the death of the victim was caused by multiple gunshot wounds and the sharp force injury to the neck. (T-1351).

Chain of custody witnesses and crime scene technicians presented photographs and sketches of the crime scene. (T-1299, 1300-05; 1306-08) and several police officers testified to details of the credit card fraud investigation, which led to the arrests. (T-1591-1621, 1629-41, 1642-49, 1650-53).

The defense called police officers who had interviewed Appellant Heath (T-1384-88, 1875-78), plus officers who had participated in related searches. (T-1883-86). Additional details as to Michael Sheridan's jewelry and personal effects were developed. (T-1858-92, 1908-11). Appellant personally was addressed and responded that he did not wish to testify. The defense rested. (T-2031-35).

The State presented rebuttal testimony regarding a related search. (T-2036-37). The State rested. Appellant's renewed motion for judgment of acquittal was denied. (T-2041, 2044-49). Closing arguments were given. (T-2054-2130). The jury was instructed and retired to deliberate. (R-346-69, T-2132-56). The jury found Appellant guilty of first-degree murder and armed robbery of Michael Sheridan. Additionally, they found Appellant guilty of conspiracy to commit uttering a forgery, conspiracy to commit forgery; seven counts of forgery, and seven counts of uttering a forgery. (R-313-17, T-2158-61).

On 27 November 1990, the trial court reconvened for the penalty phase. (T-2183). The trial court instructed the jury as to their role prior to the presentation of evidence. (T-2185-87).

Gerald H. Parker. A detective, testified that he was the Jacksonville Sheriff's Office Homicide Detective who had been assigned to investigate the murder case against Appellant Heath on 17 December 1977. (T-2188-89); when Appellant Heath was seventeen years old. The body of Michael Lee Green, was found a few hundred feet away from his 1973 Ford which had been burned. (T-2190-91). Green had sustained twenty-three stab wounds and had a crushed skull. (T-2192). Detective Parker interviewed Appellant Heath, who was seventeen years old at the time, on 17 December 1977. Appellant cooperated and gave a sworn statement on 22 December 1977, detailing the circumstances of the offense which was admitted into evidence and read to the penalty phase jury. (R-370-419, T-2195-2243). Appellant Heath entered a plea of guilty to second degree murder and was sentenced to thirty years imprisonment in that case. (T-2244). A certified copy of the judgment and sentence

dated 25 April 1977, was entered into evidence. (R-511, T-2244).

Vivian Heath. Appellant's mother, and William Palmer Heath, Appellant's father, testified on his behalf at the sentencing hearing. (T-2247-63, 2263-73). Vivian and William described the problems that they began having with Appellant Heath when he was thirteen years old. (T-2250, 2265). After having difficulties with Appellant stealing, skipping school, and staying out late, they took him to a psychologist. (T-2251, 2265). A few weeks before the homicide of Michael Green, Appellant Heath overdosed on drugs. (T-2252, 2266). Both parents agreed that once Appellant was incarcerated, he seemed to adjust well to prison life and used his time constructively to obtain a high school diploma and became involved in a civic organizations. (T-2253-54, 2267).

Penny Powell. Met Appellant while she was working at Lake Butler Correctional Institution, where he was incarcerated, in February, 1988. When Appellant was released from prison in November, 1988, he moved in with Powell. (T-2314-16). Powell also testified that the brother, Kenneth Heath, drank excessively and smoked pot and that Appellant Heath and his brother did not get along well. (T-2321-23).

Appellant again waived his right to testify and also waived his right to call Dr. Krop to testify regarding psychological examinations. (T-2331-33). Following these waivers, the defense rested. The State did not present any evidence in rebuttal. The jury received the penalty phase instructions (R-422-26,T-2360-68), and recommended the imposition of the death penalty by a 10-2 vote for the death of Michael Sheridan. (R-427, T-2385-88).

On 10 December 1990, defense counsel presented additional argument against finding the aggravating factor of heinous, atrocious, and cruel. (T-2398-2401).

The trial court entered the sentencing order of 17 December 1990, (R-452-71, T-2444-60), finding two aggravating factors for the murder of Michael Sheridan:

> 1. The defendant was previously convicted of another capital felony or of a felony involving the use of, or threat of, violence to the person. (R-456-58, T-2449-50).
>
> 2. The murder was committed during the course of an armed robbery. (R-458-60, T-2450-51).

The Court did not find the aggravating circumstance that the murder was heinous, atrocious, or cruel. (R-460, T-2451).

The court found mitigating factors, to-wit:

> 1. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> 2. Aspects of the defendant's character; behavior in prison was above standard.
>
> 3. That the co-defendant received a life sentence.

The court rejected as mitigation: (1) the victim was a participant; (2) the defendant was an accomplice and his participation was relatively minor; (3) the defendant acted under the substantial domination of another person; (4) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired; and (5) the age of the defendant. (R-460-69, T-2453-60).

2. Statement of the Case and Facts at Evidentiary Hearing.

The following, summarized, twenty-one claims were presented to the trial judge. Where fairly debatable or supported by some quantum of evidence, the issues will be argued to the Court. Where issues, have been consolidated, reference will be made in footnote. (1) trial counsel were ineffective in developing the testimony of Kenneth Heath as pertains to the penalty phase of the trial; (2) defense counsel rendered ineffective assistance of counsel during the guilt phase of the trial by failing to completely develop and produce the eyewitness testimony of Kenneth Heath; (3) Kenneth Heath's recanted testimony amounts to newly discovered evidence, which, if introduced at sentencing probably would have resulted in a life sentence; (4) Kenneth Heath's testimony constitutes newly discovered evidence, which introduced during the guilt phase of the trial would probably have resulted in a conviction of a lesser included offense for Petitioner Ronald Heath; (5)defense counsel rendered ineffective assistance of counsel during the guilt phase of the trial by failing to present the only viable defense: voluntary intoxication and failed to present sufficient, available evidence that the Defendant was intoxicated as a mitigating circumstance; (6) defense counsel rendered ineffective assistance of counsel during the guilt phase of the trial by failing to advise and/or failing to properly advise the Defendant regarding the availability of the voluntary intoxication defense; (7) defense counsel rendered ineffective assistance of counsel during the penalty phase of the trial by failing to raise the mitigating circumstances that the Defendant, Ronald Heath, was suffering from severe antisocial personality disorder; (8) defense counsel rendered ineffective assistance of counsel during the guilt phase of the trial by failing to

request the voluntary intoxication jury instruction; (9) defense counsel rendered ineffective assistance of counsel during the guilt phase of the trial by failing to call available expert witnesses to prove that the Defendant acted under the dominion of Codefendant Kenneth Heath; (10) defense counsel rendered ineffective assistance of counsel during the penalty phase of the trial by failing to call available expert witnesses to prove that the Defendant acted under the dominion of Codefendant Kenneth Heath; (11)defense counsel rendered ineffective assistance of counsel during the guilt phase of the trial by failing to call certain material witnesses; (12) defense counsel rendered ineffective assistance of counsel during the guilt phase of the trial by failing ensure that the Defendant was present during all of the pretrial motion hearings and at the allocution hearing; (13) defense counsel rendered ineffective assistance of counsel during the penalty phase of the trial by failing to challenge the "committed in the course of a felony" aggravator, in the alternative, the aggravator is an unconstitutional "double"; (14) the State improperly withheld exculpatory information regarding Codefendant Kenneth Heath's actions while being transported by the police from Jacksonville to Gainesville, in violation of *Brady*; (15) a change in the law concerning the proper role of the jury in a penalty phase has occurred since the trial that requires a new penalty phase; (16) defense counsel rendered ineffective assistance of counsel during the guilt phase of the trial by failing to request a special verdict requiring the jury to specifically choose between premeditated murder and felony murder; (17) defense counsel rendered ineffective assistance of counsel during the penalty phase of the trial by failing to request a special verdict regarding the specific aggravating factors found by the jury; (18) defense counsel rendered

ineffective assistance of counsel during the penalty phase of the trial by failing to challenge that the indictment was insufficient due to its failure to specifically allege the aggravating circumstances upon which the State intended to rely; (19) trial counsel rendered ineffective assistance of counsel by failing to file motions to preserve that (a) aggravating circumstances must be pled and proved beyond a reasonable doubt, (b) the judge could not override the jury, and (c) the jury must reach a unanimous verdict; (20) Florida Statute 921.141 is unconstitutional; (21) defense counsel rendered ineffective assistance of counsel during the penalty phase of the trial by failing to argue non-statutory mitigating factors, including but not limited to, Ronald Heath's role was not the dominating force in the commission of the homicide.

Kenneth Heath. Kenneth Heath took the stand and was placed under oath. (EH1-31).[3] His lawyer, Lloyd L. Vipperman, Esq., was present in the courtroom. (EH1-31). Kenneth Heath, Appellant's younger brother, had, since the jury trial, given a sworn statement recanting, in part, his trial testimony. After consulting with counsel he was willing to testify. (EH1-32). Exhibit A, the original affidavit of Kenneth Heath, was verified and received into evidence as Defense Exhibit No. 1. (EH1-33). The trial court took judicial notice of the record on appeal of the trial proceedings in the this case, Case No. 1989-3026, which was received into evidence as Court's Exhibit No. 1. (EH1-34). Kenneth Heath stated that he and Appellant Heath, drove from Jacksonville to Gainesville on 23 May 1989. (EH1-35). Inside of

[3]"EH" will refer to the transcript of the State Court evidentiary hearing conducted on 29-31 March 2006.

the car at that time was a .22 caliber handgun, a sawed off shotgun, and a knife which belonged to him (Kenneth). (EH2-36). The handgun was initially located underneath the driver's seat of Kenneth Heath's car. Appellant Heath had been driving. (EH1-37). Kenneth Heath stated that he had no knowledge that his knife was inside of the vehicle until the night the homicide occurred. (EH1-37). The two arrived in Gainesville around 4:00 p.m., and spent the night at the home of Jennifer Berquist.

On the way to Gainesville, Kenneth Heath had tested the handgun to make sure that it worked by actually shooting it. (EH1-39). He obtained the handgun from they had burglarized in Georgia (EH1-39), before going to Jacksonville (and then to Gainesville). In his sworn statement of 05 February 1990, Kenneth Heath testified that he had placed *his own* handgun underneath the passenger's seat. (EH1-39). Kenneth Heath agreed that the prior statement was accurate. (EH1-39).

Kenneth Heath and Appellant Heath visited the Purple Porpoise on the first night they arrived in Gainesville. (EH1-40). Kenneth Heath recalled that they met Michael Sheridan the second night (24 May 1989). (EH1-41). He specifically remembered returning to the Purple Porpoise after the homicide, because he recalled stepping on the alligator inside his car after leaving the Purple Porpoise. (EH1-41). This alligator was captured while Appellant Heath, Kenneth, and Mr. Sheridan were driving around looking for a place to smoke marijuana. (EH1-41).

Kenneth Heath and Heath went to the Purple Porpoise on their first night in Gainesville to visit Ms. Berquist. (EH1-43). They consumed alcohol and smoked marijuana. (EH1-44). The next morning, 24 May 1989, Kenneth Heath and Appellant Heath smoked marijuana, consumed alcohol, and consumed cocaine. (EH1-

45-46).

Later that night, Kenneth Heath and Appellant Heath again traveled to the Purple Porpoise. (EH1-47). Ronald Heath drove Kenneth's car. The handgun was under the passenger's seat and the shotgun was in the back. (EH1-47). They arrived at the Purple Porpoise at approximately 7:00 p.m. (EH1-47). Both Kenneth Heath and Ronald Heath had some drinks. R1-48). Later, they stepped out of the front entrance of the bar and noticed a man lying on the ground drunk. (EH1-48). Kenneth Heath alleged that Appellant Heath instructed Kenneth Heath to pretend to give this individual a ride home, and then rob him. (EH1-48). Kenneth Heath asked the man if he needed a ride home, the man said he did. Kenneth Heath began to help the man to his car. (EH1-48). A female friend of the unidentified man intervened, and told Kenneth Heath that she would take the man home. (EH1-48). Kenneth Heath and Appellant Heath went back into the Purple Porpoise. (EH1-48).

While Kenneth Heath was sitting at the bar, Michael Sheridan, sitting a couple of seats away, initiated a conversation. (EH1-50). Mr. Sheridan bought Kenneth Heath a drink. (EH1-50). Kenneth Heath believed that he may have known Mr. Sheridan from playing baseball. (EH1-50). Mr. Sheridan told Kenneth Heath that he was in town on business and asked if Kenneth Heath smoked marijuana. (EH1-51). Mr. Sheridan indicated that he wished to buy some. (EH1-51). According to Kenneth, Appellant Heath came over, and allegedly suggested to Kenneth Heath they now rob Mr. Sheridan. (EH1-52). Kenneth Heath agreed. (EH1-52). Kenneth Heath was not forced or threatened into the plan and he participated freely and voluntarily. (EH1-53).

After a few more drinks, Mr. Sheridan, Kenneth Heath, and the Defendant Ronald Heath left the bar (approximately 9:00 p.m.) (EH1-54). Mr. Sheridan paid the tab with a credit card. (EH1-55). Mr. Sheridan told Kenneth Heath and Appellant Heath that he no longer wanted any marijuana. (EH1-56). Kenneth Heath talked Mr. Sheridan into going with them. (EH1-56).

Although he had his own car, Mr. Sheridan rode with Kenneth Heath and Ronald Heath in Kenneth's car. (EH1-55). Kenneth Heath was the driver. (EH1-57). Mr. Sheridan asked Kenneth Heath where he was going. Kenneth Heath responded that he wanted to drive around rather than sitting in the parking lot smoking pot. (EH1-57). Appellant Heath, sitting in the passenger's seat, rolled up a joint. Mr. Sheridan sat in the backseat. (EH1-57).

As they were driving down a back road they saw a small alligator. (EH1-58). Appellant Heath got out of the car, caught the alligator, and put it in the open back area of the station wagon. (EH1-58). They came to an intersection which lead to a dark dirt road. (EH1-59). The only light was from passing vehicles 50 - 60 feet away on the main road. (EH1-60).

Kenneth Heath parked, all three got out of the car and stood at the rear. (EH1-61). According to Kenneth, Appellant Heath began to gesture to Kenneth Heath to get the handgun. (EH1-61). Kenneth Heath retrieved the pistol from the car purposefully choosing the handgun because he knew that there were no shells for the shotgun. (EH1-63).

Kenneth Heath had the intent to take anything of value belonging to Mr. Sheridan. (EH1-64). Earlier, he had observed Mr. Sheridan in possession of a gold

bracelet, a gold watch, and a necklace. (EH1-64). Kenneth Heath approached Mr. Sheridan, pointed the gun at him, and told him to remove his jewelry and wallet. (EH1-64). Mr. Sheridan thought Kenneth Heath was joking. (EH1-64). After he understood that Kenneth Heath was serious, Mr. Sheridan began moving back and forth in front of Kenneth Heath. (EH1-65). The Defendant, Ronald Heath told Kenneth Heath to shoot Mr. Sheridan, but Kenneth reframed. Suddenly, Mr. Sheridan lunged toward Kenneth Heath. Kenneth Heath fired a round into Mr. Sheridan's chest. (EH1-65). Kenneth Heath fired because he believed that Mr. Sheridan was going to attack him. (EH1-66). Kenneth Heath specifically stated that he did not shoot Mr. Sheridan because Appellant Heath had told him to. (EH1-66). Mr. Sheridan staggered a few steps backwards and sat down on the ground. (EH1-67). Appellant Heath told Mr. Sheridan to remove his jewelry. (EH1-67). Mr. Sheridan tried, but could not comply. (EH1-67). Appellant Heath then removed Mr. Sheridan's necklaces, watch, and wallet. (EH1-67). Appellant Heath could not find one particular necklace that Mr. Sheridan had been wearing earlier. Appellant Heath asked Mr. Sheridan where the necklace was. (EH1-68). Mr. Sheridan did not answer. (EH1-68). Kenneth Heath alleged that Appellant Heath began kicking Mr. Sheridan, pulled Mr. Sheridan's shorts down to search for the bracelet (EH1-68). Appellant Heath, according to Kenneth, told him to shoot Mr. Sheridan again to make sure he was dead. Kenneth Heath fired a shot into Mr. Sheridan's head. (EH1-68).

Kenneth Heath thought he detected signs of life when he shot Mr. Sheridan the second time. (EH1-68). Kenneth Heath fired the second shot to eliminate the witness

due to the fact he had just been released from prison. (EH1-69).[4] Kenneth Heath testified that this point he also considered eliminating his brother, Appellant Heath, as a witness as well. (EH1-69). When, according to Kenneth Heath, Appellant said to shoot Mr. Sheridan again, Kenneth Heath shot Mr. Sheridan a third time, again a shot to the head. (EH1-70). This shot was fired from 12 inches away. (EH1-70).

Kenneth Heath had testified that he had discussed eliminating Mr. Sheridan as a witness while at the Purple Porpoise. When confronted with this prior statement, "these thoughts went through my head very quickly, without talking them over with Ronald, and I then shot Michael Sheridan twice in the head," and, "I also knew that things had gone so far that there couldn't be any witnesses, so I figured Michael Sheridan was going to die, anyway." (EH1-72-73). There was no doubt that Mr. Sheridan was dead after the third shot. (EH1-72).

Kenneth and Appellant Heath moved the body of Michael Sheridan further bacl into the woods (EH1-72) and they returned to the car. According to Kenneth, Appellant Heath went back to the body to look for an object that he had left behind. (EH1-72). After Appellant Heath had been gone for sometime, Kenneth Heath also went back to the body. (EH1-73). There he allegedly witnessed Ronald Heath cutting on the throat of the corpse with a knife. (EH1-73). Kenneth Heath, fearing that Appellant Heath would be his ultimate downfall, actually pointed the gun to the back of his brother's head and contemplated killing him (EH1-73).

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[4]Kenneth Heath explicitly did not attribute the shooting to being under the dominion or control of the Defendant, Ronald Heath. He always claimed the victim lunged at him.

Kenneth Heath stated that Appellant Heath appeared "crazy," (EH1-77) and looked like he did the time when Appellant Heath set himself on fire to see how it would feel. (EH1-77). When Kenneth Heath got into to the car he stepped on the alligator when he got in. (EH1-78). After a few more minutes, Kenneth Heath and Appellant Heath returned to the car and then went back to the Purple Porpoise where they remained until closing. (EH1-78).

Kenneth Heath and Appellant Heath went to another bar (which was closed) and finally ended up at King Douglas' apartment (EH1-79), where they stayed until the next morning. (EH1-79). At 9:00 a.m., Kenneth Heath was awaken by flashing police lights. (EH1-80). He initially believed the officers were there for the homicide, but later realized that the police were attempting to capture the alligator which had by now escaped from their car. (EH1-80).

Kenneth Heath and Ronald Heath went back to the Purple Porpoise that morning where they observed Mr. Sheridan's rental car in the parking lot. (EH1-80). Kenneth Heath took the rental car and drove to an unknown location intending to destroy the car. (EH1-81-82). On the way, they stopped at a gas station and Kenneth Heath used Mr. Sheridan's credit card to purchase gasoline. (EH1-82). At the final unknown destination, the car was searched, and set on fire. (EH1-83).

Next, the brothers traveled to the Oaks Mall, where they used Mr. Sheridan's credit cards to buy jewelry, shoes, haircuts, and other miscellaneous items. (EH1-84). After leaving the mall, they went to a western clothing store. (EH1-85), then to a stereo shop where Kenneth Heath had a problem attempting to use Mr. Sheridan's credit card. (EH1-86).

The store clerk telephoned the credit card company, and put Kenneth Heath on the phone. Kenneth Heath hung up and told Appellant Heath they needed to leave. (EH1-86-87). They left Gainesville and went to Jacksonville. (EH1-87).

Kenneth Heath testified that he had no desire to help Appellant Heath. (EH1-88). His motivation for testifying was that after he was approached by defense investigator Marc Levi, he learned that his testimony at trial was not as he had remembered it. (EH1-88). He testified because he wanted to let the truth be known. (EH1-89). Kenneth Heath reaffirmed that the statements he had made concerning shooting Mr. Sheridan three times before the Defendant touched him were true. (EH1-90).

Kenneth Heath stated he was initially approached by law enforcement in reference to the forgeries that had occurred at the Oaks Mall. (EH1-91). He said, he lied about his brother's involvement in the forgery case to protect Appellant Heath. (EH1-92). Kenneth Heath did not admit he was involved in the murder during his taped statement. (EH1-92).

Pursuant to his plea agreement, Kenneth Heath was required to give a sworn statement on 05 February 1990. (EH1-95).

Kenneth Heath believed that all of the items taken from Mr. Sheridan had been placed in a bag and thrown into the St. John's River. When Appellant Heath was arrested in possession of Mr. Sheridan's watch, Kenneth was surprised. (EH1-102). Kenneth Heath did not recall testifying that the Defendant Ronald Heath had returned with a knife in his hand after the first shot, despite the State's referring him to portions of the record. (EH1-104-107).

Kenneth Heath now testified that he shot Mr. Sheridan twice in the head only after the Defendant ordered him to do so. He affirmed a prior statement that he had always been afraid of his brother Ronald Heath. (EH1-108). He recalled an incident when they were children and the Defendant shot him with a bow and arrow. (EH1-109). He also alleged that he was sexually abused when he was younger by his brother Appellant Heath (EH1-110).

The State referenced Kenneth Heath's deposition given on 19 September 1990. (EH1-113). In that deposition, Kenneth Heath testified that Appellant Heath came back with a knife after he had searched the car for Mr. Sheridan's bracelet. In this version, Mr. Sheridan was still alive. (EH1-122-123). Kenneth Heath, however, did not recall the facts that way. (EH1-123). The State noted that Kenneth Heath's prior statement compared his brother's acts to torture. (EH1-123). The sworn statement of Kenneth Heath taken on 05 February 1990 was entered into evidence as State's Exhibit No. 1. (EH1-128). The deposition of Kenneth Heath taken on 19 September 1990 was received into evidence as State's Exhibit No. 2. (EH1-129). The State moved for the Court to judicially notice the trial testimony of Kenneth Heath, which was received into evidence as State's Exhibit No. 3. (EH1-130).

Kenneth Heath again stated that he believed the victim was already dead when Appellant Heath used the knife on him. (EH1-131). At the time of the incident, Appellant Heath did not have a gun, did not threaten Kenneth Heath with the knife, (or any other weapon), and Appellant Heath did not threaten Kenneth Heath in any other way. (EH1-132).

The statement Kenneth Heath gave during the evidentiary hearing was the same

statement he told to his own attorney, Appellant Heath's attorney, and defense investigator Marc Levi. (EH1-135-136). Kenneth Heath was not controlled by Ronald Heath when they traveled to Gainesville, went to the Purple Porpoise, or when during the robbery of Mr. Sheridan. (EH1-137). On 05 February 1990, Kenneth Heath entered an immunity agreement with the State so that he would not be facing the death penalty for murder. (EH1-140-141). Kenneth Heath established his own extensive criminal record during the time that his brother Appellant Heath was incarcerated. (EH1-143-144), and when it was physically impossible for him to have been "dominated" by his brother.

Kenneth Heath indicated that at the time he entered into the plea agreement in this Alachua County case, he entered into a plea agreement in Duval County in another murder case. (EH1-145). In reference to the (subsequent) Duval County murder case, Kenneth Heath stated that Appellant Heath had killed a friend to let Kenneth Heath know who was in control. (EH1-146-147). Defense counsel objected stating that the question was outside of the scope of direct and was not relevant. The Court overruled the objection. (EH1-147). Kenneth Heath answered that he told authorities that his brother Appellant Heath had killed a friend of his, but not to show him who he was in control. (EH1-147). Reading from State's Exhibit No. 2, Kenneth Heath's prior deposition, Kenneth Heath made statements that Appellant Heath had shot the victim in cold blood, that Ronald Heath was not in his right mind, that Ronald Heath needed to be off the streets, and that he was afraid that his brother, might kill his parents. (EH1-149). In the Alachua County cases, Kenneth Heath plead guilty to first-degree murder, robbery, escape, forgery and uttering. (EH1-

150). He was sentenced to life with a minimum mandatory of twenty five years. (EH1-150). Prior to entering his plea he believed that he would only receive a sentence of twenty-five years. He did not know that the judge could also sentence him on the other crimes he had not yet been sentenced on. (EH1-150). Kenneth Heath understood that he faced the death penalty. (EH1-151). On further redirect, Kenneth Heath stated that neither Assistant State Attorney Grable nor anyone else from the Alachua County State Attorney's Office was present when he signed his Jacksonville plea deal. (EH1-153).

Dr. Darren Rothschild. Dr. Rothschilds's curriculum vitae was admitted into evidence as Defense Exhibit No. 2. (R-155). He was a practicing physician, psychiatrist, and forensic psychiatrist. (R-156). In 2002, he completed a training program in psychiatry, obtained his B.A. from a four-year university, received his medical degree from the University of South Florida, and completed his residency in general psychiatry at Duke University. (EH1-156). After completing his residency, he spent one year in forensic psychiatry, which specialized in training in the interface of the legal system and completed a board examination in clinical psychiatry and forensic psychiatry. (EH1-157). He was also licenced to practice medicine in Georgia and North Carolina, as well as Florida. (EH1-158). Dr. Rothschild was a member of the American Medical Association, the American Psychiatric Association, the American Academy of Psychiatry and the Law, the Florida Psychiatric Association, and the Florida Medical Association. (EH1-159). Dr. Rothschild had testified in trial proceedings approximately 12 times prior to his testimony in this case. (EH1-159). The Defendant moved to have Dr. Rothschild tendered as an expert

witness, the State conducted a voir dire examination. (EH1-161), during which it was established that Dr. Rothschild previously testified in competency proceedings, trials involving the insanity defense, and trials regarding aggravating and mitigating sentencing factors. (EH1-161). The State then accepted Dr. Rothschild as an expert in forensic psychiatry without further objection and without further questioning. (EH1-161).

In preparation for his testimony and evaluation of the Defendant, Dr. Rothschild reviewed a banker's box filled with excerpts of the case file, investigative reports, the testimony of Kenneth Heath at trial, depositions, prior evaluations of the Appellant, Ronald Heath, and other statements which had been taken. (EH1-161). Appellant Heath was evaluated by Dr. Rothschild on 10 November 2004. (EH1-162-163). The examination was performed in conformity with recognized guidelines in the field of psychiatry. (EH1-164-165). The Defendant's family history was gathered from review of records and was confirmed and corroborated by interviews and other documentation. (EH1-165-166). Dr. Rothschild also relied upon eight other psychiatric evaluations which had been conducted on Appellant Heath earlier. (EH1-166).

Based on these sources, Dr. Rothschild concluded that the Defendant had an antisocial personality disorder and a history of substance abuse. (EH1-166-167). Antisocial personality disorder hinges on the presence of a pervasive pattern of lack of respect for other people's rights and, properties, and disrespect for law and order. (EH1-167). To be diagnosed with antisocial personality disorder, there must have been a pervasive pattern of conduct disregarding others and law and order. (EH1-

168). In this context, the term "respect" refers to a disregard for the rights and feelings of others. (EH1-169). Individuals with antisocial personality disorder can control their behavior, but the decision to control the behavior s lacking. (EH1-170). The Diagnostic and Statistical Manual (DSM) recognizes and lays out criteria for antisocial personality disorder. (EH1-170). One criteria is that there is manifested evidence of conduct disorder onset before the age of 15. (EH1-171). The criteria for "conduct disorder" are aggression to people or animals, destruction of property, deceitfulness or theft, and serious rule violations. (EH1-171). Dr. Rothschild found Appellant Heath had been physically cruel to people, had used a weapon to cause serious bodily harm, had burglarized someone's house, and had lied to cover up his actions from his parents. (EH1-172). The Defendant had also set fires. He set himself on fire, set a car on fire, set his home on fire, which are hallmark signs of the disorder. (EH1-172). Symptoms had began to develop in Appellant Heath as early as the age of 13. (EH1-172). As an adult, the criteria for antisocial personality disorder that the Defendant met were failure to conform to social norms with respect to lawful behavior, lack of remorse, history of deceitfulness, irritability, and aggressiveness. (EH1-173). Other criteria for the disorder included consistent irresponsibility and reckless disregard for the safety of one's self and others. (EH1-174). Dr. Rothschild spent about thirty hours researching, interviewing, and discussing the Defendant's case prior to reaching his diagnosis and opinion. (EH1-175-176).

Dr. Rothschild's second diagnosis was alcohol abuse. (EH1-176). The criteria of which requires a pattern of drinking to excess and having negative consequences

of alcohol use that were social, financial, or occupational. (EH1-176). [The doctor also concluded that the offense was not committed under extreme mental or emotional disturbance, and that the Defendant did not have diminished capacity to appreciate the criminality of his behavior at the time he committed his crime. (EH1-177)]. The doctor's diagnosis was inconclusive as to whether Kenneth Heath dominated the Defendant Ronald Heath or whether the Defendant Ronald Heath dominated Kenneth Heath due to the discrepancies in the accounts of the events. (EH1-177).

Other factors which were significant in terms of the Defendant's mental health functioning were his history of physical abuse as a child. The Appellant was severely whipped and beaten as a child which was corroborated by his father. (EH1-178). Appellant's use of alcohol was also significant, The Defendant was intoxicated on the night of the event. (EH1-178). Also, the Defendant had a history of being a victim of multiple sexual assaults and rapes while in prison after his juvenile conviction and incarceration. (EH1-178).

Diagnosis of antisocial personality disorder was not the equivalent of saying that a person is legally insane and not responsible for his actions at the time of the offense. (EH1-179). The insanity defense requires that there is a mental disease or defect that impairs one's ability to understand the wrongfulness of their actions. (EH1-179). Antisocial personality disorder does not affect one's ability to understand the wrongfulness of their actions. (EH1-179-180). Dr. Rothschild concluded while there was no statutory identification of antisocial personality disorder as a statutory mitigator, there have been cases where it has been found to be a non-statutory

mitigating factor, specifically, the Eileen Wuornos case.[5] (EH1-180).

Dr. Rothschild concluded that being in confined settings with law enforcement officers nearby does help provide structure to individuals with antisocial personality disorder. (EH1-183). They are less likely to act in away that disregards the law because the consequences are more clear and present. (EH1-183). Infractions decrease when individuals with antisocial personality disorder are in a confined setting due to the decreased opportunity. (EH1-184). Antisocial personality disorder is a disorder of mental functioning as opposed to a mental illness, but it is classified in the same diagnostic manual that classifies all other mental illnesses. (EH1-185).

Dr. Rothschild agreed that a popular name for antisocial personality disorder is "sociopath." (EH2-193). Although the terms are often synonymously used, "sociopath" often takes on other features that are not included in the diagnosis of antisocial personality disorder. (EH2-193). If one is a sociopath, that person will likely meet the criteria for antisocial personality disorder, but the reverse is not true. (EH2-193). Sociopath is not a currently recognized diagnosis in the DSM-IV, which is commonly used to classify people with mental illness and disorders. (EH2-194). People with antisocial personality disorder are more likely to be irritable but not necessarily emotional. (EH2-196). A person with antisocial personality disorder would tend to be less likely to be bothered by hurting someone, than a person without

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[5] *Wuornos v. State*, 676 So. 2d 966, 968, 971 (Fla. 1995). *See also, Morton v. State*, 789 So. 2d 324 (Fla. 2001), [antisocial personality disorder is a valid mitigating circumstance for trial courts] *citing Eddings v. Oklahoma*, 455 US 104, 107 115 (1982); *Robinson v. State*, 761 So. 2d 269, 273 (Fla. 1999) *cert. denied* 529 US 1057; *Snipes v. State*, 733 So. 2d 1000, 1003 (Fla. 1999); *Rutherford v. State*, 727 So. 2d 216, 224 (Fla. 1998).

the disorder. (EH2-196). Differences between antisocial personality disorder and sociopath behavior include that sociopaths have a glibness or charm. (EH2-199).

Before evaluating the Defendant, Dr. Rothschild, pursuant to his standard procedures, informed the Defendant of the purpose of his evaluation, why it was being conducted, and placed the Defendant on notice that anything he said could be used in a report. (EH2-203). The Defendant knew that he had a pending motion for postconviction relief, and that the evaluation was conducted to investigate the alleged claims. (EH2-203).

Appellant Heath told him that both he and his brother Kenneth Heath, went to the Purple Porpoise on the night of the incident. (EH2-207). While he was playing a video game keeping to himself, he noticed that Kenneth Heath was at the bar talking to Mr. Sheridan. (EH2-207). Kenneth Heath then gestured for the Defendant to come over, and Mr. Sheridan bought them a round of drinks. (EH2-207). Kenneth Heath and the Appellant Ronald Heath were already intoxicated. Appellant Heath wanted to go home. (EH2-207). He could not go immediately home because Kenneth Heath was making plans to smoke marijuana with Mr. Sheridan. (EH2-207-208). Appellant stated he wound up in the back seat of Kenneth Heath's car and passed out due to his fatigue (or intoxication). (EH2-208). Appellant Heath woke up and saw Kenneth Heath pointing a gun a Mr. Sheridan. (EH2-208). He got out of the car. At that point, Mr. Sheridan lunged toward Kenneth Heath, who fired a shot hitting Mr. Sheridan. (EH1-207). Mr. Sheridan moved around for several seconds and died. (EH2-208). Kenneth Heath then asked, "What's the matter, Big Brother? Are you afraid of some blood?" After seeing the look in Kenneth Heath's eyes, Ronald Heath

thought, "Don't make him shoot you, too." (EH2-208). Appellant Heath was then instructed by Kenneth Heath to take Mr. Sheridan's wallet which he did. (EH20). Kenneth Heath then dropped a knife near Ronald Heath and ordered Appellant to cut Mr. Sheridan. (EH2-209). He believed that Kenneth Heath wanted him to make a mark so he would also be involved. (EH2-209). They returned to the Purple Porpoise at approximately 1:00 a.m. and then drove to Mr. King Douglas' house. (EH2-209).

Dr. Rothschild was aware that the Defendant had given a prior statement to the police in which he completely denied that he was at the murder scene. (EH2-210). Dr. Rothschild testified that he did have some concerns about the veracity of the Defendant's statements because he had heard conflicting stories before he ever saw him. (EH2-210-211). Appellant had also told Dr. Rothschild that he knew nothing about the credit cards stolen from Mr. Sheridan until later in the day of their shopping spree. (EH2-211).

Dr. Rothschild stated that the Appellant's parents did not lead him to believe that Kenneth Heath dominated Appellant Heath. (EH2-214). While conducting his evaluation, there were two occasions at which the issue of the Appellant allegedly sexually abusing Kenneth Heath was raised. (EH2-215). Appellant Ronald Heath denied the allegations, but Dr. Rothschild heard from another evaluator that there was a allegation of that the sexual abuse originated from their father. (EH2-215). When Dr. Rothschild spoke to the father, Mr. William Heath said that there was a one time allegation from Kenneth Heath, during his late teens, that he had been sexually abused by the Appellant, but he did not disclose the specifics of what had happened. (EH2-215).

Dr. Rothschild was also aware that when Appellant Heath was 16 he was convicted of second degree murder. Dr. Rothschild knew about statements from Kenneth Heath that alleged that the Appellant had asked him to rob a drunken man on the street prior to robbing Mr. Sheridan. (EH2-220). The defense at trial utilized a defense expert, Dr. Harry Krop. (EH2-220). Dr. Rothschild was unaware of Dr. Krop's actual diagnosis, but he had spoken with Dr. Krop (a psychologist) about the case, and his diagnosis was suggested. (EH2-220).

Dr. Harry Krop. Dr. Harry Krop, (called out of turn with consent) was a licensed psychologist. (EH2-244). He received his bachelor's degree from Temple University, a master's degree in clinical psychology, and a Ph.D., from the University of Miami, majoring in motivational psychology and mental retardation. He also completed a clinical internship in Connecticut and a post doctoral internship with a specialization in neuropsychology. (EH2-244). Among various other accolades, Dr. Krop was an associate professor at the University of Florida and conducted a private practice. (EH2-245-248). He had conducted approximately 1,350 forensic psychological evaluations and approximately 10,000 competency and insanity evaluations. (EH2-248). Dr. Krop's vitae was entered into evidence without objection as State's Exhibit No. 5. (EH2-250). The State also tendered him as an expert witness in the field of forensic psychology without objection. (EH2-250).

Dr. Krop originally evaluated the Appellant on 14 July 1989; a second evaluation was conducted on 12 November 1990. (EH2-251). The Appellant was evaluated to determine his competency to proceed, and his mental state at the time of the alleged offense. Also factors which may have mitigated the death penalty were

examined. (EH2-252). Dr. Krop was initially retained as a confidential expert to assist the defense in preparing sanity, competency, and mitigation issues. (EH2-253).

Dr. Krop received a history of the Appellant's familial background and at some point spoke to Appellant about the event. (EH2-259). Appellant reported that he had been physically and emotionally abused. (EH2-259). He described strict discipline in his home but also talked about negative experiences which occurred when he was sent to a private Catholic school. (EH2-259). In arriving at his opinion, Dr. Krop reviewed 13 depositions, records relating to Appellant's 1977 juvenile case for second degree murder, a PSI, a legal file, school records, DOC records, and medical records. (EH2-259-260). He also had the benefit of five or six different evaluations that had been previously conducted on Appellant. (EH2-260). There were no indications of organic brain disorder. (EH2-262).

When interviewed by Dr. Krop, Appellant Heath blamed Kenneth Heath. (EH2-264). The Defendant told Dr. Krop that it was an incident where he had been associating with his brother, who killed Mr. Sheridan on his own accord. (EH2-264). The Defendant admitted that he helped move the body and used the credit cards which had been stolen from Mr. Sheridan. (EH2-264). On the night of the incident, Appellant and his brother Kenneth Heath were at the Purple Porpoise drinking. (EH2-264). Mr. Sheridan picked up their tab, and they all left the bar. (EH2-265). Appellant stated that he got in the back seat and that Kenneth Heath drove. (EH2-265). When they pulled over so that Mr. Sheridan could urinate, Kenneth Heath ordered him to give up his wallet and to not come any closer. (EH2-266). When Mr. Sheridan took a step forward, Kenneth Heath shot him in the chest. (EH2-266). The

Appellant yelled at Kenneth about what he had done was told to shut up. (EH2-266). The Appellant believed that his brother would shoot him so he stood back. (EH2-266). Kenneth Heath then took out a knife and began cutting at Mr. Sheridan's neck. (EH2-266). Kenneth Heath took Mr. Sheridan's jewelry, and shot him twice more in the head. (EH2-266). Afterwards, they returned to the Purple Porpoise. (EH2-267). They found the car, and drove it to find an ATM machine. (EH2-267). Dr. Krop noted several discrepancies between the statement that Appellant gave him and what he had told police. (EH2-267-268).

On 19 October 1990, Dr. Krop had conversations with William Heath, the Defendant's father, who described problems he had with Appellant's rebelliousness as a child. (EH2-268). William Heath, a former police officer stated that he attempted all kinds of discipline, including corporal punishment that he did not perceive as excessive. (EH2-269). When the Defendant entered the sixth grade his behavior began deteriorating. (EH2-269). His parents first found out about his drug and alcohol abuse when the Defendant at age sixteen passed out in their living room, in front of them, hitting his head. (EH2-270).

In Dr. Krop's opinion, the preexisting evaluations and defiant and rebellious behavior demonstrated by Appellant, indicated that he indeed suffered from antisocial personality disorder. (EH2-270). He also concluded the Appellant was competent to proceed and did not qualify under M'Naghten test. (EH2-272).

Trial counsel for Appellant Heath, Mr. Scheck told Dr. Krop that based on his findings, the defense believed that Dr. Krop may be more harmful than helpful and decided not to call Dr. Krop to testify at trial. (EH2-274). Defense counsel believed

that they could present mitigating evidence in relation to the Defendant's upbringing with his family, and did not want to risk Dr. Krop being cross-examined on the inconsistent statements he was given by the Defendant Ronald Heath during the evaluation. (EH2-276-277). Counsel also believed that it was likely that the jury would look unfavorably upon an individual with traits of antisocial personality disorder due to defense counsel's previous experiences. (EH2-276). A follow up letter was written by Dr. Krop to Mr. Scheck which reiterated this conversation. (EH2-274). The letter was admitted into evidence as State's Exhibit No. 6 without objection. (EH2-275). Dr. Krop did not believe that there was a way to present his testimony so that it would have been more beneficial than harmful to the Defendant's case. (EH2-278).

On cross-examination, Dr. Krop testified that he knew there had been some cases that determined that antisocial personality disorder was a "personality disorder" and could be used as a mental health mitigator. (EH2-278-279). Dr. Krop also discussed with the trial attorneys that the Defendant had been abused as a child by corporal punishment from his father. (EH2-279). He had no recollection whether or not he discussed that the Defendant was a slow learner or that the level of alcohol use on the night of the offense could have risen to the level of intoxication. (EH2-280). In his opinion, people with antisocial personality disorder do better in closed environments. (EH2-281).

Mary Cook. Postconviction counsel informed the Court of his intention to call Mary Cook (a/k/a, Mary Dodd), to introduce her statement about the jewelry, in relation to a claim that was pled and denied without prejudice. (EH2-285). The State

objected to the presentation of this testimony and argued that the claim was never repled. (EH2-285). Collateral counsel proffered that Ms. Cook would testify that a gold watch (of the victim Michael Sheridan) came into the possession of the Defendant at the beach. (EH2-285). Ms. Cook, Kenneth Heath, and the Defendant Ronald Heath were together at a beach in Jacksonville, Florida. As Kenneth Heath went into the water at the beach, he gave Ms. Cook the watch. (EH2-285). She would testify that she put the watch into a shoe which belonged to the Defendant Ronald Heath. (EH2-286).

The Court sustained the State's objection, but (EH2-288) the Court accepted into evidence without objection the pretrial Deposition of Mary Dodd. (EH2-291).

Vivian Heath. Vivian Heath, the mother of Appellant Heath and Kenneth Heath, testified during the original trial proceedings as a character witness on behalf of the Defendant and was in attendance for the entire trial While she could not remember the exact day, Mrs. Heath recalled overhearing a conversation by the attorneys for the State which took place in the presence of jurors. (EH2-296). She and her husband were leaving the courthouse for lunch, got into the elevator, and were accosted by whom she believed was the grandmother of the victim. (EH2-296). Mrs. Heath then left out of the back door of the courthouse and happened to run into the jury being escorted out of the building. (EH2-296). The prosecutors were also leaving at the same time and were in the presence of the same jurors. (EH2-298). Mrs. Heath overheard the Assistant State Attorney and his assistant speaking about Appellant Heath's prior (juvenile murder) conviction. (EH2-298). She could not recall the exact words, but did remember that it had something to do with the fact that

Appellant Heath had already served one prison term. (EH2-299). The entire episode occurred in less that five minutes. (EH2-300). She became very upset about the improper comments but could not recall whether she informed the defense attorney's about the problem. (EH2-302).

On cross-examination, Mrs. Heath recalled that the comments had occurred prior to the penalty phase of the trial. (EH2-302). At the time she heard the statements, the juror's were closer (25 ft.) to her than the prosecutors. (EH2-302). She did not hear anyone say the name "Ronald Heath" (EH2-303), and she could not testify that any of the jurors actually heard the prosecutor's conversation. (EH2-304). On redirect examination, Mrs. Heath revised her estimate as to distance, to the effect that the prosecutors were further from her, but closer to the jury. (EH2-306).

William Heath. William Heath was the father of Appellant Heath and Kenneth Heath. (EH2-309). At the trial, he was only in attendance for the closing arguments. (EH2-309). He was under subpeona and therefore excluded from the courtroom. (EH2-309). He had no independent recollection of the incident with his wife in the presence of the jury. (EH2-310).

William Heath testified had been a police officer for seven years. He recalled his wife reporting to him that she overheard improper prosecutorial statements being made in the presence of the jury, but he could not say he heard any of these comments himself. (EH2-312). He knew that prior to trial, prosecutors, witnesses, judges, and other court personnel could not talk about the case in front of jurors. (EH2-313). If he had heard such statements he would have considered them improper. (EH2-313). If Mr. Heath had had personal knowledge of improper statements made by the

prosecutors, he would not have reported it to the defense attorneys. (EH2-313). He felt as if he were on an island since he had been barred from the courtroom and the attorney's did not talk to him after the trial started. (EH2-314). Additionally, he was not allowed back into the courtroom until the penalty phase of the proceedings, and therefore he did not have an opportunity to talk with defense counsel during the guilt phase. (EH2-314).

Sheila Short. In 1989, Ms. Short was employed as a corrections officer by the Alachua County Sheriff's Office. (EH2-316). One day, she attended the Ronald Heath trial with Victoria Wade, a friend hers who knew Appellant Ronald Heath from high school. (EH2-316-317). Ms. Short overheard spectators stating, "God, there's the prosecuting attorney, and he shouldn't be talking around those people." (EH2-318). She could not identify the specific individual that made the statements. (EH2-318). Ms. Short also overheard some talk about the Defendant having a prior conviction. (EH2-318). The events occurred before the trial had ended. (EH2-319). Ms. Short did not report what she had heard; she was not sure whether Victoria Wade reported it. (EH2-319).

Ms. Short no longer worked for the Department of Corrections. (EH2-320). She remembered that the individual talking in the presence of the jurors was a tall man with a beard and glasses. (EH2-321). The only person whom she could identify out of the group of people who heard the statement was her friend, Victoria Wade. (EH2-322). The incident took place in the hallway outside of the courtroom. (EH2-322). She could not recall what the tall man said word for word, but she heard something about the Appellant's prior murder conviction. (EH2-323). She heard

these statements being made at approximately 1:00 p.m. (EH2-323). When she originally overheard these statements she did not think about the conduct being improper because she had no idea it was jurors in the vicinity. (EH2-324).

Ralph Grabel. Assistant State Attorney Ralph Grabel, a prosecuting attorney for approximately twenty-two and a half years, participated in the Appellant' s trial in 1989; at that time he had been a prosecutor for seven years. (EH2-327). In the instant case, Mr. Grable could not recall whether he had made a specific effort to ensure that the jurors did not overhear his statements. (EH2-330). Mr. Grabel testified that it was his practice to refrain from talking with anyone in the hallway during the course of a trial. (EH2-328). He did not know whether or not the jurors wore identification tags. (EH2-330).

Mr. Grable denied ever discussing the Defendant's prior murder conviction within 12 feet of the jury. (EH2-331). He stated that he would never be within 50 feet of a juror. (EH2-331). No juror ever stepped forward and complained of hearing any statements from the prosecutor, (EH2-333). Mr. Grable was confident that he would not have discussed the Defendant's prior record in the hallway outside of the courtroom where the jury could hear. (EH2-334).

On cross-examination, Mr. Grable admitted that the old courthouse facility (where the trial took place) was of such a design that there was an opportunity for civilians, jurors, witnesses, visitors, and observers to commingle in the halls during proceedings. (EH2-334). Mr. Grable agreed that the opportunity for those kinds of events were present. (EH2-334). He did have prior knowledge of the Defendant's murder conviction, and he did have discussions with co-counsel in relation to that

evidence. (EH2-335). He admitted that with the configuration of the old courthouse it was possible that a juror could have overheard statements. (EH2-337).

[Judge] Phyllis Diane Kotey. During the trial of Defendant, Ronald Heath, in February 1990, Judge Phyllis Diane Kotey was employed as an Assistant State Attorney in Gainesville, Florida, and was co-counsel with Assistant State Attorney Ralph Grabel in this case. (EH2-340). She had begun working at the State Attorney's Office as an intern in 1984. Mr. Grable was the lead prosecutor at the time and the case was equally divided in terms of responsibility. (EH2-341). Judge Kotey confirmed that during the Defendant's trial jurors did wear visible tags which indicated their status as jurors. (EH2-342). She stated that both prosecutors took their responsibilities very seriously, and were careful not to speak in front of jurors or anyone else. (EH2-343-344). She agreed that the configuration of the old courthouse did create an opportunity for witness, spectators, and jurors to congregate and overhear each other's conversations. (EH2-344-345). This fact was taken into consideration and Judge Kotey stated that normally she would not have discussed the case with Mr. Grable in any of the public areas. (EH2-345-346). Based upon her normal practice and awareness of the potential for being overheard, she was confident that she would not have discussed the case in the presence of the jury and if she thought that she had, she would have informed the court of such an occurrence. (EH2-346).

Judge Kotey stated that there was a high probability of prosecutors and defense attorneys, witnesses, and jurors running into each other inside of the old courthouse. (EH2-347). If one of the prosecutors had let their guard down, there was a possibility

that conversations were overheard. (EH2-348). She stated that this event was unlikely because both prosecutors would have had to let their guards down at the same time. (EH2-348).

During the investigation phase of the case, Assistant State Attorney Kotey became aware of the Defendant's prior murder conviction. (EH2-348). She could not specifically remember at any time having contact with the jurors outside of the courtroom. (EH2-349). There were separate bathroom facilities for the prosecutors and jurors. (EH2-350). There was a vending area downstairs which was accessible to counsel and jurors, but jurors would usually be escorted by the bailiff when visiting this area. (EH2-350). If a lawyer so chose, there was an opportunity in this area to have contact with jurors. (EH2-351).

Vivian Heath (recalled). Mrs. Heath had been interviewed by the defense postconviction expert, Dr. Rothschild. (EH3-357). Mrs. Heath testified there was never any abuse of animals by Appellant Heath. (EH3-358). The family owned cats, dogs, rabbits, and a turtle that everyone in the family loved. (EH3-358). The Defendant Ronald Heath was particularly good with birds and had a strong affection for the dog. (EH3-385). These facts were specifically told to the trial attorneys. (EH3-359). Mrs. Heath also told Dr. Rothschild that there was no abuse among family members, but conceded that the Defendant did receive spankings. (EH3-350-360).

Mrs. Heath recalled an incident during which the Defendant, at age 16, was standing in the kitchen and suddenly passed out. (EH3-361). After taking him to the doctor to treat a cut, the doctor informed the parents that he did not need to give the

Defendant Ronald Heath pain medication because he was already under the influence. (EH3-360). This information was also shared with the Defendant's trial attorneys prior to his trial. (EH3-361). Mrs. Heath was aware of an incident when Appellant Heath set a small fire set on the carpet of his bedroom. (EH3-361). She did not know Appellant Heath had set himself on fire, and she did not know he had set a tree house on fire. Mrs. Heath did recall an incident where Ronald Heath set a car on fire. (EH3-361). But she did not know of this incident until it was reported in the newspaper. (EH3-362).

Mrs. Heath informed Dr. Rothschild that William Heath was employed while she remained at home to raise the children. They spent a lot of time together as a family. (EH3-362). The first time she became aware of pattern of misconduct Appellant Heath was when at age thirteen, he broke into a neighbor's house and stole several items. (EH3-363). There was also another burglary about which Mrs. Heath could not remember the details. (EH3-363). There was no pattern of physical fights, assaults, impulsivity, or short temper. (EH3-363-364). When the Defendant was sixteen, he went to prison for the first time. (EH3-364).

The younger son, Kenneth Heath first began getting into trouble he was 17 years old and while his brother Appellant Heath was in prison. (EH3-364). Kenneth Heath was 19 years old when he was placed in the Jacksonville Prison Farm for breaking into a car. (EH3-366-367). Prior to being placed in prison himself, Kenneth Heath had visited his brother Ronald Heath on several occasions while Ronald was incarcerated. (EH3-366). At some point, Kenneth Heath refused to visit Ronald Heath because it was too hard on him. (EH3-366). Appellant Heath was not

controlling Kenneth Heath at this time, nor was he controlling him after he was released from prison. (EH3-366). Observing their interactions while they grew up together, Mrs. Heath stated that neither son dominated, nor controlled, the other. (EH3-367).

Mrs. Heath stated that neither she or her husband to her knowledge emotionally abused the Defendant. (EH3-368-369). Spankings were only imposed after other forms of punishment such as deprivation of television or ground failed. (EH3-369). The father, William Heath, used the belt that he wore on his pants to "spank" the Defendant. (EH3-369). The Defendant was clothed when these whippings took place. (EH3-369). After this discipline, Appellant's *buttocks would appear red,* but Mrs. Heath never observed welts or marks on the Defendant's back, arms, or neck. (EH3-370).

The incident that the Defendant went to prison for at age sixteen occurred approximately four months after the incident where he passed out in the family kitchen. The family discovered for the first time, Appellant Heath had been using drugs. (EH3-370). Appellant Heath had begun to break into neighborhood homes at the age of thirteen, Mrs. Heath and her husband took him to see a psychologist. (EH3-371). The psychologist gave her ten books that the young man should read told her to get Appellant involved with a sport and make him stick with it. (EH3-371). Appellant followed the psychologist's instructions. (EH3-371).

The only time Kenneth Heath complained that his brother had physically abused him was after Kenneth was an adult and after Kenneth had been sent to prison. (EH3-371). Kenneth Heath never told his mother that the Appellant had sexually

abused him in any way. Vivian Heath believed that Kenneth Heath had the more dominating personality, of her two sons. (EH3-372). Kenneth Heath did not want to go to visit his brother in jail because it took ten hours of car travel over a weekend and the visiting park at the prison was chaotic. (EH3-374). Mrs. Heath did not believe that Appellant Heath grew up emotionally deprived, was abused or neglected, or was a slow learner. (EH3-374). When Appellant was in the sixth grade, In order to avoid having to bus him across town, his parents placed him in a private Christian school. (EH3-375). Mrs. Heath did not realize that Appellant had a substance abuse problem. (EH3-375). Mrs. Heath told the trial lawyers, and Dr. Rothschild, that she believed that Kenneth Heath was the dominating force over the Defendant. (EH3-376).

William P. Heath. The father, William Heath, stated that he did spank the Appellant in order to inflict punishment. (EH3-380). Initially he used his hand but when the Defendant became twelve years old he began using a belt. (EH3-380). The first time he became aware of the Appellant's substance abuse was when Appellant passed out in the living room at age fifteen. (EH3-381). The doctor informed them that the Appellant had been taking quaaludes. (EH3-381). There was a second incident in which found Appellant Heath smoking marijuana with his friends at age sixteen. (EH3-382). When the Appellant was fifteen, the parents had him psychologically examined after he broke into a neighbor's home. (EH3-383). The Defendant complied with the psychologist's recommendation, but several months later was arrested for another burglary. (EH3-383).

Kenneth Heath never complained to his dad that he did not want to see his

brother because he had abused him. (EH3-386). Right before, or during, his own trial for breaking and entering, Kenneth told his father that he had been sexually abused by Ronald Heath. (EH3-386). At the time, Ronald Heath was in prison. (EH3-386). Kenneth Heath did not give his dad a time frame of when the alleged sexual abuse occurred, it was only raised in passing for a couple of minutes. (EH3-389). William Heath never saw any events or evidence that Appellant Heath dominated Kenneth Heath at any time or vice versa. (EH3-386-387).

William Heath recalled the most dramatic change in the Appellant's behavior occurred at the age of twelve. (EH3-387). In order to avoid being bussed to a sixth-grade center located on the opposite side of town, Mr. and Mrs. Heath decided to enroll Ronald Heath in a private school. (EH3-387). After three months at this school, Appellant began demonstrating behavior and attitude problems. (EH3-387). After meeting with his teachers, the parents decided to move Appellant Heath from the private school and bring him back into the local public school system. (EH3-388). But Appellant's conduct continued to decline. (EH3-388). While in the Christian school, the Defendant told his parents that he was being abused by on of his teachers. (EH3-391).

William Heath recalled that the last time he spanked Appellant Heath, he pulled his pants down and noticed bruising after the whipping was over. (EH3-392). William Heath testified that he never spanked the Defendant when he was mad or out of control and would wait until he calmed down. (EH3-392). He did not believe that the Defendant was a slow learner, but William Heath did believe that he had a substance abuse problem. (EH3-392).

Sheila Short. At the time this case was originally tried, Ms. Short was a correctional officer at the Alachua County Detention Center. (EH3-398). As a correctional officer, Ms. Short came into contact with Kenneth Heath but was not in a position to observe whether Kenneth Heath was ever dominated by Appellant Heath or vice versa. (EH3-398-399). She did not observe any acts or testimony that suggested domination on the part of either brother. (EH3-399).

When it became known that Kenneth Heath was going to be a witness against Appellant Heath, the brothers were kept separate from each other. (EH3-399).

Ms. Short resigned from the Alachua Count Sheriff's Office in lieu of being terminated based on allegations of improper conduct with an inmate Nighthorse in August of 2001. (EH3-401). Among the allegations, she was accused of introducing documents relating to the ownership of a horse for Inmate Nighthorse to sign, introduction of manila envelops with a metal clasp, introduction of a personal letter, and introduction of ibuprofen. In an interview with Detective Mims Ms. Short was accused of being untruthful, allowing Inmate Whitehorse to make personal calls, failing to properly search an envelope for contraband, and allegations concerning her relationship and treatment of Inmate Nighthorse. (EH3-405-406).

Ms. Short stated that she overheard statements that Kenneth Heath was dominating or attempting to get in a position of power over Appellant Ronald Heath. (EH3-417). While he was incarcerated at the old jail, Ms. Short, while walking the hallway, became engaged in conversation with Kenneth Heath. (EH3-418). After another inmate called Ms. Short over to the cell to ask a question, Kenneth Heath approached her and stated "I fixed his ass this time, didn't I," and began laughing.

(EH3-418). At that time Ms. Short heard this statement, she did not know who Kenneth Heath was. (EH3-418). She asked Kenneth Heath what he was talking about and Kenneth Heath responded, "my brother." (EH3-419). Ms. Short conceded with the State's assertion that Kenneth Heath could have been talking about anything, but that she did not perceive it that way. (EH3-421).

Ronald Heath (Defendant/ Appellant). The Defendant was placed under oath. (EH3-426). The Defendant stated that he had spoken with his attorney Robert Augustus Harper and with associate counsel, Jonathan Mitchell Kester, at the Alachua County Adult Detention Center, concerning his right to testify. (EH3-426-427). The Defendant then indicated that it was his decision not to testify. (EH3-428). The Court accepted the Defendant's waiver, and postconviction counsel rested the case. (EH3-430).

Robert Rush. Trial counsel, Robert Rush, the defense trial attorney had graduated from law school in 1985. (EH3-431). After spending two years at the Public Defender's Office and one year with a civil litigation firm, he began a private practice in 1988. (EH3-431). In November of 1990, when this case was originally tried, Mr. Rush had never tried a murder case to verdict. (EH3-432). Since that date, Mr. Rush has tried approximately 25 criminal trials to verdict. (EH3-432). In preparation for his testimony, Mr. Rush reviewed depositions, transcripts, and sworn statements from Kenneth Heath Heath. (EH3-432). An investigator, two third year law students, Dr. Krop, and co-counsel Stephen Scheck also assisted in the case. (EH3-433-434). At a later point in his career, Mr. Scheck admittedly developed some alcohol problems. (EH3-434). In preparation for trial, Mr. Rush deposed all of the

State's witnesses. (EH3-434), and attempted to locate all defense witnesses as well. (EH3-435). The Defendant assisted him. (EH3-435).

The theory of the defense was that the Defendant's brother, Kenneth Heath, committed the murder and blamed the Defendant to get the benefit of a plea deal. (EH3-436). This theory of defense was adopted because the depositions. Evidence tended to support the theory. The Defendant supported the theory, and it seemed like the most viable defense. (EH3-437). Mr. Rush testified that the Defendant ultimately made the decision not to testify at trial. (EH3-438). Although there was evidence of drug and alcohol consumption by the Defendant on the night of the incident, Mr. Rush opined that an intoxication defense was not viable at the guilt phase. (EH3-438). First, he believed that it would be a difficult defense for the jury to accept. (EH3-439). Second, Mr. Rush did not believe in presenting multiple defenses because he believed that it diminished the effectiveness of each defense. (EH3-439). And third, he did not believe that the evidence rose to a level compatible with an intoxication defense. (EH3-439). He consulted with Appellant Heath multiple times in regards to the intoxication defense and advised the Defendant to pursue an alibi defense in lieu of intoxication. (EH3-440). Mr. Rush testified that with the hindsight of fifteen years of trial experience, there was nothing that he would have done differently if presented with the same facts and circumstances today. (EH3-442).

In support of the theory that the Defendant was not present at the crime scene,[6]

[6]The Defendant's own statement to defense trial expert witness Dr. Harry Krop was that he was present. (EH 262, 265-266, 267-268). Further the Defendant's statement to police indicated he was present at the scene of the homicide. (EH 267-268).

Mr. Rush presented the testimony of Wilburn Johnson, Jr., an inmate (EH3-442), who testified that Kenneth Heath admitted that he robbed and killed Mr. Sheridan and that the Defendant was not present. (EH3-442). He also testified that Kenneth Heath stated that he was the black sheep of the family and that he wanted to make his parents suffer. (EH3-443). John Knight, a/k/a Michael Ryan, testified that Kenneth Heath had received a letter from his grandmother and became very upset because the Defendant blamed the murder on him. (EH3-443). Mr Knight also testified that Kenneth Heath said he shot Mr. Sheridan a couple of times and cut his throat, "because he pissed me off, he wouldn't die." (EH3-444). He also remembered calling Bobby Starker, after his recollection was refreshed, who stated that Kenneth Heath had returned to prison very angry after visiting his attorney and learning that the Defendant blamed him for the homicide. (EH3-444). Kenneth Heath specifically stated, "That MF won't lie for me." (EH3-444).

To impeach Kenneth Heath's testimony, Mr. Rush presented his plea deal and inconsistent statements. (EH3-444). On cross-examination, Mr. Rush also brought out the fact that Kenneth Heath potentially faced the death penalty for the crime committed. (EH3-445). Defense counsel was also concerned about opening the door to certain testimony during cross-examination, such as, the alleged sexual abuse allegedly perpetrated by the Defendant upon Kenneth Heath. (EH3-446). He was also concerned about opening the door to any testimony that Ronald Heath allegedly shot and killed Kenneth Heath's friend in Jacksonville, Florida. (EH3-446).

Mr. Rush believed that Jennifer Berquist was the State's second most important witness. (EH3-446). She placed the Defendant at the bar with Michael Sheridan,

and leaving with the victim. (EH3-446). Mr. Rush presented evidence that she was not being candid, that there was sexual activity with both Kenneth Heath and the Defendant Ronald Heath, and that she was also a user of cocaine and marijuana. (EH3-447). He felt that this information would greatly compromise her credibility as a witness. (EH3-447). At trial, Wayburn Williams testified that Appellant Heath told him that he wanted to escape so that he could kill Cindy and Jennifer Berquist because they were the only two individuals who could tie him to the murder. (EH3-447). To impeach his testimony, Mr. Rush exposed the fact that he received a favorable plea deal from the State and questioned his position as a confidant to the Appellant Ronald Heath. (EH3-448).

Another witness, Ronald Heydon, called by the defense (EH3-449), testified that Kenneth Heath (alone) attempted to sell Mr. Sheridan's wedding ring to him to prove that the murder had been committed by Kenneth Heath. (EH3-450). Thomas Riddle was also called to testify about seeing Kenneth Heath in possession of Mr. Sheridan's watch. (EH3-450). Jonathan Gilbert for the Audio Outlet store was called and testified that Kenneth Heath was the individual in charge, while Appellant Ronald Heath merely stood back and watched Kenneth Heath make decisions. (EH3-451). Penny Powell testified that the Defendant was genuinely surprised at the presence of Mr. Sheridan's watch and the Kenneth Heath had probably placed it there. (EH3-452).

In response to Ground I, which claimed that defense counsel was ineffective for failing to conduct a through cross-examination of Kenneth Heath and to bring forth the facts alleged in his sworn statement, Mr. Rush replied that he had no such

evidence at the time of trial. (EH3-453). He added that Kenneth Heath stood up well during pretrial depositions and that he had no basis to believe that he was going to testify any differently than he had done in his deposition. (EH3-454-455). In response to Ground II, ineffective assistance for failure to develop and produce the same testimony from Kenneth Heath, Mr. Rush answered similarly. (EH3-455). On Ground III, which claimed newly discovered evidence in the form of recanted testimony, Mr. Rush replied that Appellant Heath never stated that he stabbed Mr. Sheridan after he was dead, nor ever conceded that he was at the scene of the crime. (EH3-456). On Ground V, failing to present the defense of voluntary intoxication, Mr. Rush stated that he had nothing further to add to his testimony previously given on this issue. (EH3-458). On Ground VI, failure to advise defendant of the availability of the voluntary intoxication defense, he answered the same as to Ground V. On Ground VII, ineffective assistance of counsel during penalty phase by failing to raise the mitigation circumstance that the Defendant, was suffering from severe antisocial personality disorder, Dr. Rush stated that he discussed the disorder with Dr. Krop and received a letter advising him that the defense would not be helpful. (EH3-459). To his best recollection, Dr. Krop would have testified that the Defendant chose not to conform with societal norms and with the law. (EH3-460). Dr. Krop also informed Mr. Rush of his conversations with the Defendant's parents and advised him that the their testimony would also not have been helpful mitigation in this case. (EH3-460). Specifically, Mr. Rush said that the Defendant's parents never told him that the Defendant grew up emotionally deprived. The Defendant was not emotionally abused, and was not a slow learner. They did not tell him that Ronald

Heath was under the influence of extreme emotional or mental disturbance at the time of the crime. (EH3-460-463). Mr. Rush was aware that the Defendant suffered corporal punishment with a belt when he was a child, but after speaking with Dr. Krop, he did not believe that the jury would believe this was sufficient to serve as a mitigator. (EH3-461-462). He was also aware of the Defendant's substance abuse and use. Mr. Rush characterized the drug use as only experimentation. (EH3-462). Other reasons that Mr. Rush decided not to present evidence of the Defendant's childhood, education, and family relationships were allegedly due to the Defendant's own wishes not to pursue those mitigators and to not testify. (EH3-464). Some of these areas were discussed during the direct examinations of William and Vivian Heath. (EH3-464).

The defense theory during the penalty phase was that the Defendant was wrongly convicted and that there was residual doubt[7] as to his guilt and level of culpability. (EH3-464). As to Ground X, ineffective assistance of counsel during the penalty phase for failure to present an expert witness to rebut the State's theory of domination, Mr. Rush responded that Dr. Krop was retained and that there was no evidence that was found to the contrary. (EH3-466). Mr. Rush stated that the Defendant was older, larger, and appeared to be mentally quicker and secure. (EH3-466). He never asked the Defendant's parents of their opinions as to whether one was more dominant than the other. (EH3-466). In reference to the allegation that he was ineffective for failing to present evidence and argue Kenneth Heath's testimony as a

[7]*See Oregon v. Guzek*, 526 US 517, 126 S. Ct. 1226, 163 L. Ed. 2d 1112 (2006). (No constitutional right to present "residual doubt" evidence at sentencing), *infra*.

nonstatutory mitigator, Mr. Rush responded that Dr. Krop, and co-counsel, Mr. Sheck, both questioned the Defendant's parents and they concluded that their testimony did not present significant mitigation evidence. (EH3-467).

No one ever approached Mr. Rush with allegations that the Defendant's prior conviction had been discussed by prosecutors in front of jury members. (EH3-468). He believed that his relationship with the Defendant's parents was such that had they had this information, they would have presented it to him. (EH3-469).

On cross-examination, Mr. Rush stated that he took the main role in the guilt and penalty phase; Mr. Scheck took the predominate role in the preparations, and that they were coequals. (EH3-470). The decision to as to whether or not to rely on Dr. Krop's evaluation of the case or to seek another opinion was made by consensus, and if not, would have been made by Mr. Sheck. (EH3-470). In the guilt phase, if there was no consensus, Mr. Rush would have made the final decision. (EH3-471).

This was Mr. Rush's and Mr. Sheck's first-degree murder trial. (EH3-471). In hindsight, Mr. Rush believed that the most important State witness was Kenneth Heath. (EH3-472). He also agreed that if his testimony was discounted, it would have affected not only the guilt phase but also the penalty phase of the trial. (EH3-472). In the entire case, the only thing that backed up Kenneth Heath's version of events was a prior consistent statement and some circumstantial evidence that did corroborate certain portions of his testimony. (EH3-472). It was always apparent that Kenneth Heath was involved, the only question was the level of his culpability. (EH3-473). Mr. Rush did not personally depose Kenneth Heath because his defense

attorney, Mr. DeThomasis, would not allow it.[8] (EH3-473). Mr. Rush recalled that the extent of Kenneth Heath's statements of which he was aware, included the deposition of Kenneth Heath which he conducted (sic), a sworn statement taken 05 February 1990, and police reports. (EH3-473-474). Mr. Rush was also aware of the allegation that another homicide in Jacksonville, Florida. (EH3-474).

Mr. Sheck also believed that Kenneth Heath was the State's most important witness. (EH3-476). Mr. Sheck's alcohol problems began in the mid '90s. (EH3-476). According to Mr. Rush, none of the symptoms or manifestations of alcohol abuse were present at the time the Defendant's case was tried. (EH3-476).

Dr. Krop was the only mental-health expert who was consulted by the defense in this case. (EH3-477). There was no particular reason that they did not seek a second opinion. (EH3-477). Mr. Rush was aware that antisocial personality disorder had been recognized by the Supreme Court of Florida, as a nonstatutory mitigating circumstance. (EH3-478). There was a discussion about pursuing the mitigator, but Mr. Rush could not recall specifically with whom the discussion was had. There was also no count as to how many aggravators that they were facing versus how many mitigators, the strategy was to rely on residual doubt[9] from the guilt phase of the trial. (EH3-478). Mr. Sheck ultimately made the decision not to put on the antisocial personality disorder mitigating circumstances. (EH3-479). Mr. Sheck also made the decision not to seek a second opinion after Dr. Krop said that the antisocial

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[8]But see Rule 3.220(i), Fla. R. Crim. P., investigations not to be impeded.

[9]*Oregon v. Guzek*, 526 US 517, 126 S.Ct. 1226, 1232; 163 L. Ed.2d 1112, 1121 (2006) [no constitutional right to present residual doubt evidence in penalty phase].

personality disorder mitigator would not be useful. (EH3-479).

Mr. Rush indicated that the theory of the defense, was his client did not do it, was incompatible with the voluntary intoxication defense. (EH3-479). Coupled with his belief that there was not enough evidence to present the voluntary intoxication defense, he made the decision not to pursue that defense. (EH3-480). At some point, Appellant Heath had told Mr. Rush that he was passed out in the back of the car during the incident and was awaken up after the homicide. (EH3-480). The defense was not overlooked, but was rejected by Mr. Rush. (EH3-481).

In regards to the Defendant taking the stand, Mr. Rush stated that it was his routine practice to discuss such matters with his clients. (EH3-482). Mr. Rush possessed no evidence that the Defendant was driving the vehicle on the night of Mr. Sheridan's death. (EH3-482). It was Mr. Rush's impression that while Kenneth Heath committed the murder, the Defendant was in the back seat of the car asleep and did not wake up until the following day. (EH3-483). The theory of the defense was that when the Defendant left, Mr. Sheridan was alive. (EH3-483). Due to his unfamiliarity with the transcript, Mr. Rush could not recall where he was dropped off or at what time this had occurred. (EH3-484). Going into trial, Mr. Rush knew that Kenneth Heath would be the key witness. Kenneth Heath was a very prepared witness and was difficult to impeach. (EH3-485). Regarding the penalty phase, no one interviewed Kenneth Heath in order to determine whether or not his testimony would assist in establishing the existence of any nonstatutory mitigating circumstance. (EH3-486).

Mr. Rush opined that the jewelry found in the case both hurt and helped

Appellant's case. (EH3-486). The fact that the decedent's property was found in possession of both brothers bolstered the State's case. (EH3-486). But Mr. Rush believed that he could establish that the property was predominately in the possession of Kenneth Heath which would have been helpful to the Defendant's case. (EH3-487). He did not believe that Mary Dodd's (f/k/a Mary Cook) testimony would have been helpful to the case, and he purposefully excluded her testimony. (EH3-487). She would have testified that she saw the Defendant with the jewelry, which Mr. Rush did not want presented at trial. (EH3-487).

Other than Kenneth Heath's testimony, there was no other evidence which suggested that the Defendant dominated Kenneth Heath. (EH3-488). Counsel never heard any allegations that the prosecutors had discussed aspects of the case in the presence of jurors. (EH3-488). Prior to reading Kenneth Heath's recent affidavit, he had never heard any testimony that Kenneth Heath shot the victim three times prior to the Defendant ever touching him. (EH3-489). If he had that evidence at the time of the penalty phase, he would have used it. (EH3-490). Had this evidence been presented to Mr. Rush prior to trial it would have caused some retooling of the defense presented and would have been used during the penalty phase to demonstrate the Kenneth Heath was the sole perpetrator of the murder. (EH3-491).

Mr. Sheck discussed the family history with William and Vivian Heath. (EH3-492). Mr. Rush was verbally briefed on the content of these discussions. (EH3-492). He knew that the Appellant had been subjected to corporal punishment as a child, although, this fact was not presented during any phase of the trial. (EH3-492). Mr. Rush recalled that the Defendant did not want to present that evidence. (EH3-493).

Mr. Rush did not have a conversation with William or Vivian Heath regarding the Defendant's traumatic experience during the sixth grade, he could not recall Mr. Sheck informing him about the Defendant passing out at age sixteen from drug use. (EH3-493). He also knew of the several incidents of the Defendant smoking marijuana as young teenager prior to his release from prison. (EH3-494). He could not recall any discussions with Mr. Sheck regarding substance abuse as a mitigating circumstance for the jury. (EH3-494). It was Mr. Rush's belief that based on the interviews with the Defendant's parents, there was no particularly helpful information gained for use as statutory mitigators and in fact believed that the parents would have been a strong aggravator for the death penalty. (EH3-497-498).

Mr. Rush was also aware that the Defendant had been subjected to sexual assault while he was previously imprisoned as a young man. (EH3-498). To his best recollection, Mr. Scheck handled this matter and the Defendant did not want this evidence presented, ultimately the decision was made not to present this evidence. (EH3-499).

Defense Counsel Rush indicated that it was a mutual decision between him and co-counsel Sheck to hire Dr. Krop as an expert witness. (EH3-500). If he had disagreed with Mr. Sheck's decision not to pursue the antisocial personality disorder mitigator the matter would have been discussed at length. (EH3-501).

As to Ground I, Mr. Rush had not discovered any of the facts alleged in Kenneth Heath's recent affidavit and had he discovered these facts, he would have altered the theory of defense. (EH3-502). On Ground II, both Mr. Rush and Mr. Sheck would have come to an agreement as to whether or not that information would

have been presented in the guilt phase. (EH3-502). On Ground III, whether the Defendant expressed to defense counsel that the victim was already dead, that information was not known to defense counsel. (EH3-502). The decision to not present evidence of voluntary intoxication during the guilt or penalty phase was made jointly by Mr. Rush and Mr. Sheck. (EH3-503). On Ground VII, Mr. Rush did not have any information that the Defendant grew up emotionally deprived. (EH3-504). Mr. Rush was aware that he could have presented antisocial personality disorder as a nonstatutory mitigator but made a joint decision with Mr. Sheck not to present that testimony. (EH3-505). He was also aware of the lengthy interview that was conducted after the Defendant was arrested in Douglass, Georgia, involving forgeries and the homicide. (EH3-505). The State's motion in limine preventing the defense from presenting evidence from the two officers who took those statements was granted. (EH3-505). Mr. Rush presented to the jury that there was a voluntary post Miranda statement made to police officers in order to leave the jury with the impression that the State was hiding evidence. (EH3-505). Prior to his recorded statement, Appellant had made several statements including that he did not know what the officers were talking about and that he had not been to Gainesville since 1988. He also stated that he had found the watch in question at the beach in Jacksonville. (EH3-506). Mr. Rush could not remember whether he was aware of Mary Dodd's statement, that Kenneth Heath put the watch in the Defendant's shoe, at the time he decided not to call her as a witness. (EH3-508).

In reference to the Defendant being asleep on the night of the homicide, the State clarified that the Defendant was asleep inside of Kenneth Heath's vehicle

parked behind the Purple Porpoise. (EH3-508). As Mr. Rush recalled, the Defendant's statement to law enforcement officers was that Kenneth Heath had gone off alone with the victim and came back to wake him up after the event occurred. (EH3-508). Ms. Berquist, besides the individuals involved was in a position to evaluate the sobriety level of each the Defendant, Kenneth Heath, and Mr. Sheridan. (EH3-509). Her testimony was that the Defendant was not impaired at the time he left the bar. (EH3-510). In regards to who had been the dominating individual, Ms. Berquist testified that Kenneth Heath had been engaging Mr. Sheridan in conversation prior to leaving the bar and that the Defendant had several whispering conversations with Kenneth Heath while Kenneth and Michael Sheridan were talking. (EH3-510).

Mr. Rush's recollection was that the Defendant stayed with Mr. Douglas during the nights they were in Gainesville. (EH3-511). The Medical Examiner's testimony during trial was that the cause of death was multiple gunshot wounds and a sharp object cutting, if Mr. Rush had Kenneth Heath's testimony prior to trial, he could not have argued that the Defendant was not there. (EH3-512). If he had argued that he was there and that he mutilated a corpse as opposed to murdering an individual, that theory would have not been inconsistent with the Medical Examiner's report. (EH3-512).

On recross-examination, Mr. Rush indicated that the reports that the Defendant was passed out in the back seat of Kenneth Heath's car played into the strategy decision. (EH3-513). Mr. Rush wanted to get this testimony presented at trial without having the Defendant testify and attempted to do so by presenting the

testimony of the interviewing officers. (EH3-513). This was consistent with the theory of defense (he was not there) and was evidence of intoxication. (EH3-514). Therefore, the intoxication in the context of those facts was not inconsistent with the defense presented at trial. (EH3-514). Mr. Rush indicated that if he had Kenneth Heath's statement, he would have reexamined may things about the case, including the Medical Examiner's testimony. (EH3-514). Mr. Sheridan's body was eight days old when it was found, the Medical Examiner's report indicated that there was deterioration around the thoracic region. (EH3-515). In regards to the Medical Examiner's testimony that the throat injury was precipitant to the cause of death, Mr. Rush believed that the Medical Examiner had great difficulty concluding such to a medical certainty. (EH3-515).

On redirect-examination, Mr. Rush stated that he tried very hard to have admitted the Defendant's self serving statement that he was passed out in the back of the car at the time of the homicide. (EH3-516). Had this statement been admitted, defense counsel could have argued both intoxication and an alibi defense. (EH3-516).

The evidentiary hearing thereafter concluded with scheduling and briefing matters.

D. SUMMARY OF THE ARGUMENT

On post conviction appeal Appellant Heath challenges the trial strategy during the penalty phase. Trial counsel testified that the penalty phase strategy was "residual doubt" as to Appellant's guilt and level of culpability. (EH3-464). Such a "strategy" is the same as no strategy as a matter of law under *Oregon v. Guzek*, 526, US 517,

126 S. Ct. 1226, 163 L. Ed. 2d 1112, 1121 (2006). There is nothing strategic about attorney ignorance. Defense counsel relied upon a theory and a strategy, which was not only without merit, but was without foundation and law. The logic has been debunked as early as 1988 [prior to the Appellant's trial, *Franklin v. Lynaugh*, 487 US 164, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988)]. The *Franklin* court stated that any right to introduce residual doubt evidence at the penalty phase was quite doubtful. Therefore, trial counsel here abandoned the only evidence of a statutory mitigating circumstance, a severe anti-social personality disorder. Coupled with the fact that the trial counsel failed to establish as a matter of record before the sentencer that the Defendant abused alcohol. Counsel knew that Appellant was, even under his theory of the defense, drinking heavily and "passed out." *[Cf.* Dr. Darren Rothschild (EH1-176) Defendant had a pattern of drinking to excess and having negative consequences to the use of alcohol, socially, financially, and occupationally].

Trial counsel had the knowledge that other non-statutory mitigating circumstances existed, namely the Defendant had been a victim of sexual assault and rape while in prison at the age of 16 (EH1-178). Yet the trial record contains no such evidence that the Defendant knowingly and intelligently waived his right to introduce these mitigating circumstances. It was proven during the post conviction evidentiary hearing that the Appellant grew up emotionally deprived, emotionally abused, physically abused, was a slow learner, had substance abuse problems in addition to the sexual assaults in prison. Trial counsel effectively abdicated the responsibility of going forward with mitigation evidence during the penalty phase of the trial choosing, rather, to argue to the same jury who had convicted the Appellant that they

in effect had made an error in reaching that verdict beyond and to the exclusion of a reasonable doubt, and relying on a mere argument, not evidence, that the Defendant should be pardoned because of the jury's faulty verdict.

The brother of the Appellant, Kenneth Heath, had the most to gain, and arguably the most to lose in the trial of Appellant Ronald Palmer Heath. Nevertheless, Kenneth Heath was hardly examined as to his motive to lie. It was hardly discussed that he had made a plea bargain in this case sparing him the death penalty, as well as in the Jacksonville murder case, in which he had admitted complicity. Kenneth Heath's testimony at the evidentiary hearing, was similar to the trial testimony, and would have been identical had the witness been locked down, examined, and confronted with the relevant evidence by trial counsel. His "recanted testimony" was "newly discovered" because trial counsel in the first instance failed to make the appropriate inquiries to arrive at Kenneth Heath's version of the truth that he, Kenneth, had shot and killed victim Michael Sheridan and that the wounds inflicted by his brother Ronald Heath were after the fact of death.

In the face of eyewitnesses who saw Appellant Heath and his brother, Kenneth, leave with the victim Michael Sheridan, and that they had been drinking, counsel strategically shows another line of defense, voluntary intoxication, was present rather than the theory that the Defendant wasn't even present." State witness Jennifer Berquist put the Defendant and his brother together with the decedant on the night of the homicide drinking alcohol. (EH1-48). Voluntary intoxication at the time of the offense was a valid defense [see Fla. Stat. § 775.051 (1999] and as a corollary, counsel were ineffective for failing to ask for a jury instruction outlining this theory

of the defense. Much of the trial centered on who was under the dominion of whom, i.e. whether the Appellant was under the dominion of his brother Kenneth Heath or vice versa. Counsel would submit that an expert, such as the expert used by the defense during the evidentiary hearing would have established a lesser role and a lesser involvement of Appellant.

It is also presented that Kenneth Heath's recanted testimony amounts to newly discovered evidence which cannot, under the facts of the case, be summarily disregarded and ignored by the fact finder. In view of the fact that the same witness and the same witness' testimony were responsible not only for the guilt of Appellant Heath, but also largely responsible for the penalty which was inflicted upon Appellant Heath it is respectfully submitted that the trial judge erred in denying this request for relief as the testimony of Kenneth Heath was sufficient to trigger a new trial.

Appellant concludes with an attack on the constitutionality of § 921.1441 Fla. Stat. as applied to the case of Ronald Palmer Heath particularly the nonunanimous jury verdict as to penalty. The trial judge made the finding and conclusion that it was not proven beyond a reasonable doubt that Appellant Ronald Heath actually killed the deceased Michael Sheridan, it is further submitted that the application of the double penalty scheme on the Appellant, who did not, beyond a reasonable doubt, actually kill, is unconstitutional.

D. ARGUMENT AND CITATIONS OF AUTHORITY

1. Trial counsel during the penalty phase of the case rendered ineffective assistance of counsel in that the strategy employed, "residual doubt," is not a legally cognizable mitigating theory, and, therefore, counsel failed to develop and failed to use available mitigating evidence, which, if used, would have probably resulted in a different penalty, namely a life sentence, below.

a. Ineffective assistance. During the evidentiary hearing, Mr. Rush, testified that the defense during the penalty phase proceedings relied upon residual doubt. (EH3-464). *Franklin v. Lynaugh*, 487 U.S. 164 108 S.Ct. 2320, 101 L. Ed. 2d 155 (1988) (plurality opinion), makes clear, contrary to the understanding of the trial counsel that the Supreme Court's previous cases have not interpreted the Eighth Amendment as providing a capital defendant the right to introduce at sentencing evidence designed to cast "residual doubt" on his guilt of the basic crime of conviction. The *Franklin* plurality said it was "quite doubtful" than any such right existed. *Id*., at 173, n. 6, 108 S. Ct. 2320, 101 L. Ed. 2d "our cases" do not support any such "right to reconsideration by the sentencing body of lingering doubts about . . . guilt." *Id*., at 187, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (O'Connor, J., concurring in judgment). See also *Penry v. Lynaugh*, 492 U.S. 302, 320, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (characterizing *Franklin* as a case in which a majority "agreed that 'residual doubt' as to Franklin's guilt was not a constitutionally mandated mitigating factor" (brackets omitted)). *Oregon v. Guzek*, 546 U.S. 517, 126 S. Ct. 1226, 163 L. Ed. 2d. 1112, 1121 (2006).

The Sixth Amendment right to counsel implicitly includes the right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771; 90 S.Ct. 1441, 1449; 25 L.Ed.2d 763 (1970); *Chatom v. White*, 858 F.2d 1479, 1484 (11th Cir. 1988), *cert. denied*, 489 U.S. 1054, 109 S.Ct. 1316, 103 L.Ed.2d 585 (1989); *see Powell v. Alabama*, 287 U.S. 45, 53; 53 S.Ct 55, 58; 77 L.Ed. 158 (1932). A defendant is entitled to this constitutional guarantee of effective assistance of counsel whether he is represented by retained or court-appointed counsel. *Scott v.*

Wainwright, 698 F.2d 427, 429 (11th Cir. 1983). The familiar test utilized by courts in analyzing ineffective assistance claims follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.
>
> Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversarial process that renders the result unreliable.

Strickland v. Washington, 446 U.S. 668, 687, 104 S.Ct.2052, 2064, 80 L.Ed.2d 693 (1984).

The Supreme Court addressed ineffective assistance of counsel claims and the *Strickland* test in *Lockhart v. Fretwell,* 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The Court emphasized that the Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." *Strickland v. Washington*, supra, 466 U.S., at 684, 104 S.Ct., at 2062; *Nix v. Whiteside*, 475 U.S. 157, 175, 106 S.Ct. 988, 998, 89 L.Ed.2d 123 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); *United States v. Cronic*, 466 U.S. 648, 653, 104 S.Ct. 2039, 2043, 80 L.Ed.2d 657 (1984) ("Without counsel, the right to a trial itself would be of little avail") (internal quotation marks and footnote omitted); *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665,

667, 66 L.Ed.2d 564 (1981).

As pointed out in Justice O'Connor's concurring opinion, the *Fretwell* opinion should not be interpreted as a change on the prejudice inquiry under *Strickland*. "The determination question...whether there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,'...remains unchanged." *Fretwell, supra*, 506 U.S., at 373, 113 S.Ct., at 845 (O'Connor, J., concurring), quoting, *Strickland, supra*, 466 U.S., at 694, 104, S.Ct., at 2068.

b. Severe antisocial personality disorder. The Defendant, Ronald Heath, asserts that suffering from severe antisocial personality disorder constitutes a statutory, and a non-statutory mitigating circumstance, for the purposes of sentencing. (See fn. 5, *supra*). Penalty phase counsel were ineffective for failing to present the mitigating circumstance and the underlying childhood history that proves ups the mitigator. As a result, the Defendant was denied his right to effective assistance of counsel in violation of the Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution and in violation article I, section 16, of the Florida Constitution.

The Defendant suffered from several mental health problems. These problems were detailed in the Defendant's pre-existing prison mental health history, as well as in the opinion of Dr. Darren Rothschild. During the evidentiary hearing, Dr. Rothschild diagnosed Defendant Heath with antisocial personality disorder. (EH1-166-167). Among the symptoms that qualified Defendant Heath for this diagnosis were that he had been physically cruel to people, used a weapon to cause serious bodily harm, committed prior burglaries, and was deceitful. (EH1-172). Dr.

Rothschild also noted that these symptoms began to manifest in the Defendant at the age of thirteen which is also a requirement of the diagnosis. (EH1-172). He also testified that individuals with antisocial personality disorder work well in confined settings with law enforcement officers and are less likely to behave in a way that disregards the law. (EH1-183).

At the time of the offense, the Defendant was suffering from an antisocial personality disorder, which constitutes a mitigating circumstance, for purposes of sentencing. *Booker v. State*, 773 So. 2d. 1079, 1086 (Fla. 2000). But for counsel's ineffectiveness, the result of the proceeding would have been different, as the jury would have not have recommended the death penalty and/or the judge would not have imposed the death penalty.

c. Alcohol abuse. Dr. Rothschild also established that Defendant Heath had a history of alcohol abuse. (EH1-176). The criteria for a diagnosis of alcohol abuse required Dr. Rothschild to identify a pattern of drinking to excess and having negative consequences of alcohol use which are social, financial, or occupational. (EH1-176).

d. Abused child. Dr. Rothschild indicated that other factors found that were significant in relation to Defendant Heath's mental health functioning were a history of physical child abuse and his history of being a multiple victim of sexual assault and rape while in prison at the age of sixteen. (EH1-178).

e. Under dominion of brother. Trial counsel were ineffective for failing to present an expert during the trial to dispute the State's theory that the Defendant dominated his younger brother Kenneth Heath. As a result, the Defendant was denied

his right to effective assistance of counsel in violation of the Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution and in violation article I, section 16, of the Florida Constitution.

The evidence at trial was undisputed that Kenneth Heath was the triggerman of the gun and the gunshot wounds ultimately were the cause of death. Yet the State's theory was that Kenneth Heath acted pursuant to the dominion and control of the Defendant. An expert such as Dr. Darren Rothschild should have been called by defense counsel. If called, Dr. Rothschild would testify that a review of the family history and the relationship between the Defendant and Kenneth Heath reveals that it is unlikely that Kenneth Heath acted pursuant to the direction of the Defendant. During the evidentiary hearing, Dr. Rothschild testified that the events leading to the murder as told by the Defendant, indicated that Kenneth initiated contact with Mr. Sheridan and that he was intoxicated and wanted to go home. (EH2-207). Witnesses confirmed Kenneth initiated the contact with the victim. Had the.

With respect to mitigation the Supreme Court of Florida has recognized that "the obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated." *State v. Lewis*, 838 So. 2d 1102, 1113 (Fla. 2002). "An attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." *Ragsdale v. State*, 798 So. 2d 713, 716 (Fla. 2001) (alteration in original) (quoting *State v. Riechmann*, 777 So. 2d 342, 350 (Fla. 2000)). But for counsel's ineffectiveness, the result of the proceeding would have been different, as the jury would have either acquitted the Defendant or convicted him of a lesser-included offense.

f. Unconstitutional "doubler." Penalty phase counsel were ineffective for failing to challenge the "committed in the course of a felony" aggravator. The aggravator is unconstitutional and/or improper because it acts as a doubler (i.e., the same set of facts that support the felony murder conviction also support the imposition of an aggravating factor). As a result, the Defendant was denied his right to effective assistance of counsel in violation of the Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution and in violation article I, section 16, of the Florida Constitution. Absent the unconstitutional aggravator, the there was only one other aggravator. But for counsel's ineffectiveness, the result of the proceeding would have been different, as the jury would have not have recommended the death penalty and/or the judge would not have imposed the death penalty.

g. Cause of death. During the evidentiary hearing, Kenneth Heath's testimony established that he caused the death of Mr. Sheridan. The trial judge concluded "It cannot be said beyond a reasonable doubt that the stabbing of Michael Sheridan by [Appellant] Ronald Heath caused the death of Michael Sheridan." (R-467; Order Imposing Sentence of Death). Kenneth Heath testified that he initially shot Mr. Sheridan because he believed that he was about to be attacked and not because he had been instructed to do so by Defendant Heath. (EH1-66). Kenneth Heath also fired the two additional shots into Mr. Sheridan's head, after which, he concluded that Mr. Sheridan was dead. (EH1-70). After Mr. Sheridan was shot a third time, Kenneth Heath observed Defendant Heath cutting on Mr. Sheridan's throat. (EH1-73). Had this testimony been presented at the penalty phase of the trial, there is a reasonable likelihood that the jury would have found that the Defendant

Heath was not the cause of the death of Mr. Sheridan and did not dominate Kenneth Heath. Regarding ineffective assistance of counsel during the penalty phase of a trial, a defendant must demonstrate that but for counsel's errors he would have probably received a life sentence. *Hildwin v. Dugger*, 654 So. 2d 107, 109 (Fla. 1995), *cert. denied*, 116 S. Ct. 420, 133 L. Ed. 2d 337 (1995). Such a demonstration is made if "counsel's errors deprived the defendant of a reliable penalty phase proceeding." *Id*. at 110.

h. Other mitigating facts. Defendant Heath contends that the following information was available had counsel conducted a reasonably diligent investigation: (1) Appellant Heath grew up deprived emotionally; (2) Appellant Heath was emotionally abused and neglected throughout his childhood; (3) Appellant Heath's father abused Appellant Heath as a child with corporal punishment; (4) Appellant Heath was a slow learner; (5) Appellant had a substance abuse problem; (6) Appellant Heath endured multiple rapes and sexual assaults as a juvenile while in prison. *Rose v. State*, 617 So. 2d 291 (Fla. 1993). But for trial counsel's ineffectiveness, the mitigators would have outweighed the aggravators, and Defendant Heath would probably have been sentenced to life in prison. In fact, the trial court judge that sentenced the Defendant for his previous second-degree murder conviction sent a letter to prison officials specifically requesting that the Defendant receive treatment for his mental illness. Moreover, at the time of the offense, the Defendant was suffering from an extreme emotional distress due to the recent fight and break-up he had with his girlfriend, Penny Ann Powell. All of these mitigating factors should have been presented. Moreover, the defense should have presented a mental health

expert at the penalty phase.

2. Trial counsel was ineffective in failing to develop evidence and ineffective in failing to use evidence known, available, relevant, and material to the guilt phase of the trial, as more specifically detailed below, which, if properly utilized would have probably resulted in a different outcome in the guilt phase of the proceedings below.

a. Voluntary Intoxication. Trial counsel for Defendant Heath failed to conduct a constitutionally adequate investigation and failed to consider the defense of involuntary intoxication after having knowledge that Defendant Heath consumed alcohol on the night of the offense. First degree murder, the crime for which Defendant Heath was tried and convicted, is a specific intent crime. *Gardner v. State,* 480 So.2d 91, 92 (Fla. 1985). Voluntary intoxication is a recognized defense to specific intent crimes. *Bartley v. State,* 689 So.2d 372 (Fla. 1st DCA 1997). A defendant states a facially sufficient claim of ineffective assistance of trial counsel by alleging a failure to investigate and consider the defense of voluntary intoxication after having been informed that the defendant was intoxicated at the time of the offense. "It is not necessary...that a defendant point to record evidence of intoxication at the time of the alleged offense in order to state a legally sufficient claim." *Green v. State,* 705 So.2d 700, 701 (Fla. 1st DCA 1998), *citing Bartley, supra* at 372; *see also Young v. State*, 661 So.2d 406 (Fla. 1st DCA 1995), and *Brunson v. State*, 605 So.2d 1006 (Fla. 1st DCA 1992).

The evidence at trial was undisputed that the Defendant was intoxicated on the evening of the offense. State witness Jennifer Zimbel Berquist testified that Defendant Heath was consuming alcohol and smoking marijuana on the evening of

the offense. At the evidentiary hearing, Kenneth Heath also testified that he and Defendant Heath consumed alcohol on the night of the homicide. (EH1-48, EH1-54). Dr. Rothschild also testified that he believed that Defendant Heath had an alcohol abuse problem. (EH1-176).

First-degree premeditated murder and robbery are specific intent crimes for which voluntary intoxication is a defense.[10] But for counsel's ineffectiveness, the result of the proceeding would have been different, as the jury would have either acquitted the Defendant or convicted him of a lesser-included offense.

3. Kenneth Heath's recanted testimony amounts to newly discovered evidence, upon which the trial judge should have granted a new trial, or at least a new penalty phase hearing.

First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known [of it] by the use of diligence." Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *Jones*, 709 So.2d at 521 (citations omitted). In the context of a claim regarding newly discovered evidence as to the penalty phase, the standard for the second prong of Jones is whether the newly discovered evidence is of such a nature that it would probably produce a life sentence.

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[10] Section 775.051, Florida Statutes (1999), eliminated the defense of voluntary intoxication for crimes committed after its effective date of October 1, 1999. Ch. 99-174, § 1, at 968, Laws of Fla. The alleged offense in the Defendant's case was committed in 1989, prior to the effective date of section 775.051. Section 775.051 does not apply to the Defendant's case and therefore voluntary intoxication was still a valid defense to the crimes of premeditated murder and robbery.

See *Jones v. State*, 591 So.2d 911, 915 (Fla.1991) ("[N]ewly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. The same standard would be applicable if the issue were whether a life or a death sentence should have been imposed."); see also *Mills v. State*, 786 So.2d 547, 549-50 (Fla. 2001) (same); *Kight v. State*, 784 So.2d 396, 399 (Fla.2001).

During the evidentiary hearing, Kenneth Heath's testimony established that he alone caused the death of Mr. Sheridan. Kenneth Heath testified that he initially shot Mr. Sheridan because he believed that he was about to be attacked and not because he had been instructed to do so by Defendant Heath. (R1-66). Kenneth Heath also fired the two additional shots into Mr. Sheridan's head, after which, he concluded that Mr. Sheridan was dead. (R1-70). After Mr. Sheridan was shot a third time, Kenneth Heath observed Defendant Heath cutting on Mr. Sheridan's throat. (R1-73).

In the court's preliminary Order Denying Post-conviction Relief, the Court indicates that the factual issue before the court is whether or not Kenneth Heath's recanted testimony was true or whether or not the testimony given at the evidentiary hearing was true. The court found that because Kenneth Heath's trial testimony was consistent with the testimony of the medical examiner, and because his recanted testimony was inconsistent with the testimony of the medical examiner, Kenneth Heath's testimony at the evidentiary hearing was a false recantation of his prior testimony. The court stated that the medical examiner's testimony at trial was that the victim died either from a gun shot would to the chest, or died from a gaping wound in the victim's neck. During the jury trial the medical examiner specifically testified that there were two contemporaneous causes of death.

Q: Based on those findings, Dr. Hamilton, were you able to form an expert opinion concerning the cause of death?

A: Yes, sir I was.

Q: And what was that opinion?

A: In my opinion, the cause of death of Michael Joseph Sheridan was multiple gun shot wounds and sharp-force injury of neck.

(Jury trial transcript p. 1351). The medical examiner's testimony at trial suggests that an individual can die more that once by its assertion that there were two causes of death. Due to the nature of the medical examiner's testimony regarding cause of death, no testimony cannot be consistent with the medical examiner's testimony given at trial, because the Medical Examiner's opinion is not consistent with itself.

4. The "cumulative picture and the effect [the testimony of Kenneth Heath] may have had on the imposition of the death penalty" can neither be ignored, nor overemphasized. *Lightborne v. State*, 742 So. 2d 238, 249 (Fla. 1999).

5. Defense counsel rendered ineffective assistance of counsel during the penalty phase of the trial by failing to request a special verdict regarding the specific aggravating factors found by the jury.

Penalty phase counsel were ineffective for failing to request a special verdict regarding the specific aggravating factors found by the jury. As a result, the Defendant was denied his right to effective assistance of counsel in violation of the Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution and in violation article I, section 16, of the Florida Constitution. Absent the unconstitutional aggravator, the there was only one other aggravator. But for counsel's ineffectiveness, the result of the proceeding would have been different, as

had the jury only found one aggravator, the sentence would have been disproportionate per se. *State v. Steele,* 921 So. 2d 538, 31 Fla. L. Weekly 574 (Fla. 2005).

6. Defense counsel rendered ineffective assistance of counsel during the guilt phase of the trial by failing to challenge that the indictment was insufficient due to its failure to specifically allege the aggravating circumstances that the State intended to rely on.

The defense counsel moved for a statement of aggravating circumstances requesting the Court to compel the State to provide the aggravating circumstances upon which it intended to rely. (R1-103-04). *State v. Steele, supra*. At least one statutory aggravating circumstance must be alleged in indictment. *United States v. Allen*, 406 F.3d 940 (8th Cir. 2005); *United States v. Robinson*, 367 F.3d 278 (5th Cir. 2004); *United States v. Barnette*, 390 F.3d 775, 784-88, but see *United States v. Wills*, 346 F.3d 476 (5th Cir. 2003). Because the fact of a prior violent felony was found to be an aggravating circumstance and the offense was committed during the course of a robbery, neither of which was alleged in the indictment (R-23), neither of which was found by a jury, beyond a reasonable doubt a violation of *Blakley* and *Ring* occurred. *United States v. Sanchez*, 269 F.3d 125, 1278 (11th Cir. 2001).

7. Florida Statute 921.141 is unconstitutional as applied to this case.

a. The nonunanimous recommendation of the jury (10-2) recommending the death sentence utilized in Florida, does not satisfy constitutional standards intended to guarantee reliability, narrowing, proportionality and other constitutional safeguards in the capital sentencing process.

In *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S.Ct. 2428 (2002) the

Supreme Court held that in capital sentencing schemes where aggravating factors "operate as 'functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Id*. at 609 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n. 19, 147 L. Ed.2d 435, 120 S. Ct. 2348 (2000). "*The effect of that decision on Florida's capital sentencing scheme remains unclear*." *State v. Steel*, 921 So. 2d 538 31 Fla. L. Weekly 574 (Fla. 2005). In Florida, to recommend a sentence of death for the crime of first-degree murder, a majority of the jury must find that the *State has proven, beyond a reasonable doubt, the existence of at least one aggravating circumstance listed* in the capital sentencing statute. See § 921.141(2)(a), Fla. Stat. (2004). It must also find that *any aggravating circumstances* outweigh *any mitigating circumstances*, also listed in the statute, that may exist. See § 921.141(2)(b), Fla. Stat. (2004). Since *Ring*, the Supreme Court of Florida has not yet forged a majority view about whether *Ring* applies in Florida; and if it does, what changes to Florida's sentencing scheme it requires. *State v. Steele, supra*, at 3.

The Supreme Court of Florida has consistently held that the lack of notice of specific aggravating circumstances does not render a death sentence invalid. *See Sireci v. State*, 399 So. 2d 964, 970 (Fla. 1981), overruled on other grounds as recognized in *Rutherford v. State*, 545 So. 3d 853, 856 (Fla. 1989). In *Hitchcock v. State*, 413 So. 2d 741, 746 (Fla. 1982), the court concluded that because *"the statutory language limits aggravating factors to those listed. . . . there is no reason to require the state to notify defendants of the aggravating factors that the state intends to prove*." The court has reaffirmed this principle both before *Ring*, see *Cox v. State*, 819 So. 2d 705, 725 (Fla. 2002); *Vining v. State*, 637 So. 2d 921, 927 (Fla.

1994), and after, see *Kormondy v. State*, 845 So. 2d 41, 54 (Fla.), *cert. denied*, 540 U.S. 950, 157 L. Ed.2d 283, 124 S. Ct. 392 (2003); *Lynch v. State*, 841 So. 2d 362, 378 (Fla.), *cert. denied*, 540 U.S. 867, 157 L. Ed.2d 123, 124 S. Ct. 189 (2003).

The Supreme Court of Florida has held that no statute, rule of procedure, or decision of the court or the United States Supreme Court compels a trial court to require advance notice of aggravating factors. But it is equally clear that none prohibits it either. *State v. Steele, supra*. "However, the justification for notice is stronger than ever." *Id*. When it decided *Hitchcock* and *Sireci*, the capital *sentencing statute contained only* fourteen *aggravators*. Since then, the *Legislature has added* eight *more*. See § 921.141(5)(i), Fla. Stat. (2004) [murder was cold, calculated, and premeditated]; § 921.141(5)(j) [victim was law enforcement officer engaged in performance of duties]; § 921.141(5)(k) [victim was elected or appointed public official engaged in performance of duties]; § 921.141(5)(l) [victim was less than twelve years of age]; § 921.141(5)(m) [victim was especially vulnerable because of advanced age or because defendant stood in position of familial or custodial authority]; § 921.141(5)(n) [perpetrator was criminal street gang member]. Other aggravators have been give broader scope. For example, the aggravating factors in section 921.141(5)(a) now apply to defendants who commit murder while on probation or community control, not merely while under a sentence of imprisonment. See ch. 96-290, § 5, Laws of Fla. (Adding community controllees); ch. 91-270, § 1, Laws of Fla. (Adding probationers). Also, aggravated child abuse and elder abuse have been made crimes qualifying a capital defendant for the "prior violent felony" aggravator in § 921.141(5)(d). See ch. 96-302, § 1, Laws of Fla. (Adding elder

abuse); ch. 95-159, § 1, Laws of Fla. (adding aggravated child abuse). Thus, *the notice provided by the list of aggravators in the statue is broader*, and therefore *less specific*, than when the court addressed the issue in *Hitchcock* and *Sireci*.

> Because of the *expansion in available aggravating circumstances*, as well as the absence of any express prohibition on requiring advance notice of aggravators, we conclude that a trial court does not violate a clearly established principle of law in requiring the State to provide such notice. Whether to require the State to provide notice of alleged aggravators is within the trial court's discretion.

State v. Steele, supra.

To obtain a conviction of first degree murder, the State must prove each element beyond a reasonable doubt, and the jury must be unanimous in agreeing each statutory element has been so proven. However, to *obtain a death sentence, the State must prove a nonspecific list of aggravators to the jury, beyond a reasonable doubt, but the jury not even unanimous on one aggravating circumstance, may recommend death. This problem offends constitutional safeguards*. Cf. *Henyard v. State*, 689 So.2d 239, 249-50 (Fla. 1996) [holding that a jury is not compelled to recommend death where aggravating factors outweigh mitigating factors]. While, the defendant may invoke the existence of "any other factors" in the defendant's background that would mitigate against the imposition of the death penalty. § 921.141(6)(h), Fla. Stat. (2004) *see also Ford v. State*, 802 So. 2d 1121, 1138 (Fla. 2001) ("We adopted the [U.S. Supreme Court's] definition of a mitigating circumstance: 'any aspect of a defendant's character or record and any of the circumstances of the offense' that reasonably may serve as a basis for imposing a sentence less than death") (Pariente,

J., concurring in result only) (quoting *Campbell v. State*, 571 So. 2d 415, 419 n.4 (Fla. 1990), receded from in part by *Trease v. State*, 768 So. 2d 1050 (Fla. 2000)), and the State, is limited to the specific aggravating factors listed in § 921.141(5). See *Miller v. State*, 373 So. 2d 882, 885 (Fla. 1979) (noting that "the aggravating circumstances specified in the [Florida] statute are exclusive, and no others may be used for that purpose") (citing *Purdy v. State*, 343 So. 2d 4, 7 (Fla. 1977), the reliability of the community conscience cannot be polled by such an imprecise process.

Section 921.141 does not require jury findings on aggravating circumstances. The Supreme Court of Florida has held that *Ring* does not require special verdicts on aggravators. See *Kormondy*, 845 So. 2d at 54. And, Florida's capital sentencing statute and the standard jury instructions, only require that, to recommend a sentence of death, a majority of the jury conclude that at least one aggravating circumstance exists--not necessarily the same one. *State v. Steele, supra*. The "advisory" recommendation of the jury is not even an accurate poll of what the trial jury is trying to say to the sentencer judge.

Section 921.141, Fla. Stat. (2004), establishes the obligations of the judge and jury concerning aggravating circumstances during a capital penalty phase:

> (2) Advisory sentence by the jury.-- After hearing all the evidence, the jury shall deliberate and *render an advisory sentence to the court*, based upon the following matters:
>
> > (A) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
> >
> > (b) Whether sufficient mitigating circumstances exist which outweigh the

> aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.
>
> (3) Findings in support of sentence of death.-- *Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating circumstances, shall enter a sentence* of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which [*19] the sentence of death is based as to the facts:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Section 921.141(2)-(3), Fla. Stat. (2004), [emphasis added]. Consistent with these provisions, the standard jury instructions require the jury to determine whether one or more aggravating circumstances exists, and if so , to weigh any aggravators against any mitigating circumstances. See Fla. Std. Jury Instr. (Crim.) 7.11, at 132-33. The instructions also provide that the jury's advisory sentence need not be unanimous, that a more majority vote is necessary for a death recommendation, and that a vote of six or more jurors is necessary for a life recommendation. See *id*. at 133.

Under the law, therefore, the jury may recommend a sentence of death so long as a majority concludes that at least one of several, nonspecified, aggravating circumstances exists. Nothing in the statute, the standard jury instructions, or the standard verdict form, however, requires a majority of the jury to agree on which

aggravating circumstances exist. Under the current law, for example, the jury may recommend a sentence of death where four jurors believe that only the "avoiding a lawful arrest" aggravator applied,[11] see § 921.141(5)(e), while three others believed that only the "committed for pecuniary gain" aggravator applied,[12] see § 921.141(5)(f), because seven jurors believed that at least one aggravator applies. *Steele, supra*. *Ring* requires a jury's majority (or unanimous) conclusion that a particular aggravator applies. *Steele, supra*.

The Supreme Court of Florida has held that specific jury findings on aggravators without guidance about their effect on the imposition of a sentence *could unduly influence the trial court's own determination of how to sentence the defendant*. *Steele, supra*, at 21. Under § 921.141(3), Fla. Stat., the trial court must independently determine the existence of aggravating and mitigating circumstances, and the weight to be given each. See *Blackwelder v. State*, 851 So. 2d 650, 653 (Fla. 2003) (reminding judges of their duty to independently weigh aggravating and mitigating circumstances and noting that a "sentence order should reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors and the weight each should receive"); *Bouie v. State*, 559 So. 2d 1113, 1116 (Fla. 1990) (holding that a trial court order must reflect the independent determination of the existence and weight of aggravating and mitigating circumstances) which should confirm and conform the committing judge alone. The current Florida system

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[11]Kenneth Heath testified to the "elimination of witnesses" aggravator.

[12]Evidentiary Hearing - The offense was committed during the course of a robbery.

fosters independence but "the trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely." *State v. Steele, supra*.[13]

The Supreme Court of Florida holds "The requirement of a majority vote on each aggravator is also an unnecessary expansion of *Ring*." *State v. Steele, supra*. But the United States Supreme Court in *Ring* concluded that under Arizona's capital sentencing scheme, aggravating factors operate as the *"functional equivalent of an element of a greater offense."* 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19). An essential element of the offense since the dawn of American juris-prudence has been found by a jury unanimously, and beyond a reasonable doubt. Therefore, the United States Supreme Court held, the Sixth Amendment required that aggravators be found by the jury. *Id*. Petitioner Heath submits that the United States Constitution requires a jury finding one at least one (and therefore the same) aggravating circumstance beyond, and to the exclusion of a reasonable doubt, and by a unanimous jury.

In *Jones v. United States*, 526 U.S. 227, 250-51, 143 L. Ed.2d 311, 119 S.Ct. 1215 (1999), the Court noted that in its decision in *Hildwin v. Florida*, 490 U.S. 638, 104 L. Ed.2d 728, 109 S. Ct. 2055 (1989), in which it concluded that the Sixth Amendment does not require explicit jury findings on aggravating circumstances, "a

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[13]In this case the same judge has retreated to relative safety in considering a violent crime committed by a juvenile (16 year old Ronald Heath), concluding. "It cannot be said beyond a reasonable doubt that the stabbing of Michael Sheridan by Ronald Heath caused the death of Michael Sheridan." Order, 17 December 1990, page 16. (R3-452, at 467).

jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." In requiring the jury to consider by majority vote each particular aggravator submitted rather than merely specifying whether one or more aggravators exist, the trial court in this case imposed a greater burden. But *cf. State v. Timmons*, 209 Ariz. 403, 103 P.3d 315, 318 (Ariz. Ct. App. 2005) (observing that in *State v. Ring*, 204 Ariz. 534, 65 P.3d 915 (Ariz. 2003), the Arizona Supreme Court construed the United States Supreme Court decision in *Ring* as requiring a jury finding on each aggravating factor supporting a death sentence).[14]

Florida is now the only state in the country that allows a jury to decide that aggravators exist and to recommend a sentence of death by a mere majority vote. Of the 38 states that retain the death penalty, 35 require, at least, a unanimous jury finding of aggravators. Of these, 24 states require by statute unanimity only as to the jury's finding of aggravators. Seven more states have judicially imposed a requirement at least that the aggravators be determined unanimously. Of these seven states, five (all except Alabama and Kentucky) require that both the aggravators and the recommendation of death be unanimous. Alabama and Kentucky require that only that the aggravators be determined unanimously. Although Missouri law is less clear, it appears that a jury at least must unanimously find the aggravators. *See Parker v. Bowersox*, 188 F.3d 923, 929 (8th Cir. 1999); *State v. Thompson*, 134 S.W. 3d 32, 33

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[14]After *Ring*, the Arizona legislature amended its capital sentencing statute to require jury findings on individual aggravators. See *Ariz. Rev. Stat.* § 13-703.01(E) (Supp. 2003), as amended by 2002 Ariz. Sess. Laws 5th Spec. Sess., ch. 1, § 3.

(Mo. 2004); Mo. R. Crim. P. 29.01(a).[15]

Of those seven states, two judicially require both a unanimous jury finding of aggravators and a unanimous recommendation of death. These are **Connecticut** (*State v. Reynolds*, 264 Conn. 1, 836 A.2d 224, 313 (Conn. 2003) (quoting *State v. Ross*, 230 Conn. 183, 646 A.2d 1318, 1352 (Conn. 1994))) and **Nevada** (*Geary v. State*, 114 Nev. 100, 952 P.2d 431, 433 (Nev. 1998)). Five judicially require only a unanimous jury finding of aggravators. These are **Alabama** (*McNabb v. State*, 887

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[15]The following states require a unanimous finding on aggravators, as well as a unanimous recommendation of death, pursuant to their respective sentencing statutes: **Arizona** (Ariz. Rev. Stat. § 13-703.01(E), (H), (Supp. 2003)); **Arkansas** (Ark. Code Ann. § 5-4-603(a) (Michie 1997)); **California** (Cal. Penal Code § 190.4(a)-(b) (West 1999)); **Colorado** (Colo. Rev. Stat. § 18-1.3-1201(2)(a) (2004); **Georgia** (Ga. Code. Ann. § 17-10-31.1(c)(2004)); **Idaho** (Idaho Code § 19-2515(3)(b) (Michie Supp. 2003)); **Illinois** (720 Ill. Comp. Stat. Ann., § 5/9-1(g) (West Supp. 2005)); **Kansas** (Kan. Stat. Ann. § 21-4624(e) (Supp. 2004)); **Louisiana** (La. Code Crim. Proc. Ann. Art. 905.7 (West 1997); *State v. Sonnier*, 402 So. 2d 650, 657 (La. 1981)); **Maryland** (Md. Code Ann., Crim. Law, § 2-303(i) (Supp. 2004); *Baker v. State*, 367 Md. 648, 790 A.2d 629, 636 (Md. 2002)); *Metheny v. State*, 359 Md. 576, 755 A.2d 1088, 1097 (Md. 2000)); **Mississippi** (Miss. Code Ann. § 99-19-103 (1999)); **New Hampshire** (N.H. Rev. Stat. Ann. § 630:5 (IV) (1996)); **New Mexico** (N.M. Stat. Ann. § 31-20A-3 (Michie 2000)); **New York** (N.Y. Crim Proc. Law § 400.27(7)(b), (10) (Supp. 2003)); **Oklahoma** (Okla. Stat. Tit. 21, § 701.11 (2002)); **Ohio** (Ohio Rev. Code Ann. § 2929.03(B), (D) (Supp. 2005); (Ohio R. Crim. P. 31)); **Oregon** (Or. Rev. Stat. § 163.150(1)(b)-(e) (2003)); **Pennsylvania** (42 Pa. Cons. Stat. § 9711(c)(1)(iv) (Supp. 2005)); **South Carolina** (S.C. Code Ann. § 16-3-20(C) (Supp. 2001)); **South Dakota** (S.D. Codified Laws §§ 23A-26-1, 23A-27A-4) (1998)); **Tennessee** (Tenn. Code Ann. § 39-13-204(g) (2003)); **Texas** (Tex. Code Crim. Proc. Ann. Art. 37.071(2) (Supp. 2004)); **Washington** (2005 Wash. Laws ch. 68, § 4; Wash. Rev. Code §§ 10.95.060, 10.95.080 (2002)); and **Wyoming** (Wyo. Stat. Ann. § 6-2-102(d)(ii) (2005)).

These are **Montana** (Mont. Code. Ann. § 46-1-401(1)(b), (3); 46-18-301 (2003)); **Nebraska** (Neb. Rev. Stat. § 29-2520(4)(f) (2003)); **Delaware** (Del. Code Ann. Tit. 11, § 4209(d)(1) (Supp. 2004)).

So. 2d 998 (Ala. 2004); *McGriff v. State*, 908 So. 2d 1024, 2004 WL 2914951 at *11 (Ala. 2004)); **Indiana** (*State v. Barker*, 809 N.E.2d 312, 316 (Ind. 2004)); **Kentucky** (*Soto v. Commonwealth*, 139 S.W. 3d 827, 871 (Ky. 2004), *cert. denied* 161 L. Ed.2d 495, 125 S. Ct. 1670 (2005)); **New Jersey** (*State v. Nelson*, 173 N.J. 417, 803 A.2d 1, 15-16 (N.J. 2002)); *State v. Bey*, 112 N.J. 123, 548 A. 2d 887, 905 (N.J. 1988)); **North Carolina** (*State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426, 428 (N.C. 1990)). However, in two of these states, a unanimous recommendation of death is required by statute. See N.J. Stat. Ann. § 2C:11-3 (West Supp. 2003); N.C. Gen. Stat. § 15A-2000 (2001).

That leaves Utah and Virginia. In those states, the jury need not find each aggravator unanimously, but the jury must unanimously recommend the death penalty. See Utah Code Ann. § 76-3-207(5)(b) (2003); *State v. Carter*, 888 P.2d 629, 655 (Utah 1995) (concluding there is no requirement that the jury find separately and unanimously each aggravator relied on in imposing the death penalty); Va. Code Ann. § 19.2-264.4D (2004); *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784, 791-92 (Va. 1979) (concluding it is not necessary for jurors to specify that they found an aggravator or aggravators unanimously). Finally, the federal government, when imposing the death penalty, also requires a unanimous jury. See 18 U.S.C. § 3593(d) (2000).

Many courts and scholars have recognized the value of unanimous verdicts. For example, the Connecticut Supreme Court has stated:

> We perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and

> helps to assure the reliability [*32] of the ultimate verdict. The "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate"; *Sumner v. Shuman*, 483 L. Ed.2d 56 (1987); convinces us that jury unanimity is an especially important safeguard ast a capital sentencing hearing. In its death penalty decisions since the mid-1970s, the United States Supreme Court has emphasized the importance of ensuring reliable and informed judgments. These cases stand for the general proposition that the "reliability" of death sentences depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact. The requirement of a unanimous verdict can only assist the capital sentencing jury in reaching such a reasoned decision.

State v. Daniels, 207 Conn. 374, 542 A.2d 306, 315 (Conn. 1988) (citations omitted); see also *Andres v. United States*, 333 U.S. 740, 749, 92 L. Ed. 1055, 68 S. Ct. 880 (1948) (upholding lower court's interpretation of a federal statute to require jury unanimity as to both guilt and punishment and reasoning that such a requirement "is more consonant with the general humanitarian purpose of the statute and the history of the Anglo-American jury system"); Elizabeth F. Lotus & Edith Greene, "Twelve Angry People: The Collective Mind of the Jury," 84 COLUM. L. REV. 1425, 1428 (1984)(reviewing Reid Hastie et al., *Inside the Jury* (1983))(review of an empirical study indicating that "behavior in juries asked to reach a unanimous verdict is more thorough and grave than in majority-rule juries, and that the former were more likely than the latter jurors to agree on the issues underlying their verdict").

The bottom line is that Florida is now the only state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote both whether aggravators exist and whether to recommend

the death penalty. The federal act requires notice to the defendant setting forth aggravating factors that the government proposes to prove as justification for a sentence of death. The federal act also requires that a decision for a death sentence be made by a unanimous jury. 18 U.S.C. §§ 3593-94 (2000). In 2004, the Supreme Court issued *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and in 2005, the Supreme Court decided *Shephard v. United States*, 544 U.S. 13, 161 L. Ed. 2d 205, 125 S. Ct. 1254 (2005). These cases have additional analysis of the Sixth Amendment right to a jury determination in criminal sentencing.

In *Ring*, the United States Supreme Court noted that of the thirty-eight states that have the death penalty, there were twenty-nine states in which the sentencing jury generally had the sentencing responsibility; there were five states in which the judge had the sole sentencing responsibility; and there were four "hybrid" states, including Florida, in which the jury ultimately decided on the sentence. *Ring*, 536 U.S. at 608 n.6. Approximately three years later, no states have "judge-only" capital sentencing. In thirty-three states, as well as the federal system, the jury is now generally responsible for imposing the death sentence.

b. A constitutional skewing of the Defendant's eligibility occurred in this case where the jury was allowed to consider, without the benefit of curative instruction, that Appellant Heath had killed Michael Sheridan, when, as a matter of law, the fact had not been proven beyond a reasonable doubt.

The Eighth Amendment succinctly prohibits "excessive" sanctions. It provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In *Weems v. United States,* 217 U.S. 349, 54 L. Ed. 793, 30 S. Ct. 544 (1910), the Supreme Court held that a punishment of 12

years jailed in irons at hard and painful labor for the crime of falsifying records was excessive. The Supreme Court explained "that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." *Id.,* at 367. The court have repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment. See *Harmelin v. Michigan,* 501 U.S. 957, 997-998, 115 L. Ed. 2d 836, 111 S. Ct. 2680 (1991) (KENNEDY, J., concurring in part and concurring in judgment); see also *id.,* at 1009-1011 (White, J., dissenting). Thus, even though "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual," it may not be imposed as a penalty for "the 'status' of narcotic addiction," *Robinson v. California,* 370 U.S. 660, 666-667, 8 L. Ed. 2d 758, 82 S. Ct. 1417 (1962), because such a sanction would be excessive. As Justice Stewart explained in *Robinson:* "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.,* at 667. The Supreme Court has read the text of the amendment to prohibit all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.

A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in his opinion in *Trop v. Dulles,* 356 U.S. 86, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958): "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.,* at 100-101. Proportionality review under those evolving standards should be informed

by "'objective factors to the maximum possible extent,'" see *Harmelin*, 501 U.S. at 1000 (quoting *Rummel v. Estelle*, 445 U.S. 263, 274-275, 63 L. Ed. 2d 382, 100 S. Ct. 1133 (1980)). The court has pinpointed that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry,* 492 U.S. at 331, 106 L. Ed. 2d 256, 109 S. Ct. 2934. Relying in part on such legislative evidence, the Supreme Court of the United States has held that death is an impermissibly excessive punishment for the rape of an adult woman, *Coker v. Georgia,* 433 U.S. 584, 593-596, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (1977), or for a defendant who neither took life, attempted to take life, nor intended to take life, *Enmund v. Florida,* 458 U.S. 782, 789-793, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982).

In *Coker*, the court focused primarily on the then-recent legislation that had been enacted in response to our decision 10 years earlier in *Furman v. Georgia,* 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) *(per curiam),* to support the conclusion that the "current judgment," though "not wholly unanimous," weighed very heavily on the side of rejecting capital punishment as a "suitable penalty for raping an adult woman." *Coker,* 433 U.S. at 596. The "current legislative judgment" relevant to the decision in *Enmund* was less clear than in *Coker* but "nevertheless weighed on the side of rejecting capital punishment for the crime at issue." *Enmund*, 458 U.S. at 793. "For purposes of imposing the death penalty, Enmund's criminal *culpability* must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Ronald Heath to death to avenge a killing that he did not commit does not measurably contribute to

the retributive end of ensuring that the criminal gets his just deserts.

At the evidentiary hearing, the Court pointed to the record on appeal from the trial proceedings, the testimony of the medical examiner as to the cause of death, noting particularly the opinion of the doctor was that the victim died from a gun shot wound *and* trauma to the neck area. In all due respect, a person can only die once. The testimony of Kenneth Heath, both at trial and the evidentiary hearing, remains undisputed on at least one point. Whether his testimony is weighed, balanced, accepted, or rejected, the State of Florida does not dispute he, Kenneth Heath, had the gun. Kenneth Heath did *all* of the shooting. Kenneth Heath, *only,* shot. According to the law of this case, found by this very judge:[16] **"It cannot be said beyond a reasonable doubt that the stabbing of Michael Sheridan by Ronald Heath caused the death of Michael Sheridan."** Kenneth Heath killed the victim. If the victim were dead from the gun shot wound, as was the opinion of the Medical Examiner, the trauma inflicted on the neck area was nothing more than mutilation of a corpse. See Fla. Stat. § 872.06. Florida case law is consistent in that mutilation of a body after death is neither an aggravating circumstance nor a relevant consideration for the imposition of the homicide. *Scott v. State*, 494 So. 2d 1134 (Fla. 1986), *postconviction relief granted in part* 604 So. 2d 465. *Adkins v. Virginia,* 536 U.S. 304; 122 S. Ct. 2242; 153 L. Ed. 2d 335 (2002).

In *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973, a plurality of the Supreme Court decided that a defendant convicted of acting in concert with

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[16]Order Imposing Sentence of Death, *State of Florida v. Ronald Palmer Heath*, page 16, (R3-452, at 467).

others to rob and to kill could introduce at the sentencing stage evidence that she had played a minor role in the crime, indeed, that she had remained outside the shop (where the killing took place) at the time of the crime. A plurality of the Court wrote that, the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and *any of the circumstances of the offense that the defendant proffers* as a basis for a sentence less than death." *Id.*, at 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (emphasis added and deleted). And in *Eddings v. Oklahoma,* 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1, the court majority adopted this statement. *See also McCleskey v. Kemp*, 481 U.S. 279, 306, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987); *Bell v. Ohio*, 438 U.S. 637, 642, 98 S. Ct. 2977, 57 L. Ed. 2d 1010 (1978) (plurality opinion).

Ronald Heath's role, which did not, beyond a reasonable doubt cause the death of Michael Sheridan, despite his alleged domination, should alone be sufficient to cause the setting aside of the sentence of death. Since *Furman v. Georgia,* 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)*(per curiam)* the Supreme Court has required States to limit the class of convicted defendants to which the death penalty may be applied. This narrowing requirement is usually met when the trier of fact finds at least one statutorily defined eligibility factor at either the guilt or penalty phase. *See Tuilaepa v. California,* 512 U.S. 967, 971-972, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994). No aggravating circumstances were included in the indictment of Defendant Ronald Heath. The trial judge did not rely on or use the same aggravators presented to the jury. The constitutionally mandated "narrowing" never occurred, in

this trial. Once the narrowing requirement has been satisfied, the sentencer, in Florida, the judge, is called upon to determine whether a defendant thus found eligible for the death penalty should in fact receive it. Most States channel this function by specifying the aggravating factors (sometimes identical to the eligibility factors) that are to be weighed against mitigating considerations.

Supreme Court cases have frequently employed the terms "aggravating circumstance" or "aggravating factor" to refer to those statutory factors which determine death eligibility in satisfaction of *Furman*'s narrowing requirement. *See, e.g., Tuilaepa v. California,* 512 U.S., at 972, 114 S. Ct. 2630, 129 L. Ed. 2d 750. Supreme Court jurisprudence has distinguished between so-called weighing and non-weighing States. The terminology is somewhat misleading, since the court has held that in *all* capital cases the sentencer must be allowed to weigh the facts and circumstances that arguably justify a death sentence against the defendant's mitigating evidence. 455 U.S. 104, 110, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). The terminology was adopted, moreover, relatively early in the development of death-penalty jurisprudence, when the court was "perhaps unaware of the great variety of forms that state capital-sentencing legislation would ultimately take." *Brown v. Sanders,* 126 S. Ct. 884; 163 L. Ed. 2d 723; 2006 U.S. LEXIS 760; 74 U.S.L.W. 4059; 19 Fla. L. Weekly Fed. S35 (2006). The Supreme Court identified as "weighing States" those in which the only aggravating factors permitted to be considered by the sentencer were the specified eligibility factors. See, *e.g., Parker v. Dugger,* 498 U.S. 308, 313, 318-319, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991) (citing Fla. Stat. § 921.141(3)(b) (1985)); *Richmond v. Lewis,* 506 U.S. 40, 47, 113 S. Ct. 528, 121 L. Ed. 2d 411

(1992) (quoting Ariz. Rev. Stat. Ann. § 13-703(E) (1989)).

In this case, therefore, the jury's consideration of state proffered aggravating circumstances necessarily skewed its balancing of aggravators with mitigators, *Stringer,* 503 U.S., at 232, 112 S. Ct. 1130, 117 L. Ed. 2d 367, and requires reversal of the sentence because the sentencing judge did not rely on any of those factors, found its own aggravators, and in so doing held in effect "Appellant Heath did not kill." The United States Supreme Court has therefore set forth different rules governing the consequences of an invalidated eligibility factor in a non-weighing state on the rationale that consideration of an invalid eligibility factor amounts to constitutional error in a non-weighing State in two situations. First, due process requires a defendant's death sentence to be set aside if the reason for the invalidity of the eligibility factor is that it "authorizes a jury to draw adverse inferences from conduct that is constitutionally protected," or that it "attaches the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, . . . or to conduct that actually should militate in favor of a lesser penalty." *Zant,* 462 U.S., at 885, 103 S. Ct. 2733, 77 L. Ed. 2d 235. Second, the death sentence must be set aside if the jury's was allowed it to hear evidence that would not otherwise have been before it. See *id.*, at 886, 103 S. Ct. 2733, 77 L. Ed. 2d 235; see also *Tuggle* v. *Netherland,* 516 U.S. 10, 13-14, 116 S. Ct. 283, 133 L. Ed. 2d 251 (1995) *(per curiam)*.

Under the prior Florida law, when a trial jury found a person guilty of a capital felony, a majority of the twelve member jury could mandate a life sentence for the defendant, instead of death, by recommending him to the mercy of the court. The

judge would then be compelled by statute to impose a life sentence. Alternatively, if no such recommendation was given, the judge was similarly compelled to impose a death sentence. It was this type of discretion exercised by juries under the prior law which was so strongly condemned by the Court in *Furman*. *State v. Dixon*, 283 So. 2d (Fla. 1973) (J. Boyd, dissenting), at 72.

"The most important safeguard presented in Fla. Stat. § 921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed." *Dixon, supra*, at 8. The Florida Legislature actually, provided a system whereby the possible aggravating and mitigating circumstances are defined, but where the weighing process is left to the carefully scrutinized judgment of jurors and judges. *Dixon, supra*, at 15-16.

Under the old system a majority of the twelve member jury, in the exercise of their discretion, determined the nature of the punishment. Under the new law, to the exercise of that discretion is added the opportunity for the arbitrary, completely unfettered, and final exercise of discretion by the judge. *Dixon, supra*, at 75.

Ring requires more than simple jury participation in the penalty phase of a capital case. *Karmody v. State*, 845 So. 2d 41, 55 (Fla. 2003) (J. Pariente concurring). The jury participation at a bare minimum must include a unanimous finding of the existence of at least one aggravating circumstance. Would submit that no less than a unanimous consensus of the jury on at least one, and the same, aggravating circumstance upon which the sentence must rely is constitutionally mandated by current death penalty standards of law. Those constitutional prerequisites were not provided to Petitioner Heath. His sentence of death should, and must, be reversed,

and that relief is hereby requested.

E. CONCLUSION

As more specifically stated above, the claims of Appellant are: (1) ineffective assistance of counsel during the penalty phase of the trial; relief requested would be a new sentencing hearing; (2) ineffective assistance of counsel during the penalty phase of the trial; appropriate relief would be a new trial; (3) newly discovered evidence, which would justify a new guilt and penalty phase (if necessary) trial. The constitutional challenge would justify a reversal and remand with directions to impose a life sentence. All appropriate relief is hereby requested.

F. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Meredith Charbula
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by hand/mail delivery this _____ day of December, 2007.

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G. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Initial Brief of Appellant complies with the type-font limitation.

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