IN THE

Supreme Court of Florida

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

REPLY BRIEF OF APPELLANT

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C. ARGUMENT AND CITATIONS OF AUTHORITY IN REPLY

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. Residual doubt is not a valid mitigation case, or factor, as a matter of law.

"Residual doubt" is not a fact about the defendant or circumstance of the crime. It is instead a lingering uncertainty about facts, a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty." Counsel's "residual doubt" claim was that the State of Florida had not proved its case of guilt to "an absolute certainty" therefore the death sentence was precluded. Nothing in relevant jurisprudence mandates the imposition of this heightened burden of proof at capital sentencing. *Franklin v. Lynaugh*, 487 U.S. 164, 188 (U.S. 1988). "[As] several courts have observed, jurors who decide both guilt and penalty are likely to form residual doubts or 'whimsical' doubts . . . about the evidence so as to bend them to decide against the death penalty. Such residual doubt has been recognized as an extremely effective argument for defendants in capital cases. To divide the responsibility . . . to some degree would eliminate the influence of such doubts." 758 F. 2d, at 247-248 (J. Gibson, J., dissenting) (citations omitted). *Lockhart v. McCree*, 476 U.S. 162, 181 (U.S. 1986).

However, Florida does not recognize residual or lingering doubt as a valid non-statutory mitigating circumstance. *See Bates v. State*, 750 So. 2d 6, 9 n.2 (Fla. 1999).

The Constitution does not compel state courts to consider residual doubt. See *Franklin v. Lynaugh, supra*, 487 U.S. 164, 108 S. Ct. 2320, 2327, 101 L. Ed. 2d 155 (1988) (plurality opinion). ("This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor."). The trial attorney was relying on a "nondefense." *Zeigler v. Crosby*, 345 F. 3d 1300, 1310 (11th Cir. Fla. 2003). Petitioner Heath's trial counsel candidly admitted to reliance on "residual doubt." (EH3-464).[1] This is not a cognizable mitigator as a matter of law. This is not a colorable claim as a matter of fact under the law in Florida. Other issues and claims not presented by counsel confirm that other facts and circumstances could have and should have been presented as mitigating circumstances. See sections "b" through "h." Reversal and remand for a new sentencing hearing is in order, and is hereby requested.

b. Severe antisocial personality disorder.

Pursuant to post conviction proceedings, a through psychiatric evaluation to assess the Defendant's current mental state and functioning (EH1-164),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 interviewing Appellant's mother and father, and by reviewing the testimony of brother Kenneth. (EH1-165-166). Defense expert Dr. Darren Rothschild also relied upon eight other psychiatric evaluations which had been conducted on Appellant Heath earlier. (EH1-166).

[1]"EH" refers to the transcript of the evidentiary hearing 29-31 March 2006 consisting of three volumes.

Based on these sources, Dr. Rothschild concluded that Petitioner Heath had an antisocial personality disorder and a history of substance abuse. (EH1-166-167). Antisocial personality disorder hinges on the presence of a pervasive historical 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). One criteria is that there is manifested evidence of conduct disorder onset before the age of 15. (EH1-171). Ronald Heath had set fires. He had set himself on fire, set a car on fire, set his home on fire, which are hallmark signs of the disorder. (EH1-172). The symptoms had began to develop in Appellant Heath as early as the age of 13. (EH1-172). 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 concluded 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). As an adult, the criteria for antisocial personality disorder that the Defendant met include 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).

c. Alcohol abuse.

Expert witness Rothschild opined Petitioner Ronald Heath suffered from chronic alcohol abuse. (EH-176). The criteria requires a pattern of drinking to excess and having negative consequences of alcohol use that are social, financial, or occupational. (EH1-176). Dr. Rothschild also concluded that the offense was not committed under extreme mental or emotional disturbance and that Defendant Heath did not have diminished capacity to appreciate the criminality of his behavior at the time he committed his crime. (EH1-177). The diagnosis was *inconclusive* to the issue as to whether Kenneth dominated the Defendant or the Defendant dominated Kenneth due to the discrepancies in the accounts of the event. (EH1-177). This evidence was available and could have and should have been presented emphasized to the fact finder as a mitigating circumstance.

d. Abused child. See Corrected Initial Brief, page 65.

e. Under dominion of brother.

Petitioner Heath would submit the evidence was at least inconclusive on the issue. (EH1-177).

f. Unconstitutional "doubler."

Petitioner Heath relies on the Initial Brief filed herein, page 67.

g. Cause of death.

The Court, *Heath v. State*, 648 So. 2d 660 (Fla. 1994) has made various findings and conclusions which impeach the death sentence herein imposed. As Kenneth Heath testified at the evidentiary hearing, "Sheridan lunged at Kenneth" and "Kenneth shot him in the chest." *Heath v. State*, 648 So. 2d 660, 661 (Fla. 1994). This is not a shooting under the dominion or control or direction of another. This is a

spontaneous reaction, not a calculated assassination, an imperfect self-defense. "Kenneth shot him [Sheridan] in the chest." *Id*. at 662. After Ronald Heath instructed Kenneth to kill Sheridan, "Kenneth shot him in the chest." *Id*. Michael Sheridan was not yet dead. Ronald Heath attempted, but was not successful in trying to complete the task with the dull hunting knife, *Id*., "and Kenneth shot him [Michael Sheridan] twice in the head." (*Id*.). Cumulatively in the overall scheme of capital cases, *State v. Larzelere*, 2008 LEXIS 273, 33 Fla. L. Weekly 5136 (Fla. 2008), the theory of responsibility and the evidence of Kenneth shooting the victim three times, it is no wonder the trial judge concluded "It cannot be said beyond a reasonable doubt that the stabbing of Michael Sheridan by Ronald Heath caused the death of Michael Sheridan.[2]

h. Other mitigating facts.

Other factors that were significant in terms of the Defendant's mental health functioning were his history of physical abuse as a child, he was severely whipped and beaten as a child which were corroborated by his father. (EH1-178). His use of alcohol was also significant, he was intoxicated on the night of the event. (EH1-178). Also, his history of being a multiple victim of sexual assault and rape while in prison after age 16 may have contributed to his behavior. (EH1-178).

Diagnosis of antisocial personality disorder is 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).

[2]Order imposing Sentence of Death, (R3-452, at 467).

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 not statutory identification of antisocial personality disorder as a statutory mitigator, there has been cases where it has been found to be a non-statutory mitigating factor, specifically, the Eileen Wournos case. (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 a way that disregards the law because the consequences are more clear and present. (EH1-183). People with antisocial personality disorder infractions decrease antisocial conduct when they are in a confined setting because there's less opportunity to engage in such activity. (EH1-184). Antisocial personality disorder is a disorder of mental functioning as opposed to a mental illness but is classified in the same diagnostic manual that classifies all other mental illnesses. (EH1-185).

On cross-examination, Dr. Rothschild testified that a popular name for antisocial personality disorder is "sociopath." (EH2-193). Although the terms are synonymously used, "sociopath" often takes on other features that aren't included in the diagnosis of antisocial personality disorder. (EH2-193). If you are a sociopath, you will likely meet the criteria for antisocial personality disorder but the reverse is not true. (EH2-193). Sociopath s not a currently recognized diagnosis in the DMS-IV, which is commonly used to classify people with mental health disorders.

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.

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*, 2887 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, 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.

Trial counsel for Heath failed to conduct a constitutionally adequate investigation and failed to consider the defense of involuntary intoxication after having knowledge that Heath was heavily dosed with psychotropic medication at the time of the offense, as well as alcohol. First-degree murder, the crime for which 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). However, the record reflects Ronald Heath was intoxicated at the time of the offense, as per the testimony of his brother, waitresses, and even defense counsel.

In the State of Florida, a defendant seeking post conviction relief based upon a claim of ineffective assistance of counsel may proceed pursuant to Rule 3.850, Fla. R. Crim. P. If the motion fails to set forth a factual basis or contains little beyond conclusory allegations, it may be summarily denied without attaching excerpts from the record. *Richardson v. State,* 617 So. 2d 801 (Fla. 2d DCA 1993). However, if the motion is facially sufficient and the allegations contained therein cannot be rebutted by attaching excerpts from the trial record, an evidentiary hearing must be held. Where an evidentiary hearing has not been held, the defendant's allegations in the motion must be accepted as true, except that the allegations are conclusively rebutted by the record. *Allen v. State*, 642 So. 2d 120 (Fla. 1st DCA 1994). A trial court's finding that some action or inaction by trial counsel was tactical is generally inappropriate without an evidentiary hearing. *Flores v. State*, 662 So. 2d 1350, 1351 (Fla. 2d DCA 1995); *see also Guisasola v. State*, 667 So. 2d 248, 249 (Fla. 1st DCA

1995).

In *Stanley v. State*, 703 So. 2d 1156 (Fla. 2d DCA 1997), the court allowed, pursuant to the defendant's post conviction motion, the defendant to withdraw his negotiated plea because his counsel had not mentioned the possibility of utilizing a voluntary intoxication defense to charges of battery on a law enforcement officer. The court reasoned that discovery materials available to the defendant's counsel indicated the possibility of utilizing the defense, and the defendant asserted he was not advised of that possibility. *Stanley*, 703 So. 2d at 1157.

Heath's activities at the Purple Porpoise leading up to the homicide of Mr. Sheridan clearly warranted, at the least, investigation and consideration of an involuntary intoxication defense by his trial counsel. Heath's trial counsel knew about his complex psychological traumas and caused him to be evaluated. Counsel knew, or should have known, of his excessive drinking activities before the homicide.

Mr. Heath was prejudiced by his counsel's failure to inform him of the defense of voluntary intoxication and failure to investigate the defense further. Had counsel investigated and presented the defense of involuntary intoxication, the result of the trial proceedings would probably have been different. Trial counsel could have called Dr. Krop to testify during the guilt or penalty phase, and elicited testimony regarding the role of alcohol in Mr. Heath's behavior. The inactivity of Mr. Heath's trial counsel in overlooking the involuntary intoxication defense directly prejudiced Mr. Heath's guilt trial and penalty phase. *See ABDUL-KABIR v. Quartermoon*, - - - U.S. - - -, 127 S.Ct. 1654, 167 L. Ed. 2d 585 (2007).

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. Appellant relies on the Amended Initial Brief pages 70-72.

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). Appellant relies on the Amended Initial Brief, page 72.

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. Appellant relies on the Amended Initial Brief, page 72.

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.

Petitioner Heath contends that his death sentence is disproportionate. The Court in deciding whether death is a proportionate penalty, must consider the totality of the circumstances of the case and compare the case with other capital cases. *See Urbin v. State*, 714 So. 2d 411, 416-17 (Fla. 1998); *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991). The Court also must remain mindful that the death penalty is reserved for the most aggravated and least mitigated of first-degree murders. *See State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973). The present case does not involve a horrible, senseless and indefensible first-degree murder, the case poses a close question on whether the sentence of death is warranted. "Upon reviewing the record and similar capital cases, however, we conclude that this crime is not among those for which the death penalty is specifically reserved under *State v. Dixon*." *Johnson v. State*, 720 So. 2d 232 (Fla.

1998).

The mitigating circumstances of this case support vacating the death sentence. The prior violent felony aggravating circumstance is not strong when the facts are considered. The aggravator is also based on Ronald Heath's juvenile conviction. This prior violent felony aggravator and the burglary/pecuniary gain aggravator are weighed against the following statutory and nonstatutory mitigation: (1) Ronald Heath was a juvenile at the time of the prior crime; (2) Ronald Heath had a troubled childhood; (3) Ronald Heath was previously employed; (4) Ronald Heath was respectful to his parents and neighbors; (5) Ronald Heath had a GED and participated in high school athletics. In addition to the totality of the circumstances supporting the vacation of the death sentence, this case is similar to other capital cases in which the Court has vacated imposed death sentences. *See Terry v. State*, 668 So. 2d 954 (Fla. 1996) (death sentence disproportionate where facts surrounding homicide were unclear[3] and the aggravating circumstances were not extensive); *Thompson v. State*, 647 So. 2d 824 (Fla. 1994)(death sentence disproportionate where only one valid aggravator and significant nonstatutory mitigation exist). *Johnson v. State, supra*, 720 So. 2d at 238.

In the Purple Porpoise bar, there is considerable question over relative wrong doing. Penny Powell, traveled to the Jacksonville home of Heath's grandmother. After an argument with Heath, Powell returned to Douglas, Georgia, where she and Heath lived. Petitioner Heath and his brother, Kenneth Heath, drove to Gainesville to

[3]It is not clear beyond a reasonable doubt that Ronald Heath inflicted a mortal wound on the victim herein. (R3-452, at 467).

visit some of Heath's friends. On 24 May 1989, the brothers went to the Purple Porpoise Lounge in Gainesville where two of Heath's friends worked as waitresses. *Heath v. State*, 648 So. 2d 660 (Fla. 1994). During the evening the brothers struck up a conversation with Sheridan, a traveling salesman who had come to the lounge for drinks and dinner. Sheridan bought the brothers a drink and inquired if they ever got high or had any marijuana. Ronald Heath suggested to Kenneth that they take Sheridan somewhere and rob him; Kenneth *agreed*. The three left the bar in Kenneth's vehicle, which Ronald Heath drove to an isolated area of Alachua County. After parking on a dirt road, all three got out of the car and smoked marijuana according to Kenneth Heath. Heath made the hand motion of a pistol and asked Kenneth, "Did you get it?" Kenneth retrieved a small-caliber handgun from under the car seat, pointed it at Sheridan, and told him that he was being robbed. Sheridan balked at giving the brothers anything. Heath told Kenneth to shoot Sheridan. *When Sheridan lunged at Kenneth, Kenneth shot him in the chest*. Sheridan sat down, saying "it hurt." As Sheridan began to remove his possessions, Heath, according to Kenny, kicked Mr. Sheridan and stabbed him in the neck with a hunting knife. Heath attempted to slit Sheridan's throat, but was unable to complete the task with the dull knife and *could only saw at Sheridan's neck.* Heath then instructed Kenneth to kill Sheridan with the gun, and Kenneth shot him twice in the head. The brothers moved the body further into the woods. After returning to the Purple Porpoise, the brothers took Sheridan's rental car to a remote area, removed some items, and burned the car. No first-degree murder makes for sympathetic reading. But in an overall comparative scheme, this conduct is far removed from those set aside for special treatment and the

special punishment of death.

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, and this case, does not satisfy standards intended to guarantee reliability, narrowing, proportionality and other constitutional safeguards in the capital sentencing process.

> The Court has an independent obligation to review each case where a sentence of death is imposed to determine whether death is the appropriate punishment. *See Morton v. State*, 789 So. 2d 324, 335 (Fla. 2001). As has been stated, "The death penalty is reserved for 'the most aggravated and unmitigated of most serious crimes.'" *Clark v. State*, 609 So. 2d 513, 516 (Fla. 1992) (quoting *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973)). In deciding whether death is a proportionate penalty, the Court must consider the totality of the circumstances of the case and compare the case with other capital cases. *See Urbin v. State*, 714 So. 2d 411, 417 (Fla. 1998). However, in cases where more than one defendant was involved in the commission of the crime, the Court performs an additional analysis of relative culpability. Underlying our relative culpability analysis is the principle that "equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment." *See Ray v. State*, 755 So. 2d 604, 611 (Fla. 2000). *See also Jennings v. State*, 718 So. 2d 144, 153 (Fla. 1998) ("While the death penalty is disproportionate where a less culpable defendant receives death and a more culpable defendant receives life, disparate treatment of co-defendants is permissible in situations where a particular defendant is more culpable.") (citation omitted).

Shere v. Moore, 830 So. 2d 56 (Fla. 2002), at 60-61.

Appellant argued below, and here, that his sentence was disproportionate to that of his co-defendant, who was his natural brother, who was convicted of the same offense, and the same degree of the crime. *Shere v. Moore, supra,* 830 So. 2d at 61.

The co-defendant, Kenneth Heath was of the requisite age and not mentally retarded. *Id*., at 62. In fact a majority of the predicate evidence which formed the foundation for the imposition of the sentence of death was nothing more than the uncorroborated, unsubstantiated self serving statements of Kenneth Heath. Kenneth actually killed the victim.[4] The cause of death, incongrously, was attributed to a fatal gunshot wound and fatal knife wound. While either *could* have been the cause of death, both could not be the cause of death.

This critical factual issue was never resolved by the fact finder. Not surprisingly the main witness for the State sought to "blame shift." Kenneth Heath testified he did the shooting and Appellant, did the cutting.

Due to the uniqueness and the finality of death, the Court addresses the propriety of all death sentences in a proportionality review upon appeal. *See Porter v. State*, 564 So.2 d 1060, 1064 (Fla. 1990). In conducting the review, the Court considers the totality of all the circumstances in a case as compared to other cases in which the death penalty has been imposed, *see Robinson v. State*, 761 So. 2d 269 (Fla. 1999), *cert. denied*, 529 U.S. 1057, 146 L. Ed. 2d 466, 120 S. Ct. 1563 (2000), thereby providing for uniformity in the application of this sentence. As a corollary the Court also performs an additional analysis of relative culpability in cases where more than one defendant was involved in the commission of the killing. *Shere v. Moore, supra*, at 64.

The first analysis focuses on the larger universe of death sentences that have

[4]*Heath v. State, supra* 648 So. 2d at 662.

been imposed, the latter analysis homes in on the smaller universe of the perpetrators and participants in a given capital murder. *Slater v. State*, 316 So. 2d 539, 542 (Fla. 1975), "Defendants should not be treated differently upon the same or similar facts." In *Ray v. State*, 755 So. 2d 604, 611 (Fla. 2000).

> The record in this case reflects the *possibility* that Hall [co-defendant] was the shooter. Hall was injured during the shootout with Lindsey, and the placement of the wounds suggest that Hall was facing Lindsey with his arm raised in a shooting position. *At a minimum, Ray and Hall are equally culpable*. Both men actively participated in planning the robbery, in executing the robbery, and in stealing the car. During their escape from the robbery, they stopped to attend to a mechanical problem with the getaway vehicle, and a gun battle with Lindsey ensued. Forensic evidence shows gun residue on Ray's hands, injuries to Hall from Lindsey's gun, and Hall's blood on the murder weapon. After Lindsey was killed, both men continued their flight until they were apprehended. Much of the evidence points to Hall as the dominant player in the crimes. It is undisputed that Hall did nearly all the talking during the robbery and appeared to be in command of the operation. In addition, only Hall had shotgun injuries caused by the officer. Finally, Hall's statements and questions to paramedics suggest that he was responsible for shooting the officer. During sentencing the State argued that although Hall instigated the gun battle, both Hall and Ray shot Lindsey. The State sought the death penalty for both. *The trial judge's own remarks in sentencing Hall reflect that, at a minimum, he believed Ray and Hall to be equally culpable in the shooting*. It seems clear that the judge would have imposed equal sentences but for his belief that a failure to abide by the jury's recommendation would result in a reversal on appeal. Under these circumstances, the trial court's entry of disparate sentences was error.

Ray, 755 So. 2d at 611-12 (emphasis added).

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.

See Amended Initial Brief, pages 85-ff, and arguments made above.

D. CONCLUSION

The case of Ronald Heath, comparatively has received disproportionate treatment, from the point of his prior violent felony being committed when he was sixteen years old, until the instant homicide being inconclusively attributed to him,[5] the case merits close scrutiny. Appellant would submit, all buzz words aside, that the docket of the court, and indeed, the dockets of the lower courts, are filled with much more egregious and heinous conduct. Up until now the conviction and sentence have been indulged. But in the face of the expressions of doubt by the sentencing court and the opinion of the Court which arguably says that Kenneth actually killed the victim,[6] Appellant respectfully submits the case should be put in its proper perspective. The case does not belong in that special and unique class of death eligible cases.

[5] Order Enforcing Sentence of Death, supra (R3-452, at 467)

[6] *Heath v. State,* 648 So.2d at 662

E. CERTIFICATE OF SERVICE

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

Meredith Charbula
Office of the Attorney General
Department of Legal Affairs
PL01, The Capitol
Tallahassee, Florida 32399-1050

by U.S. mail and electronic mail this 30th day of May, 2008.

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F. 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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