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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1470

LOWER COURT CASE NO. 16-1991-CF-8144-AXXX

KENNETH HARTLEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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STANDARD OF REVIEW

In reviewing the relative culpability of co-defendants, this Court has held: "[a] trial court's determination concerning the relative culpability of the co-perpetrators in a first degree murder case is a finding of fact and will be sustained on review if supported by competent and substantial evidence." Puccio v. State, 701 So. 2d 858, 860 (Fla. 1997).

REQUEST FOR ORAL ARGUMENT

Mr. Hartley has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Hartley, through counsel, accordingly urges that the Court permit oral argument.

INTRODUCTION[1]

In 1996, this Court reviewed Mr. Hartley and his co-defendant, Ronnie Ferrell's convictions and death sentences. In affirming Mr. Ferrell's death sentence, this Court stated: "Although not considered in aggravation, the trial judge noted that Ferrell was just as culpable as the shooter because he used his friendship with the victim to lure the victim to his death." Ferrell v. State, 686 So. 2d 1324, 1327 (Fla. 1996). This Court also held:

> We also note that the sentence of death in this case is appropriate even though Ferrell was not the shooter and even though Johnson received a sentence of life-imprisonment. First, Ferrell played an integral part in planning and carrying out the murder. Moreover, Ferrell used his friendship with the victim to lure him to his death. Johnson merely provided the getaway vehicle after the crime was committed. We have previously determined that death is the appropriate sentence under similar circumstances.

Id. at 1331.

In 2010, this Court affirmed the circuit court's finding

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[1]Citations in this brief are as follows: References to the Mr. Hartley's record on direct appeal are designated as "R. ___". References to Mr. Hartley's trial transcripts are designated as "T. __". References to the record on appeal from the denial of Mr. Hartley's initial postconviction proceedings are designated as "PC-R. ___". References to the record on appeal from the summary denial of Mr. Hartley's successive Rule 3.851 motion that was based on Porter v. McCollum, 559 U.S. 30 (2009), are designated as "PC-R2. ___". References to the record on appeal from the denial of Mr. Hartley's second successive Rule 3.851 motion are designated as "PC-R3. ___". The supplemental record on appeal is designated as "SPC-R3. ___". Mr. Ferrell's record on appeal was admitted as an exhibit in the postconviction proceedings below and will be designated as "PC-R3. ___".

that Mr. Ferrell's trial counsel had not conducted a reasonable investigation relating to mitigation and that the mitigation presented in postconviction demonstrated prejudice. See Ferrell v. State, 29 So. 3d 959, 984-5 (Fla. 2010).

On December 9, 2010, Mr. Ferrell was re-sentenced to life imprisonment, with a minimum mandatory of 25 years (PC-R3. 1913-22). However, Mr. Ferrell's life sentence was not the product of a plea negotiation and no agreement was made which required Mr. Ferrell to forego challenging his convictions in exchange for a life sentence. In fact, as Mr. Ferrell's re-sentencing counsel stated: "Your Honor, he just wanted to make the record clear that he's not entering a plea or admitting to any facts." (PC-R3. 1918).

Thus, at the time Mr. Ferrell was re-sentenced to life he was an equally culpable co-defendant convicted for the first degree murder of Gino Mayhew. Mr. Ferrell's culpability, as determined at the time of his trial and affirmed on direct appeal, did not change during his re-sentencing proceedings. Therefore, the law of the case establishes that Mr. Ferrell is Mr. Hartley's equally culpable co-defendant who received a life sentence for the murder of Mr. Mayhew. See Florida Dept. of Trans. v. Juliano, 801 So. 2d 101, (Fla. 2001)("Under the law of the case doctrine, a trial court is bound to follow prior rulings of the appellate court as long as the facts on which such

decision are based continue to be the facts of the case.”); Greene v. Massey, 384 So. 2d 24, 28 (Fla. 1980)("All points of law which have been adjudicated become the law of the case and are, except in exceptional circumstances, no longer open for discussion or consideration in subsequent proceedings in the case."); Strazzulla v. Hendrick, 177 So. 2d 1, 3 (Fla. 1965). Thus, this Court must reverse the circuit court and remand for the imposition of a life sentence in Mr. Hartley’s case.

STATEMENT OF THE CASE

Mr. Hartley was indicted with the first-degree murder of Gino Mayhew, armed burglary, and aggravated assault (R. 1016).

Mr. Hartley was found guilty on August 27, 1993 (R. 1016). Mr. Hartley’s jury recommended a sentence of death by a 9 to 3 vote on September 9, 1993. Mr. Hartley was sentenced to death on December 9, 1993.

On direct appeal, this Court affirmed Mr. Hartley’s convictions and sentences. Hartley v. State, 686 So. 2d 1316 (Fla. 1996).

During Mr. Hartley’s initial postconviction proceedings, a series of Rule 3.850 motions were filed. The first motion was a shell motion filed by the Capital Collateral Regional Counsel - North. Later, Mr. Hartley’s appointed counsel, Jefferson Morrow, filed amended motions. During Mr. Hartley’s postconviction evidentiary hearing, Morrow was removed from Mr. Hartley’s case

based on information from Mr. Hartley that Morrow demanded payment from Mr. Hartley's family[2] in order to do further work while also being paid by the state as Registry Counsel. Mr. Hartley was not permitted to be present at that hearing. Subsequently, Mr. Hartley privately retained counsel to represent him (PC-R. 2384-94). The trial court held a hearing on three of Mr. Hartley's postconviction claims: trial counsel's failure to 1) call certain witnesses in the penalty phase; 2) prepare for the penalty phase, and 3) use a mental health expert. After the evidentiary hearing, the circuit court denied relief.

Mr. Hartley appealed to this Court. This Court denied all relief on May 22, 2008. Hartley v. State, 990 So. 2d 1008 (Fla. 2008).

Mr. Hartley filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida on October 7, 2008. That petition is still pending.

On November 22, 2010, Mr. Hartley filed a successive Rule 3.851 motion based on the United States Supreme Court's opinion in Porter v. McCollum, 559 U.S. 30 (2009). The circuit court denied Mr. Hartley's motion.

Mr. Hartley appealed the decision to this Court. On May 31, 2012, this Court affirmed the denial of relief. Hartley v. State,

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[2]At the time Morrow represented Mr. Hartley in postconviction, his brother, Shawn Jefferson, played professional football in the NFL.

91 So. 3d 848 (Fla. 2012).

While Mr. Hartley's appeal of his Porter claim was pending, he filed a Rule 3.851 motion relating to the imposition of a life sentence in Mr. Ferrell's case (PC-R3. 1-43).

Initially, the circuit court dismissed Mr. Hartley's motion based upon the fact that Mr. Hartley's appeal was pending before this Court (PC-R3. 68-70).

Mr. Hartley filed a motion for rehearing (PC-R3. 71-3), which was granted on January 20, 2012 (PC-R3. 74-6).

On September 10, 2012, a case management conference was held at which time Mr. Ferrell's record on appeal from his trial proceedings was admitted as Defense Exhibit 1. Mr. Hartley was also directed to file a memorandum identifying specific portions of Mr. Ferrell's record on appeal that established Mr. Ferrell was equally culpable in Gino Mayhew's homicide and to obtain the transcript of Mr. Ferrell's re-sentencing (PC-R3. 1796-8).

After the hearing, Mr. Hartley filed a memorandum regarding Mr. Ferrell's record on appeal (PC-R3. 1811-23), and the transcript of Mr. Ferrell's re-sentencing (PC-R3. 1799-1810).

A subsequent case management conference was held on March 21, 2013, (SPC-R3. 48-67), at which Mr. Hartley introduced Mr. Ferrell's revised judgement and sentence reflecting that Mr. Ferrell was re-sentenced to life imprisonment on December 9, 2010 (PC-R3. 1906-12), and the transcript of Mr. Ferrell's re-

sentencing (PC-R4. 1913-22).

On June 21, 2013, the circuit court denied Mr. Hartley's Rule 3.851 motion (PC-R3. 1923-33).

A timely notice of appeal was filed (PC-R3. 1934-5).

STATEMENT OF THE FACTS

I. MR. HARTLEY'S TRIAL

Mr. Hartley, along with Ronnie Ferrell and Sylvester Johnson, was charged by indictment with first-degree murder of Gino Mayhew, armed burglary and aggravated assault (R. 1016). The three were tried separately and were each convicted of first degree murder, robbery and kidnapping (R. 1016). Mr. Hartley and Mr. Ferrell were sentenced to death while Mr. Johnson was sentenced to life in prison (R. 1016).

Gino Mayhew, the victim, was a 17 year old drug dealer who carried a sawed off shotgun in the back seat of his Chevrolet Blazer (T. 2008-9; 2069). On the evening of April 22, 1991, he parked his car in the Washington Heights apartments in Jacksonville, a particularly dangerous area of town, to sell crack cocaine (T. 2069, 2106). Sidney Jones, 33 years of age and a six time convicted felon, was a friend of Mayhew's and was helping him sell drugs by flagging down people who might be going to other dealers that were also in the vicinity (T. 2069-70). Jones took the rock that Mayhew offered him in exchange for his services and after walking a short distance, Jones realized that

the rock was smaller than what he and Mayhew had agreed on earlier in the day (T. 2073).

Jones, who at the time of the trial was in custody at the Duval County Jail, testified that he headed back to the vehicle and saw Hartley, Ferrell and Johnson near the blazer and that Mr. Hartley was holding a gun (T. 2077). Jones said that he saw Mr. Hartley force Mayhew into the driver's seat and that Mr. Hartley climbed in the backseat behind Mayhew (T. 2077). Mr. Ferrell was in the front passenger seat and Sylvester Johnson left in a separate vehicle, heading in the same direction (R. 2077).

Jones expected that his good friend Mayhew was about to be murdered, but instead of calling the police, Jones returned home and smoked the crack that Mayhew had just paid him with (T. 2090; T 2116-7). Jones was a confidential informant and had the beeper number for the officer whom he was assisting with an investigation of Mayhew's drug dealing but he did not call the officer about Mayhew's abduction at gunpoint (T. 2091). Jones had been a paid confidential informant for the police since the 1970s and admitted that his attorney negotiated with the prosecutor and judge for a lesser sentence on his January 25, 1993, armed robbery arrest (T. 2098-9).[3] Jones stated that there were other witnesses to Mayhew's abduction that did not come

[3]Jones received a fifteen-month sentence on a March 11, 1985, charge of carrying a concealed firearm and possession of a firearm by a convicted felon (T. 2101).

forward, but he refused to provide their names (T. 2114). Jones also admitted to lying in his deposition taken prior to trial (T. 2119). Since Jones' arrest for trespassing, he was also charged with armed robbery for which he received a year in prison (T. 2094).

Witness Juan Brown, a two time convicted felon and good friend of Mayhew's, testified that he was driving in his car with two friends and saw Mayhew driving his blazer with Mr. Ferrell in the passenger seat and a "light skinned black male" in the backseat (T. 2136-7). Brown never identified the person sitting behind Mayhew in the Blazer (T. 2136-7). Brown followed Mayhew's blazer, but eventually lost him as he headed in the direction of Sherwood Park Elementary School (T. 2136-7). At the time of Mr. Hartley's trial, Brown was actually being held for contempt because he failed to appear for a trial preparation session with the prosecutor on Mr. Hartley's case (T. 2149). Brown did not come forward but was contacted in May or June of 1991 by detectives (T. 2145). Police never asked him about his two friends who were traveling in his car with him that night and also saw Mayhew's car (T. 2144).

The next day Mayhew's body was discovered in the car at Sherwood Park with six gunshot wounds to the head (T. 2038). Hartley, Johnson, and Ferrell were arrested about three weeks later (T. 2038).

The State presented its theory of how the shooting occurred through the medical examiner. The state also presented three witnesses in addition to Jones and Brown that inculpated Mr. Hartley. Mr. Hartley's conviction relied completely on the credibility of these witnesses as there was no direct evidence of Mr. Hartley's involvement.

At trial, Medical Examiner Lipkovic testified that Mayhew had six gun shot wounds (T. 2032). Lipkovic believed that the victim was seated in the driver's seat and the shots came from behind and somewhat to the right and the victim was turning around (T. 2054-5). On cross examination, Lipkovic conceded that the state's theory of the victim and shooter's positions at the time of the shooting was not the only possibility and that the victim could have been seated in the right hand seat and turning to the left based on the angle of the gunshot wounds (T. 2056).

Witness Anthony Parkin had five felony convictions and had pled guilty on July 12, 1991, to dealing in stolen property (T. 2182). At the time of trial, Parkin was in custody awaiting sentencing on that charge and on two violations of probation charges (T. 2182). A week after Parkin watched a televised bond hearing that showed Mr. Hartley and his co-defendant, he contacted detectives with information that he had regarding Gino Mayhew's murder (T. 2189; 2199). Parkin told police, and later the jury, that he overheard Mr. Hartley confessing to another

inmate and that Mr. Hartley also confessed to him directly (T. 2190). The felony that Parkin was awaiting sentencing on at the time of Mr. Hartley's trial exposed him to a thirty-year sentence and possible habitual offender status (T. 2207). However, after agreeing to testify for the prosecution, Parkin's plea agreement specified that he would not receive more than fifteen years concurrent on two charges and would not be sentenced as a habitual offender (T. 2183). The judge had passed on sentencing Parkin numerous times prior to Mr. Hartley's trial in order to verify that he testified "truthfully" against Mr. Hartley.

State witness Ronald Bronner, a four time convicted felon, was awaiting sentencing on a cocaine trafficking charge at the time of Mr. Hartley's trial (T. 2218). He was arrested on September 11, 1991, and was placed in a cell with Mr. Hartley (T. 2227). On October 1, 1991, Bronner received notice of the state's intent to prosecute him as a career criminal and the following day, October 2, 1992, Bronner received notice that the state was seeking habitual offender status on him (T. 2237). Bronner testified that Mr. Hartley confessed to murdering Gino a week later during recreation (T. 2227). Bronner ultimately entered into a plea agreement with the prosecutor. Under the agreement, the prosecutor withdrew the habitual offender motion and the maximum sentence was reduced to twenty-five years, but Bronner understood that the sentence could be anything less than

that (T. 2229). Sentencing was delayed on Bronner's guilty plea until the conclusion of Mr. Hartley's capital trial (T. 2252).[4]

State witness Eric Brooks, a two time convicted felon, was in jail awaiting sentencing on armed robbery when he testified against Mr. Hartley (T. 2254). Brooks was placed in the jail on August 26, 1991, in the same section as Mr. Hartley (T. 2259). A few days later, Mr. Hartley denied killing Mayhew in a conversation during recreation (T. 2260). Brooks testified that sometime later, in October, Mr. Hartley confessed to shooting Mayhew in the back of the head "a few times." (T. 2262). Brooks initially was not going to go to authorities but changed his mind because he was turned off by Mr. Hartley's allegedly "bragging" about murdering Mayhew (T. 2263).

Just like Bronner, Brooks entered into a plea agreement with prosecutors on November 14, 1991. In exchange for his testimony against Hartley, Brooks would not be classified as a habitual offender, would get a thirty-year maximum sentence and the three year minimum mandatory sentence was waived (T. 2255). Sentencing was delayed until after Mr. Hartley's trial (T. 2256).[5]

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[4]After testifying against Hartley, Bronner was sentenced to three years at Florida State Prison, however he was never sent to prison and was given two years time served and released from the Duval County Pre-Trial Detention Center (PC-R. 977-8).

[5]After testifying against Mr. Hartley, Brooks was sentenced to three years at Florida State Prison, however he was never sent to prison and was given two years time served and released from the Duval County Pre-Trial Detention Center (PC-R. 977-8).

Mr. Hartley's trial counsel, Robert Willis, presented no guilt phase witnesses. The jury convicted Mr. Hartley, as charged.

At the penalty phase, trial counsel presented the testimony of Alan Chipperfield and one lay witness. Assistant Public Defender Chipperfield testified as a sentencing expert about the incarceration assurance of the fifteen and twenty-five year mandatory minimum sentences.

The Reverend Coley Williams, the Hartley family's pastor, testified that Mr. Hartley had a quiet and peaceful spirit, attended church on and off, came from a good family and was intelligent. Hartley v. State, 686 So. 2d 1316, 1319 (Fla. 1996).

After Reverend Williams concluded his brief testimony, the entirety of the mitigation evidence, Willis rested the defense case. The prosecutor, apparently surprised that no expert testimony had been presented regarding the important mental health mitigators, asked the trial judge to determine why no such evidence was being presented (R. 2554-5). Willis then explained "we are aware that the Court entered an Order transporting him for that purpose we did not request that it be done" and that his was a reasoned decision (R. 2554-5).

The state presented Detective Steve Higginbotham whose testimony outlined Mr. Hartley's January 19, 1987, conviction for manslaughter for shooting Angel McCormick in the chest with a

shotgun (T. 2465). The state then presented Detective J.C. Perret who detailed Mr. Hartley's April 19, 1991, arrest for robbery and subsequent conviction. Mr. Hartley robbed a cab driver (T. 2468-70). The state also presented Edward Saple, another cab driver, who testified that Mr. Hartley robbed him at gunpoint (T. 2480-6). That trial resulted in a conviction (T. 2480).

Not surprisingly, the court found minimal mitigation and sentenced Mr. Hartley to death.

II. MR. FERRELL'S TRIAL

The State's theory of the case at Mr. Ferrell's trial was largely consistent with the State's theory at Mr. Hartley's trial: Ronnie Ferrell used his friendship with Gino Mayhew to lure Mayhew to his death while Mr. Hartley was the "triggerman." Though the evidence differed slightly, in that, according to the State, Mr. Ferrell made statements to law enforcement and a jailhouse snitch, many of the witnesses who testified against Mr. Hartley also testified against Mr. Ferrell.

Throughout the State's case at Mr. Ferrell's trial, the prosecutor argued and presented a picture that Mr. Ferrell and Mr. Hartley were jointly responsible for the actions of one another and that Mr. Ferrell was at least equally as culpable as Mr. Hartley, if not more so, in the murder of Gino Mayhew.

A. Voir Dire

The State's theory of Mr. Ferrell's culpability was demonstrated from the very inception of it's case when the State charged Mr. Ferrell with first degree murder in an information that was read to the jury (PC-R3. 867-9).

In voir dire, the prosecutor began to flesh out the legal theory supporting the first degree murder charge by explaining the law of principals "... that if two or more people work together to help commit a crime, that each of the partners are responsible for what he does and for what his partner does." The prosecutor discussed the law of principals and felony murder with the prospective jurors and fielded questions from them about the concept (PC-R3. 1010-2). The defense also weighed in on these concepts during its voir dire of the jury (PC-R3. 1070-1). Thus, the jury was exposed early on to the idea that Mr. Ferrell was equally guilty and equally culpable for the victim's murder.

B. Opening Statements

The prosecutor's entire opening argument laid the groundwork for the State's theory that Mr. Ferrell premeditated with Mr. Hartley and Mr. Johnson to murder Gino Mayhew. The prosecutor explained the motive for murdering Mayhew was the trio's belief that Mayhew was seeking to retaliate for a robbery committed against him by Mr. Hartley and a masked man (PC-R3. 1128-9). The prosecutor then provided a brief preview of the evidence expected

from the State's witnesses. The prosecutor told the jury that Mayhew's murder was a "classic execution style killing." (PC-R3. 1130).

The prosecutor told the jury that: Lynwood Smith and Gene Felton would testify that Mayhew had been robbed two days prior to his murder by Mr. Hartley and a "masked man." (PC-R3. 1131). Felton would tell the jury about hearing Mr. Ferrell "bragging" about the prior robbery (PC-R3. 1131).

In addition, the prosecutor told the jury that: Sidney Jones was a witness to Mayhew's abduction and would identify Ferrell, Hartley and Johnson. Jones was the first to detail Mr. Ferrell's role in luring Mayhew to the car so that Mr. Hartley could force Mayhew into the car and then get in the back seat. Mr. Ferrell got into the front passenger seat. Jones would also tell the jury that Mr. Johnson stopped Mayhew's Blazer to speak to Mr. Hartley before the Blazer drove away (PC-R3. 1132-3). Jones saw Mr. Johnson get into a second car and follow in the direction of Mayhew's car, establishing Johnson as the "getaway driver." (PC-R3. 1135).

And, the prosecutor told the jury that Juan Brown, a friend of Mayhew's would corroborate Jones' testimony (PC-R3. 1135). Brown saw Mayhew driving his Blazer towards the site of the murder, Mr. Ferrell was in the front passenger seat, and a "light skinned, black male" seated behind the driver's seat was

"crouched up very close to Gino, unusually close, almost as if he was talking in his ear." (PC-R3. 1136). The prosecutor told the jury that "the reason he was crouched up toward Gino is because he had that gun to his head telling him where to drive." (PC-R3. 1136). The prosecutor told the jury: "[t]he defendant and his partners executed Gino Mayhew that night." (PC-R3. 1137).

The prosecutor also stated that Mr. Ferrell confessed the entire plot to Robert Williams while the two were in the Duval County jail together. The plan to get Mayhew alone hinged on his friendship with Mr. Ferrell, because Mayhew would trust Mr. Ferrell to set up a drug transaction with him (PC-R3. 1138-9). According to the prosecutor, Williams would testify that Mr. Ferrell took the gold necklace off of Mayhew's neck and they took his drugs and money (PC-R3. 1159).

The prosecutor also attacked Mr. Ferrell's alibi testimony as flawed: Though Mr. Ferrell told police during two separate interviews prior to his arrest that he was with his wife at her mother's house at the time of the murders (PC-R3. 1142-3), Mr. Ferrell's wife and her mother would testify that Ferrell was not with them at the house at the time of the murder (PC-R3. 1143).

The prosecutor also discussed the law of principals with the jury:

> Under the law of principals the State doesn't have to show that this defendant was the one that pulled the trigger or this defendant was the one that took the money from Gino. Under the law of principals if we

> show the defendant knew what was going to happen, that he intended to actively participate, and if he did something to help carry out that crime, that the law considered him doing everything that his partners did. **And the reason I mention that you is as you listen to all the evidence, look for the evidence that shows how this defendant knew what was going to happen, intended to actively participate and actually did something to help.**

(PC-R3. 1144)(emphasis added).

During the defense's opening argument, Mr. Ferrell's trial counsel attempted to minimize Mr. Ferrell's role, stating that the State is not even making the allegation that Mr. Ferrell was the one who actually killed Mayhew (PC-R3. 1149). He told the jury that mere presence at the scene does not make someone a principal (PC-R3. 1149).

C. Witness Testimony

The testimony regarding Mr. Ferrell's role in the crimes unfolded before the jury: Officer Duckworth responded to the scene and described Mayhew's gunshot wounds (PC-R3. 1155-62). Likewise, Detective Bolena testified about the scene, the Blazer, the bullet wounds and the drug paraphernalia found on the seat. (Based on this testimony, during closing arguments, the prosecutor argued that the bullet wounds demonstrated that Mr. Ferrell premeditated Mayhew's murder (PC-R3. 1527)).

Trial counsel elicited testimony that no physical evidence linking Mr. Ferrell to the car or the scene existed (PC-R3. 1187). However, on re-direct, the prosecutor made the point that

fingerprints would not have been significant because Mayhew and Mr. Ferrell were "close friends" (PC-R3. 1188).

The medical examiner, Peter Lipkovic, described the gunshot wounds and explained the routes that the bullets took through Mayhew's body (PC-R3. 1195-7). (Based on this testimony, the prosecutor argued that the nature of wounds show premeditation and intent (PC-R3. 1202-3). The prosecutor also argued the evidence about the bullet wounds in support of its argument that the heinous, atrocious and cruel aggravator applied in the penalty phase as to Mr. Ferrell).

Lynwood Smith testified that he was an old friend of Mayhew's (PC-R3. 1216). Mayhew told him that he was beat up and robbed two days prior to his murder by Mr. Hartley and a "masked man" (PC-R3. 1216-43). Mayhew told Smith that the robbers hit him with a pistol, shot at him two or three times and he had a bleeding wound on his forehead and a bullet had grazed his knee (PC-R3. 1226-8). (Based on this testimony, during closing argument, the prosecutor argued that this testimony about the prior robbery partially explained Mr. Ferrell's motive for killing Mayhew (PC-R3. 1537)).

Gene Felton testified that he had known Mr. Ferrell for over twenty years and that Mr. Ferrell was "like a brother" to him (PC-R3. 1245). Felton also told the jury that he overheard Mr. Ferrell bragging about beating Mayhew up and robbing him (PC-R3.

1248).

Sidney Jones testified that he assisted Mayhew in his drug business by flagging down cars. Mayhew paid Jones with crack cocaine. The night of Mayhew's abduction, Jones was working for Mayhew. Jones knew Hartley, Ferrell and Johnson and claimed to be an eye witness to Mayhew's abduction (PC-R3. 1253-67). Jones testified that he saw Mr. Hartley holding a pistol to Mayhew's head in Mayhew's car and that Mayhew had a "scared look on his face." (PC-R3. 1263, 1265). Jones testified that he saw Mr. Ferrell take a seat in the front passenger side of Mayhew's car, that nobody forced Mr. Ferrell to sit there (PC-R3. 1266). Jones saw Mr. Johnson get into a purple truck and follow after Mayhew's car (PC-R3. 1275). Jones also explained that he did not call the police because he was afraid to talk because "these people" would kill him (PC-R3. 1281-5).

The State also presented Juan Brown, a friend of Gino Mayhew's. Brown was driving around with unnamed friends the night of Mayhew's murder, when he saw Mayhew heading towards him in his car (PC-R3. 1326-8). Brown was heading towards the Washington Heights Apartments, Mayhew was driving away from the apartments. Brown knew Mr. Ferrell and Mr. Hartley. He saw Mr. Ferrell seated in the passenger seat of Mayhew's car (PC-R3. 1330). Brown testified that he also saw a man seated behind Mayhew, but crouched up close to him and talking (PC-R3. 1331).

Brown could not see who the man was, but said that it was a light skinned, black male (PC-R3. 1326). Brown tried to get Mayhew to stop by honking his horn, waving, turning the car to follow him, but Mayhew just kept driving (PC-R3. 1332-3). This was unusual for Mayhew not to stop (PC-R3. 1332-3).

Robert Williams testified that Mr. Ferrell confessed to him while the two were in the Duval County jail together. Williams said that Johnson, Hartley and Ferrell robbed Mayhew the Saturday prior to Mayhew's murder (PC-R3. 1352). Williams went on to state that Mr. Ferrell confessed to him that he, Mr. Hartley and Mr. Johnson planned the murder together because they heard that Mayhew was tired of them robbing him and that Mayhew had put out a "hit" on them (PC-R3. 1354). Mr. Ferrell allegedly told Williams that the plan was for Mr. Ferrell to set up a drug deal with Mayhew, because Mayhew did not know Mr. Ferrell participated in the prior robbery and the two were friends (PC-R3. 1356-8). Williams testified that the trio chose Sherwood Park so that there would not be any witnesses (PC-R3. 1359). Williams described how Mr. Ferrell met Mayhew at Washington Heights Apartments and lured him into his car by telling him that they needed to go to Sherwood Park to get the money from Mr. Ferrell's partner (PC-R3. 1356-8). Williams also stated that Mr. Hartley got into the car at gunpoint at some point (PC-R3. 1357). The plan all along was to get Mayhew alone in order to murder him

(PC-R3. 1356). Williams testified that Mr. Farrell told him that he took Mayhew's gold chain from his neck, they robbed Mayhew of his money and drugs and exited the vehicle (PC-R3. 1360). Then, Mr. Hartley shot Mayhew in the head four or five times (PC-R3. 1360). They then put drug paraphernalia on the front seat (PC-R3. 1362). Mr. Ferrell did not tell them how much money they got from Mayhew, but did say that they got a little more than an ounce of drugs (PC-R3. 1362). Mr. Ferrell was "bragging" about the crime and felt he was not going to be convicted because the State did not have any evidence against him (PC-R3. 1363).

Detective Jefferson initially questioned Mr. Ferrell about the murder. At that time, Mr. Ferrell said that he was with his wife at her mother's house at the time of the murder 1387-1405, 1427-31).

Detective Baxter conducted a second interview with Mr. Ferrell regarding Mayhew's murder. Mr. Ferrell again stated that he was with his wife at her mother's house at the time of the murder, but then changed his mind about that and said that he had picked up a friend, Clyde Porter, at a pool hall and brought him to a liquor store, then brought Porter back to the pool hall, then returned to his mother in law's house (PC-R3. 1445-6). The detectives confronted Mr. Ferrell with his changing stories (PC-R3. 1451). Mr. Ferrell responded by looking at them and stating: "go ahead, mother fucker, do what you've got to do." (PC-R3.

1452).

D. Closing Arguments

The prosecutor, framed his closing in terms of the law of principals (PC-R3. 1520). The prosecutor explained "if two or more persons help each other commit or attempt to commit a crime and the defendant is one of them, the defendant must be treated as if he had done all of the things the other person or persons did if the defendant, one, knew what was going to happen, two, intended to participate actively or by sharing in an expected benefit, and actually did something by which he intended to help commit the crime." (PC-R3. 1520-1). The prosecutor then argued:

> So in this case to prove this defendant guilty of the first degree murder, the State does not have to show that it was that defendant's finger on the trigger that put those bullet holes in Gino Mayhew's head. When his partner Kip fired that gun under the law, the law looked as if this defendant's finger was on the trigger of that gun. Because of the law of principals when Kip pointed the gun at Gino Mayhew and forced him in the Blazer, and this defendant got in beside that defendant, when they kidnapped him basically from the Washington Heights apartments to the school where he was executed those were the acts of this defendant. When the money and drugs were taken from Gino Mayhew during the course of the robbery, the State does not have to show that it was this defendant's hands that took the money, that took the drugs. He was in, that defendant was there, **he was an active participant** and under the law of principals no matter which of those three partners were doing those acts each of them were doing what the other was doing.

(PC-R3. 1523)(emphasis added).

The prosecutor first explained the theory of premeditated first degree murder (PC-R3. 1526). The prosecutor then detailed

the evidence presented that established premeditation: Robert Williams testimony as to the planning and decision to relocate to the more isolated Sherwood Park (PC-R3. 1526); Sidney Jones' eye witness account (PC-R3. 1527); the photos of the bullet wounds that show the intention behind the shots were to kill Mayhew – **Mr. Hartley and Mr. Ferrell intended to execute him** (PC-R3. 1527-8). "Because of the law of principals the State does not have to show this is the defendant that pulled that trigger. That's premeditation." (PC-R3. 1528).

The prosecutor also argued that the State proved first degree murder under the felony murder theory because Mayhew died during the course of a robbery and kidnaping (PC-R3. 1528-9). "In this case we have clear evidence that the defendant actively participated in an armed robbery and armed kidnaping. We have clear evidence that Gino Mayhew died during the course of that armed robbery and armed kidnaping. Under Florida law that's first degree felony murder." (PC-R3. 1529). The prosecutor exhorted the jury to find Mr. Ferrell guilty of the "highest crime" of first degree murder (PC-R3. 1530).

In reviewing Dr. Lipkovic's testimony, the prosecutor argued that the bullet wounds were "wounds of an execution." (PC-R3. 1536). And, the prosecutor actually characterized Mr. Ferrell as being the shooter, based on the law of principals: "... **the defendant and his partners didn't stop at just one fatal shot,**

they wanted to make sure that their plan, that their premeditation was carried out so then they fired more shots into Gino's brain to make sure that their plan, that their execution was fully carried out." (PC-R3. 1536)(emphasis added).

The prosecutor argued Mr. Ferrell's "treachery" by referring to Lynwood Smith, Robert Williams, and Gene Felton's testimony (PC-R3. 1536-8). Mr. Ferrell was actually bragging to Felton about his robbing Mayhew days prior to the murder (PC-R3. 1538). The prosecutor used the testimony of these witnesses to corroborate Sidney Jones eyewitness account of Mayhew's abduction (PC-R3. 1538-45).

In recounting Robert Williams testimony about Mr. Ferrell's "confession", **the prosecutor told the jury that Mr. Ferrell was the "inside man, he was the man that Gino trusted, he was the one that walked up to Gino that night to make sure that he had drugs, to make sure that night in addition to killing him he'd be able to get some drugs off of him. Gino didn't know this defendant was involved in that Saturday night robbery.**" (PC-R3. 1549-50)(emphasis added).

E. Jury Instructions

The trial court instructed the jury on the law of principals (PC-R3. 1609-11). Immediately following that instruction, was the first degree murder instruction where the jury was told that Mr. Ferrell:

> unlawfully and from premeditated design to effect the death of Gino Mayhew or during the commission – attempt to commit or escape from the immediate scene of a robbery or kidnaping, did then and there kill the said Gino Mayhew, a human being by shooting him with a firearm and during the commission of the aforementioned murder in the first degree the said Ronnie Ferrell carried or had in his possession a firearm, to wit: A pistol.

(PC-R3. 1610-1).

The jury returned with a verdict of guilt for first degree murder, robbery, kidnaping (PC-R3. 1646).

F. Penalty Phase

During the penalty phase, the prosecutor highlighted the fact that Mr. Ferrell was a friend of Mayhew's (PC-R3. 1687). The prosecutor called Mr. Ferrell an "executioner." (PC-R3. 1690). The prosecutor argued the fact that Mr. Ferrell was not the triggerman is not mitigating (PC-R3. 1694). "Under the law of Florida this defendant is just as guilty because of that principal instruction that was explained to you during the early part of this trial. He's just as guilty as if he had pulled the trigger and the law looks upon him equally as the person that actually held that gun." (PC-R3. 1694).

The jury deliberated for about twenty-five minutes before recommending death (PC-R3. 1722-4).

G. Sentencing

At sentencing, the trial court stated that even though Mr. Ferrell did not fire the shots, he is "equally guilty with the

person who actually pulled the trigger that killed the victim" because Mr. Ferrell "set up the victim, and betrayed his friend for money and drugs." (PC-R3. 1791). The Court went on to state: "**Ferrell ... placed Mayhew in a position where he could not defend or protect himself and his murder was inescapable.**" (PC-R3. 1791)(emphasis added). When Mr. Hartley "pointed a pistol at Mayhew's head, Mayhew realized that his trusted friend Ferrell had betrayed him. **Ferrell of trust made the murder possible and his culpability equals that of Hartley.**" (PC-R3. 1791-2)(emphasis added).

The trial court's written order sentencing Mr. Ferrell to death, likewise highlighted Mr. Ferrell's exploitation of his friendship with Mayhew to set him up for murder (PC-R3. 591). The trial court assigned "great weight" to the "heinous atrocious or cruel" aggravator, even though Mr. Ferrell was not the triggerman due to Mr. Ferrell's "treachery." (PC-R3. 597-8). The trial court also found the "cold, calculated and premeditated" aggravator due to Mr. Ferrell's "heightened premeditation." (PC-R3. 599).

The trial court assigned slight weight to the "questionable" mitigating circumstance that Mr. Hartley was the actual triggerman (PC-R3. 600-1). The trial court's order states in no uncertain terms that Mr. Ferrell was "equally guilty" with Mr. Hartley due to his "treachery." The trial court found:

> Ferrell, Hartley, and Johnson twice robbed Mayhew. The first time (4-20-91) Ferrell wore a mask so Mayhew would not recognize his 'trusted friend.' The second time (4-22-91) **Ferrell put the plan into motion when, by trickery, he learned that Mayhew had money and drugs - and reported this back to Hartley and Johnson so the robbery-murder could go forward.**
>
> **Then Ferrell and Hartley approached Mayhew who was unsuspecting because Ferrell was his "trusted friend". Hartley then pointed a pistol at Mayhew's head and, too late, Mayhew realized his "trusted friend" Ferrell had betrayed him.**
>
> **Ferrell's perfidy placed Mayhew in a position where he could not defend or protect himself and his murder was inescapable.**
>
> **Ferrell's betrayal of trust made the murder possible and his culpability equals Hartley's.**"

(PC-R3. 601)(emphasis added).

H. Direct Appeal

On direct appeal, the State argued that the CCP aggravator applied with even greater force to Mr. Ferrell than to Mr. Hartley because Mr. Ferrell himself was never threatened by Mayhew's "hit" because Mayhew was unaware that Mr. Ferrell was involved in the initial robbery. (State's Answer Brief at 36).

Also, in it's Answer Brief, the State repeatedly argued that Mr. Ferrell's "culpability equaled Hartley's" based on the circumstances as outlined in the sentencing order and the law of principals (PC-R3. 195, 201, 202, 206, 220, 228, 242, 243).

Indeed, this Court has already addressed the issue of disparate sentencing as to the appropriateness of the death

sentence for Mr. Ferrell. This Court stated: "Although not considered in aggravation, the trial judge noted that **Ferrell was just as culpable as the shooter** because he used his friendship with the victim to lure the victim to his death." Ferrell v. State, 686 So. 2d 1324, 1327 (Fla. 1996)(emphasis added). This Court went on to hold:

> **We also note that the sentence of death in this case is appropriate even though Ferrell was not the shooter and even though Johnson received a sentence of life-imprisonment. First, Ferrell played an integral part in planning and carrying out the murder. Moreover, Ferrell used his friendship with the victim to lure him to his death.** Johnson merely provided the getaway vehicle after the crime was committed. We have previously determined that death is the appropriate sentence under similar circumstances.

Id. at 1331 (emphasis added).

SUMMARY OF THE ARGUMENT

This Court has established that "equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment." Shere v. Moore, 830 So. 2d 56, 60 (Fla. 2002); see also Wade v. State, 41 So. 3d 857, 867-8 (Fla. 2010). Indeed, disparate sentencing is only permissible when one of the co-defendants is more culpable than the other or others. Jennings v. State, 718 So. 2d 144, 153 (Fla. 1998). Here, both the circuit court and this Court found that Mr. Ferrell and Mr. Hartley were equally culpable co-defendants, thus, because Mr. Ferrell's sentence has now been reduced to life, Mr. Hartley's must be as well.

Likewise, the Eighth and Fourteenth Amendments to the United States Constitution also requires that Mr. Hartley's death sentence be vacated. In Parker v. Dugger, 408 U.S. 308, 321 (1991), the United States Supreme Court stated:

> "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way **that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not**." *Spaziano v. Florida, 468 U.S. 447, 460, 82 L. Ed. 2d 340, 104 S. Ct. 3154 (1984).* The Constitution prohibits the arbitrary or irrational imposition of the death penalty. *Id., at 466-467.* We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. See, *e. g., Clemons, supra, at 749* (citing cases); *Gregg v. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976).*

(Emphasis added). Due to the previous findings of fact made in

Mr. Hartley and Mr. Ferrell's cases, it is simply impossible to "rationally distinguish between" Mr. Hartley and Mr. Ferrell as to the appropriate punishment the two deserve. And, because Mr. Ferrell's death sentence has been vacated, so must Mr. Hartley's.

Furthermore, the now disparate sentences of Mr. Ferrell and Mr. Hartley violates Lockett v. Ohio, 438 U.S. 586, 604 (1978), which held that the Eighth and Fourteenth Amendments require that capital juries not be precluded from considering, as mitigating factors, any aspects of a defendant's character or of "the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." See also Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). Mr. Hartley's sentencing jury and judge never knew that an equally culpable co-defendant received life rather than death. Such a fact would probably have resulted in a life sentence for Mr. Hartley.

ARGUMENT

THE CIRCUIT COURT ERRED IN DENYING MR. HARTLEY'S CLAIM THAT HIS SENTENCE OF DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION DUE TO THE NEWLY DISCOVERED EVIDENCE OF CO-DEFENDANT FERRELL'S LIFE SENTENCE.

I. MR. HARTLEY'S CLAIM

On December 9, 2010, Mr. Hartley's co-defendant, Ronnie Ferrell, was sentenced to life. Mr. Ferrell's life sentence constitutes newly discovered evidence that entitles Mr. Hartley to a life sentence (PC-R3. 1906-9).

Kenneth Hartley, Ronnie Ferrell and Sylvester Johnson were charged as co-defendants for the kidnapping, robbery and first degree murder of Gino Mayhew. The crimes occurred on April 22, 1991. The prosecution's theory at trial was that Hartley, Ferrell and Johnson robbed Mayhew, a drug dealer, on April 20, 1991. Then two days later, Hartley, Ferrell and Johnson decided to again rob Mayhew. According to the prosecution's witnesses, Ferrell, who was a friend of Meyhew's, approached Mayhew in order to determine if Mayhew possessed drugs and money. Ferrell then lured Mayhew over to his vehicle where Hartley forced Mayhew, at gun point, into the vehicle. Hartley and Ferrell got into the vehicle and forced Mayhew to drive out of the community. Johnson followed in another vehicle – used as the getaway car. Later, Mayhew was told to stop the vehicle near a school and was shot

and killed. Mayhew's money, drugs and jewelry were taken from him.

Mr. Ferrell's trial, including the penalty phase, occurred in March, 1992. The jury not only convicted Mr. Ferrell, but recommended he be sentenced to death. Indeed, during the closing argument of Mr. Ferrell's penalty phase, the prosecution urged the jury to sentence Mr. Ferrell to death because "**he was a major participant in the robbery and kidnapping" and "[h]e was a full partner in this plan to rob, kidnap and murder Gino [Mayhew]**" (PC-R3. 1677). The trial court deferred sentencing until after Mr. Hartley and Mr. Johnson's trials were held.

Mr. Johnson's trial, including the penalty phase, occurred in May, 1992. While the jury convicted Mr. Johnson, it recommended a sentence of life in prison. The prosecution had urged the jury to recommend a sentence of death. The trial court deferred sentencing until after Mr. Hartley's trial was held.

Mr. Hartley's trial occurred in August, 1993. After the jury convicted Mr. Hartley, the penalty phase was held in September, 1993. The jury recommended the death sentence by a vote of 9 - 3. The trial court deferred sentencing until December 9, 1993, when the court sentenced Mr. Hartley to death.

Just over a week later, on December 17, 1993, the trial court sentenced Mr. Ferrell to death. In sentencing Mr. Ferrell to death, the Court stated:

> Treachery - is not a statutory aggravating circumstance and I have not considered it as such. However, Ferrell's treachery in betraying his "friend" Mayhew for money and drugs - knowing he would be murdered - made Ferrell equally guilty with the one who pulled the trigger.
>
> Ferrell, Hartley, and Johnson twice robbed Mayhew. The first time (4-20-91) Ferrell wore a mask so Mayhew would not recognize his "trusted friend". The second time (4-22-91) Ferrell put the plan into motion when, by trickery, he learned that Mayhew had money and drugs - and reported this back to Hartley and Johnson so the robbery-murder could go forward.
>
> Then Ferrell and Hartley approached Mayhew who was unsuspecting because Ferrell was his "trusted friend". Hartley then pointed a pistol at Mayhew's head and, too late, Mayhew realized that his "trusted friend" Ferrell had betrayed him.
>
> Ferrell's perfidy placed Mayhew in a position where he could not defend or protect himself and his murder was inescapable.
>
> **Ferrell's betrayal of trust made the murder possible and his culpability equals Hartley's.**

(PC-R3. 1791-2)(Emphasis added).

The trial court sentenced Mr. Johnson to life on January 14, 1994.

On direct appeal, this Court addressed the issue of disparate sentencing as to the appropriateness of the death sentence for Mr. Ferrell. This Court stated: "Although not considered in aggravation, the trial judge noted that Ferrell was just as culpable as the shooter because he used his friendship with the victim to lure the victim to his death." Ferrell v. State, 686 So. 2d 1324, 1327 (Fla. 1996). This Court went on to

hold:

> We also note that the sentence of death in this case is appropriate even though Ferrell was not the shooter and even though Johnson received a sentence of life-imprisonment. First, Ferrell played an integral part in planning and carrying out the murder. Moreover, Ferrell used his friendship with the victim to lure him to his death. Johnson merely provided the getaway vehicle after the crime was committed. We have previously determined that death is the appropriate sentence under similar circumstances.

Id. at 1331.

Thus, the trial court made a "determination concerning the relative culpability of" Hartley, Ferrell and Johnson which constitutes a finding of fact that this Court held was supported by competent and substantial evidence. See Puccio v. State, 701 So. 2d 858, 860 (Fla. 1997). As to Mr. Ferrell, the trial court found that he was equally culpable in the murder of Gino Mayhew and that the death sentence was an appropriate sentence for him. That Mr. Ferrell is equally culpable and deserving of the death penalty is the law of his case and Mr. Hartley's.

On December 9, 2010, Mr. Ferrell was re-sentenced to life (PC-R3. 1906-9.

Mr. Ferrell's life sentence constitutes newly discovered evidence. See Scott v. Dugger, 604 So. 2d 465 (Fla. 1992). In Scott, this Court reviewed a capital postconviction defendant's challenge to his death sentence after his co-defendant's death sentence was reduced to life on direct appeal. Id. This Court described the circumstances in Scott:

> On direct appeal, this Court vacated codefendant Amos Robinson's death sentence and remanded for a new sentencing proceedings before a jury. Upon the jury's recommendation, Robinson was re-sentenced to life. Based upon Robinson's subsequent life sentence, Scott's 3.850 motion requested that his death sentence be vacated as disproportionate, disparate , and invalid. The circuit court summarily denied relief on this claim, finding it "untimely" and "improper" under Rule 3.850.

Id. at 468 (citations omitted). This Court reversed the circuit court and held: a co-defendant's subsequent life sentence constitutes newly discovered evidence which would permit collateral relief.

In reversing the circuit court in Scott, this Court analyzed Scott's claim under the Hallman/Jones standard:

> Two requirements must be met in order to set aside a conviction or sentence because of newly discovered evidence. First, the asserted facts "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." *Hallman*, 371 So.2d at 485. Second, "the newly discovered evidence must be of such nature that ir would *probably* produce an acquittal on retrial." *Jones v. State*, 591 So.2d 911, 915 (Fla. 1991). The *Jones* standard is also applicable *whe*re the issue is whether a life or death sentence should have been imposed. *Id*.

Id.

Here, like in Scott, the co-defendant's life sentence was imposed after Mr. Hartley's direct appeal. Indeed, Mr. Ferrell was sentenced to life on December 9, 2010 (PC-R3. 1906-9). Thus, because Mr. Hartley filed his 3.851 motion within one year of Mr. Ferrell's life sentence, his claim was timely. See Farina v.

State, 937 So. 2d 612, 619 (Fla. 2006)("Anthony meets the first prong of the newly discovered evidence test because we reduced Jeffrey's sentence two years after they were sentenced to death.").

As to the second prong of the Jones standard, Mr. Hartley submits that because Mr. Ferrell was an equally culpable co-defendant who has now received life, Mr. Hartley's death sentence violates the eighth and fourteenth amendments. In Scott, this Court held that Scott was entitled to a life sentence because equally culpable co-defendants should not be treated differently. Id. at 469. Here, as in Scott, the co-defendants were found to be equally culpable. See PC-R3. 1791-2. Thus, like in Scott, Mr. Hartley's sentence of death must be vacated and he must be sentenced to life.

This Court has established that "equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment." Shere v. Moore, 830 So. 2d 56, 60 (Fla. 2002); see also Wade v. State, 41 So. 3d 857, 867-8 (Fla. 2010). Indeed, disparate sentencing is only permissible when one of the co-defendants is more culpable than the other or others. Jennings v. State, 718 So. 2d 144, 153 (Fla. 1998). Here, the trial court made the determination that Mr. Ferrell and Mr. Hartley were equally culpable, thus, because Mr. Ferrell's sentence has now been reduced to life, Mr. Hartley's must be as

well.

Likewise, the Eighth and Fourteenth Amendments to the United States Constitution also requires that Mr. Hartley's death sentence be vacated. In Parker v. Dugger, 408 U.S. 308, 321 (1991), the United States Supreme Court stated:

> "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way **that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not**." *Spaziano v. Florida, 468 U.S. 447, 460, 82 L. Ed. 2d 340, 104 S. Ct. 3154 (1984).* The Constitution prohibits the arbitrary or irrational imposition of the death penalty. *Id., at 466-467.* We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. See, *e. g., Clemons, supra, at 749* (citing cases); *Gregg v. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976).*

(Emphasis added). Due to the previous findings of fact made in Mr. Hartley and Mr. Ferrell's cases, it is simply impossible to "rationally distinguish between" Mr. Hartley and Mr. Ferrell as to the appropriate punishment the two deserve. And, because Mr. Ferrell's death sentence has been vacated, so must Mr. Hartley's.

Furthermore, the disparate sentences of Mr. Ferrell and Mr. Hartley violates Lockett v. Ohio, 438 U.S. 586, 604 (1978), which held that the Eighth and Fourteenth Amendments require that capital juries not be precluded from considering, as mitigating factors, any aspects of a defendant's character or of "the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." See also Eddings v.

Oklahoma, 455 U.S. 104, 110 (1982). Mr. Hartley's sentencing jury and judge never knew that an equally culpable co-defendant received life rather than death. Such a fact would probably have resulted in a life sentence for Mr. Hartley.[6]

[6]Indeed, considering Mr. Ferrell's life sentence simply as newly discovered evidence of mitigation, the jury would have heard the Mr. Hartley's equally culpable co-defendant received life, as well as the other mitigation presented at trial and in Mr. Hartley's initial postconviction evidentiary hearing. The evidence previously presented established that Mr. Hartley's prior conviction for manslaughter, which was used as an aggravator can be severely weakened. Indeed, Jean Hartley testified in postconviction that her son was eighteen years old when he was convicted of manslaughter and was released from prison when he was twenty-four (PC-R. 1663). Also, Lao Groomes testified that she knew the young woman who Mr. Hartley shot, Angel McCormick, calling her a "very fine young lady." (PC-R. 1674). Ms. Groomes still wrote to Kenneth Hartley, visited him, and accepted his phone calls while he was in jail (PC-R. 1677). Similarly, Tanya Hawk also knew Angel McCormick and knew of Mr. Hartley's armed robbery convictions. She still visited him in prison (PC-R. 1687). Dorothy Cherry also knew of the manslaughter conviction and called it "an accident." (PC-R. 1704). She knew the victim and called her a "fine young woman." (PC-R. 1706). She also knew of Mr. Hartley's armed robbery convictions (PC-R. 1702). Despite this, she invited Kenneth Hartley to stay with her after he was released from his prison sentence imposed after his manslaughter plea so that he could get out of his old neighborhood (PC-R. 1710). She allowed Mr. Hartley to stay in the second bedroom of her two-bedroom apartment that she shared with her newborn and nine-year old children. She testified that Mr. Hartley moved back to his old neighborhood to be near his mom and because "he was going through a lot." (PC-R. 1711).

Mr. Hartley also testified at the evidentiary hearing about his remorse. He told the court that he pled guilty because he was wrong and he wanted to take responsibility for his actions. He said "the court system, give me that time to pay a debt to society that could never be paid." (PC-R. 1730).

Likewise, mitigation existed that Mr. Hartley used drugs in the weeks and days before his arrest.

As to other background mitigation, Mr. Hartley established that he switched high schools due to Washington Heights gang activity and his mother touched on the difficulty of raising her

According to the trial court's findings, the murder of Gino Mayhew would not have happened without Mr. Ferrell. The trial court held: "Ferrell's perfidy placed Mayhew in a position where he could not defend or protect himself and his murder was inescapable." According to the prosecution's theory and the findings of the various courts, Mr. Ferrell's friendship with Mayhew, and his betrayal of that friendship, led to Mayhew's murder. Due to the circumstances presented by the prosecution, found by the trial court and upheld by this Court, Mr. Ferrell was an equally culpable co-defendant. Thus, his recent life sentence requires that Mr. Hartley also be re-sentenced to life.

II. THE CIRCUIT COURT'S ORDER

Despite the fact that this Court has directed capital co-defendants, like Mr. Hartley to seek relief through a 3.851 motion when an equally culpable co-defendant obtains a life sentence, the circuit court believed that the court was not in a

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son on welfare in their rough neighborhood (PC-R. 1579).

Mr. Hartley's brother, Shawn Jefferson, who played in the NFL at the time of Mr. Hartley's trial, testified that his brother inspired him and pushed him to work hard.

In addition to the mitigation, Mr. Hartley's jury also heard an unconstitutionally vague cold, calculated and premeditated jury instruction.

And, on direct appeal, this Court struck the heinous, atrocious and cruel aggravator, but in light of the minimal mitigation presented at trial, found that the error was harmless. Hartley v. State, 686 So. 2d 1316, 1323-4 (Fla. 1996). In light of Mr. Ferrell's life sentence, the striking of an aggravator considered by the sentencer is undoubtedly prejudicial.

Considering Mr. Ferrell's life sentence, Mr. Hartley is, at a minimum, entitled to a new sentencing phase.

position to review Mr. Hartley's claim that Mr. Ferrell's life sentence constitutes unconstitutional disparate treatment (PC-R3. 1929, n.4)("Defendant's claim presenting a comparative proportionality is not proper for this Court to consider). Thus, the circuit court's review of Mr. Hartley's claim was limited to whether Mr. Ferrell's life sentence constituted newly discovered mitigation sufficient to probably produce a life sentence in Mr. Hartley's case (PC-R3. 1929). This was so because the circuit court determined that Mr. Hartley had not established that Mr. Ferrell was a "dominant force and more culpable" than Mr. Hartley in the crime and that Mr. Ferrell was not equally culpable" (PC-R3. 1929).

The circuit court largely relied on the fact that Mr. Hartley was alleged to be the triggerman. See PC-R3. 1929-30. However, this "fact" is not new. Indeed, it was always the State's theory in both Mr. Hartley's and Mr. Ferrell's trials that Mr. Hartley was the triggerman. This "fact" did not cause the State to charge Mr. Ferrell with something less than first degree murder, or seek a sentence less than death. Indeed, the State told the jury that Mr. Ferrell was the "inside man, he was the man that Gino trusted, he was the one that walked up to Gino that night to make sure that he had drugs, to make sure that night in addition to killing him he'd be able to get some drugs off of him." ((PC-R3. 1549-50)(emphasis added).

Likewise, the State's theory as to the identity of the triggerman was known to the jury that recommended that Mr. Ferrell be sentenced to death as well as the trial court when the court sentenced Mr. Ferrell to death, finding that his "culpability equals Hartley's". It was also known to this Court when this Court held that "Ferrell was just as culpable as the shooter because he used his friendship with the victim to lure the victim to his death." Ferrell, 686 So. 2d at 1327.

In addition, all of the other "facts" relied on by the circuit court as to Mr. Hartley's alleged role in the crimes, see PC-R3. 1929-30), were also known to the State, the jury, the trial court and this Court when Mr. Ferrell was sentenced to death.[7] Therefore, it cannot be said that Mr. Ferrell was not "a dominating force behind the murder" (PC-R3. 1930), because the trial court and this Court have already determined that he was.

The circuit court's reliance on Stein v. State, 995 So. 2d 329 (Fla. 2008), is also misplaced. In Stein, this Court rejected Mr. Stein's claim that his co-defendant's life sentence rendered his death sentence disproportionate. Id. at 342. After being tried separately, the jury hearing the evidence in Mr. Stein's co-defendant's case (Marc Christmas), recommended a life

[7]Likewise, Mr. Hartley and Mr. Ferrell's prior records were known to the trial court when imposing death sentences and contrary to the circuit court's determination (see PC-R3. 1931-2), are not relevant to the culpability question that was previously decided by the trial court and affirmed by this Court.

sentence. The trial court overrode the jury recommendation and imposed a death sentence. Christmas v. State, 632 So. 2d 1368, 1370 (Fla. 1994). In reviewing Mr. Christmas' death sentence this Court determined that the trial court erred in overriding the jury recommendation in Mr. Christmas' case because a rational basis existed for the jury's recommendation of life. Id. at 1372. Thus, at the time of Stein's direct appeal, this Court determined that Stein was the more culpable co-defendant and the disparity between Mr. Stein and Mr. Christmas' sentences was warranted.

Indeed, based on the facts, this Court held that Stein was the more culpable co-defendant. Those facts included the trial court's finding that "strong evidence" existed that showed that Mr. Stein was the triggerman. Stein, 995 So. 2d 329, 342 (Fla. 2008).[8] And, in reviewing Stein's death sentence on direct appeal, this Court made findings, referring to the trial court's sentencing order that reflected that Stein was the more culpable co-defendant.

However, the circuit court overlooked the significance of Stein to Mr. Hartley's case. That is, in reviewing a claim based upon disparate treatment of co-defendants, the circuit court and this Court must look to the trial court's sentencing order and

[8]This Court has held that "Although not always the case, we acknowledge we have sometimes characterized the "triggerman" to be the more culpable of codefendants." Stein, 995 So. 2d at 341. Thus, this Court made clear that the triggerman need not necessarily be more culpable, as his Court held in Mr. Ferrell's case.

the findings that were affirmed on direct appeal to determine the relative culpability of the co-defendants. Here, it is clear that both the trial court and this Court determined that Mr. Ferrell was an equally culpable co-defendant who deserved the death penalty for his "integral part in planning and carrying out the murder." Ferrell, 686 So. 2d at 1331.

The circuit court's determination that Mr. Ferrell is not equally culpable is directly contrary to the record which demonstrates that the trial court found, and this Court affirmed the finding, that Mr. Ferrell was equally culpable and deserving of the death penalty: "Ferrell's perfidy placed Mayhew in a position where he could not defend or protect himself and his murder was inescapable. Ferrell's betrayal of trust made the murder possible and **his culpability equals Hartley's**." (PC-R3. 601)(emphasis added). Further, this Court held that "Ferrell played an integral part in planning and carrying out the murder", and due to his dominant role, this Court affirmed Mr. Ferrell's sentence of death. See Ferrell, 686 So. 2d at 1331.

Thus, the circuit court's determination is rebutted by clear and convincing evidence that Mr. Ferrell was an "integral" participant in the crimes whose culpability was equal to Mr. Hartley's. Mr. Hartley's sentence of death cannot stand.

The circuit court also attempts to characterize Mr. Ferrell's recent life sentence as a product of prosecutorial

discretion. The circuit court's characterization of "prosecutorial discretion" ignores this Court's explanation of how "prosecutorial discretion" can be used to differentiate between co-defendants' sentences. This Court has held: "[i]n instances where the codefendant's lesser sentence was the result of a plea agreement of prosecutorial discretion, this Court has rejected claims of disparate sentencing." England v. State, 940 So. 2d 389, 406 (Fla. 2006); see also Wade v. State, 41 So. 3d 857, 867-8 (Fla. 2010)(holding that co-defendants must be convicted of same degree of crime in order for principle of disparate sentencing to apply).

Here, Mr. Ferrell's life sentence was not the product of a plea or cooperation with the prosecution. In sentencing Mr. Ferrell to life, the State did not even request that he forego challenging his convictions in exchange for the life sentence. In fact, Mr. Ferrell's re-sentencing counsel stated: "Your Honor, he just wanted to make the record clear that he's not entering a plea or admitting to any facts." (PC-R3. 1918). The circuit court ignored the facts and the law as it applied to Mr. Ferrell's being re-sentenced to life.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, appellant, **KENNETH HARTLEY**, urges this Court to reverse the lower court's order and remand for a life sentence to be imposed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by electronic mail to Carolyn Snurkowski, Assistant Deputy Attorney General, on this 26th day of December, 2013.

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CERTIFICATION OF TYPE SIZE AND STYLE

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