IN THE SUPREME COURT OF FLORIDA

TROY MERCK,

Appellant,

vs. **CASE NO. 91,581**

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a resentencing proceeding following this Court's decision in Merck v. State, 664 So.2d 939 (Fla. 1995) which affirmed the adjudication of guilt for Merck's first degree murder of James Anthony Newton.[1]

At the resentencing proceeding eyewitness Katherine Sullivan again identified Merck in court as the man who killed her friend Jim Newton (Vol. XII, R. 469). During a confrontation at 2:00 A.M. in the City Lites parking lot, appellant and his companion were sarcastic, apologizing for leaning against her car. She congratulated victim Newton on his birthday and appellant said something like congratu-fucking-lations. Appellant tried to get the victim to fight with him but Newton said he was not going to fight. The victim was called a pussy, appellant took off his shirt and said he would teach Jim "how to bleed". Merck reached into the passenger side of the car, fumbled around the passenger seat, returned holding his hand down to the side and charged at the victim throwing punches. The victim stood there and put his arms up. The witness noticed blood spots every time he got punched. At one point Sullivan saw a glint of silver from the streetlight and

[1]At a motion in limine hearing the trial court granted a defense motion precluding evidence that the victim was celebrating the birth of his new child, despite the state's reliance on the victim impact provision, F.S. 921.141(7) and Windom v. State, 656 So.2d 432 (Fla. 1995) (Vol. IX, R. 17-21).

thought it was a knife (Vol. XII, R. 474-480). Sullivan stated that appellant's friend had thrown him the car keys, and Merck caught them five to ten feet away. The friend said nice catch, Troy and appellant responded don't use my real name (Vol. XII, R. 488). Sullivan testified that Merck was able to walk and talk okay (Vol. XII, R. 489). Subsequently, on a proffer, she indicated she wasn't really paying any attention to what Merck's companion was saying although she did hear him warn the victim that appellant was serious (Vol. XII, R. 498). The companion had a different body build, was taller and thinner. The stabber had a southern accent (Vol. XII, R. 500). As between Merck and companion Neil Thomas, appellant was the shorter one, had droopy eyes and was the one who did the stabbing. She had been able to select both Merck's and Thomas' photos from a sheriff's office photopack and she could tell the difference between the two men (Vol. XII, R. 502-506).

Donald Ward also saw the assailant stab the victim in the midsection four to six times and when the victim fell saw a big three inch cut in his neck. Prior to the attack the stabber had said Happy Birthday to the victim and used his left hand to hold or hug Newton and used the right hand to stab him (Vol. XII, R. 511-515). Security man James Carter got the tag number of the departing car after Sullivan told him Newton was being stabbed.

They tried to stop the bleeding and the victim was moving around, coughing up blood and moaning (Vol. XII, R. 517-519).

Neil Thomas, appellant's companion at the City Lites the night of the homicide, had met Merck a few weeks before the incident (Vol. XII, R. 528). He identified Exhibit 22, appellant's hunting knife and testified they had bought a little red Bobcat from Merck's brother (Vol. XII, R. 528-533). They decided to go to City Lites after getting free drink passes, arriving at about 10:00 or 10:30 and staying until closing time around 2:00 A.M. Thomas estimated he had five or six beers and a couple of shots while there and Merck probably about the same (Vol. XII, R. 534-537). Appellant was not showing any obvious signs of impairment by closing time, no trouble standing, walking or talking. They did not know the victim and had not had any contact with him in the bar (Vol. XII, R. 537-540). After closing, they all spilled into the parking lot. Appellant and Thomas were leaning up against the blue car and a female voice called out to get off the car. Appellant replied sarcastically excuse me. When the victim made a remark about why don't you get off the girl's car, Thomas responded that you look like a real pussy. The victim said yeah, I'm a pussy. Appellant became very agitated, started taking off his shirt and headed around the side of the car and said I'll show you a pussy. Merck went to the passenger side of the Bobcat and threw his shirt

in. Thomas had walked to the driver's side and was standing next to it. Thomas turned and told the victim you'd better go ahead and haul ass and get out of here because you'll get a serious beating (Vol. XII, R. 541-546). Appellant ran around the Bobcat, ran around the blue car to where the victim was standing, grabbed him around the neck and started punching him for fifteen to twenty seconds. The victim didn't do anything to provoke, didn't fight back and never knew what hit him. Appellant headed back to the car, Thomas noticed the victim over the hood and his dark shirt looked wet. Thomas didn't notice appellant with a knife but during the fight heard a popping sound like sticking a screwdriver through a piece of carpet. Appellant told him it was time to go. Thomas had no idea Merck was going to produce a knife and do what he did. He became suspicious when Merck seemed to be concealing something in his hand as he walked back to the car. They got in the car and Thomas drove away. Thomas asked Merck if he had stabbed the guy; appellant held up his hand and as they went under a streetlight Thomas could see appellant holding a knife and his entire hand was covered with blood. Merck said "I fucking killed him, if I didn't kill him, I'll go back, find him in the hospital and finish the job" (Vol. XII, R. 547-554). Appellant told Thomas if anything happened he would kill Thomas' grandmother and reiterated that it was beautiful -- that he got the guy, was sticking him, grabbed him

by the hair and threw his head back, stuck the knife in the side of his neck and twisted it. When he pulled it out, the blood squirted from the neck like a squirt gun. Merck related that to make sure he slit him across the throat a couple of times. He said he'd teach the victim not to mess with my road dog (a friend or companion). Thomas stayed with him because he felt like he had been involved in a killing and was in fear for his life from Merck's threats. They abandoned the car and ran across a field and streets; appellant had no trouble running. They went to a bowling alley and Merck beat him in a game of pool at about 3:00 A.M. Subsequently, at the motel Merck relived the homicide, demonstrating the motions five or six times (Vol. XII, R. 554-561). Appellant never indicated any problem recalling the incident. Thereafter, Thomas managed to call his grandmother and told her he had a problem. Police tracked down Merck and Thomas at the hotel (Vol. XII, R. 561-564). Thomas stated that he had not been charged by the state with any crime for this incident; he didn't know what Merck had done until driving away (Vol. XII, R. 582).

Deputy sheriff Charles Vaughn arrived at the abandoned Bobcat at about 4:40 A.M. on October 11, 1991 in the parking lot of an apartment complex. He saw the tag and knife inside the car which helped locate the owner of the car and determined its possession by Merck and Thomas. After obtaining a search warrant for the car,

the Exhibit 22 knife was removed from the front passenger seat of the red Bobcat (Vol. XIII, R. 595-599).

Detective Nestor was involved in the homicide investigation of victim Jim Newton, received information that Merck was staying in a motel and others responded to arrest him (Vol. XIII, R. 600-601).

The state introduced certified copies of judgments and sentences. Exhibit 12 was a judgment and sentence for one count of robbery by Merck in Pasco County Case No. 89-1617. Exhibit 8 was a conviction for robbery with a deadly weapon in Marion County Case No. 89-786. Exhibit 9 was a conviction for robbery with a deadly weapon in Lake County Case No. 89-383. Exhibit 10 was a robbery with a deadly weapon in Lake County Case No. 89-384 and Exhibit 11 was a robbery with a deadly weapon in Lake County Case No. 89-385 (Vol. XIII, R. 610-611).

Nathan Dudeck, a store clerk at Farm Stores in Pasco County, testified that Merck put a knife to his throat and robbed him of sixty to sixty-five dollars (Vol. XIII, R. 611-614). Probation officer Darryl Jacobs identified the Exhibit 13 probation order and testified that he went over the rules of probation with appellant who testified that Merck was on probation for robbery with a weapon and identified appellant in court (Vol. XIII, R. 629-633).

The defense proffered the testimony of Neil Thomas and Thomas Nestor out of the jury’s presence. Thomas stated he was 5'10" with

a 36" waist and he and Merck could not wear the same size pants; he could not fit into the size 30 Exhibit 21 pants introduced in the prior guilt phase trial (Vol. XIII, R. 637-641). The state proffered that FBI agent Merkins found DNA from the victim's blood on those pants and that Merck had testified in the earlier trial he wore those pants (Vol. XIII, R. 642). Nestor stated that he looked through the vehicle for items of evidentiary value and he did not retain in evidence a pair of khaki pants upon determining there was no blood on them (Vol. XIII, R. 650-658).

The state called forensic pathologist Dr. Robert Davis who was board certified in four different areas (Vol. XIV, R. 675). Davis autopsied Newton, aged twenty-five, 5'9" and 188 pounds. The victim had multiple stab wounds (Vol. XIV, R. 684-685). The witness described various stab wounds four and one-half inches deep including those to the head and neck area (Vol. XIV, R. 688-698). One wound went not only through the ear but through the skin on the side of the scalp and through the entire thickness of scalp -- it required a degree of force. The wound on the side of the neck was the most serious wound, got the major vessel in the left side carrying arterial blood to the brain. Dr. Davis described the twisting of the knife in the neck wound (Vol. XIV, R. 698-706). He described seven stab wounds. An external examination disclosed an incision on the neck, abrasions, superficial cuts and also wounds

consistent with defensive wounds (Vol. XIV, R. 708-710). Victim Newton had a blood alcohol level of .18 grams per deciliter, a person would be affected by this level of alcohol but not enough to render him unconscious. It would not render him incapable of feeling any pain. Alcohol is an inefficient anesthetic. Dr. Davis estimated the range that the victim would lose consciousness between two and five minutes if all the wounds were inflicted within a minute of each other, and if unattended or untreated death would result in five to ten minutes. There were at least thirteen stab wounds that he found. The blade was more than four and ¾ inches and less than five inches (Vol. XIV, R. 711-715). He felt the neck wound was consistent with a twisting wound (Vol. XIV, R. 737).

Defense witness toxicologist Ronald Bell estimated the blood alcohol content of both Merck and Neil Thomas based on testimony of their weight and the amount drank and opined that Thomas' level would be .15 and Merck .21 (Vol. XIV, R. 752-754). On cross examination he thought Merck's range would be between .16 and .26, an average of .21, that a person who had developed a tolerance and that people with a .2 blood alcohol level who are tolerant would not display symptoms of intoxication walking across the room (Vol. XIV, R. 758-763). Dr. Willey, a pathologist, opined that consciousness was lost rapidly within a minute (Vol. XIV, R. 774)

but on cross-examination admitted that he was not board certified in forensic pathology (Vol. XIV, R. 775), could not remember doing an autopsy in forensic circumstances and it had been thirty years since he worked in the medical examiner's office (Vol. XIV, R. 776-780). He conceded that a better way to determine if the victim was conscious if other people were talking to him or talking to the people who were with him at the time (Vol. XIV, R. 780).

Stacey France, appellant's thirty-five year old paralegal sister, testified that her mother is Lois Merck and her dad was Jess Whitmire who has been dead for last seven years. She stated several men came to the house when her mother became pregnant with Troy and slept with several different people. Her father was an alcoholic and the parents fought violently (Vol. XIV, R. 796-800). Her mother saw Hubert Merck while still married to Jess and when parents split she became more serious with Hubert. Appellant was born in 1972, and mother was not faithful when Hubert went to Vietnam. Her mother was upset about being pregnant with appellant and tried to lose the baby before birth. Hubert knew the baby was not his and left. He did not act like a father to appellant. Appellant was brought up in violence, as was the witness. The witness conceded that despite her problems she has not been arrested (Vol. XIV, R. 800-830).

Appellant's sister Roberta Crowe Davis testified that her father Jess Whitmire was an alcoholic but is now dead and described how Hubert Merck would see her mother when Jess wasn't around, that Hubert and Lois eventually married and while he was gone she became pregnant with Troy. Hubert left when he found out it wasn't his child. She and her sister Stacy took care of appellant; there was no love from the mother who beat appellant and the witness. Ray Price gave the child liquor to stop his crying and to go to sleep. The witness loved her brother (Vol. XV, R. 838-852).

Appellant's aunt Kathleen Eller testified that Lois tried to get rid of the baby because she didn't want Hubert to know she was pregnant. (At a bench conference defense counsel announced that he was not attempting to get into fetal alcohol syndrome.) (Vol. XV, R. 855-861). The witness claimed the mother was mean to appellant, would hit him with anything she got her hands on, the witness didn't know who the father was; sometimes Lois treated appellant nice (Vol. XV, R. 862-866).

Merck's cousin Shane Eller, aged twenty-three, testified that appellant's mother was abusive to Troy, they lived in a trailer park 150 yards from him and they saw each other every day. He only saw one occasion in which appellant drank alcohol (Vol. XV, R. 866-872).

Appellant's cousin twenty-year-old Jason Eller, a student at a Christian college for students looking for something spiritual, testified that he was brought up in a bad, poor but non-abusive environment and that other kids picked on appellant because of his eyes. Eller's mother placed him in a Christian-based school and he learned there is another environment out there that you can care for (Vol. XV, R. 872-880). The defense played a videotape deposition of Nancy Pate (Vol. XV, R. 884). Pate was a school psychologist in South Carolina and met Merck when he was seven years old (Vol. II, R. 313). She noticed his drooping eyelids (Vol. II, R. 317), gave him tests and concluded he needed a structured classroom setting (Vol. II, R. 319). He manifested strong anti-social tendencies (Vol. II, R. 323). She re-tested him two or three years later and he gave socially inappropriate answers (Vol. II, R. 323-329). He had anti-social tendencies, problems getting along at schools (Vol. II, R. 330). Merck had an average level of intelligence (Vol. II, R. 333). She had noted that he often talks of violence (Vol. II, R. 337). This witness did not have a degree in psychology but in reading education (Vol. II, R. 338). A teacher, George Olbon, testified that when Merck was about ten or twelve years old he had a poor self-concept and his behavior and grades improved at the Collins' Children's Home. He's had no contact with im since the sixth grade (Vol. XV, R. 885-896).

Social worker Joyce Flowers described appellant's mother as uncooperative and would say negative things about him. Appellant was becoming more physically aggressive with his mother; his behavior seemed to improve during the time he was at the Collins Home (Vol. XV, R. 899-912).

Anne Rackley and her husband founded the Collins Home to help children and their families. She testified appellant's mother lacked parenting skills. His grades improved at the Collins Home during his eight months there but she could not dissuade Merck's mother from taking him back to North Carolina. She had no contact with him since 1983 except for one telephone call in 1991 (Vol. XV, R. 912-930). Therapeutic foster parent Linda Schneider who had a temporary home for children who have special problems described appellant at age fourteen as well-behaved, personable and a good sense of humor. She planned for his mother to meet at the hospital for appellant's eye surgery and Mrs. Merck seemed uncooperative and there was a lot of negative interaction between appellant and his mother. She hadn't seen Merck since he was fourteen but he seemed to behave like a normal kid, with normal intelligence and well-behaved in school (Vol. XV, R. 930-937).

Prior to the testimony of Kathleen Heide, the trial court limited the prosecutor's cross-examination of Heide: (1) not to mention defendant was adjudicated delinquent of any juvenile

offense, (2) limited any reference to fact that defendant spent time in juvenile reform school and showed no remorse for this incident, (3) regarding the shooting of Fawn Chastain that occurred when Merck was a juvenile (Vol. XVI, R. 954-955). The prosecutor relied on Jones v. State, 612 So.2d 1370 (Fla. 1992) and Muehleman v. State, 503 So.2d 310 (Fla. 1987) in support of its urging full cross-examination for the bases of the witness' opinion (Vol. XVI, R. 953) and pointed out that in her lengthy report and deposition Heide talked of appellant's criminal history (Vol. XVI, R. 962-966). Dr. Heide admitted that she had considered Merck's juvenile history of offenses (Vol. XVI, R. 973). She considered Merck's juvenile history among his life experiences for her conclusions. She devoted two and a half to three pages of her report to cataloging Merck's juvenile and adult criminal history (Vol. XVI, R. 976-980). The prosecutor reiterated his objection to the limitation on the scope of his cross-examination (Vol. XVI, R. 993-994).

Kathleen Heide, a criminologist licensed as a mental health counselor and who had appeared on Sally Jesse Raphael, Geraldo, and Maury (Vol. XVI, R. 996, 1018), stated on voir dire that she has a Bachelor's degree in psychology, did not have a Master's degree in psychology and was not a licensed psychologist and was not allowed by law to refer to herself as a psychologist and did not have a

Ph.D. in psychology and was not allowed to call her report a psychological report or hold herself out as a licensed psychologist (Vol. XVI, R. 1023-1025). She was allowed to testify. While not holding herself out as a psychologist, she did an assessment of Merck and found him pleasant and oriented to reality. She opined that there were seven levels of hierarchical development and that Merck had not reached level 4 (Vol. XVI, R. 1030-1038). The witness described his rejection by two fathers, the chemical dependency of parents, Merck's physical and emotional neglect when growing up and exposure to violence, his hyperactivity, placement in the Collins Home for Children, his boredom with school which led to her categorizing of fourteen qualities or characteristics (Vol. XVI, R. 1040-1082). On cross-examination Heide reported that during her interview with appellant he was able to relate details, enjoyed his storyteller role and seemed to have a good memory (Vol. XVI, R. 1086-1087). Merck acted and responded appropriately and admitted that he was dangerous and had short limits. Merck still loved his mother and his sisters did not indicate they had abused or hated him and he had positive relationships with his sisters growing up (Vol. XVI, R. 1087-1090). The witness did not ask appellant's mother about physical abuse and there were no reported instances of overt sexual abuse on the appellant (Vol. XVI, R. 1093-1095). Heide stated that Merck received positive feedback

from Mrs. Schneider and the Collins Children's Home and he liked the Rackleys, although he hated being made to do anything and didn't like the structure or going to church while he was there. Merck made several attempts to escape and go back to be with his mother in North Carolina (Vol. XVI, R. 1095-1097). The witness conceded that the use of alcohol would enhance the tendency to use violence more than others, as appellant admitted to her (Vol. XVI, R. 1098). Merck was not psychotic and would not meet the criteria of insanity, nor was there any evidence of hallucinations or delusions. He had normal intelligence (Vol. XVI, R. 1099-1102). As to his alleged emotional disturbance, the witness described his "just going off", nothing to explain the magnitude of his reaction to the victim; a torrent of rage was unleashed (Vol. XVI, R. 1103). She agreed that Merck appeared to be engaged in goal-directed activity during the commission of this crime and admitted that in her report she stated it was possible he had this extreme mental and emotional disturbance and could have some doubt as to really whether he had one (Vol. XVI, R. 1105-1106; see also Vol. V, R. 808, p. 33). Heide conceded that Merck is basically self-oriented, not capable of empathizing with other people and that it is not a problem for him to do something morally or legally wrong. Appellant does not see himself as accountable for his behavior and has no internalized value system. He lacked capacity to care what

he was doing (Vol. XVI, R. 1111-1113). She further admitted that Merck meets the criteria for an anti-social personality disorder (Vol. XVI, R. 1116) and he had flippantly told her he decided to quit his day job and do robberies (Vol. XVI, R. 1119-1120). Heide had given no psychological tests to Merck (Vol. XVI, R. 1121).

State rebuttal witness Dr. Sidney Merin is a psychologist specializing in clinical and neuropsychology. His degrees in psychology included a Bachelor's degree from Penn State University, a Master's degree from Temple University and a Doctor's degree from Penn State University. Merin was Board Certified in four areas (clinical psychology, professional neuropsychology, medical psychotherapy and behavioral medicine). He was a Fellow in Academy of Clinical Psychologists and had been found to be an expert close to twelve hundred times (Vol. XVII, R. 1140-1147). Merin met with appellant in May and June of 1992 and gave him tests to see if there were any evidence of brain damage. He found no evidence of impairment to the brain whatsoever -- his scores were very good (Vol. XVII, R. 1154-1155). The tests he employed included the Bender-Gestalt, Revised Beta Exam, Human Figure Drawing, the Minnesota Multiphase Personality Inventory, Peabody Picture Vocabulary Test, Rey Auditory Verbal Learning Test (Vol. XVII, R. 1155-1159). Merck had an excellent memory, very good (Vol. XVII, R. 1159). On the standard Ratan neuropsychological battery of

examinations Merck came out very well within normal limits -- he made only twenty-three errors on 208 items when the average is thirty errors and over fifty-one would be the impaired range (Vol. XVII, R. 1160-1162). He also did well on the Paying Attention test, on speech perception and tapping test for motor control and extremely well on the tactual performance test (Vol. XVII, R. 1163-1165). Merin found no evidence of any kind of neuropsychological impairment, none at all. Appellant's intelligence testing revealed a verbal score of 107, a performance IQ of 112 (bright average, about the same as an average college student) and a full scale IQ of 110. He had excellent skill if he chose to use it in common sense and understanding and development of social judgments (Vol. XVII, R. 1166-1169). The MMPI revealed elevated, exceptionally high scales on the psychopathic deviate (PD) and hypomania (MA) scales and secondary scales showed Merck tended to act in a non-mainstream manner in his environment (Vol. XVII, R. 1171-1175). Merin reviewed depositions of two others which indicated some history of abuse, kids picking on him for his droopy eyelids and he may have had attention deficit disorder. Merin opined that appellant had a personality disorder N.O.S., Not Otherwise Specified, with some characteristics of anti-social personality (Vol. XVII, R. 1177-1179). He did not have a mental disorder like schizophrenia or paranoia, nor did he have the characteristics of

the various neuroses. As to Merck, he has features of narcissistic personality disorder (brags about himself, can't do anything wrong) and also has passive-aggressive characteristics and features of borderline personality (people who are bright but don't exploit their capabilities)(Vol. XVII, R. 1180-1186). Merck also had a history of alcoholic intake. Dr. Merin further opined that at the time of the murder Merck was not under the influence of extreme mental or emotional disturbance -- this is the way appellant has always been -- the situation that occurred at the time of the killing did not represent any increase in his having experienced any particular stress at the time. The nature of the act was a function of who and what he was all about. There was no evidence of a post-traumatic stress disorder type of phenomenon where he became so confused and disorganized at the time of the killing. He knew right from wrong at the time, he knew and understood the nature and consequences of his actions (Vol. XVII, R. 1186-1188). His capacity to appreciate the criminality of his conduct or to conform to the requirements of law was not substantially impaired. He had no hallucinations or delusions. Even considering the amount of alcohol consumed that night that would not have had a significantly adverse effect on him because of the tolerance he built up. His behavior stemmed from who and what he was all about (all people who drink that amount of alcohol don't do what he did).

Merck was not in a situation where he was being governed by forces over which he had no control (Vol. XVII, R. 1188-1189). The use of alcohol for Merck probably allowed what was already there to emerge (Vol. XVII, R. 1225). With a personality disorder you don't lose the ability to make decisions, you simply make decisions that are consistent with whatever you want at that time (Vol. XVII, R. 1226-1227).

Appellant chose not to testify (Vol. XVII, R. 1232-1234).

After hearing all the evidence presented by the prosecution and defense and the instructions of the court, the jury returned a unanimous twelve to nothing recommendation of death (Vol. III, R. 597; Vol. XVIII, R. 1382).

On September 12, 1997 the trial court filed its sentencing order and imposed a sentence of death in concurrence with the jury recommendation. The court determined that the following aggravators outweighed the proffered mitigation (Vol. IV, R. 763-767):

> 1. The capital felony was committed by a person under sentence of imprisonment.
>
> The defendant, Troy Merck, was sentenced to four years in prison on October 9, 1989, six years in prison on October 31, 1989, and five years in prison on March 28, 1990. The murder for which he is here convicted occurred on October 12, 1991. Probation Officer Jacobs testified at the penalty phase that the defendant on that day was on probation for his prior prison sentence, conviction of robbery with a weapon. Since the defendant was on probation when this murder was committed, the

defendant was under a sentence of imprisonment when he committed this capital felony. This aggravating factor was proved beyond a reasonable doubt and will be given great weight.

2. The defendant was previously convicted of a felony involving the use or threat of violence to the person.

The defendant was convicted on March 28, 1990, of the crime of robbery. Additionally, on October 31, 1989, he was convicted in Lake County, Florida, of three separate crimes of robbery with a deadly weapon. Also, on October 9, 1989, he was convicted in Marion County, Florida, of robbery with a deadly weapon. Certified copies of the defendant's judgment and sentences were introduced in the penalty phase of trial. In addition, Mr. Nathan Dudeh [sic], one of the victims of the convenience store robbery, testified that the defendant placed a knife to his throat before taking money from a cash register. This aggravating factor was proved beyond a reasonable doubt, and will be given great weight.

3. The capital felony was especially heinous, atrocious, or cruel.

The victim, James Anthony Newton, on October 12, 1991, shortly after 2 a.m., left the City Lites Bar in Pinellas County, Florida. The bar had closed at 2 a.m. and several bar patrons remained in the parking lot. The victim, Mr. Newton, and several individuals, including the defendant, were in the bar's parking lot. The defendant and his companion, Neil Thomas, were leaning on a car in which several people were sitting. One of the car's occupants asked them not to lean on the car. The defendant and Mr. Thomas sarcastically apologized. The victim approached the car and began talking to the car's owner, Catherine Sullivan. When the defendant overheard Ms. Sullivan congratulate the victim on his birthday, the defendant made the snide remark of "congratu-fucking-lations." The victim responded by telling the defendant to mind his own business. The defendant then attempted to provoke the victim

to fight; however, the victim refused. The victim steadfastly refused to respond to taunts from the defendant and Mr. Thomas. The defendant said "I'll show you a pussy" and asked Mr. Thomas for the keys to the car in which the pair had driven to the bar. At the car, the defendant unlocked the passenger side door and took off his shirt and threw it in the back seat. The defendant approached the victim, telling the victim that he was going to "teach him how to bleed." The defendant rushed the victim and began hitting him in the back with punches. Ms. Sullivan, the person who had been talking to the victim, testified that she saw a glint of light from some sort of blade and saw blood spots on the victim's back where the defendant was punching him. During the course of the attack the defendant was overheard exclaiming "happy birthday." The victim fell to the ground, where he died from multiple stab wounds.

According to the medical examiner, a wound to the victim's neck was four and three quarter inches deep, which appears to be the size of the blade. This wound was inflicted with such force that it fractured the victim's skull. There were multiple defense wounds, which show that the victim was trying to shield himself from the attack. The medical examiner testified that the wounds show that the defendant had deliberately twisted the knife blade during the stabbing. The stabbing occurred after the defendant told the victim he would teach him how to bleed, and death was a result of the multiple stab wounds.

After the stabbing and killing of the victim, the defendant left the parking lot with Mr. Thomas and then stated to Mr. Thomas "I fucking killed him" and "If I didn't kill him, I'll go back ... find him in the hospital and finish the job." He then relished in this description of how the stabbing took place. He said that he "was just sticking him and sticking him" and "grabbed him by the hair" and "threw his head back." The defendant "wasn't sure if that was going to get him" so he "stuck it in the side of his neck and twisted it." The blood was coming out of the

victim's neck and defendant said "it looked like a squirt gun. It would squirt out and stop, squirt out and stop." And then just to make sure, he "slit him across the throat a couple of times." The defendant made statements that no one was going to mess with a "road dog," which is a term meaning misfit. The defendant related the story six or seven times to Mr. Thomas as to how he stabbed the victim and how this victim was picking on his friend and how cool it was that he did this. He recounted the same story over and over again. The defendant then threatened Mr. Thomas, stating the [sic] he would kill his grandmother if Mr. Thomas told anyone.

The medical examiner testified that it would take approximately two to five minutes for the victim to lose consciousness. There was testimony that the victim was groaning and moving after the stabbing, which according to the medical examiner, are signs of consciousness. There were thirteen separate wounds in the victim's body, and there was evidence that the twisting had taken place at the time of the stabbing. The medical examiner described seven of the stab wounds as deeper than they were long. It would take two to five minutes to lose consciousness after the last wound, and left untreated for five to ten minutes later, the victim would die. Even though the victim had a blood alcohol level of .18, which is significantly elevated, the medical examiner testified that alcohol may have been a mild but ineffectual anesthetic. The victim would have clearly felt this brutal attack. The victim was conscious throughout the stabbing and surely knew of his impending doom when the stabbing kept occurring, and finally took the life out of him. Testimony was presented that the final stab wound occurred when the defendant pulled the victim's head back and sliced his throat.

This murder was indeed a consciousless, [sic] pitiless crime, which was unnecessarily torturous to the victim. Since these facts were testified to by the witnesses present at the scene, and the evidence fully supports their testimony, the aggravating factor that

> the capital felony was especially heinous, atrocious or cruel has been proved beyond a reasonable doubt. It will be given great weight.

With respect to mitigation the court found appellant's age of nineteen years to be mitigating but gave it very little weight, and that Merck was under the influence of extreme mental or emotional disturbance and gave it little weight (Vol. IV, R. 767-770). The court declined to find the mitigator of capacity to conform conduct to the requirements of law was substantially impaired in light of the testimony of eye witnesses and experts (Vol. IV, R. 770-771). There was no evidence that appellant acted under extreme duress or provocation and that factor was inapplicable (Vol. IV, R. 771-772). The court found non-statutory mitigation including that appellant was the victim of childhood abuse and a deprived childhood and assigned it some weight and considered and assigned some weight to such non-statutory factors as learning disability (which did not impact on his development), the lack of a parental role model from chemically dependent parents (others had helped him grow up and exposed him to love), and capacity to form loving relationships in total were given some weight (Vol. IV, R. 772-773).

Merck now appeals.

SUMMARY OF THE ARGUMENT

I. The lower court did not err in failing to find long-term alcohol abuse as a non-statutory mitigator given the absence of supporting eyewitness testimony and in any event any error is harmless since the Court considered Merck's use of alcohol that night, since he was not impaired in his goal-directed activities and the overwhelming aggravation shown.

II. The lower court did consider the evidence presented as to Merck's use of alcohol the night of the murder including the testimony of Neil Thomas, toxicologist Bell and others but explained why this proposed mitigator should not be deemed a mitigator in the sentencing order.

III. The instant death penalty is not disproportionate; and given the presence of three strong aggravators, the weak mitigation (appellant has no brain impairment, normal IQ), this Court should agree with the unanimous jury recommendation and its prior appeal that the sentence is consistent with other imposed cases.

IV. The trial court's finding of the felony probation aggravator does not violate the ex post facto clause and this claim is not subject to appellate review for the failure to contemporaneously object below.

V. The lower court did not err in refusing to permit appellant to relitigate residual or lingering doubt as to his guilt

in this resentencing proceeding and nothing proffered suggests that Merck's sentence should be reduced because his involvement was less significant or that another culpable individual received less.

PRO SE ISSUES:

I. Claims of ineffective assistance in the guilt phase should be raised via post-conviction motion to vacate; there is nothing in the instant record to support a conclusion of trial counsel ineffectiveness.

II. There was no knowing use of perjured testimony by witness Nestor. This claim is meritless and the claim regarding the Khaki pants has been previously rejected.

III. The verdict is not contrary to the weight of the evidence and this guilt phase issue is not cognizable in this proceeding.

IV. The lower court did not abuse its discretion in denying a mistrial; if the prosecutor erred, it was cured by a cautionary instruction.

V. Most of the complaints on juror excusals for cause have not been preserved or were agreed to below. The remaining claims are meritless. The trial court complied with Wainwright v. Witt, 469 U.S. 412, 83 L.Ed.2d 841 (1985).

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED REVERSIBLY IN FAILING TO FIND AS A NON-STATUTORY MITIGATOR LONG-TERM ALCOHOL ABUSE.

In the appellant's twenty-four page Sentencing Memorandum of Law, with respect to the non-statutory mitigating factor of long-term alcohol abuse, there appears the following singular sentence:

> As testified by Roberta Crowe, Troy's sister, Troy was exposed to alcohol as an infant when it was placed in his baby bottle by Ray Price, one of his mother's suitors.

(Vol. IV, R. 721)

Roberta Crowe Davis, appellant's sister, testified that Ray Price would come in and out of the house and that Price told her he put liquor in his bottle to get him to stop crying and to go to sleep (Vol. XV, R. 847). During the testimony of the next witness, Kathleen Eller, when the state objected to any testimony relative to fetal alcohol syndrome because the listed witnesses had no medical expertise for such a diagnosis, the defense answered that "I'm not going into fetal alcohol syndrome" (Vol. XV, R. 861). Appellant's cousin Shane Eller, aged twenty-three, lived in the same trailer park in North Carolina as appellant about one hundred and fifty yards away and played and stayed together. They also lived close in South Carolina and saw each other about every other day. On cross-examination the witness admitted that he saw

appellant pretty regularly during his teenage years and only saw Merck drink on one occasion (Vol. XV, R. 868, 871). Shane's brother, Jason Eller, who testified about a similar poor environment and spent time at Merck's house, provided no testimony about appellant's use of alcohol when he knew him (Vol. XV, R. 872-880). None of the other defense witnesses who testified concerning their dealings with Merck -- Olbon, Flowers, Rackley, Schneider, France -- gave any testimony relating to appellant's alleged long-term use or abuse of alcohol. Appellant's companion at the time of the incident, Neil Thomas, met Merck only weeks before the murder of Jim Newton at the City Lite parking lot (Vol. XII, R. 528)[2]. Consequently, the lower court could permissibly decline to make a finding that Merck's alleged long term use of alcohol operated as a mitigating factor, both because of the lack of a factual predicate from those who had known appellant over the long term and because whatever Merck's consumption had been in that period, nothing reflected anything of a mitigating nature. *See* Rogers v. State, 511 So.2d 526, 535 (Fla. 1987)(" . . . record factually does not support a conclusion that Rogers' childhood traumas produced

[2]In depositions Linda Schneider testified that Merck had no incidents of using alcohol while staying with her (Vol. II, R. 256). As stated above, Shane Eller testified Merck drank on one occasion and was not known in the family as a heavy drinker (Vol. II, R. 272). Kathleen Eller stated that Merck drank a beer every once in a while but wasn't an alcoholic (Vol. II, R. 298).

any effect upon him relevant to his character, record or the circumstances of the offense so as to afford some basis for reducing a sentence of death"); *see also* Robinson v. State, ____ So.2d ____, 24 Florida Law Weekly S393, 396 (Fla. August 19, 1999) ("trial court gave little weight to the existence of brain damage because of the absence of any evidence that it caused Robinson's actions on the night of the murder").

Appellant initially complains that the lower court failed to satisfy the requirement of Campbell v. State, 571 So.2d 415 (Fla. 1990) to consider all mitigating evidence and to evaluate whether it is supported by the evidence. The instant case is distinguishable from Mahn v. State, 714 So.2d 391 (Fla. 1998) where the trial court had noted in its sentencing orders that Mahn "began drinking alcohol at a very young age and would get drunk and fight and cause trouble most of his life ... [and] has used all sorts of illegal drugs in the past." Id. at 401. In the instant case while Merck may have been exposed to a chemically dependent mother the evidence as to his drinking over a long period of time was sparse; cousin Shane Eller who saw appellant regularly in the teenage years saw Merck drinking on only one occasion (Vol. XV, R. 871) and no other eyewitnesses provided testimony regarding his alleged longstanding abuse of alcohol. Appellee has no quarrel with many of the decisions cited and would not dispute that in a given case

long term abuse of alcohol might be a mitigating circumstance, in an appropriate context. A proper mitigating circumstance is one that either helps to explain or to mitigate an accused's conduct or otherwise describes some quality or characteristic or talent of a defendant that argues for a sanction less than death. For example, if a capital defendant has an illness such as diabetes, surely no one would seriously contend that that fact alone serves to mitigate a sentence from death to life imprisonment, especially since it can so readily be treated with daily insulin injections. Obviously, a different situation might be presented if adequate evidence were presented that the illness was untreated and that aberrant conduct could be explained by the physical reaction to the untreated condition. Similarly, any alleged long term history of alcohol abuse cannot be deemed comparable to such personal qualities of an individual that might militate against the death penalty (artistic qualities, high intelligence, etc.). But regardless of what Mr. Merck's history of alcohol consumption may have been, the trial court's sentencing order adequately reflected a consideration of Merck's alcohol use and the testimony of toxicologist Bell, criminologist Heide, psychologist Merin, relatives, teachers and counselors (Vol. IV, R. 768-773). The lower court considered all that was presented even if a presumably competent defense counsel only urged a single sentence in his memorandum to this non-

statutory mitigator. *Cf*. Lucas v. State, 568 So.2d 18, 24 (Fla. 1990)(requiring that the defense share the burden of articulating non-statutory mitigators to be considered at sentencing).

Appellant points to the testimony presented concerning his upbringing in a chemically dependent household which included the indifferent stepfather Jess Whitmire and abusive mother Lois Merck. Most of the testimony presented pertained to the consumption of alcohol by others present in the household including appellant's sister Roberta Crowe Davis. As stated, *supra*, Merck's cousin Shane Eller who saws Merck every other day when living nearby only saw Merck drink on one occasion (Vol. XV, R. 871). (Additionally, the deposition testimony of Linda Schneider, a therapeutic foster parent, reported no incidents of Merck's using alcohol while staying with her, Vol. II, R. 256; Shane Eller added in deposition that appellant was not known in the family as a heavy drinker, Vol. II, R. 272; and Kathleen Eller stated in deposition that Merck drank a beer every once in a while but wasn't an alcoholic; Vol. II, R. 298). Moreover, the trial court in the sentencing findings had addressed the point of Merck's and his siblings' abuse "physically and emotionally by an alcoholic mother" (Vol. IV, R. 772). Merck also refers to the testimony of Dr. Heide who relied on Merck's self-reporting of alcohol use at an early age, but interestingly Heide apparently contradicted a report by one of the

sisters concerning alcohol being placed in Merck's bottle (Vol. XVI, R. 1071). While Dr. Merin also acknowledged a potential for alcohol abuse (Vol. XVII, R. 1176) explained that Merck was not under the influence of extreme mental or emotional disturbance at the time of the murder, he was under no particular stress at the time and the nature of appellant's act was a "function of who and what he was all about" (Vol. XVII, R. 1187). That Merck may have been drinking on the night in question or developed a tolerance for it over a period of time does not mitigate because all people who drink that much don't do what he did (stab victim Newton multiple times without provocation) (Vol. XVII, R. 1189).

Merck further argues in his brief that he and Neil Thomas -- whom he met a short few weeks earlier -- drank in North Carolina and drank heavily at the City Lites night club the evening of the homicide. The testimony of Thomas as well as toxicologist Bell estimating the blood alcohol level and testimony of Dr. Willey on intoxication at the time is relevant to the issue of alleged intoxication at the time of the crime -- an issue urged in Issue II, *infra* -- and was dealt with in much detail in the lower court's sentencing findings (Vol. IV, R. 770-771). The court concluded:

> This testimony compels this Court to believe that the alcohol use on the night of the murder did not substantially impair the defendant. ... In light of the testimony of the eye witnesses and the experts' testimony, this court is reasonably convinced that the

> defendant's capacity to conform his conduct to the requirements of law was not substantially impaired.
>
> (Vol. IV, R. 771)

And at the risk of repetition, the totality of the testimony of the eyewitnesses to the unprovoked assault and murder of Jim Newton in the parking lot -- his goal-directed behavior and his conduct afterward including flight from the scene, the purposeful abandonment of the motor vehicle containing the murder weapon, his ability to walk and talk, run and play pool without impairment demonstrate that any alleged long term alcohol use is not meaningfully mitigating.

Finally, even if the Court were to conclude that the lower court insufficiently articulated Merck's alleged long term use of alcohol as a mitigating circumstance, it is clear from the remainder of the sentencing order that the totality of proffered mitigation was properly considered and evaluated and in light of the presence of unchallenged and serious aggravators, death is the appropriate sentence and any error is harmless. This Court has previously determined that some "Campbell" error can be harmless. *See, e.g.*, Cook v. State, 581 So.2d 141, 144 (Fla. 1991)(court concluded that sentence of death would stand even if sentencing order had contained findings that each of the non-statutory mitigating circumstances had been proven); Thomas v. State, 693

So.2d 951, 953 (Fla. 1997)(sentencing order which failed to mention that defendant was a “delightful young man”, “very loving” with a “lot of good in him” constituted harmless error because evidence in aggravation was massive in counterpoint to the relatively minor mitigation); Wickham v. State, 593 So.2d 191 (Fla. 1991)(evidence of abusive childhood, alcoholism and extensive history of hospitalization for mental disorders should have been found and weighed by the trial court but in light of the strong case for aggravation, trial court’s error would not reasonably have resulted in a lesser sentence); Barwick v. State, 660 So.2d 685, 696 (Fla. 1995)(any error in articulating particular mitigating circumstances was harmless); Peterka v. State, 640 So.2d 59, 70 (Fla. 1994) (sentencing order in conjunction with instructions to jury indicates that trial court gave adequate consideration to the mitigating evidence presented); Mungin v. State, 689 So.2d 1026, 1031 (Fla. 1995)(rejecting claim of failure to evaluate substance of evidence from those who knew defendant during high school and rejecting attack on failure of sentencing order to mention good prison record or Dr. Krop testimony about use of alcohol and drugs because court’s reference to rehabilitation capacity encompassed prison record and Krop findings).

ISSUE II

WHETHER THE LOWER COURT ERRED IN FAILING TO FIND, WEIGH OR EVALUATE APPELLANT'S DRINKING ON THE NIGHT OF THE CRIME AS A MITIGATOR.

The trial court did consider Merck's alleged being under the influence of alcohol at the time of the homicide:

> 2. Non-Statutory Mitigating Factors
>
> The defendant asked the Court to consider these non-statutory mitigating factors:
>
> a. The defendant was under the influence of alcohol.
>
> The Court has addressed this factor under the defendant's third statutory mitigating factor regarding his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

(Vol. IV, R. 772)

Earlier the court explained:

> c. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> Two experts testified that the defendant had a substance abuse alcohol disorder. Ron Bell, the defendant's expert toxicologist, testified that he estimated the defendant's blood alcohol level to be in the range of 0.16 - 0.26 with an average level of 0.21 at the time of this murder. However, this information was not derived from a blood test but rather was estimated based upon testimony of alcohol consumption. He acknowledged that long term use of alcohol can increase tolerance levels.
>
> The state's expert found the defendant did appreciate the criminality of his conduct and that the defendant's conduct to the requirements of the law was not impaired. The expert for the defense disagreed and testified that the defendant had no emotional appreciation of the significance of the

> killing and she stated that it was beyond his capacity to think or evaluate it. She testified that once the impulsiveness and aggression of the defendant began, it would not stop. She also testified that on the night of the homicide the defendant had excessive alcohol use; consequently, the defendant experienced emotional upheaval at the time of the homicide.
>
> There was testimony from eye witnesses which described the defendant as not appearing intoxicated, walking very deliberately to his friend's car, catching tossed keys in mid-air, unlocking and opening the car door, retrieving the knife and hiding it from the on-lookers. One eye witness testified that when the defendant caught the keys in mid-air, in response to his friend's comment "nice catch Troy", the defendant replied "don't use my real name." The defendant then proceeded in a deliberate fashion and brutally stabbed the victim. This testimony compels this Court to believe that the alcohol use on the night of the murder did not substantially impair the defendant. The test for this mitigating factor is for this Court to be "reasonably convinced" that the defendant's capacity to conform his conduct to the requirements of the law was substantially impaired. In light of the testimony of the eye witnesses and the experts' testimony, this court is reasonably convinced that the defendant's capacity to conform his conduct to the requirements of law was <u>not</u> substantially impaired. Therefore, this mitigating circumstance will be given no weight.

(Vol. IV, R. 770-771)

The trial court could permissibly give no weight to this proffered mitigation in light of the testimony adduced below. While there was testimony that Merck had between five and six beers and a couple of shots between 10:30 P.M. and 2:00 A.M. both Neil Thomas and Katherine Sullivan testified that appellant did not

display any signs of physical impairment such as poor balance, slurred speech, difficulty walking or standing and he responded in a lucid manner to conversation (Vol. XII, R. 537-540; R. 489-490). Moreover, the testimony of the incident demonstrated a very deliberate goal-oriented course of action; after engaging in insults with the victim Merck announced he would "teach him how to bleed", walked to his car, demanded the keys from Neil Thomas and caught them in the air, retrieved a knife which he concealed at his side and assaulted the victim with several blows to the chest, head and neck area. Appellant repeatedly recited the facts of the incident afterward (Vol. XII, R. 475-481, 545-562, 586-587). While toxicologist Ron Bell testified that appellant could have had a blood alcohol level of between 0.16 and 0.26 if Neil Thomas' estimate was accurate and if all the alcohol had been absorbed, there is no basis to give the estimate any mitigation weight absent evidence of physical impairment and given Merck's goal-directed activity. *See* Cooper v. State, 492 So.2d 1059, 1062 (Fla. 1986) (evidence of alcohol and marijuana consumption without more did not even require a jury instruction on the mitigator; trial court does not err in rejecting this mitigating circumstance when it is inconsistent with testimony presented and in light of the fact that the defendant was able to give a detailed account of the crime); Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986)(noting that

Kokal's specific recounting the details of the robbery and murder to his friend contradicts notion he didn't know what he was doing and refuting mother's testimony of alcohol and drug abuse the night of the murder); Johnston v. State, 497 So.2d 863 (Fla. 1986) (ingestion of LSD on night of murder did not rise to mitigating factor); Buford v. State, 403 So.2d 943, 953 (Fla. 1981) (defendant's ability to give detailed account of crime resulted in rejection of drinking and drug use on night of the murder as a mitigator). *See also* Banks v. State, 700 So.2d 363, 368 (Fla. 1997)(while voluntary intoxication or drug use might be mitigator, whether it actually is depends on the facts of a particular case and no abuse of discretion on trial court's finding insufficient evidence appellant was under the influence of alcohol where he was served five to seven 16 ounce servings of malt liquor over a period of five to six hours at a local bar and was able to win several pool games throughout the evening and displayed no visible signs of drunkenness such as slurred speech or stumbling and circumstances of crime demonstrate they were committed in a purposeful manner); Brown v. State, 721 So.2d 274, 281 (Fla. 1998)(Despite claim of having smoked crack cocaine and consumption of alcohol on the night of the murder, evidence indicated Brown was coherent at the time of the murder and knew what he was doing; he deliberately chose a knife rather than a firearm and was able to stab the victim many

times. Although no evidence Brown was actually intoxicated at the time of the murder, trial court generously found it as a non-statutory mitigator but no abuse of discretion in failing to find a statutory mitigator).

As in Banks the trial court could properly reject Merck's alcohol consumption as a mitigator in light of his non-impaired and purposeful goal-related activity during the homicide. Not only did Merck's conduct reflect no impairment whatsoever immediately during the homicidal incident but his subsequent conduct after fleeing the incident (running away from the abandoned Bobcat, defeating Thomas in a pool game at the bowling alley at 3:00 A.M. and vividly recalling, reciting and reliving the incident to listener Thomas) shows that there was no alcohol-induced impairment or otherwise point of mitigation for his drinking at the City Lites. As Dr. Merin testified it simply allowed what was there to emerge (Vol. XVII, R. 1225).

ISSUE III

WHETHER THE DEATH PENALTY IS DISPROPORTIONATE.

On October 12, 1995 five members of this Court felt that the imposition of a sentence of death for Troy Merck was not disproportionate. Merck v. State, 664 So.2d 939, 943 (Fla. 1995):

> C. The death sentence is disproportionate.
>
> [6] Merck bases this issue primarily upon the contention in point B that the heinous, atrocious, or cruel aggravator should be stricken. We have rejected that contention and likewise reject the contention that death is disproportionate in this stabbing murder. Whitton; Derrick v. State, 641 So.2d 378 (Fla.1994), cert. denied, --- U.S. ----, 115 S.Ct. 943, 130 L.Ed.2d 887 (1995); Taylor v. State, 630 So.2d 1038 (Fla.1993), cert. denied, --- U.S. ----, 115 S.Ct. 107, 130 L.Ed.2d 54 (1994); Atwater v. State, 626 So.2d 1325 (Fla.1993), cert. denied, --- U.S. ----, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994). We do not find this case similar to Kramer v. State, 619 So.2d 274 (Fla.1993). The mitigating factors found to exist in Kramer are not found to exist in this case. Id. at 278.

Since that time nothing has changed to alter the quality of the offense or to change the character of the defendant, and this Court should again determine that the imposed sentence following a unanimous jury recommendation is consistent with the Court's proportionality jurisprudence. In his prior appeal Merck challenged the trial court's failure to find the age of nineteen to be mitigating and this Court rejected the challenge:

> . . . the trial court may find or decline to find age as a mitigating factor in respect to a defendant who is 19. In the trial court's sentencing order in this case, the trial court considered but rejected defendant's age as being a mitigating factor. We affirm.

Id. at 942

In the instant resentencing proceedings the lower court similarly considered the age mitigator but found it to be mitigating although worthy of only very little weight (Vol. IV, R. 767-768):

> a. The age of the defendant at the time of the offense.
>
> At the time this murder was committed, the defendant was nineteen years old. The defendant’s IQ was normal. The defense expert testified that his “personality age” would be fourteen years old. She explained that he did not see himself accountable for his behavior. The court has considered defendant’s age at the time of the crime and finds it to be a mitigating factor but it will be given very little weight.

In the prior appeal this Court rejected the defense contention that the HAC aggravator was inapplicable:

> [5] The basis of Merck’s argument regarding the second point is that this aggravator is not applicable because this was a sudden attack at a time when both Merck and the victim were intoxicated. The medical examiner testified that the fatal wound to the neck would have caused unconsciousness within two to five minutes and death within five to ten minutes. The victim had a blood alcohol level of .18. Likewise, there was substantial evidence that Merck had consumed a sufficient amount of alcohol to have been intoxicated at the time of the murder. However, there was

> also evidence that Merck had deliberately twisted the knife blade during the stabbing. Witnesses testified that this stabbing occurred after Merck said to the victim, "I'll show you how to bleed." Death was a result of multiple stab wounds.
>
> We recently rejected a challenge that the heinous, atrocious, or cruel aggravator was not applicable based upon a similar assertion in Whitton v. State, 649 So.2d 861 (Fla.1994), petition for cert. filed, No. 94-9356 (U.S. May 15, 1995). We believe that the heinous, atrocious, or cruel aggravator was applicable in this case and affirm on this issue.

Id. at 942

In the resentencing proceeding the trial court again found the presence of this aggravator noting the appellant's snide remarks to the victim prior to the assault, appellant's unsuccessful attempt to provoke the victim into a fight with taunts, Merck's deliberate retrieval of the murder weapon from the car after obtaining the car keys from companion Neil Thomas and removal of his shirt prior to the effort to "teach him how to bleed", the inflicting of multiple blows with the knife including a four and three quarters inch deep wound to the neck, a wound which fractured the victim's skull, multiple defense wounds and deliberate twisting of the knife blade during the stabbing, Merck's subsequent admission that to make sure he slit him across the throat a couple of times and the medical examiner's testimony that it would take two to five minutes for the victim to lose consciousness, that the victim was conscious as evidenced by eyewitness testimony as to his groaning and moving.

The victim sustained thirteen separate wounds in the body, seven of which were deeper than they were long. It would take two to five minutes to lose consciousness after the last wound, and left untreated, death would follow five to ten minutes later. The medical examiner stated the victim would have felt this brutal attack since, even though he had an elevated blood alcohol level, alcohol is an ineffectual anesthetic. The victim was conscious throughout the stabbing and surely knew of his impending doom when the stabbing occurred unabated (Vol. IV, R. 764-767).

Additionally, the trial court found as an aggravator -- unchallenged here -- that Merck was previously convicted of felonies involving the use of threat or violence to the person which included a 1990 Pasco County conviction of robbery wherein victim Nathan Dudeck had a knife placed to his throat, a 1989 Marion County conviction of robbery with a deadly weapon and 1989 convictions in Lake County of three separate crimes of robbery with a deadly weapon (Vol. IV, R. 763; see also Vol XIII, R. 610-620).

Furthermore, the trial court found as an aggravator that the capital felony was committed by a person under sentence of imprisonment. Merck was sentenced to four years in prison on October 9, 1989, six years in prison on October 31, 1989 and five years in prison on March 28, 1990 and the instant homicide of Jim Newton occurred on October 12, 1991. Probation officer Jacobs

testified that on that date Merck was on probation for his prior prison sentence, a conviction of robbery with a weapon (Vol. IV, R. 763; Vol. XIII, R. 629-634). *See also* Merck v. State, 664 So.2d 939, 944-945 (Fla. 1995)(J. Wells, concurring).

This Court may permissibly conclude that there is no merit to Merck's challenges to the aggravating factors previously found and approved on his last appeal (HAC, and prior violent felony convictions for robbery) upon reconsideration in light of the new evidence presented at resentencing. *See* Robinson v. State, ____ So.2d _____, 24 Florida Law Weekly S393, 397, n 4 (Fla. August 19, 1999).

Initially, it is important to remember that while this Court engages in proportionality review that does not mean the Court must abandon the practice of refusing to substitute its judgment for that of the judge and jury; this Court in the past has stated it would decline to reweigh aggravating and mitigating factors and decide which capital defendants sentenced to death deserve to die.

The frequently-cited dictum that the death penalty has been "reserved for only the most aggravated and least mitigated" of first degree murders -- *see* State v. Dixon, 283 So.2d 1, 7 (Fla. 1973) -- represents a misapplication of that seminal precedent. In Dixon this Court utilized that language in discussing the legislative determination for which crimes were reserved for the

death penalty and did not seek to create an appellate standard, whether for proportionality review or any other purpose ("It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes. ... The Legislature has, instead, provided a system whereby the possible aggravating and mitigating circumstances are defined, but where the weighing process is left to the carefully scrutinized judgment of jurors and judges." 283 So.2d at 7)(emphasis supplied). But the Dixon Court also expressly held that it would review each capital case to ensure that the sentencing process was one of "reasoned judgment rather than an exercise in discretion", the reviewing process designed to guarantee that "the reasons present in one case will reach a similar result to that reached under similar circumstances in another case." Id. at 10. Accordingly, for the last quarter century, the Court has conducted a proportionality review as part of every direct capital appeal. *See, e.g.*, Palmes v. Wainwright, 460 So.2d 362, 364 (Fla. 1984); Urbin v. State, 714 So.2d 411, 417 (Fla. 1998); Sliney v. State, 699 So.2d 662, 672 (Fla. 1997); Melendez v. State, 612 So.2d 1366, 1368 (Fla. 1992); Tillman v. State, 591 So.2d 167, 169 (Fla. 1991); Garcia v. State, 492 So.2d 360, 368 (Fla. 1986). Under this proportionality review this Court has stressed that the trial court was responsible for finding what

mitigating circumstances exist and determine the weight these factors should be given. Foster v. State, 654 So.2d 112, 114 (Fla. 1995); Hudson v. State, 538 So.2d 829, 831 (Fla. 1989); Toole v. State, 479 So.2d 731, 734 (Fla. 1985); Daugherty v. State, 419 So.2d 1067, 1070 (Fla. 1982). This Court has stated that its role is limited to seeing that the trial court applied the correct law and that its factual findings are supported by competent, substantial evidence. *See* Cave v. State, 727 So.2d 227 (Fla. 1998); Blanco v. State, 706 So.2d 7, 10 (Fla. 1997); Blanco v. State, 702 So.2d 1250, 1252 (Fla. 1997)("As long as the trial court's findings are supported by competent substantial evidence, "this Court will not 'substitute its judgment for that of the trial court on questions of fact ..."); Campbell v. State, 571 So.2d 415 (Fla. 1990); Atkins v. State, 497 So.2d 1200, 1203 (Fla. 1986)("It is not this Court's function to engage in a general *de novo* re-weighing of the circumstances. Rather, we are to examine the record to ensure that the findings relied upon are supported by evidence.").

The Court should decline the defense invitation to engage in reweighing the aggravating and mitigating circumstances in order to substitute its view for that of the trial judge and unanimous jury vote as to the appropriateness of the ultimate sanction here, in the guise of proportionality review, especially in light of the

fact that proportionality review is not required by the Constitution -- *see* Pulley v. Harris, 465 U.S. 37, 79 L.Ed.2d 29 (1984) and the decision of the people with the recent enactment and promulgation of Amendment 2, modifying Article I, Section 17 of the Florida Constitution requiring that the proscription on cruel or unusual punishment to be construed in conformity with the federal Constitution. The death penalty is not limited only to notorious serial killers like Bundy and Rolling.

In performing its proportionality review function the Court must "consider the totality of the circumstances in a case and ... compare it with other capital cases." Nelson v. State, ____ So.2d ____, 24 Florida Law Weekly S250, 253 (Fla. 1999); Terry v. State, 668 So.2d 954, 965 (Fla. 1996); Urbin, *supra*. Proportionality review requires a discrete analysis of the facts entailing a qualitative review by the Court of the underlying basis for each aggravator and mitigator, rather than a quantitative analysis. Urbin, Tillman, *supra*; Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). It is not a comparison between the number of aggravating and mitigating circumstances. The Court must consider and compare the circumstances of the case at issue with the circumstances of other decisions to determine if death penalty is appropriate.

(A) Aggravation:

Turning to the case at hand appellant contends that the instance case is not among those in aggravation for which the death penalty is appropriate (Brief, pp. 74-78). Appellee disagrees. As argued earlier under this point the trial court in this resentencing proceeding found as aggravators those found and approved by this Court in Merck's prior appeal, the HAC aggravator, F.S. 921.141(5)(h) and prior violent felony convictions involving the use or threat of violence to the person, F.S. 921.141(5)(b).

(1) HAC:

This Court has on more than one occasion expressed the view that the HAC aggravator is one of the two most serious aggravators promulgated by the legislature. *See, e.g.*, Maxwell v. State, 603 So.2d 490, 493 (Fla. 1992)(". . . the present case involves only two aggravating factors. These do not include the more serious factors of heinous, atrocious, or cruel, or cold, calculated premeditation.")(emphasis supplied); Larkins v. State, ____ So.2d ___, 24 Florida Law Weekly S379, 381 (Fla. 1999)("We also note that neither the heinous, atrocious, or cruel nor the cold, calculated, and premeditated aggravators are present in this case. These, of course, are two of the most serious aggravators set out in the statutory sentencing scheme, and, while their absence is not

controlling, it is also not without some relevance to a proportionality analysis.").

While Merck does not in a separate issue challenge the correctness of the trial court's finding of the HAC aggravator, in this section he does urge that this factor should not have been found relying on the fact that victim Newton had an elevated blood alcohol level and on Kramer v. State, 619 So.2d 274 (Fla. 1993) as he did in the prior appeal and which this Court rejected. Merck v. State, 664 So.2d at 943. Appellee will continue to rely on Merck I and the case law cited therein indicating that the victim's intoxication does not preclude a finding of HAC. Whitton v. State, 649 So.2d 861 (Fla. 1994); *see also* Derrick v. State, 641 So.2d 378 (Fla. 1994); Banks v. State, 700 So.2d 363 (Fla. 1997).[3] Merck additionally seeks solace in the decisions of Voorhees v. State, 699 So.2d 602 (Fla. 1997) and Sager v. State, 699 So.2d 619 (Fla. 1997). Voorhees and Sager can best be understood by remembering that it was unclear how the homicidal incident occurred. In the

[3]If the argument advanced is that the intoxicated condition of the victim can not produce an HAC death because the victim did not feel pain, the expert medical testimony of Dr. Davis is to the contrary. If the argument is that a victim with an elevated blood alcohol level somehow deserves death for participating in alcohol consumption, again the testimony clearly established that the victim did not willingly participate in conduct leading to his demise -- he refused the invitation to fight. Cf. Thomas v. State, 618 So.2d 155, 157 (Fla. 1993)(murder victim's attempt to purchase cocaine prior to the murder irrelevant to Thomas' culpability); Bolender v. State, 422 So.2d 833, 837 (Fla. 1982)(approving jury override despite fact victims were armed cocaine dealers).

Sager case this Court emphasized that Sager suffered from mental illness (having been released from a Kansas mental health facility just weeks before the crime), that Voorhees was the leader of the two, and irrespective of any challenge to his homicidal intent on a premeditation theory there was overwhelming evidence of felony murder. 699 So.2d at 623, and 622 n 6. In Voorhees the Court explained that Voorhees awoke to observe Sager fighting with the victim prior to participating in the killing and that the evidence sufficed under a felony-murder theory, 699 So.2d at 605, 614 n 12, that this was a "spontaneous fight" for no reason and involved mitigation of mental stress, severe loss of emotional control, 699 So.2d at 615. Unlike Voorhees and Sager, the instant case was not merely a fight between drunks which escalated unto death; this was a case in which Merck committed a premeditated murder of Jim Newton when the victim refused to be goaded into fighting despite provocation by his tormentor and nothing has been presented in the resentencing proceeding to lead this Court to change its view from 1995 that this killing satisfied the criteria of this Court's HAC precedents and that the quality of this homicide has been reduced to deserving of a sentence of mere life imprisonment.

(2) Prior violent felony convictions:

Appellant appears not to challenge this finding. While this Court has apparently expressed a preference for the HAC and CCP

aggravators at the top of the aggravating hierarchy, appellee would respectfully submit that a large number of citizens -- some perhaps jurors -- would be equally or more impressed upon learning whether a capital defendant whose fate must be determined has a history of committing violent felonies (for which he has been previously apprehended and convicted) and thus has chosen not to learn and benefit from prior adverse experience. In many ways this aggravator is more significant than the "HAC" and "CCP" aggravators because the latter only depict a snapshot of perhaps a momentary episode in an otherwise law-abiding and harmless life, whereas a history of continuous serious criminal activity more accurately shows the panorama of the defendant's character and indicates the broader perspective for judge, jury and reviewing court. Since the proportionality review function involves a qualitative as opposed to a merely quantitative counting of aggravators and mitigators it is appropriate to consider Merck's history. As the evidence established and the sentencing court found Mr. Merck's meeting with Jim Newton in the City Lites parking lot was not his first involvement in serious and violent lawbreaking. Merck had a history of committing armed robberies -- not once, not twice, but more. In 1990 he was convicted of the Pasco County armed robbery of Nathan Dudeck; in 1989 he was convicted of three separate armed robberies in Lake County and in the same year yet another robbery

with a deadly weapon in Marion County. He told Dr. Heide he decided to quit his day job and do robberies (Vol. XVI, R. 1119-1120). Presumably only his premeditated killing of Jim Newton could end his promising career as an armed robber. The lower court properly gave this aggravator "great weight", undoubtedly as did the jury in its unanimous recommendation, and this Court should likewise deem Merck's pattern of serious prior convictions involving force or violence in conducting its proportionality analysis.[4]

(3) But we have more.[5] The lower court also found applicable the aggravating factor that the capital felony was committed by a person under sentence of imprisonment or while on felony probation (the evidentiary basis for which is unchallenged although Merck

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[4]Significantly, in many of the cases relied on by appellant in his effort to urge disproportionality of the sentence there is no pattern or series of prior felony convictions. For example, in Urbin v. State the Court took pains to explain that the prior violent felony aggravator occurred two weeks after the homicides, 714 So.2d at 418; in Kramer v. State the prior violent felony conviction was apparently an isolated incident where another victim was beaten, 619 So.2d at 278; Sager and Voorhees did not have the prior violent felony conviction aggravator, 699 So.2d 619, 699 So.2d 602. Robertson v. State, 699 So.2d 1343 (Fla. 1997) did not include the prior violent felony aggravator.

[5]Appellee notes that frequently in proportionality analysis discussions the Court has noted that the presence of three valid aggravators yields a determination that the imposed sentence of death is proportionate. *See* Snipes v. State, ____ So.2d ____, 24 Florida Law Weekly S191, 194 (Fla. 1999) distinguishing from Bonifay v. State, 680 So.2d 413 (Fla. 1996) in part because "there were three, rather than two, factors in aggravation in *Bonifay*"; Sochor v. State, 580 So.2d 595 (Fla. 1991).

urges an ex post facto challenge in Issue IV, *infra*). Further confirming appellant's refusal to be amenable to society's rules, Merck committed a robbery with a deadly weapon on March 15, 1989, was convicted in the Marion County circuit court on October 9, 1989 and received a four year sentence in the state prison to be followed by one year of probation. Probation officer Jacobs advised Merck of the conditions of his probation in September 1991 after his release from the prison portion of his sentence and Merck murdered Newton weeks later in October of 1991.

Appellant contends that the instant case is not sufficiently aggravated -- thus disagreeing with this Court on the last appeal -- because the victim's intoxication would have decreased his capacity to feel pain and the attack occurred quickly which he contrasts with Whitton v. State, 649 So.2d 861 (Fla. 1994) and Cave v. State, 727 So.2d 227 (Fla. 1998). Nothing in the resentencing proceeding should cause the Court to change its previous view that the HAC factor was established; the Court previously found this incident comparable to Whitton, *supra*, and Derrick v. State, 641 So.2d 378 (Fla. 1994). To the extent appellant may be relying on differing views between state forensic pathologist Dr. Davis and defense witness Dr. Willey (who was neither board certified in forensic pathology and had not worked in a medical examiner's office for more than thirty years) the judge and jury could

appropriately choose between them; especially since eyewitnesses had described conscious acts of the victim and Thomas vividly described the popping sound made by Merck's knife in the victim's skull. And while we are grateful that appellant is in agreement with this Court's resolution in Cave that emotional terror can satisfy the HAC requirement, nothing therein served to overrule the long ling of precedents of this Court that a multiple stabbing to a conscious victim satisfies the HAC aggravator. *See* Taylor v. State, 630 So.2d 1038 (Fla. 1993)(HAC upheld where victim stabbed twenty times and strangled although medical examiner did not know if victim was conscious during attack); Hansbrough v. State, 509 So.2d 1081 (Fla. 1987); Nibert v. State, 508 So.2d 1 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla. 1986); Johnston v. State, 497 So.2d 863 (Fla. 1986); Hardwick v. State, 521 So.2d 1071 (Fla. 1988); Floyd v. State, 569 So.2d 1225 (Fla. 1990); Haliburton v. State, 561 So.2d 248 (Fla. 1990); Pittman v. State, 646 So.2d 167 (Fla. 1994); Atwater v. State, 626 So.2d 1325 (Fla. 1993); Trotter v. State, 576 So.2d 691 (Fla. 1990).

(B) Mitigation:

Appellant contends that significant mitigation has been presented in the resentencing proceedings to mandate a reduction to life imprisonment. As this Court well knows on Merck's prior appeal, Merck relied on the testimony of his sisters Stacey France

and Roberta Crowe who described Merck as being an unwanted child by his mother, the uncertainty of his father, the lack of love by the mother and the abuse on Merck and his siblings. At the resentencing proceeding France and Crowe again described the family life. Merck urges that the additional mitigation evidence should require a finding of disproportionality and reduction in sentence.

As to abuse in the home by appellant's mother, the trial court considered it and gave it the appropriate "some weight" (Vol. IV, R. 773). Abused childhood should not merit a disproportionality finding, as it did not in the last appeal, 664 So.2d at 941, (*see also* Hall v. State, 614 So.2d 473 (Fla. 1993)) and the strength of that mitigator *sub judice* is tempered by the fact that the abused siblings did not choose a life of crime or murder, that he had opportunities at the Collins Children's Home but as Kathleen Heide conceded Merck didn't like the structure imposed (hated being made to do anything, going to church, etc.) and he made several attempts to escape from it and go back to be with his mother in North Carolina (Vol. XVI, R. 1096). Merck chose not to accept opportunities unlike his cousins the Ellers.

Merck also had a droopy eyelid (ptosis), a factor known in the prior appeal and argued there as a source of derision by school children. With respect to his poor self-image, witnesses Wilbon

Flowers and Rackley acknowledged that his behavior improved during their exposure to Merck.

Although non-psychologist Heide struggled to employ non-DSM-IV terminology (he just "went off" -- Vol. XVI, R. 1103, 1109) to attempt to explain his homicidal behavior, i.e., it must be mitigating since his rage constituted an excessive response and while the trial court generously found the statutory mitigator of mental or emotional disturbance, in this qualitative analysis it is important to note what this evidence both showed and failed to show. Both Heide and Dr. Merin agreed that Merck was not psychotic, insane, had no evidence of hallucinations or delusions and had normal intelligence (Vol. XVI, R. 1099-1102; Vol. XVII, R. 1179-1180, 1188, 1166-1170). Both Heide and Dr. Merin agreed that Merck did not view himself as accountable for his behavior (Vol. XVI, R. 1112-1113; Vol. XVII, R. 1185). According to Dr. Merin, appellant had a personality disorder (as distinguished from a mental illness or neurosis), a behavioral style of living with features of anti-social personality and narcissistic personality disorder. Both agreed Merck knew right from wrong and the consequences of his actions. Since proportionality analysis is a qualitative review this Court should agree with the trial court's determination to give little weight to the emotional disturbance factor, given Dr. Merin's greater expertise in psychology, and his

conclusion was supported by the psychological tests he employed. Merin's conclusion that at the time of the homicide Merck was not under the influence of an extreme mental or emotional disturbance but rather illustrating who and what he was all about is clearly the more reasonable view (Vol. XVII, R. 1187-1189).

Most recently in Robinson v. State, ____ So.2d ____, 24 Florida Law Weekly S393, 396 (Fla. August 19, 1999) this Court reiterated:

> Upon review, we find that death is the appropriate penalty in this case. In reaching this conclusion, we are mindful that this Court must consider the particular circumstances of the instant case in comparison with other capital cases and then decide if death is the appropriate penalty. *See Sliney v. State*, 699 So. 2d 662, 672 (Fla. 1997) (citing *Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996), *cert. denied*, 118 S. Ct. 1079 (1998)); *Livingston v. State*, 565 So. 2d 1288, 1292 (Fla. 1988). Proportionality review is not simply a comparison between the number of aggravating and mitigating circumstances. *Terry*, 668 So. 2d at 965. Following these established principles, it appears the death sentence imposed here is not a disproportionate penalty compared to other cases.[9] *See Spencer v. State*, 691 So. 2d 1062 (Fla. 1996); *Foster v. State*, 654 So. 2d 112 (Fla. 1995).

In affirming the imposed sentence of death the Court rejected a defense contention that the trial court had failed to consider or gave improper weight to mitigating evidence, including evidence that he suffered from brain damage. The Court noted the trial judge's summary that Robinson was a sociopath, that he had problems

since very early in life and his home life was not perfect but that did not explain or justify his behavior for the past twenty years and this Court found no abuse of discretion in the trial court's treatment and consideration of the mitigating circumstances. While the existence of brain damage is a factor which may be considered in mitigation the trial court could permissibly give little weight to it because of the absence of any evidence that it caused his actions on the night of the murder. Id. at 396.

Similarly, in the instant case, an examination of the totality of the evidence in a qualitative manner reveals that Merck was not in any real sense impaired on the evening that he premeditatively killed Jim Newton who had refused to be provoked into a fight, that Mr. Merck had a history of repeated prior violent felony convictions, and was on felony probation at the time of the instant homicide, that this homicide was especially heinous, atrocious or cruel; the statutory mitigators found to exist were appropriately given little weight (and the testimony shows complete disagreement between psychologist Merin and non-psychologist Heide even on the presence of extreme mental or emotional disturbance). The testimony of eyewitnesses established that Merck's capacity to conform his conduct to the requirements of law was not substantially impaired and he did not act under extreme duress. Although appellant had a deprived childhood with some physical

abuse (no sexual abuse) his siblings reared in the same environment did not choose a life in crime and appellant preferred to escape from the Collins Children's Home rather than learn from its beneficial aspects and those ready to help. *See* Spencer v. State, 691 So.2d 1062 (Fla. 1996)(aggravating factors of prior conviction of a felony violation [based on contemporaneous convictions for aggravated assault, aggravated battery and attempted second degree murder] and HAC, mitigating of two statutory mental health mitigators and non-statutory mitigation including drug and alcohol abuse, paranoid personality disorder and sexual abuse by his father; court determined record supported trial judge's decision to give little weight to mitigating circumstances especially since there was some question as to the degree of the emotional disturbance); *see also* Sliney v. State, 699 So.2d 662 (Fla. 1997) which reconfirms that proportionality review is a qualitative process -- the Court observing that the homicide was an extremely brutal one, even though HAC was not one of the found aggravators.

The death sentence imposed in the instant case is not a disproportionate penalty compared to other cases.[6]

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[6]Many of the cases urged by appellant, though facially similar, contain striking dissimilarities. In Urbin v. State, 714 So.2d 411 (Fla. 1998) the 17-year-old defendant participated in a robbery-murder with two others who received reduced sentences, the prior violent felony conviction aggravator occurred two weeks after murder and were not prior committed felonies, the merged aggravators of robbery/pecuniary gain were based on the same

The instant case is similar to Whitton v. State, 649 So.2d 861 (Fla. 1994). The defendant there had aggravators -- similarly to Merck -- including commission of the crime while on parole for a 1981 armed robbery conviction -- and prior conviction of another felony involving the use or threat of violence and it was heinous, atrocious or cruel; his mitigators included deprived childhood and poor upbringing, abuse by two alcoholic parents, was an unstable personality and was an alcoholic. There, as in the instant case, the stabbing victim was the victim of a rapid attack, the head

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incident in which the murder occurred, and the defendant's capacity to appreciate the criminality of his conduct was substantially impaired at the time of the shooting. Robertson v. State, 699 So.2d 1343 (Fla. 1997) involved a defendant with an impaired capacity at the time of the murder due to drug and alcohol use with a history of mental illness and borderline intelligence. Voorhees v. State, 699 So.2d 602 (Fla. 1997) and Sager v. State, 699 So.2d 619 (Fla. 1997) apparently involved first degree felony murder in which both defendants and victim were intoxicated. The Sager Court stated that defendant suffered from mental illness (recently released from a Kansas mental health facility) and that Voorhees was the leader, 699 So.2d at 623, and in Voorhees the defendant's two aggravators occurred in this homicidal episode with no prior record of violent felony convictions. Voorhees and Sager were deemed like Kramer v. State, 619 So.2d 274 (Fla. 1993) a "fight" between a disturbed alcoholic and a man legally drunk. Kramer additionally had both statutory mitigators present, in contrast Merck involves a premeditated murder after the victim declined to be drawn into a fight. Clark v. State, 609 So.2d 513 (Fla. 1992) was a single aggravator case (pecuniary gain after HAC, CCP, and during a robbery were struck for insufficiency) and much uncontroverted mitigation. Nibert v. State, 574 So.2d 1059 (Fla. 1990) involved a single aggravator and substantial uncontroverted mitigation including the presence of both statutory mental mitigators. Livingston v. State, 565 So.2d 1288 (Fla. 1988) involved a seventeen-year-old defendant who as a result of severe beatings possessed marginal intellectual functioning (whereas Merck's 100 IQ could enable him to do college work).

wounds would have caused rapid unconsciousness and featured defensive wounds. Despite the victim's intoxicated state the medical examiner concluded he would have felt pain. This Court approved both the HAC finding and the proportionality requirement in Whitton and indeed cited Whitton approvingly in Merck's last appeal. 664 So.2d at 943.

While the factual pattern may not be identical, the instant case is also comparable to Hildwin v. State, 727 So.2d 193 (Fla. 1998). The trial court had found four aggravators: (1) pecuniary gain, (2) HAC, (3) prior violent felony convictions, and (4) under a sentence of imprisonment. [This is similar to Merck except for the pecuniary gain factor.] The mitigators in Hildwin included a history of childhood abuse, a history of drug or substance abuse, organic brain damage as non-statutory mitigators and extreme mental or emotional disturbance at the time of the murder and capacity to appreciate criminality of his conduct or to conform to the requirements of law was substantially impaired as statutory mitigators. [The abuse and alcohol usage are similar to Merck as well as to the emotional disturbance finding but of course Merck has no brain damage.] There, the trial court had explained why it did not find the psychological mitigating evidence to be particularly compelling (although some weight had been assigned to it) including the fact that the experts subtly differed with one

another in their analysis and the difference in description by the experts and those who knew the defendant. This Court affirmed, approving the HAC and two prior violent felony convictions:

> Not only did he serve time in prison for these prior violent felonies, but he was on parole at the time of the murder.
>
> Rather than utilizing his freedom to become a productive, law-abiding citizen, Hildwin instead committed this murder.

Id. at 198.

This Court concluded:

> Based on our review of all of the aggravating and mitigating factors, including their nature and quality according to the specific facts of this case, we find that the totality of the circumstances justifies the imposition of the death sentence. *See Porter*, 564 So.2d at 1064. No two cases are ever identical, but based on our independent proportionality review, we find this case to be proportionate to other cases where we have upheld the imposition of a death sentence.

Id. at 198.

Upholding the death sentence would be consistent with Bowden v. State, 588 So.2d 225 (Fla. 1991)(HAC and prior violent felony weighed against terrible childhood and adolescence); Hayes v. State, 581 So.2d 121 (Fla. 1991)(two aggravating factors weighed against prior mitigating factors of age, low intelligence, learning disabled, product of deprived environment); Freeman v. State, 563 So.2d 73 (Fla. 1990)(death penalty not disproportionate where two aggravating factors weighed against mitigating evidence of low

intelligence and abused childhood); Franqui v. State, 699 So.2d 1312 (Fla. 1997)(four aggravators including prior violent felony convictions deemed to outweigh the mitigation which included hardships during youth, abandonment by his mother, death of a younger brother and father's drug and alcohol abuse).

In the instant case, the aggravators have previously been described in this brief and are strong -- especially the HAC factor and Merck's repeated history of violent felony convictions, since proportionality review involves a qualitative analysis, the Court should affirm trial court conclusion the mitigating factors found were weak; as to statutory mitigators, the lower court gave very little weight to age of nineteen -- Merck had a normal IQ, could do college work according to Dr. Merin, and had sufficient experience to have committed several robberies before the homicide. As to the mental or emotional disturbance, the testimony of Dr. Merin and Kathleen Heide conflicted -- Merin believing that appellant was not under the influence of extreme mental or emotional disturbance and Heide suggesting that he was (although Heide in her report and on cross-examination admitted she had said it was possible he had this extreme mental or emotional disturbance and could have some doubt as to really whether he had one -- Vol. XVI, R. 1106). Similarly, the non-statutory mitigation considered was insignificant. As to Merck's drinking that night his actions belied the notion of

impairment and the difficulties in his home life did not inevitably yield a life in crime as his siblings demonstrate. Unlike many other cases in this Court appellant had no significant mental problems -- there was no brain damage or impairment, no psychosis, no hallucinations or delusions, and thus no substantial basis in mitigation requiring rejection of the jury's unanimous recommendation of death.

The Court should find the sentence of death to be proportionate and affirm the order of the lower court.

ISSUE IV

WHETHER THE TRIAL COURT'S FINDING OF THE PRESENCE OF THE FELONY PROBATION AGGRAVATOR, F.S. 921.141(5)(a), VIOLATED THE CONSTITUTIONAL PROHIBITION ON EX POST FACTO LAWS.

In her sentencing findings, Judge Khouzam found:

> 1. The capital felony was committed by a person under sentence of imprisonment.
>
> The defendant, Troy Merck, was sentenced to four years in prison on October 9, 1989, six years in prison on October 31, 1989, and five years in prison on March 28, 1990. The murder for which he is here convicted occurred on October 12, 1991. Probation Officer Jacobs testified at the penalty phase that the defendant on that day was on probation for his prior prison sentence, conviction of robbery with a weapon. Since the defendant was on probation when this murder was committed, the defendant was under a sentence of imprisonment when he committed this capital felony. This aggravating factor was proved beyond a reasonable doubt and will be given great weight.

(Vol. IV, R. 763)

(A) <u>The claim has not been preserved for appellate review</u>:

Merck did not adequately preserve this claim by contemporaneous objection in the lower court. In closing argument to the jury defense counsel acknowledged the applicability of this aggravator:

> I'm also not going to stand here and tell you they haven't proven the second element beyond a reasonable doubt, the second factor, that is, the crime for which the Defendant is to be sentenced was committed while he was on felony probation.

> My recollection is Mr. Jacobs from the Department of Corrections took the stand and he pointed out that Mr. Merck at the time that he left prison was placed on felony probation for one of these crimes, and during the time that he was on felony probation this incident occurred. So I'm not going to stand here and tell you that they haven't proven those two items beyond a reasonable doubt.
>
> (Vol. XVIII, R. 1326-27)

Again, no challenge was made in the defense sentencing memorandum wherein Merck conceded that the state had established as valid aggravators prior violent felony convictions and that he was on felony probation at the time of the homicide:

> In support of the first aggravating circumstance, the State unrebuttedly introduced certified copies of judgments and sentences of armed robberies, as well as testimony from the victim of one of the armed robberies that Merck pulled a knife, and threatened violence to him. The defense recognizes that the Court will likely find that the evidence of the armed robberies was sufficient to establish, beyond a reasonable doubt, the first aggravating factor. <u>The defense also recognizes the unrebutted testimony and documentation of the Department of Corrections that establishes that Merck: a) was placed on felony probation approximately one month prior to the homicide; b) was informed of the condition; and c) was on felony probation at the time of the crime. Thus, the Defendant recognizes that the State has established the second aggravating factor.</u>
>
> (emphasis supplied)(Vol. IV, R. 714)

At the <u>Spencer</u> hearing, defense counsel recited:

> Judge, the only thing I would say on that is that I believe that I argued during the course of the re-trial that this would be an

> ex post facto application because at the time Mr. Merck went to trial the first time, it wasn't an aggravator.
>
> I realize the State cited, I think the Trotter case to knock that out, I am not abandoning that, I didn't argue it here, but to the extent that that doesn't apply, I am not going to stand here and tell you that they didn't put on evidence of that.

(Vol. VIII, R. 885)

Appellant acquiesced to the prosecutor's reliance on the adverse decision in Trotter v. State, 690 So.2d 1234 (Fla. 1996), cert. denied, ___ U.S. ___, 139 L.Ed.2d 134 (1997). *See* Lucas v. State, 376 So.2d 1149, 1152 (Fla. 1979)("This court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law."). *See also* F.S. 924.051(3); Perez v. State, 717 So.2d 605 (Fla. 3DCA 1998); Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983)("A party may not invite error and then be heard to complain of that error on appeal.").

Appellant somewhat acknowledges that the claim was not adequately preserved in the lower court[7] but posits four arguments to explain away the default (Appellant's Brief, p. 90). First, he contends that while inartful the objection was sufficient to comply with the contemporaneous objection rule. Appellee disagrees.

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[7]*See* p. 89 of Appellant's Brief noting that regarding trial counsel's assertion of a previous objection on ex post facto grounds "the record doesn't bear that out".

Defense counsel clearly acquiesced and it was incumbent upon him to urge that consideration of the aggravator would be serious legal error if he deemed it so, rather than to comply passively to the prosecutor's reliance on Trotter. Second, he contends that the error amounts to fundamental error. But the defense acknowledged to the jury that the state had proven this factor, urged no legal basis to them for rejecting it and clearly waived any due process notice issue. There is no fundamental error. Third, Merck contends that "death is different" and argues that F.S. 921.141(4) imposes an obligation to review death sentences on matters not urged. But F.S. 921.141(4) does not constitute a general repudiation of procedural bar jurisprudence in the capital context but only creates a statutory mandate to review capital judgments and sentences (even if the defendant does not want to appeal). *See e.g.*, Muehleman v. State, 503 So.2d 310, 312-313 (Fla. 1987); Pettit v. State, 591 So.2d 618, 620, n 2 (Fla. 1992)(Pettit did not want to appeal or have counsel for him appeal, but we determined that this wish could not be granted because we have an absolute statutory obligation to review every death sentence).

Finally, Merck posits that trial counsel should be declared ineffective (without hearing or cross-examination) for his failure to timely and properly object on ex post facto grounds. But trial counsel cannot be deemed deficient in this regard since this

Court's precedent of Trotter v. State, 690 So.2d 1234 (Fla. 1996) would likely have precluded success and trial counsel is not required to anticipate future changes in the law. *Cf*. Harvey v. Dugger, 656 So.2d 1253, 1258 (Fla. 1995)(trial counsel cannot be deemed ineffective for failing to object that HAC instruction was vague when this Court had previously upheld the validity of these instructions); Lambrix v. Singletary, 641 So.2d 847, 849 (Fla. 1994)(appellate counsel not ineffective because this Court would have rejected Espinosa claim on direct appeal); Stevens v. State, 552 So.2d 1082, 1085 (Fla. 1989)(" . . . claims of ineffective assistance of counsel that place a duty upon defense lawyers to anticipate changes in the law are without merit.").

(B) There is no violation of the ex post facto clause:

The trial court's action is in conformity with Peek v. State, 395 So.2d 492, 499 (Fla. 1980) wherein this Court explained:

> Probation is a sentence alternative but is not generally considered to be a sentence of imprisonment. An exception arises, however, if the order of probation includes as a condition a term of incarceration and the capital felony is committed while the defendant is or should be incarcerated. We find that the phrase "person under sentence of imprisonment" includes (a) persons incarcerated under a sentence for a specific or indeterminate term of years, (b) persons incarcerated under an order of probation, (c) persons under either (a) or (b) who have escaped from incarceration, and (d) persons who are under sentence for a specific or

> indeterminate term of years and who have been placed on parole.
>
> (emphasis supplied)

See also Merck v. State, 664 So.2d 939, 945 (Fla. 1995)("I do note that if Merck was on parole, or if his order of probation included as a condition a term of incarceration and this murder was committed while Merck was or should have been incarcerated, he would have been under a sentence of imprisonment within the meaning of section 921.141(5)(a).").

Probation officer Jacobs testified that William Melton a/k/a Troy Merck had been released from prison with a term of probation to follow and he went over the rules and regulations with Merck in the Exhibit 13 probation order (Vol. XIII, R. 630-633). The Exhibit 13 probation order plainly indicates that Merck had one year of probation consecutive to four years in the Department of Corrections (Vol. V, R. 806). Merck satisfied the under sentence of imprisonment aggravator under the exception noted in Peek, *supra*. But even if the Peek exception were not applicable, the legislature's subsequent revision of F.S. 921.141(5) to clarify with the "placed on community control or on felony probation" language puts the case in a similar posture to Trotter v. State, 690 So.2d 1234 (Fla. 1996), cert. denied, --- U.S. ---, 139 L.Ed.2d 134 (1997) where the Court rejected an ex post facto challenge and

found the community control language to be a refinement in the sentence of imprisonment factor.

> Custodial restraint has served in aggravation in Florida since the "sentence of imprisonment" circumstance was created, and enactment of community control simply extended traditional custody to include "custody in the community." See §948.001, Fla. Stat. (1985). Use of community control as an aggravating circumstance thus constitutes a refinement in the "sentence of imprisonment" factor, not a substantive change in Florida's death penalty law.

Id. at 1237. Thus, this Court disagreed with Trotter's claim, "just as [it has] found no violation in every other case where an aggravating circumstance was applied retroactively - even on resentencing." Id.; see e.g., Jackson v. State, 648 So.2d 85 (Fla. 1994)(victim was law enforcement officer aggravator); Valle v. State, 581 So.2d 40 (Fla. 1991)(same); Zeigler v. State, 580 So.2d 127 (Fla.)(CCP aggravator), cert. denied, 502 U.S. 946 (1991); Hitchcock v. State, 578 So.2d 685 (Fla. 1990)(under sentence of imprisonment aggravator), vacated on other grounds, 505 U.S. 1215 (1992); Justus v. State, 438 So.2d 358 (Fla. 1983)(CCP aggravator), cert. denied, 465 U.S. 1052 (1984); Combs v. State, 403 So.2d 418 (Fla. 1981)(same), cert. denied, 456 U.S. 984 (1982).

Recently, this Court found that the proposed application of a new aggravator would be an ex post facto violation. In Hootman v. State, 709 So.2d 1357 (Fla. 1998), this Court held that subsection 921.141(5)(m), Florida Statutes (Supp. 1996), could not be applied

to a murder committed prior to the new aggravator's effective date of October 1, 1996. The (5)(m) aggravator applies when "[t]he victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim." § 921.141(5)(m). Because "advanced age of the victim had not been part of any of the previously enumerated factors," this Court held that "the legislature altered the substantive law by adding an entirely new aggravator to be considered in determining whether to impose the death penalty." Hootman, 709 So.2d at 1360.

This case is more like Trotter than Hootman. As far as the "under sentence of imprisonment" aggravator is concerned, felony probation is the functional equivalent of community control. See ch. 948, Fla. Stat., entitled "Probation and Community Control." Felony probation, just like community control, is a type of custody in the community. § 948.001, Fla. Stat. (1997). Therefore, felony probation is also an extension of custodial restraint and merely a refinement of the (5)(a) aggravator, rather than a substantive change like the (5)(m) advanced age aggravator. Thus, no error occurred when the trial court allowed the state to introduce evidence that Merck was on felony probation or when the trial court

instructed the jury on, and then found, that the felony probation

aggravator had been established.[8]

Moreover, the correctness of the lower court's action is fortified by this Court's action in promulgating Standard Jury Instructions in Criminal Cases--No. 96-1, 690 So.2d 1263 (Fla. No. 89,053, March 6, 1997), wherein this Court ordered that these new instructions "will be effective on the date this opinion is filed". The pertinent instruction provides:

> F.S. 921.141(5) The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> Note to Judge Give only those aggravating circumstances for which evidence has been presented.
>
> 1. The crime for which (defendant) is to be sentenced was committed while [he] [she] had been previously convicted of a felony and [was under sentence of imprisonment] [or] [was placed on community control] [or] [was on felony probation];

(690 So.2d at 1265)

In Collins v. Youngblood, 497 U.S. 37, 111 L.Ed.2d 30 (1990)

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[8]A further note on Hootman. There the Court expressed a concern that unlike prior cases Hootman would have allowed juries to be given additional detrimental information to consider in making its recommendation and that judges and juries might predicate a death sentence on the victim's advanced age as the sole determining factor in aggravation. Id. at 1360. Whatever theoretical possibility that may have represented in that pre-trial vacuum, that certainly is not the case here where there are two other strong aggravators (HAC, prior violent felony convictions) and the under sentence of imprisonment-felony probation aggravator does not provide much more damaging information than the properly considered series of prior violent felony convictions for robbery.

the Supreme Court cited with approval the formulation in an earlier decision Beazell v. Ohio, 269 U.S. 167, 70 L.Ed.2d 216 (1925):

> "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto.*" *Id.,* at 169-170, 46 S.Ct., at 68-69.
>
> * * *
>
> The *Beazell* formulation is faithful to our best knowledge of the original understanding of the *Ex Post Facto* Clause: Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts.

497 U.S. at 42-43.

See also California Dept. of Corrections v. Morales, 514 U.S. 499, 132 L.Ed.2d 588, n 3 (1995)("After *Collins,* the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable."). The challenged statute neither punished as a crime an act previously done which was innocent when done nor made more burdensome the punishment for a crime after its commission, nor did it deprive one charged with a crime of any defense available at the time when the act was

committed.

(C) Harmless error:

Finally, any error in this regard must be deemed harmless. The jury returned a unanimous recommendation of death, amply supported by two other valid aggravators -- the HAC factor (previously approved by this Court) and prior violent felony conviction aggravator (unchallenged in this appeal and the evidentiary support demonstrating several armed robberies committed before the instant homicide). Thus, Mr. Merck's conduct at the City Lites parking lot was not an isolated, aberrant incident of law breaking. The mitigation was weak; Merck has no brain damage, mental retardation, or psychosis and the emotional disturbance found and given little weight was even in dispute between Dr. Merin and Ms. Heide. Removal of the "felony probation" factor from the calculus would not reasonably yield a different result to the character analysis.

ISSUE V

WHETHER ERROR TO EXCLUDE EVIDENCE THAT NEIL THOMAS WAS THE MURDERER.

This Court has consistently rejected residual or lingering doubt as a non-statutory mitigating factor. King v. State, 514 So.2d 354, 358 (Fla. 1987); Tafero v. Dugger, 520 So.2d 287, 289, n 1 (Fla. 1988); White v. Dugger, 523 So.2d 140 (Fla. 1988); Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988); Chandler v. State, 534 So.2d 701, 703 (Fla. 1988)(a resentencing is not a retrial of the defendant's guilt or innocence); Downs v. State, 572 So.2d 895, 900 (Fla. 1990); Hitchcock v. State, 578 So.2d 685, 690 (Fla. 1990); Waterhouse v. State, 596 So.2d 1008, 1011 (Fla. 1992); Preston v. State, 607 So.2d 404, 411 (Fla. 1992); Bogle v. State, 655 So.2d 1103, 1107 (Fla. 1995); Sims v. State, 681 So.2d 1112, 1117 (Fla. 1996). Appellant now asks this Court to ignore that precedent to urge that Neil Thomas rather than Merck killed Jim Newton, in the guise of mitigation.[9]

[9]Appellee also submits the claim is procedurally barred. In his sentencing memorandum below, appellant did not argue the mitigator of "Neil Thomas as murderer" (Vol. IV, R. 707-730). He observed there "Although Merck still categorically maintains his innocence, he and his counsel recognize that, based upon the original jury's conviction of first degree murder, this memorandum must be written from the perspective that Troy Merck was the individual who committed the stabbing. Nevertheless, Merck does so without waiving any objection or position relating to his limited role in the homicide" (Vol. IV, R. 707-708).

While it is true that the Court has held that the trial judge has discretion in a resentencing proceeding to allow the jury to hear evidence that will aid it in understanding the facts of the case to render an appropriate advisory sentence -- *see* Teffeteller v. State, 495 So.2d 744 (Fla. 1986); Bonifay v. State, 680 So.2d 413, 419 (Fla. 1996) -- obviously the trial court does not abuse its discretion by refusing to turn a penalty phase proceeding into a guilt phase proceeding (and exceeding the mandate of this Court) or by permitting evidence to confuse or mislead the jury, in the performance of its responsibility of returning a sentencing recommendation, or by subverting a long line of precedents of this Court that residual or lingering doubt is not a non-statutory mitigating factor. Furthermore, consideration of the proffer below and the totality of the evidence yields the conclusion that Merck (rather than Thomas) was the killer and that Neil Thomas' presence in the parking lot did not suffice either for a jury instruction or a finding that Merck was an accomplice in a capital felony committed by another person and his participation was relatively minor or that he acted under the substantial domination of another, or that an equally culpable co-perpetrator received disparate treatment.

As below, appellant relies on Downs v. State, 572 So.2d 895 (Fla. 1990) which held that it was harmless error to exclude a

portion of the testimony of the defendant's grandmother that Downs was with her when the murder occurred to corroborate the view that another man was the triggerman. The Court found in the record overwhelming proof to render the grandmother's cumulative testimony harmless beyond a reasonable doubt. Later, in Hitchcock v. State, 578 So.2d 685, 689, n 7 (Fla. 1990) this Court found the Downs case inapplicable because the latter case involved the disparity between his actions and those of his accomplices and their resultant sentences might mitigate Downs's sentence and Hitchcock had no accomplices. The same is true here. Neil Thomas was not a principal or co-conspirator and the testimony both in the prior trial and resentencing established both that he did not kill or participate in the killing to merit a reduced sentence for Merck. *See* Katherine Sullivan testimony that Merck was the shorter of the two with the droopy eyes that stabbed Jim Newton after stating he was going to show him how to bleed and that Neil Thomas did not kill the victim but only mimicked Merck (OTR 419-469; Vol. XII, R. 469-506). Neil Thomas testified at the resentencing that he warned the victim prior to Merck's assault -- as Sullivan testified -- to "haul ass" or there would be a serious beating, that he did not notice Merck's use of a knife until afterwards and Merck's subsequent admissions and recounting of the incident (which in the prior trial Merck had repeated to other defense witnesses)(Vol.

XII, R. 546-554).[10] The pants issue remains a red herring as Merck admitted in the prior trial that he was wearing the Exhibit 21 pants upon which the victim's DNA and blood were found and Detective Nester did not retain other pants found in the vehicle because they appeared to have no evidentiary value.

A defendant may not complain that his death sentence is disproportionate to that of a co-perpetrator where the latter is ineligible for the death penalty. *See e.g.*, Larzelere v. State, 676 So.2d 394 (Fla. 1996)(codefendant's acquittal exonerated him from culpability as a matter of law and thus irrelevant to a proportionality review of the defendant's death sentence); Henyard v. State, 689 So.2d 239, 254 (Fla. 1996)(codefendant aged fourteen was not eligible for a death sentence and his lesser sentence was irrelevant to Henyard's proportionality review); Mordenti v. State, 630 So.2d 1080, 1085 (Fla. 1994)(contact person received immunity

[10]If the Court is to review the prior appellate transcript on this point, appellee refers the Court to Mr. Merck's admission that he was wearing the Exhibit 21 pants on which FBI expert Mertens testified that the blood matched the DNA profile of victim James Newton (OTR 857, 576-579), the testimony of defense witness Roberta Connor that Merck announced to her that "I killed the mother-fucker" and that he had cut a main artery (OTR 930-932), that defense witness Rebecca Shuler testified Merck said he didn't give the victim a chance to hit him and that if she told anyone of the incident he'd take the closest thing to her (OTR 977-978), that rebuttal witness Sandra Ledford testified appellant admitted stabbing the victim and would take the closest thing to her if she told on him (OTR 1046).

whereas hit man who carried out contract murder properly received death).

Here, Neil Thomas' non-violent presence in the parking lot and being unaware of Merck's murderous intent until told afterwards by him cannot provide an appropriate basis for urging the sentencer that Merck's sentence should be reduced. *See* Preston v. State, 607 So.2d 404, 411 (Fla. 1992)(evidence that Preston's brother admitted committing the murder only suggested residual doubt and did not tend to establish mitigating circumstance that he was an accomplice in murder committed by another and that he acted under extreme duress or the substantial domination of another); Bogle v. State, 655 So.2d 1103, 1107 (Fla. 1995)(exclusion of evidence of facial scratches on defendant's face not error or if error harmless beyond a reasonable doubt); Sims v. State, 681 So.2d 1112, 1117 (Fla. 1996)(rejecting attempted use of lingering doubt as imperfect self-defense mitigator). *See also* Melendez v. State, 612 So.2d 1366 (Fla. 1992)(arguments relating to proportionality and disparate treatment are not appropriate where prosecutor has not charged the alleged accomplice with a capital offense).

Appellant's claim must be rejected.

PRO SE ISSUE I

DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL AT GUILT PHASE.

Appellant contends that he was denied effective assistance of counsel at the guilt phase of his trial. This Court well knows it is not as convenient as it seems to remand for a partial evidentiary hearing on a claim of ineffective assistance of trial counsel during the pendency of an appeal. *See* Nixon v. State, 572 So.2d 1336, 1340 (Fla. 1990)("We recognize the confusion resulting from our remand for these atypical proceedings and decline to dispose of this claim on the present state of the record which we view as less than complete."). *See generally* Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987)("A proper and more effective remedy is already available for ineffective assistance of trial counsel under rule 3.850. If the issue is raised on direct appeal, it will not be cognizable on collateral review."). *See also* Lawrence v. State, 691 So.2d 1068, 1074 (Fla. 1997); Consalvo v. State, 697 So.2d 805 (Fla. 1996); McKinney v. State, 579 So.2d 80, 82 (Fla. 1991). Appellee submits that it is more appropriate for full development of challenges to trial counsel's performance to utilize the postconviction vehicle of Rule 3.850, rather than the necessarily incomplete vehicle of appeal.

Alternatively, trial counsel was not ineffective for failing to timely file post-trial motions relating to Detective Nester and the khaki pants since this Court determined on the last appeal that there was no denial of due process in the failure to preserve the pants which had no blood stains. Merck v. State, 664 So.2d 939, 942 (Fla. 1995). Thus, there was neither deficiency nor resulting prejudice.

PRO SE ISSUE II

THE PROSECUTOR'S ALLEGED KNOWING USE OF PERJURED TESTIMONY BY WITNESS THOMAS NESTER.

Appellant contends that the state knowingly used perjured testimony of Detective Tom Nester. Appellee disagrees that there was any perjury. Nester testified in the previous trial -- and this Court affirmed -- that there were a pair of khaki pants which were not placed into evidence because they had no evidentiary value, that he checked them for blood stains, that Katherine Sullivan mentioned the stabber had khaki-style pants and there were no blood stains on the pants he did not retain in evidence (OTR 1053-59). At the resentencing proceeding Nester reiterated that testimony on a proffer (Vol. XII, R. 649-661). Nester explained that it was not correct that when he removed the khaki pants it went through his mind that those are consistent with what the witness said the stabber had worn (Vol. XII, R. 656) but that he had checked for blood stains and when there were none he put them back in the vehicle (Vol. XII, R. 657). There was no perjury and as this Court ruled on the last appeal no violation of due process pursuant to Arizona v. Youngblood, 488 U.S. 51, 102 L.Ed.2d 281 (1988). Merck v. State, 664 So.2d 939, 942 (Fla. 1995).

Appellant also apparently seeks to have this Court revisit the prior appeal by urging four witnesses gave comments suggesting that Neil Thomas not Merck was the killer. The totality of the testimony was to the contrary. (1) Katherine Sullivan was positive

in her in-court identification of Merck as the killer, whom she had also identified from a photo pack. He was the shorter of the two men who took off his shirt and threw it into the back of the car prior to the assault. She noted his droopy eyes which reminded her of a high school friend (OTR 420-449; Vol. XII, R. 476-504). (2) Neil Thomas testified both in the resentencing proceeding and the original trial that Merck stabbed the victim (Vol. XII, R. 546-554; OTR 750-751). (3) According to Richard Holton the assailant started hitting the victim declaring, "I'll show the jerk how to bleed" and the taller man who didn't do the stabbing was the driver who had a confused look on his face (OTR 723-725). (4) Fingerprint examiner Brommelsick testified at the prior trial that both Thomas' and Merck's prints were on the exterior of the car (OTR 610-613). The prints of both were on the roof (OTR 622).

Appellee adds that at the initial trial Merck admitted on cross-examination that he wore the Exhibit 21 blue pants on which the FBI found the victim's blood (OTR 857; OTR 576-579).

PRO SE ISSUE III

WHETHER THE VERDICT OF GUILTY IS CONTRARY TO THE LAW OR THE WEIGHT OF THE EVIDENCE.

This is an appeal from the resentencing proceeding imposing a sentence of death pursuant to a remand order by this Court; it may not be used as a belated rehearing of the affirmance of the judgment of guilt by a unanimous court. Merck v. State, 664 So.2d 939 (Fla. 1995).

Appellant continues to urge that Detective Nester committed perjury; the state submits as argued below, that there is no perjury, that Detective Nester's testimony was a matter of semantics not newly discovered evidence. (Vol. VIII, R. 843-844). In the prior guilt phase trial eyewitness Katherine Sullivan was positive that Merck -- shorter than Neil Thomas -- was the man who attacked and killed Jim Newton. She also selected his photo from a photo pack and noticed the killer had droopy eyes (OTR 420-449). Another witness Richard Holton testified that the taller companion didn't do the stabbing and drove the car away (OTR 724-725).

This Court need not review the evidence which supports the original guilty verdict and this Court's affirmance of the judgment of guilt.

PRO SE ISSUE IV

WHETHER THE LOWER COURT ERRED REVERSIBLY IN DENYING A MISTRIAL DURING THE PROSECUTOR'S EXAMINATION OF A WITNESS.

During the prosecutor's cross-examination of defense witness Dr. Kathleen Heide, the following transpired (Vol. XVI, R. 1112-1115):

> Q. And I think what you were talking about, even within the different levels of development, he hasn't reached a level of personality development where he truly sees himself accountable for his behavior?
>
> A. That is correct. That is -- would be a higher level than Troy has reached at this point in his life. So he doesn't see himself as accountable. Things just sort of happen. More of that -- again, what we would see in the normal development of a younger child wouldn't necessarily result at this point.
>
> Q. He doesn't have any kind of internalized value system is kind of another way of saying the things you just have been saying?
>
> A. That's correct, he doesn't have an internalized value system. Does that mean these things constitute a poor definition of himself? The answer would be no.
>
> Q. He doesn't believe in God or any type of religious --
>
> MR. ZINOBER: Your Honor, may we approach the bench?
>
> THE COURT: Yes, Mr. Zinober.
>
> (Whereupon, the following side bar conference was held outside the hearing of the jurors)
>
> MR. ZINOBER: Your Honor, I move for a mistrial based on basically appealing towards religious bias. I think it is totally improper in this case. There was no reason to throw religiosity in here. I don't have to bring a motion in limine on everything. Mr. Ripplinger should have known anything on that

> -- that is a blatant play to emotions. People are highly religious. That is saying like somebody is against blacks or something. I think that is prejudicial to my client.
>
> THE COURT: Mr. Ripplinger?
>
> MR. RIPPLINGER: Judge, a big part of her testimony is one of her bases for this factor is he doesn't have a value system. He doesn't care. In her report she mentioned he doesn't believe in God. That is part of the cross-examination on that.
>
> THE COURT: That should -- you all know what the cases say. That is not appropriate.
>
> Mr. Zinober, I'm going to deny your motion for mistrial. If you want me to, I can give a curative instruction to the jury right now to totally disregard the last question, that it has no bearing on this.
>
> MR. ZINOBER: I appreciate what the Court's doing, but I don't think that would cure it.
>
> (Whereupon the side bar conference was concluded)
>
> THE COURT: Members of the jury, as to the very last question asked by Mr. Ripplinger, I ask you to totally disregard that. We're going to strike it from the evidence because it has no bearing whatsoever on this case.
>
> You may proceed, Mr. Ripplinger.

The lower court did not abuse its discretion in denying the request for mistrial. Salvatore v. State, 366 So.2d 745 (Fla. 1978); Hamilton v. State, 703 So.2d 1038 (Fla. 1997); Cole v. State, 701 So.2d 845 (Fla. 1997); Gudinas v. State, 693 So.2d 953 (Fla. 1997). Reasonable persons could agree with the trial court's ruling. Hamilton, *supra*; Huff v. State, 569 So.2d 1247, 1249 (Fla. 1990). Appellee submits first of all that the prosecutor did not err egregiously in his cross-examination of defense witness Heide

concerning whether Merck had an internalized value system. She had previously opined about survivors coping strategy (Vol. XVI, R. 1048), the parents' failure to supervise (Vol. XVI, R. 1055) and the abandonment and alienation when a child doesn't have a sense of being connected to other people (Vol. XVI, R. 1073). The witness agreed that Merck was not psychotic and had normal intelligence (Vol. XVI, R. 1102) and that appellant seemed to react in this incident like a torrent of rage was unleashed (Vol. XVI, R. 1103). The best label she was able to give is "he went off", a nonprofessional term not cited in the DSM-IV (Vol. XVI, R. 1108-1109). She agreed that Merck was basically self-oriented, not capable of empathizing with other people and that it was not a problem for him to do something morally or legally wrong (Vol. XVI, R. 1112). Since Dr. Heide's thirty-three page report on appellant had noted his absence of belief in God (Vol. V, R. 808, p. 13), it was legally appropriate for the prosecutor to cross-examine the witness as to all the bases she had considered in forming whatever opinions drawn. See, e.g., Johnson v. State, 608 So.2d 4, 10-11 (Fla. 1992); Parker v. State, 476 So.2d 134, 139 (Fla. 1985); Muehleman v. State, 503 So.2d 310 (Fla. 1987); Jones v. State, 612 So.2d 1370 (Fla. 1992).[11]

[11]Appellee submits that the trial court erred in limiting the prosecutor's cross-examination of "expert" Heide under these cited authorities, as it had at the motion in limine in granting a defense motion in limine precluding the state from presenting evidence that the victim was celebrating the birth of his new

Appellee would submit that the brief query about a belief in God or other religious factor was not improper or unduly prejudicial in light of the witness' testimony attempting to explain his non-accountable personality development. But even if the question were deemed improper, the court took appropriate curative action by its instruction to the jury.[12]

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child, despite the prosecutor's proper reliance on the victim impact provision, F.S. 921.141(7), and Windom v. State, 656 So.2d 432 (Fla. 1995) (Vol. IX, . 17-21; see also Vol. V, R. 808).

[12]Appellant's claim truly rings hollow when it is remembered that Merck sought to use the benefit of religion to his advantage by introducing the testimony of cousin Jason Eller that he was a rising senior at a "Christian college" for students looking for "something spiritual" (Vol. XV, R. 873). This school "taught me how to actually love one another because I came from the same situation, a bad home, a broken home" (Vol. XV, R. 878).

PRO SE ISSUE V

THE EXCLUSION OF JURORS BECAUSE OF THEIR VIEWS OPPOSING CAPITAL PUNISHMENT.

Appellant complains that the trial court allowed about ten prospective jurors to be struck for cause simply because they held conscientious and/or religious convictions that were so strong they would never vote for the death penalty. The following jurors announced such strong religious or conscientious views: Gerow, Tice, Bedingfield, Blakely, Holcomb, Pascoe, Henry, Boksen, Jones, Cohen (Vol. IX, R. 105-106, 130-139). After questioning by the prosecutor and the defense the trial court agreed with the state that these jurors should be removed for cause (Vol. X, R. 294-305) and defense counsel agreed or did not announce opposition to Tice, Henry, Boksen (the defense would have removed her if the state had not), Jones, Holcomb, and Cohen (Vol. X, R. 294-305). Subsequently, prospective jurors Stanka, Bradley, Ovalle, Edmonds, and Keaton similarly announced religious or conscientious opposition to the death penalty (Vol. XI, R. 351, 357-359, 364, 368-369). The trial court granted a cause excusal to which the defense did not object for jurors Stanka, Ovalle, Keaton and Bradley (Vol. XI, R. 409-417). The court also granted a state motion to excuse Edmonds over defense objection (Vol. XI, R. 415).

To the extent that appellant is arguing that the state may not permissibly seek to have excused for cause jurors who are unable to follow the law and obey the trial court’s instructions, appellee

submits that he is mistaken. *See* Wainwright v. Witt, 469 U.S. 412, 83 L.Ed.2d 841 (1985); Lockhart v. McCree, 476 U.S. 162, 90 L.Ed.2d 137 (1986); San Martin v. State, 717 So.2d 462, 467 (Fla. 1998); Hudson v. State, 708 So.2d 256, 262 (Fla. 1998); Castro v. State, 644 So.2d 987, 989 (Fla. 1994); Hartley v. State, 686 So.2d 1316, 1322 (Fla. 1996).

To the extent that appellant may now be complaining about jurors who were excused for cause to which the defense did not object or agreed to removal below, the claim is procedurally barred and may not be renewed for the failure to contemporaneously object. *See* Rhodes v. State, 638 So.2d 920 (Fla. 1994); Archer v. State, 673 So.2d 17 (Fla. 1996); Peterka v. State, 640 So.2d 59 (Fla. 1994); Cannady v. State, 620 So.2d 165 (Fla. 1993).

To the extent that appellant is complaining about the excusal of prospective jurors to whom the defense did object, appellee submits that the jurors' expression of their adamant views fully warranted exclusion under the Witt standard (Vol. IX, R. 105-106, 131-133; Vol X, R. 226-227, 249-250; Vol. XI, R. 368-369).

Appellant's claim is without merit.

CONCLUSION

The instant jury after hearing evidence submitted by appellant's relatives, social workers, therapeutic foster parents, and expert Heide, returned a unanimous twelve to nothing recommendation of death; in the prior sentencing proceeding, yet another jury recommended death by a nine to three vote. Thus, two juries -- sometimes called the conscience of the community -- have expressed a consensus that death is the appropriate sanction by a combined vote of 21 to 3. Two trial judges have now agreed that death is the appropriate sentence and in 1995 this Court expressed the view than that a sentence of death was not disproportionate in this stabbing murder. 664 So.2d at 943. Appellee submits that nothing meaningful has changed and urges this Court to affirm the imposition of the sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Steven L. Bolotin, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P. O. Box 9000, Drawer PD, Bartow, Florida 33831, and Troy Merck, Appellant, DOC # 118167, Union Correctional Institution, P. O. Box 221, A1-P-2210-S, Raiford, Florida 32083, this _____ day of September, 1999.

_____

COUNSEL FOR APPELLEE