IN THE SUPREME COURT OF FLORIDA

TROY MERCK,	:	
Appellant,	:	
vs.	:	Case No. 91,581
STATE OF FLORIDA,	:	
Appellee.	:	
______________________________	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF TYPE USED

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STATEMENT OF THE CASE

Appellant, Troy Merck, Jr., was charged by indictment on November 14, 1991 in Pinellas County with the first degree murder of James Newton (1/3-4).[1] The case went to trial in November, 1992, and ended in a hung jury (OR1382,1386). After a second trial in September, 1993, appellant was found guilty as charged and sentenced to death (OR2010,2054,2129-35). On appeal, in a decision dated October 12, 1995, this Court affirmed the conviction, but reversed the death sentence and remanded for a new penalty trial (1/12-26). The resentencing proceeding took place on July 15-18, 1997, before Circuit Judge Nelly N. Khouzam and a jury. The jury unanimously recommended a death sentence (3/597; 18/1382), and the trial judge imposed the death penalty on September 12, 1997 (4/759,762-74; 7/927-48).

STATEMENT OF THE FACTS

A. State's Case

[1] In this brief, references to the record on appeal will include the volume number followed by the page number. References to the original trial record (which was made a part of the record in the instant resentencing proceeding, see 13/645-47,662-63) will be preceeded by the symbol OR (documents) or OT (transcript), followed by the page number.

Katherine Sullivan, a bartender at City Lites, was off-duty on the night of October 10-11, 1991; she was there partying with some friends. One of her friends, Jim Newton, was celebrating his birthday. Ms. Sullivan was drinking, as was Newton. She did not necessarily think she was drunk, but she felt she'd had too much to take a chance on driving home (12/467-69,474,492-93).

After the bar closed at 2:00 a.m., Ms. Sullivan was sitting in her car with her boyfriend Glenn listening to the radio, when she realized that someone was leaning against the car. The person leaning on the car was not appellant; it was his friend (Neil Thomas) (12/472, see 500-01). Glenn rolled down the window and asked him to please get off the car. Neil and appellant were being sarcastic and joking around, popping their heads in her window, but everything was fine. Jim Newton and Don Ward came up to the car to make sure everything was okay; Ms. Sullivan explained that there was no problem. Soon afterward, words were exchanged by appellant towards Jim Newton. Appellant had heard Ms. Sullivan congratulating Newton; he said something like "Congratu-fuckin'-lations". He was trying to goad Newton into fighting him, but Newton told Ms. Sullivan he was not going to fight. (12/473-75) Appellant called Newton a "pussy". He walked around to his car, which looked like a red Pinto, and took off his shirt, saying he was going to teach

Newton how to bleed. His friend Neil threw him the car keys. According to Ms. Sullivan, Neil said "Nice catch, Troy", appellant told him not to use his real name, and Neil then said "I said `boy'" (12/475-76, 488-89). Ms. Sullivan thought appellant was able to walk and talk okay (12/489).

She saw appellant reach into the passenger seat of the red car; he fumbled around in there, and then walked back and handed the key back to his friend. The whole time he was telling Newton he was going to teach him how to bleed. He was holding his hand to his side. He then charged at Newton and began throwing punches, reaching around Newton's back. Ms. Sullivan could see a blood spot on Newton's back every time he got punched. (R12/476-78) Ms. Sullivan testified, "It happened extremely quickly" (12/478, see 493-94). Newton wasn't moving; it was like he couldn't move. Ms. Sullivan saw a glint of silver off the streetlight; she put two and two together and thought it was a knife. The initial blows to the back were followed by some uppercuts. Newton was kind of falling down at that point. Ms. Sullivan saw Newton's head being pulled back, and she ran into the bar and told the bouncers to call 911 (12/479-81).

Ms. Sullivan testified that the entire incident took place very suddenly and quickly -- within about 15-20 seconds (12/493-94,

see 478). She was surprised and in a state of shock (12/493).

The defense also proffered the following direct examination of Ms. Sullivan, which was excluded by the trial court in accordance with her ruling denying the defense's pretrial motion (5/598; 9/36-45) [See Issue V, infra]. Ms. Sullivan had described the person who did the stabbing as wearing khaki pants (12/496). She recalled that the pants which had previously been introduced by the state as being the ones worn by Troy Merck on the night of the crime were not khaki (12/496-97). The defense reintroduced (for purposes of the proffer) those pants -- a pair of size 30 blue or dark slacks -- as Defense Exhibit 1 (12/508-09). According to Ms. Sullivan, it was appellant Troy Merck -- not his friend Neil Thomas -- who started the argument with Jim Newton, who goaded Newton to fight, who called him a "pussy", and made remarks like, "That's what a pussy would say" (12/497-98).

Donald Ward was also present in the parking lot when the stabbing occurred. He had had six or seven beers, maybe eight, and he was intoxicated (12/511,515). He saw a man go across the hood of a car, grab Jim Newton, and stab him in the midsection about six times (12/511,513-14). The whole thing happened pretty fast (12/514). Ward did not identify the attacker, but he recalled that the man had previously said "Happy birthday" to Newton (12/512). Ward

went over to try to help; Newton was bleeding from a cut in his neck, spitting up blood, and having convulsions (12/512-13)

James Carter, chief of security for the nightclub, ran out to the parking lot when Katherine Sullivan reported the stabbing. He saw a car pulling out of the parking lot and he got the tag number. Another co-worker was assisting Jim Newton, who was moving and coughing up blood (12/516-21).

Neil Thomas met appellant in a bar in Ocala a few weeks before this incident, and they became friends (12/528-29). Thomas acknowledged at trial that he had eight or nine felony convictions, "[s]omewhere in that vicinity", though he claimed to have changed his life since then (12/565,582).

After they began hanging out together, appellant and Thomas traveled to Sylva, North Carolina, where appellant's mother lived. They stayed for a week or two, drinking heavily every day (12/529-30,570-71). Thomas met a couple of girls; Rebecca (who had been appellant's girlfriend) and Roberta (with whom Thomas developed somewhat of a relationship)(12/531). On one occasion they went to see appellant's cousin in South Carolina; everybody was drinking and there was a confrontation which escalated into a shooting. Appellant's sister's boyfriend was shot. Appellant and Thomas were

witnesses to the shooting but they were not directly involved (12/531,571).

While in North Carolina, they bought a car -- a red Bobcat which resembled a Pinto -- from appellant's brother. Then they drove back to Florida to get Thomas' clothes and belongings (12/530,532). Appellant generally kept a hunting knife on his person, and he brought it to Florida with him (12/532-33).

On the Friday after their arrival, they went to the beach. Someone gave out a free admission or drink pass to City Lites, and they decided to go there that night. They got to the bar around 10:00 or 10:30 and stayed until closing time at 2:00 a.m. (12/534-37). They had pooled their money, but Thomas was the one who would purchase the drinks and bring them back to the table, since he was over 21, while appellant was 19 (12/537-38,574-75). Thomas and appellant were drinking the same amount -- "[w]e were kind of neck and neck" (12/537,575). Thomas estimated that he had five or six beers and a couple of shots of liquor, and appellant had about the same (12/537). At the end of the night, the bar had a dollar tequila shot special. Thomas remembered tequila being at the table with himself and appellant, but Thomas didn't recall having any himself (12/574). Thomas didn't recall any visible signs of physical impairment, such as staggering or slurred speech, in either

himself or appellant (12/538-39). However, Thomas could feel the effects of the alcohol; he variously described himself as "buzzed" or "fairly drunk" (12/539,573). Thomas' body weight was 185 pounds at the time of these events, while appellant weighed 144 pounds (12/575-76).

At closing time, Thomas wasn't ready to leave; he was just getting started. In the parking lot, Thomas caught up with some girls who had been contestants in the bar's "fake orgasm contest" and started talking to them, trying to show how he could do it better. He was leaning against a blue Camaro, and appellant was sitting on the back of the car (12/540-42,572-73). A female voice told them to get the hell off her car. Appellant replied sarcastically that he was sorry, he didn't mean to lean on her precious car, and appellant and Thomas started walking towards their own car (12/543,573). Thomas, however, was kind of mad because of the woman's tone, "[s]o I turned around and I was kind of looking for someone to provoke, and that's when I saw the -- that person" (James Newton) (12/543). Newton was standing by the driver's side of the blue car; neither Thomas nor appellant knew him nor had had any contact with him in the bar (12/539-40,543). Newton said "Why don't you get off the girl's car", and Thomas said something to the effect of "You look like a real pussy". Newton had his arms

crossed; he replied "Yeah, I'm a pussy", and Thomas shot back "That's what a pussy would say" (12/543-44). Thomas acknowledged that it was he -- not appellant -- who started in with Jim Newton (12/573); "I was trying to provoke the guy, and I really wasn't getting a response out of him" (12/544). According to Thomas, however, as the confrontation went on, appellant became very agitated. He took off his shirt and went around the side of the red car, saying "I'll show you a pussy". He threw his shirt in the car (12/544045). Thomas did not recall throwing the car keys to appellant; nor making any comments like "Nice catch, Troy"; nor appellant telling him not to call him by name (12/545,576-77). However, since he (Thomas) was the driver, he would have had to have given appellant the keys if the door was locked (12/577).

Thomas was still talking to the person he had been trying to provoke earlier. He told him, "You probably need to go ahead and haul ass and get out of here because you're fixing to get a real serious ass beating" (12/545-46). The guy did nothing. Appellant ran up, grabbed him around the neck, and started reaching around and punching him in the back. This lasted around 15 to 20 seconds; Thomas could hear faint popping noises accompanying the blows (12/546-48). Newton just stood there with his arms crossed, not fight-

ing back. Thomas didn't think he even knew what had hit him (12/546-47).

The prosecutor asked Thomas what was his last image before appellant let go. Thomas replied that his attention wasn't focused on the actual confrontation or fight, but "[i]t was kind of focused on the parking lot in general" (12/547). As he shifted his attention back to what was going on, he had just seen that appellant kind of had Newton by the hair and was throwing him back toward the hood of the blue car (12/547). As appellant was walking away, Thomas saw Newton bent over the hood and noticed that his shirt looked kind of wet (12/547-48). Appellant walked back to the red car, saying "Come on, let's go, let's go"; and Thomas agreed that it was time to go (12/549). Appellant was holding his hand stiffly by his leg, as if concealing something. Thomas had not seen a knife but he was starting to have suspicions (12/548-49).

They got into the car, with Thomas driving. As they drove away from the parking lot, Thomas asked appellant if he had stabbed the guy (12/550,553). Appellant held up his hand, and when the streetlight hit it Thomas could see that he was holding a knife and his hand was covered with blood (12/553-54). According to Thomas, appellant said "I fucking killed him" and "[I]f I didn't kill him, I'll go back -- find him in the hospital and finish the job"

(12/554). He said something to the effect that nobody was going to mess with his "road dog"[2] (12/555). Thomas testified in the resentencing trial that appellant described how he stuck the knife in the side of his neck and twisted it, and how he slit him across the throat a couple of times to make sure (12/554-55,560-61). [Thomas acknowledged on cross that he didn't recall mentioning any such statements in his testimony in the original trial or in deposition (12/578-82,587-88)]. Appellant told Thomas he would kill his grandmother if he said anything (12/554).

They pulled into an apartment complex where both of them changed clothes and they changed the tag on the car; "We were doing everything we could to get away from the cops" (12/555-56). They heard a police cruiser, and they ran through a field and a parking lot and across a couple of streets, ending up at a Burger King on US 19. Thomas called a taxicab to come and get them. They went to a bowling alley where they shot pool for twenty minutes, and then went back to their hotel (12/556-59). While in their hotel room Thomas was "very instrumental" in having appellant repeat to him five, six, or seven times, telling him and demonstrating how he

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[2] A "road dog", according to Thomas, is "somebody you hang around with, just people that aren't really accepted by society. You're just kind of kicked around" (12/555).

stabbed the guy (12/559-60,588). Thomas testified, "[I]t was like kids in a locker room that were describing a fight" (12/561).

The next morning, they went to where they had left their car. It was gone. Out of money, they developed a plan for Rebecca and Roberta to come down from North Carolina and help them get back there. When they called the girls, the police were there. Rebecca and Roberta eventually came down and met them at the Howard Johnson's motel where they were then staying. The police tracked them down at the hotel after Thomas called his grandmother (12/561-64).

Deputy Charles Vaughn testified that the red Bobcat was recovered in the parking lot of an apartment complex. A tag and a knife (State Exhibit 22) were inside the vehicle (13/596-99).

Detective Thomas Nestor, the lead investigator in the case (13/600,648; see OT665-93), learned that appellant was staying at the Howard Johnson's motel in Clearwater; he was subsequently taken into custody by other officers (13/600-01). The following proffered defense testimony was excluded pursuant to the trial court's pretrial ruling: Detective Nestor took the statement of the eyewitness Katherine Sullivan, who described the person who did the stabbing as wearing khaki pants (13/648). She also told Nestor that the person who stabbed Jim Newton was the same individual who started the argument with Newton (13/648-49). Detective Nestor

executed a search warrant and collected evidence from the Bobcat. A plastic bag containing various articles of clothing was removed from the back of the vehicle; among these items was a pair of khaki pants. Nestor visually examined the khaki pants, did not see any visible bloodstains, and therefore concluded that they "had no evidentiary value" and put them back inside the vehicle. The items which were not collected into evidence were left in the vehicle and returned to the registered owner (13/649-61).

The defense also proffered testimony from the original guilt phase trial of eyewitness Richard Holton (OT720-30), crime scene technician Alyson Morganstein (OT534-58), and fingerprint examiner Henry Brommelsick (OT606-22). Holton would have testified that the person who did the stabbing went around to the side of the Bobcat, pounded his hand on top of the roof and said throw me the keys (13/662). The forensic witnesses would have testified that Neil Thomas' palmprint was found on the roof of the vehicle directly above the passenger side door, while appellant's palmprint was further toward the rear of the roof (13/662). In the original trial, on cross-examination by the defense, Brommelsick had testified:

> Q. Someone went like, "Give me the keys", on the top portion of the car, right above the passenger side where the door handle would be,

> trying to get into the car, who would that have been according to your fingerprints?
>
> A. It would be Neil Thomas.

(OT622).

The state introduced documents showing appellant's four prior convictions of robbery with a deadly weapon (three from Lake County and one from Marion County) and one conviction of robbery (from Pasco County) (13/610; 5/801-05). Nathan Dudeck, a clerk at a Farm Stores in Dade City, testified that appellant, accompanied by a girl, came into the store. Appellant put a knife to his throat, pushed him to the floor, and took about 65 dollars from the register; then he and the girl left (13/612-14).

The state called a D.O.C. probation officer from Ocala, who testified that appellant was on probation for the Marion County robbery at the time of the instant offense (13/629-33). The probation order was introduced into evidence (13/630-32; 5/806).

Associate medical examiner Robert Davis performed an autopsy on James Newton (14/675-76, 683). The cause of death was multiple stab wounds. There were thirteen wounds in all; seven were stab wounds and the remainder were described as superficial cuts and scrapes (14/684,687-709,714-15). Some of the superficial injuries were, in Dr. Davis' opinion, consistent with defensive wounds (14/710). The most serious of the injuries was a stab wound on the

side of the neck which got the carotid artery and jugular vein (14/699-7001). Dr. Davis testified that this injury was consistent with the knife having been twisted, or with the victim having moved while it was being inflicted (14/703-06,721). The prosecutor showed Dr. Davis State Exhibit 22; and the doctor testified that the depth and nature of the stab wounds were consistent with that knife (14/706-07). Dr. Davis could not tell the sequence in which the injuries were inflicted (14/712-13).

Newton's blood alcohol level was found to be .18 (heart blood) or .21 (vitreous) (14/710-11,716). Dr. Davis described this as a "significantly elevated" level (14/711). Asked by the prosecutor what physical impairment this would cause in a person of Newton's size (188 pounds), Dr. Davis replied that this would vary with the individual, but "a person would be affected by this level of alcohol" (14/711, see 684). It would not render him unconscious nor incapable of feeling pain, but there would be a degree of decrease in his capacity to feel pain (14/711-12,719).

Dr. Davis testified that after the stab wounds were inflicted, Newton would have gone into shock (which would have further diminished his ability to perceive pain) in perhaps less than a minute; he would likely have become unconscious in two to five minutes; and

death would have occurred in five to ten minutes (14/ 713-14,734-36).

B. Defense Case

Ronald Bell is the chief toxicologist for the Pinellas/Pasco medical examiner's office; it was he who performed the toxicological analysis during the autopsy of James Newton which showed a .18 heart blood alcohol and a .21 vitreous blood alcohol (14/749,751). Bell testified that you can estimate a person's blood alcohol content without actually testing the fluid if enough information is known, such as the individual's sex, his or her body weight, and the amount of alcohol consumed within a specific period of time (14/750-51). Based on the testimony of state witness Neil Thomas that Thomas and appellant had each consumed about six beers and two or three shots of liquor between 10:30 p.m. and 2:00 a.m., and based on a body weight of 180 for Thomas and 144 for appellant, Bell estimated Neil Thomas' blood alcohol level at .15 and appellant's blood alcohol level at .21 (14/752-54,756-57). .21 indicates a significant degree of impairment (14/754). Allowing for variations among individuals, Bell testified the total range of possibilities within a 90 percent statistical certainty is that appellant's blood alcohol was between.16 and .26 (14/757-58). The

overt effects of alcohol vary among individuals; persons who consume alcohol on a regular basis may develop a tolerance and display fewer outward symptoms of impairment (14/761-63).

Dr. Edward Willey, a pathologist in private practice, reviewed the autopsy report and other materials and concluded that James Newton probably became unconscious less than a minute after receiving the neck injury (14/771-73,780,790). If someone is moaning or rolling on the ground it means that they are not comatose, but it does not necessarily mean they are conscious (14/773). Asked how Newton's blood alcohol content of .18 would affect his ability to feel pain, Dr. Willey answered that alcohol blunts pain to some extent and it also alters the perception of it. "[T]he greater the amount of alcohol in the blood the greater the influence" (14/774). Alcohol affects the higher cortical centers of the brain. For medical purposes it is a poor anesthetic, but nevertheless it was used as an anesthetic even for major surgery before here were better things available (14/774).

Asked whether a .21 blood alcohol content (appellant's level according to toxicologist Ron Bell's estimate) would affect a person's ability to think, reason, and exercise control, Dr. Willey answered "Most definitely" (14/775).

Stacey France is appellant sister. They also have an older sister, Roberta, and a brother, Tony. Troy, born in 1972, is the youngest (14/796-97,814). Their mother is Lois Merck. Stacey's father was Jess Whitmire. Nobody knows who Troy's father is; several men were coming to the house during the time when Lois became pregnant with him (14/798-99). Stacey thought it might be a man named Candy, because she and her brother Tony were in bed asleep, and she woke up beside her mother who was having sex with this person. Afterwards Lois was pregnant (14/797-98,807).

Jess Whitmire was an alcoholic, and his relationship with Lois was very violent. Stacey remembered Lois breaking a Coke bottle over Jess' head and seeing the blood streaming down his face, and she remembered Jess hitting Lois with the butt of a gun (14/799-800,831). While still married to Jess, before Troy was born, Lois began sneaking around with a seventeen year old boy named Hubert Merck (14/804-05). Eventually Lois and Jess separated, and she continued seeing Hubert, who was now staying nights in their house. Stacey testified, "daddy had us taken away for meanness. The Court gave us to another lady that kept us awhile", and after about a year Lois got the children back (14/799-800,805).

Hubert Merck was drafted and went to Vietnam (14/797-98,804, 806). With Hubert gone, Stacey remembered three different men com-

ing to the house. Lois would leave the kids at home in bed, and she would go into town to meet her boyfriends (14/806). When she found herself pregnant, Lois wouldn't admit to it. "She was very upset. She didn't want the baby from the beginning. She tried every way that she could think of to cause herself to abort him. She drank turpentine. She rubbed turpentine on her stomach." She got in fights. Although she tried to lose the baby every way she could, Stacey observed that "[t]he only thing she accomplished was messing him up, causing him to have problems when he was born" (14/808).

In the meantime, Hubert Merck returned from Vietnam, and he and Lois got married. When he learned of her pregnancy, she "tried to make out at first like the baby was his, but he knew better." After a blood test confirmed his suspicion, he left (14/808-09). Soon afterward Lois caught him in a beer joint dancing with her sister-in-law and she stabbed him in the neck (14/808-09). When he came back to the house to get his clothes, she wouldn't let him have them and she started a fight. Whenever he tried to leave she would get in the car and chase him. One time Hubert had left after a fight and he was walking up the road. Lois asked Stacey for her pocketbook (which Stacey had hidden at her mother's request) "and before I could get it she slapped me down and kicked me across the

living room floor, and she tore the scab off. She jumped in the car and tried to run over Hubert, and she didn't even stop to see if I was okay" (14/810,813).

After Troy was born, Hubert came to the house and held him one time; he never came back (14/810).

Troy was raised in a shack outside Seneca, South Carolina with his mother and (before she ran them off) his older siblings. There was newspaper on the walls to keep the air out. Stacey could remember lying in bed watching the wolf rats go into the bathroom and kitchen (14/824).

Lois never expressed any love for any of the children; only her boyfriends. "Troy didn't see any love. He wasn't brought up in love. he was brought up in violence" (14/811). Lois's brothers were always coming in drunk and fighting, and they didn't fight like brothers -- they fought to kill each other. One uncle took the other's head and banged it against the wall; there was hair and blood all over the door. Lois was always fighting with Jess Whitmire (who was back in the house). There was always somebody there drunk, and there was also Lois, who "didn't drink, but she didn't have to drink because she was mean to us and she beat us" (14/811-12).

Troy saw all of this violence; "[h]e grew up in it. That's all the boy knew" (14/812). Although Lois beat all of her children, Troy got the worst of it because he was the baby and he was at home; "[t]he rest of us, she had ran us off" (14/815). When all of the siblings were in the house, one of them got a whipping every day; "[w]hen it was just Troy there, he got it all" (14/832). Also, Lois blamed Troy for her losing Hubert (14/815). When he was born she was going to give him away to a family that lived down the road, but Stacey begged her not to. During Troy's childhood, Lois let him know that she had wanted to give him away, and told him he was useless (14/815).

Lois beat Stacey many times in Troy's presence. "She'd get you down on the floor and beat you with her fist or take a shoe heel and sit on you and hit you in the head with it." One time she held Stacey on the floor and beat her on the head with a big, round glass ashtray until she broke it (the ashtray). "And I still have problems with my head. I have had brain scans and things done, and they think this stems from all the beatings to the head" (14/812).

As previously mentioned, it was Troy who got the worst of the beatings (14/815,832). His head is full of scars where Lois beat him (14/815). In addition to her fist, she used broom handles, shoes, anything she could pick up (14/816). Sometimes she'd tell

Troy's older brother Tony to whip him. Once Lois had Pete Mathis ("an old boy there around the house that I think mama was sleeping with") tie Troy up in a chair, and then she beat him with a stick (14/816). When Troy was young he would hide under the floor all day long; when he got older he got to where he would fight back and defend himself (14/824).

Troy had a lot of trouble with other kids because of his eyes. (Before he had his surgery, one eye was almost completely closed; the left one he still cannot open real well). The other kids were always making fun of him and he was always having to fight (14/816-20).

Stacey spent her fourth, fifth, and sixth grade years at Tamassee DAR School, a Christian boarding school; her brother Tony was also there for a shorter time. Lois had placed them there "because she didn't want us. She didn't want to have to fool with us", but preferred to spend the time with her boyfriends (14/822-23,827). Stacey recalled when Troy was in the Collins Children's Home. Lois had moved to North Carolina at that time and she said to Stacey that it wasn't fair that she wasn't getting any money for Troy. "So she snatched him out of the Collins Children's Home so she could get a welfare check on him" (14/823).

Appellant's other sister is Roberta Crowe Davis. Her dad, she assumed, was Jess Whitmire. Jess was an alcoholic, and is now deceased (15/839-40). Her mother, Lois Whitmire, a/k/a Lois Merck, ran Roberta off when she was fourteen or fifteen (15/842). Lois and Jess were still together when seventeen-year-old Hubert came into the picture. Hubert would come to see Lois when Jess was at work. The Lois and Jess split up, and Hubert was drafted and went to Vietnam (15/840-42). Asked if she could remember other men coming to the house while Hubert was in Vietnam, Roberta said "Well, I could probably name you seven of them" (15/842-43). This was when Lois became pregnant with Troy. She knew that Hubert would leave her as soon as he got back, so she tried her best to abort the child. She tried various medicines and shots, and drank turpentine, but it didn't work. At first she wasn't going to keep the baby, but "she decided she might fool Hubert into thinking he was his" (15/843-44).

When Hubert came back from Vietnam, he and Lois got married. Hubert didn't know the child was someone else's until after Troy was born. Lois told him the baby was premature, but the doctor said he was a nine-month baby. "And so Hubert had tests run, and they said he wasn't his, so he then left" (15/844-45).

When Troy was an infant his mother wouldn't take care of him, so his sisters had to. Lois never showed him any love; she treated him like he was just something she had to put up with (15/845-46). When she would get angry she would whip him or beat him, "but mamma doesn't give whippings like people . . . usually do" (15/846). Whatever is close by you get hit with -- broomhandles, cups, shoes (15/846-47). Roberta (like appellant) still has scars on her head (15/846-47, see 14/815-16).

One of the men who would come to the house a lot when Troy was a child was Ray Price, who was in his mid-twenties. Troy would hang out with Ray because he had nobody to play with. Ray always drank, and he'd bring liquor. "And some people think it's funny to give a child a drink of liquor to see how they -- what it does to them, but he had told me before he had put liquor in [Troy's] bottle to get him to shut up crying, to go to sleep" (15/847-48). One day Roberta caught Troy out back on the porch sniffing gas; he was 4 or 5 years old. She asked him where did he learn to do that, and he said Ray showed him how to sniff gas and glue and paint (15/847).

When Troy was small, if there was any liquor on the table or in the refrigerator he would get it, or somebody would give it to

him. "And he was really not told by mother not . . . to do that" (15/849).

Roberta also testified that when Troy and his friend Neil Thomas were in North Carolina shortly before the stabbing incident for which Troy was on trial, she (Roberta) was dating a guy named Tommy Painter. While the four of them were visiting other relatives in South Carolina, Tommy Painter was shot to death; they "blowed half his head off". Roberta didn't know if Troy actually saw the shooting happen, but he was there (15/850-51).

Kathleen Eller is Lois Merck's sister and Troy's aunt. She recalled Lois becoming pregnant while Hubert was overseas, and Lois trying to get rid of the baby because she didn't want Hubert to know. Lois told Kathleen she took some turpentine and an overdose of sleeping pills. Kathleen warned her not to do that because it would harm her and go straight to the baby's system (15/857,859-60).

Nobody knows who Troy's father is; "[t]he only one he ever called daddy was Jess Whitmire". When Jess was drinking he would claim Troy, but when he was sober he didn't want him around, and that hurt Troy quite a bit (15/864).

Lois was pretty mean to Troy and she got really mean with him at times (15/862,865). "[S]he didn't whip the boy like he was sup-

posed to have been, you know, disciplined" (15/865). Whenever she took a notion, or thought about something that might have happened two or three weeks earlier, she would give him a whipping for it (15/865, see 864). She would hit Troy with anything she got her hands on, a curtain rod or anything (15/862). She would throw cups at him, and he'd run out the door dodging them (15/864-65). She would tell other people (such as his brother Tony, or just anybody that was around) to spank Troy or give him a whipping (15/862-63).

Kathleen never had any problem with Troy; he played with her sons Shane and Jason and they would scuffle and wrestle like boys being boys. She used to take the three of them fishing, and Troy seemed to enjoy that. One time Kathleen was playing gin rummy with Troy, "next-door to where him and his mom lived, and she came over there and just beat the fire out of Troy. And I never did know what it was all about, something that happened two weeks beforehand that he supposedly had done" (15/864).

Shane Eller is Kathleen's son and Troy's cousin. They lived nearby and saw each other often as kids (15/867-68). According to Shane, if Lois Merck got aggravated or Troy did something small, there was no warning. Whatever she got her hands on Troy got hit with (15/869). Shane saw him get hit with sticks, dishes, an ash-tray, and saw him getting beaten with belts for ten or fifteen

minutes (15/869-70). The kids would hide up under the trailer for hours to get away from her, waiting for her to cool off. When Troy would eventually come out, "[h]e'd get beat" (15/869). Lois' other children were mistreated too, but there was a big difference with Troy and he was mistreated a lot more. In Shane's observation, as Lois got older she just got meaner (15/870). She would make the older brother Tony whip Troy; if he didn't do it they both got whipped. Shane felt that Troy was actually a lot better off if Tony did whip him. However, "[i]f Tony whipped him and Lois wasn't satisfied with the whipping, [Troy] would get it later on because she was still mad about it" (15/871).

Shane's brother Jason Eller also played with Troy as a child. He recalled Lois whacking Troy several times with a broom handle; Jason ran because it scared him too. Sometimes Lois would hit Troy with a belt, "not even aiming. She would just start swinging it, and wherever it landed, it landed" (15/876). Jason never heard Lois speak nicely to Troy; instead she "would verbally abuse him, maybe tell him he wasn't any good, maybe she didn't want him" (15/876). Troy was picked on a lot by other kids because of his eyes. They would harass him and try to provoke him to fight. Troy didn't want to fight, but sometimes he did end up fighting with them (15/876-77).

Jason testified that his own family was also very poor, but his mom, Kathleen, never mistreated or hit her children (15/875). When Jason was ten, he and his brother were placed by Social Services in the Tamassee D.A.R. School, a Christian-based boarding school for children from broken homes or bad environments. Jason spent ten years there until he graduated from high school; Shane spent six or seven years there. Jason testified that the school taught him to love, help, and understand other people (15/877-79). He is now a music major at Southern Wesley College with a year to go until graduation; he still receives financial support from Tamassee School as long as he keeps his grade average above 3.0 (15/873-74, 878). Asked if his mom ever tried to pull him out of the school, Jason testified:

> No. Actually it was the opposite. After she went through the court case and everything she went through in order to get to see us again, which was about a year and a half, two and a half years, she reassigned us into the school. She loved us enough to say this is more beneficial than what I can give you. This is what I want you to have but I can't give you. So she reassigned us back in the school each of the following years.

(15/879)

The testimony of Nancy Pate was presented by videotape (15/880-84;3/520-22;2/308-41). She was a school counselor/evaluator and later a school psychologist (2/311,320,325). She met Troy when

he was referred for testing at the beginning of second grade, at age seven (2/313). During a home visit she was surprised to see newspapers stapled to the walls; she was later told by the social worker that poor people often do that for insulation (2/315-16). Ms. Pate noticed Troy's drooping eyelids; he had to tilt his head up an exaggerated amount because the lids fell down over his eyes. In addition to a visual problem in his left eye, he was asthmatic and his dental hygiene was poor (2/317-18,326).

Ms. Pate administered tests to Troy on two occasions when he was seven. After the first battery of tests she determined that he needed a highly structured classroom setting, and noted that he responded well to praise. As the school year progressed, however, it became increasingly apparent that Troy was failing to profit from instruction (2/318-23). He was referred for additional testing. In her report Ms. Pate noted that Troy appeared to have an extremely low self-concept. He made statements that "People hate me" and "I am very ugly" and "No one wants to be around me" (2/322-23). Ms. Pate observed that at age seven Troy was manifesting strong antisocial tendencies, and she recommended that he be placed in a psychoeducational center for children with emotional disabilities (2/323,335).

Three years later, when Troy was ten years old, he was tested for a third time (2/324-26). The test results showed indications of mental confusion, withdrawal, and impulsiveness, as well as low self-reliance, low feelings of belonging to a group, inadequate social skills, and antisocial tendencies (2/328-30). When Troy took the Weschler Intelligence Scale, Ms. Pate made note of several of his responses which she felt were reflective of a violent content. One question was "what are you supposed to do if a boy much smaller than you starts to fight you"; Troy answered "Walk away, but if he keeps on, tell him you'll murder him". Asked to give two reasons why criminals are locked up, he said "To teach them a lesson" (a correct response) and "So they won't steal and get head blew off" (2/330). In Ms. Pate's opinion, these responses from a ten year old were consistent with someone who had been exposed to violence at a very young age (2/338).

George Olbon was Troy's teacher (from age ten until twelve or thirteen) in a self-contained emotionally handicapped class in Seneca, South Carolina (15/887-88,895). Troy was of normal intelligence; his problems were emotional (15/895). Olbon was working on developing in Troy a more positive self-concept and curbing impulsive behavior (15/889). Troy was affected by drooping eyelids and he had to look up with his head in order to see you (15/889).

At some point while he was a student in Olbon's class, Troy went to live at the Collins Children's Ministry Home, a residential facility in Seneca run by Joseph and Anne Rackley (15/890). While he was at the Collins Home, Troy's behavior, his school grades, his reading ability, his ability to follow instructions, and his ability to get along with others all showed marked improvement (15/890-92). His self-concept improved tremendously (15/891). Before going to the Collins Home he was reading on a low level, probably a 2.2 level. In math he was functioning on about a 3.2 level. By the time he left the Collins Home and Mr. Olbon's class to move to North Carolina, he had achieved approximate grade level (sixth grade) in math and was approaching that point in reading (15/891-92, 896).

On Troy's report card, Mr. Olbon wrote, "Troy has been a very good student. I'm proud of Troy and can see happiness that come from real peace from inside. Thanks for allowing Troy to be a part of my class" (15/894). Olbon explained that Troy "seemed to have found peace and was able to get along and be happier with himself. I just sensed a -- more happiness with him at that point than I had before" (15/894). He attributed the change in Troy largely to the Collins Children's Home (15/894-95).

Joyce Flowers was a social worker with the Oconee County School District. Troy was brought to her attention by Nancy Pate. After Troy was placed in the emotionally handicapped class, Mr. Flowers started working with him and his mother (15/900-04). She made home visits often; sometimes two or three times a week, other times on a weekly basis. Ms. Flowers found Lois Merck to be quite uncooperative. Many times there was a man at the house, and she often smelled alcohol on Lois's breath. Ms. Flowers would try to help her understand the problems Troy was having, and try to carry over what they were doing in school into the home, but it was to no avail (15/904-08). There was no healthy or positive relationship in the home. Troy was very sensitive and self-conscious, and he felt that nobody liked him and nobody wanted him around. Lois would say negative, derogatory things about him to the social worker. Ms. Flowers eventually came to the conclusion that this was not an environment Troy should be in any more (15/906-08). She began talking to Lois about the possibility of Troy being voluntarily removed from the home and placed at the Collins Children's Home (15/909).

Once Troy began living at the Collins Home, Ms. Flowers saw significant progress. Troy's behavior in school improved, he was listening and following directions better, and was making better

grades. When Ms. Flowers talked with him, he wasn't as angry or negative about himself; "he was seeming to see like a glimmer of light, you know, that things . . . could be different" (15/909-12).

However, when school was out that year, Lois Merck decided that she no longer wanted Troy to be at the Collins Children's Home, and she removed him from that facility. Ms. Flowers remembered calling her in North Carolina and talking with her about Troy returning to the Collins Home, and she refused (15/910-11).

Anne Rackley and her husband Joe are the founders and directors of the Collins Children's Home Ministry. Since 1980 they have had over fifty children in residence; there are usually ten to fourteen boys and girls at a time. Physically, it is like a big middle-class home with seven bedrooms. They strive to create a family atmosphere and work together to solve problems (15/913-17). Troy Merck was placed there through Joyce Flowers' referral. Troy's home environment was definitely the problem. Mrs. Rackley met Lois Merck and could not see any parenting skills in her. Everyone -- Mr. Olbon, Ms. Pate, Ms. Flowers, the Rackleys -- was in unanimous agreement that Troy needed to get out of the situation he was in (15/919-21).

When Troy came to the Collins Home he was frightened and unsure at first. It took him awhile to realize they weren't going

to hurt him or mistreat him; that he would get good food; and that he would "actually get to play and enjoy himself and go on trips and go shopping and go to movies and do things that . . . you normally want children to experience" (15/ 921-22). It was Mrs. Rackley's impression that Troy hadn't realized before that life could get better -- he thought that what he had experienced was just the way it was (15/922).

Troy's grades and behavior in school improved immediately, and the Rackleys were just so pleased. They were receiving positive feedback from the school system -- "[A]ll the things you want to hear about any child we were hearing about Troy" (15/922-23). He was participating with the extended family of children and adults in the Rackleys' home, and he was cast as a donkey in the Christmas play at church. Mrs. Rackley believed that this was significant, that he now felt enough self-confidence that he could portray a donkey and go down the aisle he-hawing with a little child sitting on his back. He liked the role and was proud of himself, and they were proud of him (15/923).

Troy ended the school year making Honor Roll for the first time, getting all Bs. He had just been taken out of the self-contained emotionally handicapped class (where the children feel stigmatized and excluded) and was going to be placed during the

upcoming year in a resource class (where extra academic help is available if needed, but he "was going to be a normal kid") (15/924). "And we celebrated. I mean we were so excited, because I mean this is a hard thing to do. . . . It was a big deal. You know, look at Troy. And he was the most proud of himself for that one thing than anything that I can remember" (15/924).

Then in June his mother called. She had moved to North Carolina and said she was coming to get Troy. The Rackleys told her he was not ready, told her all the good things he had accomplished, and said everything they could to convince her not to take him away, that this "was the moment we could do something or lose it" (15/925). Lois wouldn't listen. She said she was getting government assistance and she could not get her check unless she had him living with her (15/925).

Mrs. Rackley testified that she will never forget that time because it was so frustrating; "It's like you've got it right here and you can't hold it" (15/926). Troy sat there with his head down, defeated. He walked out the door with tears in his eyes. Mrs. Rackley wished that for the first time in his life he'd speak up and say what he needed, but he didn't and he left. Mrs. Rackley hugged him and told him she loved him, and would always love and pray for him (15/926-27).

Mrs. Rackley read to the jury the notation she had written at the time at the bottom of the discharge summary: "Mother insisted Troy move to Sylva to live with her so that she could collect payment for dependent care, food stamps, etc. -- Big mistake!" (15/927-28; 7/820). Mrs. Rackley testified that she had felt hurt, frustrated, and hopeless, "like the hope we thought we could give him walked out the door" (15/928).

Mrs. Rackley had no further contact with Troy until October or late September 1991 when he called her.[3] He said he was sorry that he had left the Collins Home, he was sorry that he didn't get to stay, that his life had never been the same. Troy told Mrs. Rackley "I love you, I'll try to call again". She testified, " . . . [H]e seemed defeated. It was kind of a sad time again, but there was nothing that could be done about it" (15/929-30).

Dr. Kathleen Heide is a criminologist, and is a tenured professor in the Department of Criminology at the University of South Florida. Her areas of specialization include juvenile and adolescent homicide; child abuse and neglect within dysfunctional families; and working with survivors of childhood trauma (16/996-

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[3] It is not entirely clear from the testimony whether this phone call took place before or after the homicide, which occurred on October 11. In the defense sentencing memorandum, counsel represented that the phone call was prior to the homicide (4/723).

98). [Dr. Heide's credentials are set forth in testimony (16/996-1028) and in her resume (Defense Exhibit 14 at 7/823)]. She conducted an assessment of Troy Merck, which consisted of a seven hour interview with Troy, as well as speaking with his sisters, his mother, and a former foster care parent, and reviewing clinical records (16/1029-30).

Dr. Heide noticed that Troy is extraordinarily hyperactive. She has assessed about 100 youths charged with violent crimes "and I've never seen a youth or young adult with that kind of activity level" (16/1031). Troy was 19 at the time of the crime and 25 when she interviewed him, but his personality developmental age is much younger than that; more like 10, 12, or at the most 14 (16/1038-40). He does not see himself as having choices or as being accountable for his behavior; he is not introspective, but tends to operate on the basis of formulas (16/1038).

Dr. Heide testified that arrested personality development can be caused by childhood trauma, and in Troy's case he experienced not only multiple trauma but severe trauma (16/1040,1042,1073). Throughout his childhood, he was physically, psychologically, and verbally abused, and physically, emotionally, and medically neglected (16/1041-42,1054-69). The pattern of abuse and neglect began before and just after his birth; he was unwanted by his mother and

rejected by both of the men who could have assumed the role of father (16/1041,1049-50). It is very painful for a child to have a parent reject him, and it can lead to low self-esteem and unresolved anger (16/1049). Troy's mother used to call him a stupid bastard and a God damn idiot, and told him she should have killed him when he was born (16/1059).

Both of the parent figures in the home were chemically dependent; alcoholism in Jess Whitmire's case and extensive abuse of mood altering medications in Lois Merck's (16/1041,1051-52). Children raised in chemically dependent households are subjected to a very high level of stress, due to the unpredictability and (emotional and actual) unavailability of their adult caregivers. After being repeatedly let down, children learn to stop trusting that adults are going to meet their needs, and eventually stop trusting people in general. Living in such circumstances becomes so painful that the child numbs himself; where there is possible anger, upset, or shame he learns not to feel it (16/1052-54).

When Troy was a child, his mother would grab and slap and spank him in a harsh and humiliating way. She would also kick him, bite him, punch him with her fists, and throw objects at him (16/1061-62). On one occasion he was hogtied by a neighbor and his mother beat him up while he was in that humiliating position (16/

1060). Lois's whippings were "all out fistfights on the ground. She would punch him, give him uppercuts, stomp on him." Troy recalled being hit with a broom handle, a Coke bottle, a perfume bottle shaped like a horse, and having a plate broken over his head (16/1061-63). When Dr. Heide asked him to estimate how frequently these "whippings" occurred, he said it was probably a couple of hundred times. Dr. Heide asked him how he arrived at that figure, "[a]nd he said . . . he was going to take it from the time he was two or three until he was about ten. And he said if he only had one beating a week -- he seemed to have more, but he said if he only had one beating a week for fifty-two weeks [per year] that would easily add up to a couple of hundred" (16/1063).

In addition to being the target of his mother's violence, Troy was constantly exposed to violence in his home and in his community (16/1042,1063-65). Lois would hit Jess Whitmire and her other boy-friends, and the boyfriends would whip Lois, although Lois, not surprisingly, "could pretty well hold her own". Troy recalled her shooting at her boyfriends, and an incident where she went after Ray Price with a gun (16/1064). He also remembered his older siblings being hurt by their mother; Tony being hit with a fishing rod, Stacey having an ashtray cracked over her head. He remembered his sisters responding with violence toward their mother (16/1064).

The effect of growing up in an environment where violence is routine, Dr. Heide testified, is that it desensitizes the person so that he stops thinking its a big deal. Violence is seen as just a normal part of everyday life -- it's how people solve their problems (16/1065).

Troy stopped attending school in the eighth grade. Although he is of normal intelligence, he was chronically bored and found it very difficult to sit still and do the work. This is consistent with the extreme hyperactivity Dr. Heide saw in him at age 25, and is consistent with attention deficit hyperactive disorder (ADHD) (16/1031,1065-66,1102-03). Individuals with ADHD are highly energized, impulsive, and find it difficult to sustain attention on a task (16/1066-67). Troy was diagnosed with an attention deficit problem at an early age and was prescribed Ritalin. However, due to parental neglect, he stopped taking his medication and he was not effectively treated (16/1067-68).

Despite his high activity level, Troy was not involved in sports; his mother wouldn't allow it because it was too expensive (16/1073). Other kids made fun of him because he was poor and small for his age, and mainly because of his appearance, calling him "Flop-Eye" and "Droopy-Eye". Dr. Heide observed that kids can be very cruel at that age, and the likely effect upon the child who

is their target is low self-esteem and a sense of inferiority. This can sometimes be ameliorated by a parent who is available emotionally, to assure the child that he has value and worth. In the absence of a supportive parent, the child is likely to see himself as deficient and ugly (16/1068-69). Dr. Heide took note of Troy's statements when he was seven years old that "I'm ugly" and "People hate me" (16/1069).

In addition to the eye problem (ptosis) and several resulting eye surgeries, Troy had respiratory problems, pneumonia, and head injuries (some from falls, some from being hit by his mother) as a young child (16/1071-72). He has an extensive history of alcohol use. He believed he was given alcohol by a male caretaker in early childhood. Troy began drinking alcohol on a regular basis when he was about eleven, and his sisters were aware that he was drinking to some extent at an ever younger age than that (16/1070). Troy recalled sniffing gas or paint when he was seven; his brother showed him how to do it, and he also inhaled chemicals with an adult (16/1071).

Dr. Heide expressed that the only way you can understand what happened with Troy when he was nineteen is "to understand what happened to him from the time he was an infant on up" (16/1084). In her opinion, three statutory mitigating factors are applicable; (1)

impaired capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law; (2) extreme mental or emotional disturbance (although not reaching the level of legal insanity or psychosis); and (3) age of nineteen, and operating on the level of a much younger child than that (16/1081-82,1098-1102). In addition, numerous other factors in Troy's childhood development contributed to his actions on the night of the homicide. These include (1) physical, mental, and emotional neglect; (2) physical, verbal, and psychological abuse; (3) rejection by two potential fathers; (4) chemical dependency of both adults in the household; (5) medical problems, including an early hospitalization; and (6) taunting and lack of acceptance by peers. Dr. Heide put these six factors in the category of severe and multiple childhood trauma (16/1077-78). Other contributing factors included (7) hereditary conditions including attention deficit hyperactive disorder, which made Troy biologically more hyperactive and impulsive than a normal child or adolescent; (10) Troy's learning difficulties and acting-out behavior in school, for which he was not permitted to receive meaningful help; and (8) his constant exposure to violence in his own home and in his neighborhood (16/1079-80). The ninth and eleventh contributing factors described by Dr. Heide are alcohol-related:

> . . . [T]he long history of substance abuse. What we know about substance abuse, when an individual started it early can impair development further. So you have a child who is already biologically at risk, who is exposed to a lot of violence, who is abusing chemicals, which is going to further impair his judgment.

(16/1079).

As for the last factor, Troy's excessive alcohol use on the night of the homicide, Dr. Heide testified that it "can impair judgment, and particularly this is going to have an effect on someone who is already impulsive, if someone's response is already to respond in a violent manner" (16/1080).

C. State's Rebuttal Case

Dr. Sidney Merin is a clinical psychologist and neuropsychologist. His credentials are detailed at 17/1040-47. Dr. Merin's initial involvement in this case came when he was retained by the defense to examine Troy Merck in early 1992 (17/1153,1192,1227).[4] Dr. Merin met with Troy for an hour or a little more, and then had

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[4] While the State's use of Dr. Merin in the resentencing trial under these circumstances appears highly questionable under Sanders v. State, 707 So. 2d 664, 668-69 (Fla. 1998), the lack of an objection below and the absence of any evidentiary development as to how or why this occurred precludes raising it as an issue on direct appeal. Appellant reserves the right to raise it on post-conviction, either separately or as part of an ineffective assistance claim, if necessary and appropriate.

someone from his office administer a series of psychological and intelligence tests, including the MMPI, the Wechsler Adult Intelligence Scale, the Bender-Gestalt, and several others (17/1154-76,1192,1204-05). Dr. Merin evaluated the test results and found good scores and no evidence of brain impairment. Troy showed an excellent memory, and performed particularly well on sensory-motor skills and visual, spatial relationships (17/1155, 1159,1162-66, 1170). He has very good artistic skills and some creativity; "his drawings were very, very fine" (1195-96). Troy's verbal IQ is 107 (in the upper end of the average range), his performance IQ is 112 (in the lower end of the bright average range), and his full scale IQ is 110 (17/1168,1195). Potentially he "could do good community college work and do reasonably well in some majors in a four-year college"; however, he does have a mild learning disability which could interfere with his ability to do college work (17/1195-96). Dr. Merin agreed that Troy may well have had attention deficit disorder, but this would not necessarily have interfered with his personality development (17/1178).

On the MMPI, which includes a number of different clinical scales, a T score of 50 is average, while a T score of 65 is significantly above average (17/1170-72). Troy had exceptionally high scores -- 93 and 92 -- on the PD scale (antisocial personality) and

the MA scale (energy level). He also had high scores -- above 65 -- on the paranoia scale and the schizophrenia scale. On the scale measuring potential for substance abuse, particularly alcohol abuse, he was in the pathological range with a score of 78 (17/1173-76).

Dr. Merin's diagnosis of Troy was that he has a personality disorder, n.o.s. (not otherwise specified). He has some of the features of antisocial, narcissistic, passive-aggressive, obsessive-compulsive, and borderline personality disorders (17/1179, 1181,1183-86). Dr. Merin concluded that the two statutory mental mitigators did not apply, and that Troy's alcohol consumption on the night of the crime would not have placed him within the category of extreme mental or emotional disturbance, nor substantially impaired his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law (17/1186-89, 1221). In Dr. Merin's opinion, Troy is neither psychotic nor neurotic; he knew right from wrong, understood the consequences of his actions, and was not suffering from any delusions or hallucinations (17/1179-81,1186-88). Dr. Merin acknowledged on cross that if Troy had a blood alcohol level of approximately .21, that "certainly suggests there is a high level of probable intoxication" (17/1223). However, he had opined on direct:

> You have to understand here is a man who had been drinking for many, many years. He had developed -- had to have developed a tolerance for it. So that if he drank that amount it's something that would have intoxicated someone else to a very significant extent, in my opinion, but would not have any significantly adverse effect on him. This is something that he just does all the time. So that his behavior would stem from who and what he was all about. All people who drink that amount of alcohol don't do what he is alleged to have done.

(17/1189).

On cross, Dr. Merin stated that he never spoke to Troy's mother or his sisters, or any of his teachers, or anyone else from his background (17/1209-10). "I assure you I spoke with no one else other than the commission I had, to examine this man alone. I read other documents which gave me some additional information, but even with those documents I relied on my examinations of this man" (17/1209, see 1210). Dr. Merin does not know anything about what Troy was subjected to as a child, other than what Troy told him (17/1218). Based on his diagnosis of borderline personality characteristics, he agreed that Troy probably experienced certain forms of abuse and rejection as a child, which would likely have led to a sense of abandonment and "would eventuate in an individual who has problems making adjustments in everyday life" (17/1214-15). On redirect, Dr. Merin made it clear that he was not suggesting

that Troy was not the product of a dysfunctional family or that he might not have suffered abuse (17/1227-28). In fact, his diagnosis would fit individuals who came from such a background (17/1228-29).

D. **Sentencing Order**

In her sentencing order, the trial judge found three aggravating factors, each of which was given great weight: (1) the capital felony was committed by a person under sentence of imprisonment (based on appellant's probationary status); (2) previous convictions of felonies involving the use or threat of violence; and (3) the capital felony was especially heinous, atrocious, or cruel (4/763-67). The trial judge found, but gave little weight to, two statutory mitigating factors: (1) age and (2) extreme mental or emotional disturbance (4/767-70; 7/946-47). As nonstatutory mitigating factors, the trial judge found and accorded some weight to (1) appellant's abused and deprived childhood; (2) his learning disability; (3) his lack of a parental role model, and (4) his capacity to form loving relationships (4/772-73).

SUMMARY OF THE ARGUMENT

Under Florida law, the death penalty is reserved for only the most aggravated and least mitigated of first-degree murders. In view of the totality of the circumstances surrounding the commission of this crime, and in view of the combination of mitigating factors including appellant's youth (age 19); his immaturity (uncontroverted testimony that his personality development was that

of a 10, 12, or at most 14 year old); the extreme physical and psychological abuse inflicted on him during his childhood; his history of emotional instability (documented as early as age seven); his learning disability; his history of alcohol abuse (from the age of eleven or even earlier); and the fact that he was very much under the influence at the time of the homicide (estimated blood alcohol level of .21, based on the amount he drank according to the state's witness), life imprisonment rather than death is the appropriate penalty. [Issue III]. Other significant errors which require reversal of this death sentence -- for imposition of a sentence of life imprisonment or, at the very least, for a new sentencing determination -- are the trial court's failure to find, weigh, or even evaluate the nonstatutory mitigating circumstances of appellant's history of alcohol abuse [Issue I], and his excessive drinking on the night of the offense [Issue II]; the ex post facto application of the felony probation aggravating factor [Issue IV]; and the exclusion of evidence tending to show that Neil Thomas was the person who stabbed the victim [Issue V].

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN FAILING TO FIND, WEIGH, OR EVALUATE AS A NON-STATUTORY MITIGATING FACTOR THE SUBSTANTIAL AND UNCONTROVERTED EVIDENCE OF APPELLANT'S LONG HISTORY OF ALCOHOL ABUSE.

A. The Campbell Rule

In its 1990 decision in Campbell v. State, 571 So. 2d 415 (Fla. 1990), and repeatedly thereafter, this Court has made it clear:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. See Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988). The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla. Std. Jury Instr. (Crim.) at 81. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly

> consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981). Hopefully, use of these guidelines will promote the uniform application of mitigating circumstances in reaching the individualized decision required by law.

571 So. 2d at 419-20 (footnotes omitted).

Compliance with the Campbell rule is a "bedrock requirement" of Florida death penalty law. Hudson v. State, 708 So. 2d 256, 259 (Fla. 1998); Walker v. State, 707 So. 2d 300, 319 (Fla. 1997). In Walker, this Court stated that "[s]ince the ultimate penalty of death cannot be remedied if erroneously imposed, trial courts have the undelegable duty and solemn obligation to not only consider any and all mitigating evidence" but also to expressly evaluate each mitigating factor proposed by the defendant to determine whether it is supported by the evidence. 707 So. 2d at 319. The Court in Walker continued:

> Clearly then, the "result of this weighing process" can only satisfy Campbell and its progeny if it truly comprises a thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty. We do not use the word "process" lightly. If the trial court does not conduct

> such a deliberate inquiry and then document its findings and conclusions, this Court cannot be assured that it properly considered all mitigating evidence. In such a situation, we are precluded from meaningfully reviewing the sentencing order.

707 So. 2d at 319.

As recognized in Crump v. State, 654 So. 2d 545, 547 (Fla. 1995) and Walker v. State, supra, 707 So. 2d at 318-19, "While all judicial proceedings require fair and deliberate consideration by a trial judge, this is particularly important in a capital case because, as we have said, death is different". [Emphasis in Walker opinion]. Absent a sentencing order which fully complies with the requirements set out in Campbell -- clear standards which have been reaffirmed and reemphasized in numerous decisions since then[5] -- this Court cannot properly fulfill it obligation under Florida's death penalty statute and the state Constitution to conduct proportionality review. Crump, 654 So. 2d at 547. Moreover, as recognized in Campbell, federal caselaw applying the Eighth Amendment states that:

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[5] See, e.g., Santos v. State, 591 So. 2d 160, 163-64 (Fla. 1991); Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995); Crump v. State, 654 So. 2d 545 (Fla. 1995); Larkins v. State, 655 So. 2d 95, 100-01 (Fla. 1995); Reese v. State, 694 So. 2d 678, 684-85 (Fla. 1997); Jackson v. State, 704 So. 2d 500, 505-07 (Fla. 1997); Walker v. State, 707 So. 2d 300, 318-19 (Fla. 1997); Hudson v. State, 708 So. 2d 256 (Fla. 1998).

> [j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. . . . The sentencer, and the [appellate court], may determine the weight to be given relevant mitigating evidence. <u>But they may not give it no weight by excluding such evidence from their consideration</u>.

571 So. 2d at 419 (quoting <u>Eddings v. Oklahoma</u>, 455 U.S. 104, 114-15 (1982)).

See also <u>Lockett v. Ohio</u>, 438 U.S. 586 (1978).

And, as this Court observed in <u>Santos v. State</u>, 591 So. 2d 160, 164 (Fla. 1991), the constitutional principle underlying the <u>Campbell</u> requirements is that mitigating evidence -- and especially uncontroverted mitigating evidence -- must at least be weighed in the balance, and may not be improperly ignored. See <u>Parker v. Dugger</u>, 498 U.S. 308 (1991).

B. <u>Long-Term Alcohol Abuse as a Nonstatutory Mitigating Factor</u>

A capital defendant's history of alcohol and/or drug abuse is a well recognized nonstatutory mitigating circumstance. See, e.g., <u>McKinney v. State</u>, 579 So. 2d 80, 85 (Fla. 1981); <u>Wright v. State</u>, 586 So. 2d 1024, 1031 (Fla. 1991); <u>Mitchell v. State</u>, 595 So. 2d 938, 942 (Fla. 1992); <u>Scott v. State</u>, 603 So. 2d 1275, 1277 (Fla. 1992); <u>Clark v. State</u>, 609 So. 2d 513, 515-16 (Fla. 1992); <u>Kramer</u>

v. State, 619 So. 2d 274, 276, 278 (Fla. 1993); Cannady v. State, 620 So. 2d 165, 168 (Fla. 1993); Besaraba v. State, 656 So. 2d 441, 447 (Fla. 1995); Voorhees v. State, 699 So. 2d 602, 615 (Fla. 1997); Puccio v. State, 701 So. 2d 858, 859 n.4 (Fla. 1997); Mahn v. State, 714 So. 2d 391, 400-01 (Fla. 1998).

In Mahn -- under the heading of "Drug and Alcohol Abuse as Nonstatutory Mitigation" -- this Court wrote:

> We have repeatedly stated that "[w]henever a reasonable quantum of competent, uncontroverted evidence of mitigation has been presented, the trial court must find that the mitigating circumstance has been proved." Spencer v. State, 645 So. 2d 377, 385 (Fla. 1994) (citing Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990)). A trial court may only reject the proffered mitigation if the record provides competent, substantial evidence to the contrary. Spencer; Nibert; Kight v. State, 512 So. 2d 922, 923 (Fla. 1987).
>
> Based on those standards, we also agree with Mahn that the trial court erred in giving no weight to his uncontroverted history of drug and alcohol abuse as a nonstatutory mitigating circumstance. See Clark v. State, 609 So. 2d 513, 516 (Fla. 1992) (finding defendant's extensive history of substance abuse constituted strong nonstatutory mitigation). This is especially true considering that the trial court acknowledged the uncontroverted evidence 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." In this case, Mahn's testimony and his prior statements are inconsistent as to whether he was actually under the influence of drugs or

> alcohol at the time of the murders. Nevertheless, we find no basis in the record for the trial court's characterization that the "evidence . . . is clear" that Mahn was not under the influence of drugs or alcohol at the time.
>
> Moreover, and contrary to the statements in the sentencing orders here, <u>evidence that Mahn was "not under the influence of drugs or alcohol" when committing the offenses is not the correct standard for determining whether long-term substance abuse is mitigating</u>. In <u>Ross v. State</u>, 474 So. 2d 1170, 1174 (Fla. 1985), we found the defendant's past drinking problems, among other things, to be "collectively . . . a <u>significant</u> mitigating factor" even though the defendant himself testified he was "cold sober" on the night of the murder. <u>Accord</u> <u>Penn v. State</u>, 574 So. 2d 1079 (Fla. 1991) (defendant's heavy drug use was significant mitigation); <u>Songer v. State</u>, 544 So. 2d 1010, 1011 (Fla. 1989) (finding several mitigating circumstances "particularly compelling," including unrebutted evidence defendant's "reasoning abilities were substantially impaired by his addiction to hard drugs"). Therefore, we find that the trial court erred in failing to give Mahn's extensive and uncontroverted history of drug and alcohol abuse appropriate weight as a nonstatutory mitigating circumstance. <u>Spencer</u>; <u>Nibert</u>; <u>cf</u>. <u>Walker v. State</u>, 707 So. 2d 300, 318 (Fla. 1997) (finding trial court erred in rejecting defendant's abusive childhood as nonstatutory mitigation and giving it no weight despite trial court's acknowledgement that evidence supported mitigator's existence).

714 So. 2d at 400-01.

In the instant case, as in <u>Mahn</u>, the evidence of appellant's history of alcohol abuse is substantial, compelling, and uncontroverted. Yet the trial court failed to find it, weigh it, or even

evaluate it in her sentencing order -- a clear violation of the Campbell principle. The trial court addressed the question of appellant's intoxication on the night of the crime only in the context of whether it rose to the level of establishing the statutory mental mitigator of "impaired capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law" (4/770-71). The trial court's order expressly fails to consider whether appellant's alcohol consumption on the night of the crime might establish a nonstatutory mitigating circumstance (4/772), and this -- as argued in Issue II -- amounted to a Campbell error given the evidence in this case. See Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990). But the even more egregious error under Campbell, Mahn, and Parker v. Dugger is the trial court's total ignoring of the evidence of appellant's long history, even at age 19, of alcohol abuse. The sentencing order, under the heading of "Non-Statutory Mitigating Factors", states:

> 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.

(4/772).

Paragraph (b) addresses the mitigator that "[t]he defendant was the victim of . . . childhood abuse and a deprived childhood." The trial court, after characterizing the physical and emotional abuse inflicted on appellant by Lois Merck as extreme, found this mitigator and give it some weight (4/772-73). Then, in the next paragraph, the trial court stated:

> c. Defendant lists as additional non-statutory factors his learning disability, <u>his long-term alcohol abuse</u>, his chemically dependent parents, his rejection by two father figures, his lack of a parental role model, his lack of a male parent, and his capability to form loving relationships. <u>Several of these factors have been previously discussed</u>. As to the remaining factors; First, as to his learning disability, the testimony showed that such disorder does not impact on development. Many children have learning disabilities and grow up to be responsible citizens. Second, as to his lack of a parental role model, his sisters, cousins, aunts and foster parents all testified about helping him to grow up and exposing him to love. Third, as to defendant having the capacity to form a loving relationship, the Court considered the testimony of his family members and his foster parents. These factors have been considered by the Court and will be given some weight.

(4/773).

The evidence of appellant's long-term alcohol abuse was <u>not</u> previously discussed in the sentencing order, and it was not discussed under paragraph (c). It is clear from the face of the order that the "remaining" factors which were considered and given some

weight are the three relatively weak ones of learning disability, lack of a parental role model, and capacity to form a loving relationship. The much more compelling mitigator, especially under the facts of this case, appellant's history of alcohol abuse, was ignored.[6]

C. **The Substantial, Uncontroverted Evidence of Appellant's Long History of Alcohol Abuse**

Whenever a "reasonable quantum" of competent, uncontroverted evidence of mitigation has been introduced, the trial court must find that the mitigating factor has been proven, and must weigh it against the aggravating factors to determine whether death or life imprisonment is the appropriate sentence. Mahn v. State, supra, 714 So. 2d at 400-01; Spencer v. State, 645 So. 2d 377, 385 (Fla. 1994); Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993); Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). Here, there was much more than a reasonable quantum of mitigating evidence of appellant's history of alcohol abuse, and not only was this evidence

[6] Even if paragraph (c) could be considered ambiguous, that is not good enough. See Crump v. State, supra, 654 So. 2d at 547; Mann v. State, 420 So. 2d 578, 581 (Fla. 1982) ("The trial judge's findings in regard to the death penalty should be of unmistakable clarity so that we can properly review them and not speculate as to what he found[.]").

uncontroverted, it was actually strengthened further by the state's own expert, Dr. Merin.

Troy Merck was brought up in a chemically dependent household. His indifferent stepfather, Jess Whitmire, was an alcoholic, his viciously abusive mother, Lois Merck, abused mood-altering prescription medications, his drunken uncles would come to the house and brawl, and (as his sister Stacey France put it) "[t]here was just always somebody there drunk" (14/799,811-12,839; 16/1041, 1051-52). One of Lois' boyfriends put liquor in Troy's bottle when he was a small child, to get him to shut up crying and go to sleep. This same individual showed him how to sniff gas and glue and paint when he was about five to seven years old (15/847-48; 16/1070-71). According to his older sister Roberta, when Troy was small if there was any liquor on the table or in the refrigerator he would get it, or somebody would give it to him. "And he was really not told by mother not . . . to do that" (15/849).

Dr. Heide testified that Troy acknowledged "a rather extensive history" of alcohol consumption:

> <u>He reported starting to drink on a regular basis at about the age of eleven</u>, and then I noted in the records that the sisters recalled him getting alcohol as a young child and liking it. I think one said he liked it, you know, quite a bit, or something like that, if he could get it. So they at least substanti-

> ated that they were aware that he was drinking to some extent as a child.

(16/1070).

Dr. Heide also emphasized Troy's history of alcohol abuse as a contributing factor to the crime:

> A ninth one that I would put here, which is going to put him more at risk again, <u>is the long history of substance abuse. What we know about substance abuse, when an individual stared early it can impair development further</u>. So you have a child who's is already biologically at risk, who is exposed to a lot of violence, who is abusing chemicals, which is going to further impair his judgment.

(16/1079).

The state's psychologist, Dr. Merin, testified that on the MMPI scale measuring one's potential for substance abuse, particularly alcohol abuse, Troy was "in the pathological range" with a T score of 78 (17/1176).

Troy met Neil Thomas in a bar in Ocala a few weeks before the homicide. After they began hanging out together, they traveled to North Carolina and stayed for a week or two, drinking heavily every day. It was commonplace for the two of them to share a bottle of Jack or a case of beer (12/528-29,570-71). On one occasion they went to see Troy's cousin in South Carolina; everybody was drinking and they ended up witnessing a confrontation that resulted in the

fatal shooting of Troy's sister's boyfriend (12/531,571; 15/850-51).

On the Friday after their return to Florida, they decided to go to the City Lites nightclub. Neil Thomas testified that because they "might be drinking I wanted to stay real close to the place we were going", so they found a nearby motel room, and then went to the bar at around 10:00 or 10:30 p.m. (12/534-37). They stayed until closing time at 2:00 a.m. (12/536-37). They had pooled their money, but Neil was the one who would purchase the drinks and bring them back to the table, since he was over 21, while Troy was 19 (12/537-38,574-75). Neil and Troy were drinking the same amount -- "[w]e were kind of neck and neck" (12/537,575). Neil estimated that he had five or six beers and a couple of shots of liquor, and Troy had about the same (12/537). At the end of the night, the bar had a dollar tequila shot special. Neil remembered tequila being at the table with himself and Troy, but Neil didn't recall having any himself (12/574). Neil didn't recall any visible signs of physical impairment, such as staggering or slurred speech, in either himself or Troy (12/ 538-39). However, Neil could feel the effects of the alcohol; he variously described himself as "buzzed" or "fairly drunk" (12/539, 573). Neil's body weight was 185 pounds at the time of these events, while Troy weighed 144 pounds (12/575-76).

Ron Bell, the chief toxicologist for the medical examiner's office -- using state witness Neil Thomas' testimony as to how much alcohol he and Troy drank within the specified time period, and the respective body weights of Neil and Troy -- estimated Neil's blood alcohol level at .15 and Troy's blood alcohol level at .21 (14/752-54,756-57). Bell stated that .21 is consistent with a significant degree of impairment (14/754). Allowing for variations among individuals, Bell testified that it is within a 90 percent statistical certainty that Troy's blood alcohol was between .16 and .26 (14/757-58). The low end of that range is double the presumptive limit under Florida's DUI laws; the high end is more than triple the DUI threshold (see 14/754). Bell also testified that some persons who consume alcohol on a regular basis may develop a tolerance and display fewer outward symptoms of impairment (14/761-63).

Dr. Edward Willey, a pathologist called by the defense, was asked whether a .21 blood alcohol content would affect a person's ability to think, reason, and exercise control; his answer was "Most definitely" (14/775).

The State's psychologist, Dr. Merin, acknowledged on cross that if Troy had a blood alcohol level of approximately .21, that "certainly suggests there is a high level of probable intoxication" (17/1223). Nevertheless, Dr. Merin did not think Troy's alcohol

consumption substantially impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law (17/1188), and here's why:

> You have to understand here is a man who had been drinking for many, many years. He had developed -- had to have developed a tolerance for it. So that if he drank that amount it's something that would have intoxicated someone else to a very significant extent, in my opinion, but would not have any significantly adverse effect on him. This is something that he just does all the time. So that his behavior would stem from who and what he was all about. All people who drink that amount of alcohol don't do what he is alleged to have done.

(17/1189).

In other words, Dr. Merin's basis for rejecting the statutory mental mitigator of impaired capacity (a mitigator which the defense's expert Dr. Heide had found to exist) is <u>not</u> that Troy did not drink enough to become highly intoxicated, but instead that Troy had already become such an advanced alcoholic by the age of 19 that he "had developed -- had to have developed" a tolerance for it. Dr. Merin, Dr. Heide, Dr. Willey, and the toxicologist Ron Bell all agreed that Troy's blood alcohol level (calculated based on the state's witness' testimony as to how much he drank) was high enough to cause significant intoxication and impairment, but Dr. Merin concluded that because of Troy's long history of alcohol

abuse (the nonstatutory mitigator which is at issue here) it would have affected him a lot less. Putting aside until Issue II the question of whether Dr. Merin's speculation that Troy's alcoholic history means that he "had to have" developed a tolerance constitutes substantial competent evidence to support the trial judge's rejection of the statutory and nonstatutory mitigators concerning intoxication of the night of the crime, the fact remains that Dr. Merin's testimony actually strengthens the nonstatutory mitigator of Troy's chronic alcohol abuse throughout his preadolescence and adolescence. This, according to Dr. Heide, was a major contributing cause of his stunted emotional development and lack of impulse control, as well as a contributing factor in the commission of this motiveless, spur-of-the-moment homicide (see 16/1079-80). Bear in mind also that Troy was nineteen years old, with the personality development of a ten, twelve or (at most) fourteen year old child or adolescent (16/1038-40).[7] As this Court observed in Mahn v. State, supra, 714 So. 2d at 400, n.9, under the laws of Florida and most other states a person cannot legally drink alcohol until the age of twenty-one; "legislatures have clearly made the choice that

[7] This testimony of Dr. Heide was uncontroverted. While Dr. Merin testified that Troy has an average to bright-average IQ and good motor and performance skills, so do many twelve year olds. Dr. Merin did not testify that Troy's emotional or personality development is consistent with his chronological age.

people under that threshold age are generally too immature to use alcohol responsibly." In Prevatt v. McClennan, 201 So. 2d 780 (Fla. 2d DCA 1967) (quoted with approval by this Court in Migliore v. Crown Liquors of Broward, Inc., 448 So. 2d 978, 979-80 (Fla. 1984)), the plaintiff was injured by a gunshot during a fight between two underage drinkers in the defendant's tavern. Holding the defendant liable, the appellate court observed:

> Here, the statute forbidding the sale of liquor to minors was violated, and constitutes negligence per se; the statute that makes it a crime to sell intoxicants to minors was doubtless passed to prevent the harm that can come or be caused by one of immaturity by imbibing such liquors. The very atmosphere surrounding the sale should make it foreseeable to any person that trouble for someone was in the making.

D. Conclusion

In the instant case, the state's own expert described 19 year old Troy Merck as "a man who had been drinking for many, many years"; somebody who drinks "all the time", to such an extent that Dr. Merin assumed that he "had to have developed a tolerance for it" (17/1189). The uncontroverted evidence is that Troy spent his childhood surrounded by an alcoholic stepfather; a chemically dependent (and viciously abusive) mother; drunken brawling uncles; and at least one adult male (a boyfriend of the mother) who gave

him liquor and taught him to huff chemicals. He drank liquor as a child whenever he could find it around the house, and began drinking regularly at age 11. He and Neil Thomas were drinking heavily every day in the weeks leading up to the homicide, and they spent the three and a half to four hours immediately before the crime drinking in a nightclub. The homicide occurred in the club's parking lot at closing time. The trial court's failure to find and weigh Troy's chronic alcohol abuse as a mitigating factor, especially in view of the totality of the circumstances in this case, is harmful and reversible error under Mahn. Her failure to even evaluate or discuss this powerful mitigating evidence is plain error under Campbell. The constitutional principle underlying the Campbell requirements -- that valid mitigating evidence, especially when unrebutted, may not be ignored -- was violated. Because death is different, both Florida law [Crump v. State, supra, 654 So. 2d at 547; Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988)] and the Eighth Amendment [Lockett v. Ohio, supra, 438 U.S. at 604; Caldwell v. Mississippi, 472 U.S. 320, 329-30 (1985)] require a heightened degree of reliability and procedural fairness in capital sentencing. That standard has not been met, and appellant's death sentence must be vacated. This Court should either reduce his sentence to life imprisonment on proportionality grounds [see Issues

II and III], or, postponing that determination, remand this case to the trial court for resentencing.

ISSUE II

THE TRIAL COURT ERRED IN FAILING TO FIND, WEIGH, OR EVALUATE APPELLANT'S EXCESSIVE DRINKING ON THE NIGHT OF THE CRIME AS A NONSTATUTORY MITIGATING FACTOR.

[Much of the caselaw and evidence discussed in Issue I is pertinent to this Point on Appeal as well, and to avoid repetition is adopted by reference].

In his sentencing memorandum, defense counsel requested the trial court to consider three statutory mitigators (age, impaired capacity, and extreme mental or emotional disturbance), and numerous nonstatutory mitigators, the first of which was "Defendant was under the influence of alcohol" (4/717-23). The trial court in her sentencing order discussed the alcohol-related evidence only in the context of whether it met the criteria of the statutory mental mitigator, i.e., whether it substantially impaired the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, and she concluded that it did not (4/770-71). However, the trial court expressly failed to consider whether the evidence that appellant was under

the influence of alcohol established a nonstatutory mitigating factor, on the ground that she'd already addressed this in rejecting the statutory mitigator. The trial court erred in limiting her consideration to the statutory factor, and the error is of constitutional dimension. As this Court wrote in Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990) (emphasis in opinion):

> . . . [I]n its written order, the trial court expressly concluded that this evidence did not support the statutory mitigating factor of "extreme" mental disturbance, because the disturbance here was not extreme. In addition, the trial court noted that it had considered "all other relevant testimony and argument as to statutory mitigating factors." There is no mention of nonstatutory mitigating factors in the written order, although the trial court did mention and out-of-hand reject such factors in its oral statements at sentencing.
>
> Florida's capital sentencing statute does in fact require that emotional disturbance be "extreme." However, it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say. Lockett [v. Ohio, 438 U.S. 586 (1978); Rogers [v. State, 511 So. 2d 526 (Fla. 1987)]. Any other rule would render Florida's death penalty statute unconstitutional. Lockett.

Thus, even assuming arguendo that the trial court in the instant case could properly find that Troy's degree of intoxication was not sufficient to establish the "substantially impaired capa-

city" statutory factor, she was still obligated to consider whether his excessive drinking on the night of the crime was a contributing factor in what occurred and should therefore be weighed as a non-statutory mitigator. See Clark v. State, 609 So. 2d 513, 515-16 (Fla. 1992) (while trial court rejected the statutory mitigating circumstances concerning mental impairments, the court did acknowledge several nonstatutory mitigators including "that his judgment may have been impaired to some extent, [and] that he drank an excessive amount of alcohol on the day of the murder").

Separate and apart from the statutory mental mitigators, a capital defendant's intoxication and/or excessive alcohol consumption at the time of the offense is a well recognized nonstatutory mitigating factor. See, for example, Smith v. State, 699 So. 2d 629, 635 n.4 (Fla. 1997); Pope v. State, 679 So. 2d 710, 712-13 n.1 (Fla. 1996); Merck v. State, 664 So. 2d 939, 941 (Fla. 1995) (the first opinion in the instant case); Cherry v. State, 659 So. 2d 1069, 1074 (Fla. 1995); Rose v. State, 617 So. 2d 291, 293 (Fla. 1993); Clark v. State, supra, 609 So. 2d at 515-16; Waterhouse v. State, 522 So. 2d 341, 344 (Fla. 1988); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987); Rembert v. State, 445 So. 2d 337, 339 (Fla. 1984).

Whether it actually is a mitigator in a particular case depends upon the facts of the case. Johnson v. State, 608 So. 2d 4, 13 (Fla. 1992). In Johnson, this Court found that the trial judge properly rejected this proposed mitigator, where "the evidence showed less and less drug influence on Johnson's actions as the night's events progressed . . . ." 608 So. 2d at 13. The instant case, in stark contrast to Johnson, involves a sudden, motiveless, spur-of-the-moment killing after a pointless verbal confrontation in the parking lot of a bar at closing time. All of the participants and witnesses were drunk or at the very least under the influence.[8] Perhaps because they were under the influence, there were significant discrepancies between the two key state witnesses. Katherine Sullivan said it was Troy who called Jim Newton a "pussy" and was trying to goad Newton into fighting him (12/474-75). Neil Thomas, on the other hand, testified for the

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[8] Appellant's blood alcohol was estimated at .21 (14/754,757-58). His buddy Neil Thomas (who admitted starting the argument and trying to provoke the victim) had an estimated blood alcohol level of .15; he admitted at trial that he could feel the effects and described himself as "buzzed" or "fairly drunk" (14/753; 12/539, 573). The victim, James Newton, had an .18 heart blood alcohol level and a .21 vitreous blood alcohol level (14/710-11,716,751). Witness Katherine Sullivan had also been drinking; she didn't necessarily think she was drunk, but she felt she'd had too much to take a chance on driving home (12/469,492-93). Witness Don Ward had six or seven beers, maybe eight, and he was intoxicated (12/511,515).

state that it happened like this: They were leaning on a car and a female voice told them to get off. Troy replied sarcastically that he was sorry, he didn't mean to lean on her precious car; then Troy and Neil started walking towards their own car (12/543,573). Neil, however, was kind of mad because of the woman's tone, "[s]o I turned around and I was kind of looking for someone to provoke, and that's when I saw the -- that person" (James Newton) (12/543). Newton said "Why don't you get off the girl's car", and Neil said something to the effect of "You look like a real pussy". Newton had his arms crossed; he replied "Yeah, I'm a pussy", and Neil shot back, "That's what a pussy would say" (12/543-44). Neil Thomas acknowledged that it was <u>he</u> -- not Troy -- who started in with Jim Newton (12/573); "I was trying to provoke the guy, and I really wasn't getting a response out of him" (12/544). As the confrontation wore on, however, Troy "just got very agitated and started taking off his shirt and started heading around the side of the car", saying "I'll show you a pussy" (12/544-45). He threw his shirt in the car, and came back and began stabbing Newton. The attack lasted 15-20 seconds and Newton just stood there with his arms crossed, not fighting back. Neil didn't think he even knew what had hit him (12/546-47).

Quite simply, everything about this incident -- where and when and how it happened -- reeks of drunkenness. When Troy's background, his youth, his stunted emotional development, and his history of alcohol abuse are factored in, the role that his excessive drinking played in this crime becomes even clearer. See Migliore v. Crown Liquors of Broward, Inc., supra, 448 So. 2d at 979-80; Prevatt v. McClennan, supra, 201 So. 2d at 781 (purpose of law forbidding sale of liquor to minors is to prevent the harm which can be caused by one of immaturity imbibing intoxicating liquors; "[t]he very atmosphere surrounding the sale should make it foreseeable to any person that trouble for someone was in the making"). Yet none of the evidence relating to Troy's alcohol consumption -- neither his extensive history nor the fact that he was under the influence at the time of the offense -- was found or weighed as a mitigating factor by the trial court. Neither Dr. Merin's assumption that Troy must have developed a tolerance,[9] nor the fact that

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[9] Dr. Merin did not purport to have any information that Troy, as an individual, had developed a tolerance; only that, being a heavy drinker for "many, many years", he "had to have developed a tolerance for it" (17/1189). Dr. Merin also made the comment, "All people who drink that amount of alcohol don't do what he is alleged to have done" (17/1189). That is certainly true, but then all people who drink that amount of alcohol don't do what Billy Ray Nibert did either; yet in that case -- where Dr. Merin was called as a defense witness -- he found Nibert's chronic alcoholism and intoxication at the time of the crime to be important mitigating (continued...)

he was able to walk and talk and maybe catch a set of car keys, justifies the disregard of mitigating circumstances so closely tied to the nature of the crime. As a result, the death sentence imposed by the trial court does not meet constitutionally mandated standards of reliability [see Cheshire; Lockett v. Ohio; Caldwell v. Mississippi; Parker v. Dugger], and must be vacated. This Court should either reduce appellant's sentence to life imprisonment on proportionality grounds [see Issue III, infra], or defer that decision until the next appeal in the event that the trial court reimposes a death sentence upon resentencing.

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[9](...continued)
factors, and this Court reversed Nibert's death sentence on proportionality grounds. Nibert v. State, 574 So. 2d 1059, 1061-63 (Fla. 1990) (discussing Dr. Merin's testimony).

ISSUE III

THE DEATH PENALTY IS DISPROPORTIONATE IN THIS CASE IN LIGHT OF THE CIRCUMSTANCES OF THE HOMICIDE, AND IN LIGHT OF APPELLANT'S YOUTH (AGE 19) AND IMMATURITY, HIS DEPRIVED BACKGROUND, THE EXTREME PHYSICAL AND PSYCHOLOGICAL ABUSE AND NEGLECT HE SUFFERED AS A CHILD, HIS LONG HISTORY OF ALCOHOL ABUSE FROM THE AGE OF ELEVEN, HIS EXCESSIVE DRINKING ON THE NIGHT OF THE CRIME, AND OTHER MITIGATING FACTORS.

A. Clean Slate

A prior death sentence which has been vacated on appeal is a nullity. Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986). Resentencing "is a completely new proceeding", Preston v. State, 607 So. 2d 404, 408 (Fla. 1992), and should proceed de novo on all issues bearing on the proper sentence to be imposed. Teffeteller, 465 So. 2d at 745. As recognized in Preston, 607 So. 2d at 408-09, and by Justice Wells in his concurring opinion in the first appeal in the instant case, capital resentencing proceedings are governed by the "clean slate" rule. Merck v. State, 664 So. 2d 939, 945 (Fla. 1995)(Wells, J., concurring). Since both sides are free to present new or different evidence in aggravation or mitigation, the "law of the case" doctrine has no applicability in the resentencing appeal, both because it would be inconsistent with the clean slate

rule, and because the evidentiary basis of the old and new sentencing decisions are not the same. See Buford v. State, 570 So. 2d 923, 924 (Fla. 1990) ("It . . . would be unfair -- as well as pointless -- to have the judge bound by our previous approval of the override, since new evidence has been presented"). As a general rule, the "law of the case" doctrine is inapplicable when a subsequent hearing or trial develops new evidence or material changes in the evidence. See Henry v. State, 649 So. 2d 1361, 1364 (Fla. 1994); Steele v. Pendarvis Chevrolet, 220 So. 2d 372, 376 (Fla. 1969); Mayflower v. Property, Inc. v. Watson, 233 So. 2d 390, 392 (Fla. 1970); Johnson v. Bernard Ins. Agency Inc., 532 F. 2d 1382, 1384 (DC Cir. 1976); In re Kendarvis Industries International, Inc., 91 B.R. 742 (Bkrtcy N.D. Tex. 1988).

In the resentencing proceeding in the instant case, the witnesses presented by the defense occupy nearly three full volumes of the record -- over 300 pages of testimony (14/748-832; 15/838-937; 16/995-1123); as compared to the first sentencing proceeding where the defense's penalty phase testimony consists of about a dozen pages (OT1317-28). No expert testimony was introduced by either side in the first penalty phase; while in the new penalty proceeding the defense called Dr. Heide, Dr. Willey, and the medical examiner's chief toxicologist Ron Bell, and the state called Dr.

Merin. The lay witnesses who had knowledge of Troy's life and background who testified in the resentencing but not in the original sentencing include Troy's aunt and cousins Kathleen, Shane, and Jason Eller; school psychologist Nancy Pate; the teacher of his class for emotionally handicapped children, George Olbon; social worker Joyce Flowers; the director of the Collins Children's Home, Anne Rackley; and a former foster-care parent, Linda Schneider. The only two penalty phase witnesses who testified in both sentencing proceedings are Troy's sisters Stacey and Roberta, but even they provided much more information in the resentencing (14/794-832, 15/838-55); their testimony in the first penalty phase was comparatively superficial (OT1321-28).

Because the clean slate rule applies, and because most of the mitigating evidence (as well as the state's rebuttal evidence and even some of the aggravating evidence) is new, this Court should conduct its proportionality review de novo. Teffeteller; Preston; Buford.

B. The Standard of Proportionality Review

As this Court recently stated in Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998):

> In performing a proportionality review, a reviewing court must never lose sight of the

> fact that the death penalty has long been reserved for only the most aggravated and least mitigated of first-degree murders. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973). See also Jones v. State, 705 So. 2d 1364, 1366 (Fla. 1998) (reasoning that "[t]he people of Florida have designated the death penalty as an appropriate sanction for certain crimes, and in order to ensure its continued viability under our state and federal constitutions `the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of [the] most serious crimes.'") (footnote omitted).

See e.g., Clark v. State, 609 So. 2d 513, 515-16 (Fla. 1992); Kramer v. State, 619 So. 2d 274, 277-78 (Fla. 1993); Voorhees v. State, 699 So. 2d 602, 604 (Fla. 1997); Sager v. State, 699 So. 2d 619, 623 (Fla. 1997).

The requirement that the death penalty be administered proportionately has a variety of sources in Florida law, including "several state constitutional provisions which collectively mandate proportionality review in capital cases". Knight v. State, __ So. 2d __ (Fla. 1998)[23 FLW S587,591], see Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991); Urbin v. State, supra, 714 So. 2d at 416. As this Court stated in Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988), "A high degree of certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty is administered evenhandedly."

Proportionality review does not involve counting the number of aggravating circumstances as compared to the number of mitigating circumstances; instead "[b]ecause death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases." Urbin v. State, supra, 714 So. 2d at 416, quoting Tillman v. State, supra, and Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990); see also Knight v. State, supra, 23 FLW at S591; Voorhees v. State, supra, 699 So. 2d at 614; Sager v. State, supra, 699 So. 2d at 623.

C. This is Not Among the Least Mitigated of First-Degree Murders

This case involves a senseless stabbing after a pointless confrontation between an intoxicated defendant (and his intoxicated friend Neil) and an intoxicated victim. See Voorhees v. State, 699 So. 2d at 615; Sager v. State, 699 So. 2d at 623; Kramer v. State, 619 So. 2d at 278. Whatever premeditation existed was upon reflection (if it can be called that) of very short duration, and under the influence of alcohol. See Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985). Troy was nineteen years old at the time -- too young to be legally served a drink -- with the emotional development of a ten,

twelve, or (at the most) fourteen year old, and a compound personality disorder which the state's own expert, Dr. Merin, acknowledged was likely causally related to a dysfunctional family upbringing and/or childhood abuse (see 17/1214-15,1227-29).

Troy was physically and psychologically abused even before he was born. Nobody knows who his father is. His mother Lois conceived him with one of her many casual boyfriends while her boyfriend-of-record Hubert Merck (the man whose name Troy inherited) was in Vietnam. Lois tried to abort him by drinking turpentine, overdosing on sleeping pills, getting in fights; when none of these measures worked, she tried to trick Hubert into thinking the baby was his. That, too, failed. Hubert left, and Lois -- who had already earned a reputation for beating the tar out of her three older children -- was left with the infant Troy, whom she blamed for her losing Hubert. She called Troy a stupid bastard, a God damn idiot, and told him he was useless, no good, she didn't want him, and she should have killed him when he was born.

Lois got back together with Jess Whitmire (the probable father of Troy's older siblings), though this apparently did not put a halt to the parade of boyfriends coming in and out of the house. Jess was an alcoholic, who would claim Troy when he was drinking but would want nothing to do with him when he was sober. Lois, on

top of her already explosive and unpredictable temper, abused mood-altering prescription medications. Lois and Jess were always physically fighting. Troy's uncles (Lois' brothers) were always coming in drunk and fighting, and they didn't fight like brothers; they fought to kill each other. There was always somebody in the house drunk. The house was a shack, with newspaper stapled to the walls for insulation and wolf rats running into the bathroom and kitchen.

Lois beat up all of her children -- vicious beatings with whatever objects were close by, which sometimes drew blood or left scars. Stacey was beaten many times in Troy's presence. "She'd get you down on the floor and beat you with her fist or take a shoe heel and sit on you and hit you in the head with it" (14/812). One time Lois held her on the floor and beat her on the head with a big, round glass ashtray until the ashtray broke. His older sister Roberta also observed that "mamma doesn't give whippings like people . . . usually do"; she, like Troy, still has scars on her head to prove it (15/846-47, see 815-16).

By popular image, the baby of the family is the child who gets spoiled; in the Whitmire-Merck household the term "spoiled" takes on a different meaning. While Lois abused all of her children, it was generally agreed that Troy got the worst of it because (as

Stacey put it) "[h]e was the baby and . . . he was at home. The rest of us she had ran off" (14/815). When there were four children in the house, one of them got a whipping every day; "[w]hen it was just Troy there, he got it all" (14/832). Also, he was the one Lois blamed for her losing Hubert (15/815). Finally, as Troy's cousin Shane observed, there was a big difference with Troy and he was mistreated a lot more; Shane guessed that as Lois got older she just got meaner (15/870).

From the time Troy was two or three years old until he was about ten (and could hide, duck, or fight back more effectively) he received one of Lois' "whippings" at least once a week. She would punch him, kick him, stomp on him, bite him, and throw objects at him. Troy recalled being hit with a broom handle, a Coke bottle, a horse-shaped perfume bottle, and having a plate broken over his head. Among the additional weapons which his sisters, aunt, and cousins recalled Troy being hit with are shoes, curtain rods, cups, sticks, dishes, and an ashtray. His cousin Shane saw Lois beating Troy with belts for ten or fifteen minutes straight, and his cousin Jason said Lois didn't even aim; she would just start swinging the belt and wherever it landed, it landed. Lois would beat Troy for any sort of real or imagined infractions; sometimes weeks after whatever had occurred to make her angry. Troy often had no idea

why he was being beaten. Sometimes Lois would make his older brother Tony give Troy a whipping, which was actually to Troy's benefit since Tony did not beat him as viciously as Lois did. On the other hand, if Lois wasn't satisfied with the job Tony did, she would administer another whipping to Troy later on. On one occasion, Lois had Pete Mathis ("an old boy there around the house that I think mama was sleeping with", Stacey testified) tie Troy up in a chair and then Lois beat him with a stick (14/816). Trying to avoid these beatings, Troy would sometimes hide all day under the trailer; when he finally came out, the beating would usually occur anyway.

The testimony of Dr. Heide that Troy suffered "not only multiple trauma but severe trauma" (16/1042; see 1073,1078) as a child, and that that trauma was the likely cause of his emotional development being stunted at the level of a ten, twelve, or (at most) fourteen year old (16/1038-40,1042), was unrebutted by Dr. Merin. In fact, Dr. Merin -- while he admitted that he had very limited information about Troy's actual life experiences -- agreed that given his diagnosis (personality disorder, n.o.s.) it would be reasonable to expect that he was brought up in an especially cruel, brutal environment and suffered abuse as a child (17/1223,1227-29).

Even the trial court in her sentencing order recognized that the abuse Troy suffered as a child was extreme (4/772).

In numerous decisions of this Court, childhood abuse has been recognized as a significant mitigating circumstance; especially compelling when coupled with other factors such as youth, immaturity, and/or substance abuse. See e.g., Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1998); Nibert v. State, 574 So. 2d 1059, 1061-63 (Fla. 1990); Clark v. State, 609 So. 2d 513, 515 (Fla. 1992); Elledge v. State, 613 So. 2d 434, 436 (Fla. 1993); Walker v. State, 707 So. 2d 300, 318 (Fla. 1997); Mahn v. State, 714 So. 2d 391, 400 (Fla. 1998); Urbin v. State, 714 So. 2d 411, 417 (Fla. 1998).

As a child, Troy had a very noticeable eye condition known as ptosis; it caused his eyelids to fall down over his eyes, and he had to tilt his head an exaggerated amount in order to see you. This, along with his small size and his poverty, made him a target for harassment by his peers, who would try -- sometimes successfully -- to goad him into fights. Between the vicious insults and beatings at home, and the more normal but still painful taunting in school, by the time Troy was seven years old he had developed an extremely low self-concept. When tested by the school counselor, he made statements that "People hate me" and "I am very ugly" and

"No one want to be around me" (2/322-23). He was placed in a class for children with emotional disabilities. When Troy was tested again at age ten, the results indicated mental confusion, withdrawal, impulsiveness, low self-reliance, low feelings of belonging to a group, inadequate social skills, and antisocial tendencies. Several of his test responses were noted as being consistent with a child who has been exposed to violence at a very young age. [See Clark v. State, supra, 609 So. 2d at 516]. Around this time, Troy was also diagnosed with an attention deficit hyperactive disorder, and was prescribed Ritalin. Due to parental medical neglect, he stopped taking his medication and was not effectively treated. Persons with ADHD are highly energized and impulsive, and find it difficult to focus attention on a task. According to Dr. Heide's unrebutted testimony, Troy is biologically more hyperactive and impulsive than a normal child or adolescent; in fact, when she interviewed him at age 25 (six years after the offense) he still had the highest activity level she'd ever seen in her career assessing youths and young adults charged with crimes (16/1031,1079).

Troy's long history of alcohol abuse is discussed in detail in Issue I. To briefly recap: He was apparently fed alcohol as a baby or toddler by one of his mother's boyfriends; he liked liquor as a small child and would drink it whenever he could find it around the

house (and it apparently wasn't in scarce supply around his house); he began drinking regularly at around the age of eleven; and by the time he was nineteen he was, according to Dr. Merin, "a man who had been drinking for many, many years", and who drinks "all the time" (17/1189). [See Clark v. State, supra, 609 So. 2d at 516]. In the weeks leading up to the crime, Troy and his buddy Neil were drinking heavily every day, as they were doing again on the night of the offense.

Dr. Heide and Dr. Merin agreed that Troy has a bright-normal intelligence level. Dr. Merin's test results indicated that he has excellent motor skills, artistic and visual-spatial ability, and memory. In other words, contrary to his mother's often-expressed opinion, Troy was not born useless. There was one brief interlude when he almost had a chance to change the course of his life.

When Troy was a student in George Olbon's emotionally handicapped class, Mr. Olbon, the school counselor Ms. Pate, and the social worker Ms. Flowers, all came to agree that Troy needed to get out of the home environment he was in. Lois Merck was persuaded to having him voluntarily removed from the home and placed at the Collins Children's Home run by Anne and Joe Rackley. As soon as it dawned on Troy that these people weren't going to hurt

or mistreat him, every aspect of his life and behavior began to turn around. In school, his grades, his reading ability, his behavior, his self-concept, and his relations with the other kids all improved markedly. Before he had been reading at a low level (about 2.2) and in math he was functioning on about a 3.2 level. Within a year, he had achieved his grade level (sixth grade) in math and was approaching that point in reading. On his report card, Mr. Olbon noted that Troy has been a very good student and seemed to have found some peace and happiness within himself (15/894). The social worker, Ms. Flowers, also observed that Troy wasn't as angry or negative about himself; "he was seeming to see like a glimmer of light, you know, that things . . . could be different (15/911-12).

Troy made the Honor Roll for the first time, getting all Bs. He had just been taken out of the self-contained emotionally handicapped class (where the children feel stigmatized and excluded) and was going to be placed during the upcoming year in a resource class (where extra academic help is available if needed, but he was going to be a "normal kid") (15/924). "And we celebrated", Anne Rackley recalled. "I mean we were so excited, because I mean this is a hard thing to do. . . . It was a big deal. You know, look at

Troy. And he was the most proud of himself for that one thing than anything that I can remember" (15/924).

Then in June his mother called. She had moved to North Carolina and said she was coming to get Troy. The Rackleys told her he was not ready, told her all the good things he had accomplished, and said everything they could to convince her not to take him away, that this "was the moment we could do something or lose it". Lois wouldn't listen. She said she was getting government assistance and she could not get her check unless she had him living with her (15/925).

At the bottom of Troy's discharge summary, Mrs. Rackley had written the following notation: "Mother insisted Troy move to Sylva to live with her so that she could collect payment for dependent care, food stamps, etc. -- Big mistake!" (15/927-28; 7/820). Mrs. Rackley testified that she had felt hurt, frustrated, and hopeless, "like the hope we thought we could give him walked out the door" (15/928).

Troy stopped attending school in the eighth grade.

The state's psychologist, Dr. Merin, diagnosed Troy as having a personality disorder n.o.s. (not otherwise specified), combining some of the features of antisocial, narcissistic, passive-agressive, obsessive-compulsive, and borderline personality disorders.

While Dr. Merin had little knowledge of Troy's background (only what Troy told him), he readily agreed that this diagnosis would fit someone who came from a dysfunctional family and suffered an abusive childhood. The state, in its answer brief, will likely try to use Dr. Merin's diagnosis of "personality disorder" to denigrate the mitigation in this case. To the contrary, a personality disorder is a serious psychiatric diagnosis. "In any scheme that tries to classify persons in terms of relative mental health, those with personality disorder would fall near the bottom." Comprehensive Textbook of Psychiatry (4th Ed. 1985), p. 958. The fact that a defendant suffers from a personality disorder is a valid nonstatutory mitigating circumstance. Eddings v. Oklahoma, 455 U.S. 104 (1982) (antisocial); Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993) (borderline).

With the array of circumstances that stunted Troy's emotional growth -- his questionable parentage and being unwanted at birth; the extreme physical and psychological abuse and neglect; the grinding poverty; the early and constant exposure to violence; the ptosis, and the taunting and lack of acceptance by peers; the severe emotional disabilities which were recognized as early as age seven; the attention deficit hyperactive disorder; the alcohol abuse which began in early childhood and progressed to the point

where he was drinking regularly by the age of eleven; the dashing of his hopes for a better life when his mother pulled him out of the Collins Home for a welfare check -- it is not surprising that he developed a compound personality disorder. Take a nineteen year old with the emotional age of a ten, twelve, or fourteen year old child who has a strong biological predisposition to hyperactivity and impulsiveness; fuel him with enough liquor and beer to reach a probable blood alcohol level of .21; put him in the parking lot of a bar at closing time in the company of other people of his age or a little older who are also intoxicated or under the influence, and a violent encounter, even a homicide, is foreseeable. Prevatt; Migliore. The senseless killing of Jim Newton is in no way excusable, but the confluence of mitigating circumstances in this case makes life imprisonment, not death, the appropriate penalty. This is not one of the most aggravated, and certainly not even close to being one of the least mitigated, first degree murders.

D. This is Not Among the Most Aggravated of First-Degree Murders

The trial court found three aggravating factors: (1) the defendant was previously convicted of a felony involving the use or threat of violence (based on Troy's guilty or nolo pleas to four armed robberies and one robbery in Lake, Marion, and Pasco Coun-

ties); (2) the capital felony was committed by a person under sentence of imprisonment (based on the fact that Troy was on probation in the Marion County case); and (3) the capital felony was especially heinous, atrocious, or cruel (HAC). The prior violent felony aggravator cannot be disputed. The aggravator based on Troy's probationary status violates the constitutional prohibition against ex post facto laws because (1) the legislature did not adopt probation as an aggravating factor until after this offense was committed, and (2) at the time this offense was committed, Florida caselaw clearly stated that probationary status could not be used as an aggravating factor. [Issue IV, infra].

The HAC aggravator should not have been found, based on the evidence that this was sudden and unexpected killing, which did not involve physical or emotional torture of the victim or prolonged anticipation of death. The victim, James Newton, had a blood alcohol level (.18 heart blood, .21 vitreous) nearly as high as Troy's. See Voorhees, 699 So. 2d at 615; Sager, 699 So. 2d at 623; Kramer, 619 So. 2d at 278. The state and defense experts agreed that, while this level of intoxication would not have rendered Newton incapable of feeling pain, it would have decreased his capacity to feel pain (14/711-12,719; 14/774). See Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1984); Herzog v. State, 439 So. 2d 1372, 1380

(Fla. 1983). The defense expert added that in addition to blunting pain to some extent, alcohol also alters the perception of it; "the greater the amount of alcohol in the blood the greater the influence" (14/774). According to Katherine Sullivan, the entire incident took place very suddenly and quickly -- within about 15-20 seconds (12/493-94, see 478). Neil Thomas didn't think Newton even knew what hit him. Contrast Whitton v. State, 649 So. 2d 861, 866-67 (Fla. 1994) (fatal beating lasted an estimated thirty minutes, and the head wounds which would have caused unconsciousness came late in the attack). Dr. Davis, the medical examiner who testified for the state, testified that after the stab wounds were inflicted, Newton would have gone into shock (which would have further diminished his ability to perceive pain) in perhaps less than a minute; he would likely have become unconscious in two to five minutes; and death would have occurred in five to ten minutes (14/ 713-14,734-36). The defense expert, Dr. Willey, believed Newton would have become unconscious even sooner than that (14/771-73,780,790). See Elam v. State, 636 So. 2d 1312, 1314 (Fla. 1994) (HAC improperly found where "[a]lthough the [victim] was bludgeoned and had defensive wounds, the medical examiner testified that the attack took place in a very short period of time (`could have been less than a minute, maybe even half a minute'), the [victim] was unconscious at

the end of that period, and never regained consciousness. There was no prolonged suffering or anticipation of death"). Contrast the finding approved by this Court in Cave v. State, __So. 2d __ (Fla. 1998) [24 FLW S17,18]:

> In the present case this Defendant personally removed the victim from the convenience store at gun point, placed her in the back seat of the car in which he and a co-defendant were seated, heard her pleas for her life during a fifteen to eighteen minute ride to an isolated area, removed her from the car and turned her over to Bush and Parker who stabbed and then shot her. At some point her panties were wet with urine. The terror she experienced must have been horrible and meets the definition of especially heinous, atrocious and cruel. The situation here in contrast to a killing that is sudden and unexpected. The Court finds this [HAC] aggravating circumstance has been established beyond a reasonable doubt.

All first-degree murders, by definition, involve the wanton infliction of pain and death. To withstand constitutional scrutiny, the HAC aggravator must be limited to killings which are especially heinous, atrocious, or cruel. As recognized in Cook v. State, 542 So. 2d 964, 970 (Fla. 1989), a finding of HAC generally is appropriate when the victim is tortured, physically or emotionally, by the killer. In addition to the Cave case, examples of killings preceded or accompanied by physical or emotional torture include Gordon v. State, 704 So. 2d 107, 116-117 (Fla. 1997);

Gudinas v. State, 693 So. 2d 953,957,966 (Fla. 1997); Branch v. State, 685 So. 2d 1250 (Fla. 1996); Cardona v. State, 641 So. 2d 361, 363 (Fla. 1994); Mendyk v. State, 545 So. 2d 846 (Fla. 1989); Francis v. State, 473 So. 2d 672,676 (Fla. 1985), and unfortunately dozens of others. The killing in the instant case -- senseless as it was [10] -- does not compare. See Demps v. State, 395 So. 2d 501, 503,505-06 (Fla. 1981). Neither the alleged twisting of the knife nor appellant's drunken braggadocio afterward (assuming arguendo that Neil Thomas' testimony on these matters is deemed credible) is enough, under the totality of the circumstances, to set this case apart from the norm of first-degree murders.

Finally, even assuming arguendo that the HAC aggravator can be sustained under these facts, it still would not be enough to make this one of the most aggravated and least mitigated first-degree murders. Proportionality review "entail[s] a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." Urbin v. State, supra, 714 So. 2d at 416 (emphasis in opinion). In light of the suddenness and very short duration of the attack; the intoxicated condition of both appellant and the victim; the absence of any prolonged fear or anticipation of death; and the fact that the victim

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[10] See Teffeteller v. State, 439 So. 2d 841, 846 (Fla. 1983).

(according to the state's expert) would likely have gone into shock in less than a minute and become unconscious within two to five minutes, the HAC aggravator in this case -- even if upheld -- is a much less compelling basis to conclude that justice demands the death penalty than in true torture-murder cases like Gordon, Gudinas, Branch, Cardona, Mendyk, and Francis. Moreover, as this Court recognized in Nibert v. State, supra, 574 So. 2d at 1063, "[t]his case involves substantial mitigation, and we have held that substantial mitigation may make the death penalty inappropriate even when the aggravating factor of heinous, atrocious, or cruel had been proved." See also Robertson v. State, 699 So. 2d 1343, 1347 (Fla. 1997) (murder committed during a burglary and HAC); Voorhees v. State, supra, 699 So. 2d at 615 (murder committed during a robbery and HAC); Sager v. State, supra, 699 So. 2d at 623 (murder committed during a robbery and HAC); Kramer v. State, supra, 619 So. 2d at 277-78 (prior violent felony and HAC); Wilson v. State, supra, 493 So. 2d at 1023 (prior violent felony and HAC).

E. Comparison With Other Proportionality Decisions

While no single case is precisely on point, undersigned counsel submits that the following decisions are the closest, and collectively demonstrate that the severe penalty of life imprison-

ment, rather than the ultimate penalty of death, is the appropriate punishment in this case: Urbin v. State, 714 So. 2d 411, 416-18 (Fla. 1998); Robertson v. State, 699 So. 2d 1343, 1347 (Fla. 1997); Voorhees v. State, 699 So. 2d 602, 614-15 (Fla. 1997); Sager v. State, 699 So. 2d 619, 623 (Fla. 1997); Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993); Clark v. State, 609 So. 2d 513, 515-16 (Fla. 1992); Nibert v. State, 574 So. 2d 1059, 1061-63 (Fla. 1990); and Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988). In addition, while it is not at this point a proportionality decision, the discussion in Mahn v. State, 714 So. 2d 391, 400-02 (Fla. 1998) of the combination of the mitigating factors of youth, immaturity, emotional instability, physical and psychological abuse during childhood, and substance abuse at a young age is very relevant to the proportionality question in the instant case.

Appellant's death sentence should be reduced to life imprisonment.

ISSUE IV

THE TRIAL COURT'S FINDING OF, AND INSTRUCTION TO THE JURY ON, THE AGGRAVATING CIRCUMSTANCE THAT THE CRIME WAS COMMITTED WHILE APPELLANT WAS ON FELONY PROBATION VIOLATED THE STATE AND FEDERAL CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS.

A. Ex Post Facto Application of the Felony Probation Aggravator [11]

The charged offense in the instant case was committed on October 11, 1991. At the time of the offense, Florida's death penalty statute provided, in pertinent part:

> (5) Aggravating Circumstances, - Aggravating circumstances shall be limited to the following:
> (a) The capital felony was committed by a person under sentence of imprisonment or placed on community control.

Fla. Stat. §921.141(5)(a).

The clearly established law in this state, at the time this offense was committed, was that aggravating circumstance (5)(a) was not applicable to persons on probation. Peek v. State, 395 So. 2d 492, 499 (Fla. 1981); Ferguson v. State, 417 So. 2d 631, 636 (Fla. 1982); Bolender v. State, 422 So. 2d 833, 837-38 (Fla. 1982).

Nearly five years after the crime in the instant case occurred the legislature amended the (5)(a) aggravating circumstance to add the words "or on probation." Laws 1996, c. 96-290, §5, subsec. (5), effective May 30, 1996. The legislature subsequently revised the (5)(a) aggravator again, effective October 1, 1996, to specify

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[11] Undersigned counsel calls this Court's attention to the same issue in the pending capital appeal of James Randall, Case No. 90,977.

"felony probation" and that the defendant have been previously convicted of a felony. Laws 1996, c. 96-302, §1, subsec. (5). For purposes of this ex post facto argument, the operative date is May 30, 1996, because prior to that date probationary status (for a felony or otherwise) was not a statutorily enumerated aggravating factor; moreover, the decisions of this Court made it clear that probationary status was not included within this aggravating factor. Peek; Ferguson; Bolender.

Under Florida law, aggravating circumstances:

> actually define those crimes . . . to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.

State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973).

In Vaught v. State, 410 So. 2d 147, 149 (Fla. 1982), this Court reiterated:

> We find that the provisions of section 921.141 are matters of substantive law insofar as they define those capital felonies which the legislature finds deserving of the death penalty.

The aggravating factors are strictly limited to those enumerated in the statute. Kormondy v. State, 703 So. 2d 454, 463; (Fla. 1997); Geralds v. State, 601 So. 2d 1157, 1162 (Fla. 1992); Miller v. State, 373 So. 2d 882, 885 (Fla. 1979). Quoting from Elledge v.

State, 346 So. 2d 998, 1003 (Fla. 1997), this Court wrote in Miller:

> We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.

373 So. 2d at 885.

See also Kormondy v. State, 703 So. 2d at 463 ("turning of a blind eye to the flagrant use of nonstatutory aggravation jeopardizes the very constitutionality of our death penalty statute").

Article I, section 10 of the Florida Constitution and Article I, section 10 of the United States Constitution prohibit ex post facto laws. In State v. Hootman, 709 So. 2d 1357 (Fla. 1998), this Court recently "approve[d] the ruling of the trial court that an aggravating factor enacted into law after the commission of a capital crime may not be considered in the sentencing of a defendant" 709 So. 2d at 1358. The Hootman Court wrote:

> Recently, the Supreme Court of the United States in Lynce v. Mathis, 519 U.S. 433, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997), held that for a law to "fall within the ex post facto prohibition, [it] must be retrospective -- that is \`it must apply to events occurring before its enactment' -- and it \`must disadvantage the offender affected by it' by altering the definition of criminal conduct or increasing the punishment for the crime." Id. at ___, 117 S. Ct. at 895, (citations omitted); accord Miller v. Florida, 482 U.S. 423, 430, 107 S. Ct. 2446, 2451, 96 L. Ed. 2d 351 (1987); Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981); Britt v.

> Chiles, 704 So. 2d 1046 (Fla. 1997); cf. Dugger v. Williams, 593 So. 2d 180, 181 (Fla. 1991) (holding that a law violates ex post facto prohibition where it is retrospective in effect and "diminishes a substantial substantive right the party would have enjoyed under the law existing at the time of the alleged offense"). In other words, "[a] law is retrospective if it `changes the legal consequences of acts completed before its effective date.'" Miller, 482 U. S. at 430, 107 S. Ct. at 2451.

The Hootman opinion then discusses the decisions of the Arizona Supreme Court in State v. Correll, 715 P. 2d 721 (Ariz. 1986), and the Arkansas Supreme Court in Bowen v. State, 911 S.W. 2d 555 (Ark. 1995), each of which held that the retrospective application of a new aggravator would be an ex post facto law and could not constitutionally be upheld. The statutory amendments to the death penalty law were substantive rather than procedural, and the defendant could be disadvantaged if the aggravator were to apply against him. See Hootman, 709 So. 2d at 1359; Correll, 715 P. 2d at 73; Bowen, 911 S.W. 2d at 563-64.

Returning to the Florida death penalty statute, the Hootman Court continued:

> . . . there is no doubt that application of section 921.141(5)(m) would be retroactive in effect since Hootman's alleged conduct occurred before the statute was enacted. It is equally apparent that section 921.141(5)(m) disadvantages Hootman by altering the definition of the criminal conduct that may subject him to the death penalty and increasing the

> punishment of a crime based upon the new aggravator. Under section 921.141(5)(m), the State may proffer evidence that "[t]he victim of the capital felony was particularly vulnerable due to advanced age or disability" in seeking the death penalty. See §921.141(5)-(m), Fla. Stat. (1997). This Court held in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), "The aggravating circumstances . . . actually define those crimes . . . to which the death penalty is applicable." Indeed, the severity of the death penalty and the role of the judge and jury in considering the prescribed aggravating circumstances make aggravating circumstances a critical part of the substantive law of capital cases. Before the legislature enacted section 921.141(5)(m), advanced age of the victim had not been part of any of the previously enumerated factors. In enacting section 921.141(5)(m), therefore, the legislature altered the substantive law by adding an entirely new aggravator to be considered in determining whether to impose the death penalty.

709 So. 2d at 1360.

In the instant case, just as in Hootman, before the legislature amended §921.141(5)(a) effective May 30, 1996, probationary status had not been part of any enumerated aggravating factor. Moreover, there was caselaw from this Court directly on point for at least fifteen years prior to the 1996 amendment that made it clear that probationary status was not an aggravator and was not included within the definition of "under sentence of imprisonment" in subsection (5)(a). Contrast Trotter v. State, 690 So. 2d 1234, 1237 (Fla. 1996). The legislature's addition of probationary

status as an aggravating factor, when for decades it had been <u>prohibited</u> from being used as an aggravating factor, was a 180-degree change in the law; not a mere "refinement". The reasoning in <u>Hootman</u> applies with full force, and the retrospective application of the "felony probation" aggravator violates the constitutional prohibition against <u>ex post facto</u> laws.

The case relied upon by the state below [see 4/693-94], <u>Trotter v. State</u>, 690 So. 2d 1234 (Fla. 1996) [referred to hereafter as <u>Trotter</u> II] is plainly distinguishable, but appellant also submits that <u>Trotter</u> II was wrongly decided as a matter of state and federal constitutional law, and this Court should reconsider that decision in light of <u>Hootman</u> (as well as the opinions from other jurisdictions discussed in <u>Hootman</u>). Appellant suggests that the concurring opinion of Justice Kogan in <u>Ellis v. State</u>, 622 So. 2d 991, 1002 (Fla. 1993) and the dissenting opinion of Justice Anstead, joined by Justice Kogan, in <u>Trotter</u> II are consistent with the <u>ex post facto</u> analysis in <u>Hootman</u> and in United States Supreme Court decisions such as <u>Weaver v. Graham</u>, 450 U.S. 24 (1981) and <u>Miller v. Florida</u>, 482 U.S. 423 (1987), and correctly state the applicable law.

Even assuming <u>arguendo</u> that <u>Trotter</u> II was not implicitly overruled by <u>Hootman</u>, it is inapplicable to the instant case. As

previously discussed, the addition of probationary status as an aggravator was a 180-degree change in the law. For years it clearly wasn't an aggravator; then -- as of May 30, 1996 by act of the legislature -- it was one. The community control aggravator at issue in the two Trotter decisions had a very different history. In Trotter v. State, 576 So. 2d 691 (Fla. 1990) [Trotter I], this Court had held that community control status or violation could not be considered as an aggravating circumstance under subsection (5)-(a), and remanded for resentencing. Immediately after the decision on appeal but before the resentencing took place, the legislature amended subsection (5)(a) to encompass community control. This aggravator was applied to Trotter on resentencing. In concluding, in Trotter's second appeal, that this did not violate ex post facto provisions, this Court wrote:

> Trotter claims -- as he did in his original appeal -- that the trial court erred in finding that community control is an aggravating circumstance. We agreed with Trotter originally, but in light of subsequent legislation making clear legislative intent, we now disagree. At the time of Trotter's initial appeal, the capital sentencing statute was ambiguous -- it failed to mention community control specifically, speaking instead of "sentence of imprisonment" broadly:
>
> > (5) AGGRAVATING CIRCUMSTANCES. -- Aggravating circumstances shall [include] the following:
> >
> > (a) The capital felony was committed

> by a person under sentence of imprisonment. §921.141, Fla. Stat. (1985).
>
> Although the phrase "under sentence of imprisonment" was read by two members of this Court in Trotter as embracing community control, the majority felt compelled under traditional rules of statutory construction to give the phrase a strict construction . . . .

Trotter II, 690 So. 2d at 1236 (footnote omitted).

Crucial to the decision in Trotter II was the fact that immediately following the decision in Trotter I, "the legislature -- in its next regular session -- amended section 921.141(5)(a) to specifically address community control. . . " 690 So. 2d at 1237. Under these unusual circumstances, this Court concluded:

> 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.
>
> . . .
>
> In light of the specificity and promptness of the 1991 amendment to section 921.141(5)-(a), and in view of our prior caselaw giving retroactive application to other aggravating circumstances effecting a refinement in the law, reliance on Trotter would result in manifest injustice to the people of Florida by

> perpetrating an anomalous and incorrect application of the capital sentencing statute.

Trotter II, 690 So. 2d at 1237.

Consequently, this Court receded from its holding in Trotter I on the use of community control as an aggravator, and noted that "this renders Trotter's original trial error-free". 690 So. 2d at 1237. Implicit in this holding is the conclusion that, contrary to the opinion in Trotter I, community control was always (or from its inception) a form of custodial restraint within the meaning of the "under sentence of imprisonment" aggravator.

The probation aggravator in the instant case is unlike the community control aggravator in Trotter in every significant respect. First, there has never been any ambiguity in the statute or in the caselaw -- until May 30, 1996 it was absolutely clear that probationary status was not an aggravator. Second, probation -- unlike community control -- is not a custodial restraint that can be likened to incarceration.[12] Third, there was no swift

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[12] Fla. Stat. §948.001(2) defines community control as:

> a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, administered by officers with restricted caseloads. Community control is an individualized program in which the freedom of an offender is restricted within the community, home, or noninstitution-

(continued...)

legislative response to "clarify its intent"; this Court held as early as 1981 that probation was not included in the (5)(a) aggravator [Peek, 395 So. 2d at 499] and reiterated that holding twice in 1982 [Ferguson; Bolender], while the amendment adding probation as a new factor which can be considered in aggravation was not adopted until 1996. Unlike Trotter, this was not a "refinement" or a clarification of an arguably ambiguous provision; it was a clear-cut change in the substantive law which seriously disadvantaged appellant when it was retrospectively applied to him in the penalty proceedings in this case. Hootman.

Under Florida's capital sentencing procedure, the jury is the co-sentencer [see Johnson v. Singletary, 612 So. 2d 575, 576 (Fla. 1983)], and the trial court must give its penalty recommendation great weight. When the jury is instructed that it can consider and

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[12](...continued)

> al residential placement and specific sanctions are imposed and enforced.

On the other hand, probation is defined in Fla. Stat. §948.001(5) as:

> a form of community supervision requiring specified contacts with parole and probation officers and other terms and conditions as provided in s. 948.03.

weigh a legally invalid (as opposed to a factually unsupported) aggravating factor, the weighing of that factor violates the Eighth Amendment, and taints both the jury's penalty verdict and the sentence ultimately imposed by the judge. See Sochor v. Florida, 504 U.S. 527, 538 (1992); Espinosa v. Florida, 505 U.S. 1079, 1081-82 (1992); Jackson v. State, 648 So. 2d 85, 90 (Fla. 1994); Kearse v. State, 662 So. 2d 677, 686 (Fla. 1995). Moreover, in the instant case, the trial court in her sentencing order found the felony probation aggravator and expressly accorded it great weight (4/763). Under these circumstances, appellant's death sentence cannot constitutionally be carried out.

B. Preservation

The ex post facto issue was brought to the attention of the trial judge before she found this aggravating factor in sentencing appellant to death. The state, in its sentencing memorandum, argued "there is no ex post facto violation for the retroactive application of this Defendant's felony probation status as an aggravator in Florida Statute 921.141(5)(a)", and cited Trotter (4/693-94). In the Spencer hearing, defense counsel stated:

> Judge, the only thing I would say on that [the felony probation aggravator] is that I believe that I argued during the course of the re-trial that this would be an expostfacto

> 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.

(7/885)

Thus, the prosecutor, defense counsel, and the trial judge were all aware of the ex post facto issue prior to sentencing, and defense counsel made an awkward objection and indicated that he wasn't abandoning it. While it appears that defense counsel intended to make the objection earlier and thought he had done so, the record doesn't bear that out. In the charge conference at the end of the penalty trial, counsel objected to the probation aggravator only on the ground of improper "doubling" with the prior violent felony factor (17/1236-40), and in his sentencing memorandum he conceded without an objection that the state had established the probation aggravator (4/714). Therefore, what we have is (1) no objection to the jury instruction, and (2) a timely although inartful objection at the Spencer hearing, prior to the judge's sentencing order and imposition of the death sentence. Since one of the main purposes of a Spencer hearing is to afford the defendant, his counsel, and the state an opportunity to be heard prior

to the final sentencing order,[13] the trial court was plainly on notice of the constitutional issue before she reached her sentencing decision in which she found the felony probation aggravator, and gave it great weight. See Castor v. State, 365 So. 2d 701, 703 (Fla. 1978).

Anticipating that the state will nevertheless argue that the issue is unpreserved, appellant's response is fourfold. First, defense counsel's objection, while inartful, was sufficiently timely and specific to comply with the contemporaneous objection rule under the Castor test. See Williams v. State, 414 So. 2d 509, 511-12 (Fla. 1982). Secondly, application of an ex post facto law in sentencing (and especially capital sentencing) violates due process and amounts to fundamental error, which can be corrected even in the absence of any objection. See Swinson v. State, 588 So. 2d 296, 297 (Fla. 5th DCA 1991)[footnotes omitted], which states:

> Defense counsel failed to challenge Swinson's habitual offender status at sentencing on the ground that the 1988 version should have been applied rather than the 1989 version. But he did object to the classification on other grounds. We can consider this error on appeal because it is a substantive, constitutional one, and one that is "fundamental," in the sense that it need not be "preserved"

[13] Spencer v. State, 615 So. 2d. 688, 691 (Fla. 1993).

> below to be raised on appeal. A court cannot apply a substantive criminal law to an event which precedes its effective date. To do so would make it an ex post facto law. Miller v. Florida, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987); Lee v. State, 294 So. 2d 305 (Fla. 1974).

See also Ghianuly v. State, 516 So. 2d 277 (Fla. 2d DCA 1987); Carnegie v. State, 564 So. 2d 233 (Fla. 1st DCA 1990); and Smith v. State, 707 So. 2d 365 (Fla. 5th DCA 1998) (Antoon, J., concurring).

For an error to be so fundamental that it can be corrected on appeal even in the absence of an objection below, it must amount to a denial of due process. State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993); Downs v. State, 572 So. 2d 895, 900 (Fla. 1990); Castor v. State, supra, 365 So. 2d at 704 n.7. The doctrine of fundamental error has not been abrogated by the Criminal Appeals Reform Act of 1996.[14] Bain v. State, __So. 2d__ (Fla. 2d DCA 1999) [24 FLW D314]. "When assessing whether a particular error is fundamental, we hold some rules, such as due process of law, in higher regard than other, such as the rules of evidence." Bain v. State, supra, at D317. And, as has been recognized, violation of the constitutional prohibition against ex post facto laws amounts to a deprivation of due process. State v. Ashley, 701 So. 2d 338, 343 (Fla. 1997) (Harding, J., concurring); Hooper v. State, 703 So. 2d 1143, 1145

[14] Fla. Stat. §924.051 (Supp. 1996).

(Fla. 4th DCA 1997); see also L. Ross, Inc. v. R.W. Roberts Construction Co., 466 So. 2d 1096, 1098 (Fla. 5th DCA 1985), approved 481 So. 2d 484 (Fla. 1986); Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992); Williams College v. Bourne, 656 So. 2d 622, 623 (Fla. 5th DCA 1995). If an ex post facto violation is a denial of due process amounting to fundamental error in the context of noncapital sentencing [Swinson; Ghianuli; Carnegie], then it certainly must be fundamental error in a capital sentencing proceeding, where heightened appellate scrutiny is required. See Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988).

Thirdly -- based on the Florida death penalty statute[15] and the constitutional principle that "death is different"[16] -- this Court has always recognized an obligation to fully review all death sentences even when unchallenged on any basis, and has never invoked the contemporaneous objection rule as a basis to uphold a legally invalid or factually invalid aggravating factor. See LeDuc v. State, 365 So. 2d 149, 150 (Fla. 1978) ("Even though LeDuc's counsel has not challenged the legal sufficiency of [his] convictions and sentences on any basis, we are obligated by law and rule

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[15] Fla. Stat. §921.141(4)

[16] See Crump v. State, 654 So. 2d 545, 547 (Fla. 1995), Fitzpatrick v. State, supra, 527 So. 2d at 811.

of this Court to ascertain whether they are proper"); Goode v. State, 365 So. 2d 381, 384 (Fla. 1978) ("Even though defendant admits his guilt and even though he expressed a desire to be executed, this Court must, nevertheless, examine the record to be sure that the imposition of the death sentence complies with all of the standards set by the Constitution, the Legislature and the courts"); Davis v. State, 461 So. 2d 67, 71 (Fla. 1984) ("Section 921.141 . . . directs this Court to review both the conviction and sentence in a death case, and we will do so here on our own motion"; this Court then proceeded to consider the aggravating circumstances found by the trial court and struck one of them, even though appellate counsel had made a tactical decision not to challenge them).

Finally, assuming arguendo that a contemporaneous objection is required to challenge on appeal a legally invalid aggravating circumstance, and assuming further that defense counsel's objection on ex post facto grounds at the Spencer hearing, prior to the judge's sentencing order, is deemed untimely or insufficient, then this Court should find ineffective assistance of counsel on the face of the record. Trial counsel obviously intended to make the ex post facto objection earlier, and thought he had done so (7/885). If counsel was aware that use of the felony probation aggravator was

or might be an ex post facto violation, there was no reasonable tactical basis to fail to object to the jury being instructed on it; to concede its applicability in the defense's sentencing memorandum; and then object for the first time during the Spencer hearing. Because an objection was ultimately made, because invalid aggravating circumstances can be stricken even without an objection below, and because the ex post facto violation is a denial of due process amounting to fundamental error, counsel's mistake does not preclude correction of the error on appeal. But in the event that this Court finds counsel's objection too little or too late to permit review, then the Court should address the ineffective assistance claim on direct appeal "to avoid the legal churning which would be required if we made the parties and the lower court do the long way what we ourselves should do the short." Ross v. State, __So. 2d__ (Fla. 2d DCA 1998) [23 FLW D2712]; Mizell v. State, 716 So. 2d 829, 830 (Fla. 3d DCA 1998); see Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987).

ISSUE V

THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE TENDING TO SHOW THAT NEIL THOMAS WAS THE PERSON WHO STABBED THE VICTIM, AS THE EVIDENCE PERTAINING TO PENALTY AND THE EVIDENCE PERTAINING TO GUILT ARE INEXTRICABLY INTERTWINED.

Although Katherine Sullivan identified Troy Merck as the person who stabbed Jim Newton, she also testified that Troy was the person who was taunting Newton and trying to provoke him to fight (12/473-75,497-98). Neil Thomas, however, made it very clear that it was himself rather than Troy who was calling Newton a "pussy" and trying to provoke him (12/543-44,573). Katherine Sullivan told Detective Nestor that the person who stabbed Newton was the same individual who started the argument (13/648-49). Ms. Sullivan described the person who did the stabbing as wearing khaki pants. (12/496; 13/648). The state introduced Troy's pants in the guilt phase trial; they are variously described as blue, gray, or dark, but -- as Ms. Sullivan acknowledged -- they are not khaki (see 12/496-97). A pair of khaki trousers were observed by Detective Nestor in searching the Bobcat automobile; because he saw no visible bloodstains he discarded them (13/648-61). It was the defense's contention in the guilt phase trial that these may have been the pants worn by the stabber, Neil Thomas, and that potentially exculpatory evidence was intentionally or negligently lost. While Neil's palmprint and Troy's palmprint were both found on the roof of the Bobcat, Neil's print was closer to the location where -- according to another witness Richard Holton (who could not make

an identification) -- the stabber pounded the top of the car. (13/662, see OT 622).

Prior to the resentencing trial, the defense, citing Downs v. State, 572 So. 2d 895 (Fla. 1990), sought to introduce evidence that (1) Troy Merck was not the person who stabbed the victim; (2) his participation in the homicide was minor; (3) Neil Thomas was not prosecuted at all, and Troy received disparate treatment, and (4) any other evidence related to the nature and circumstances of the offense (5/598). The motion was argued immediately before jury selection (9/36-45, see also 7/853-66), and was denied by the trial court (9/45). The defense proffered testimony on these matters of Katherine Sullivan (12/496-507); Neil Thomas (13/637-47); Detective Nestor (13/647-61); Richard Holton (13/662-63, OT720-30); crime scene technician Alyson Morganstein (13/662-63, OT534-38); and fingerprint examiner Henry Brommelsick (13/662-63,OT606-22), all of which was excluded by the trial court in accordance with her ruling on the pretrial motion. [In addition -- in a procedure agreed to by the prosecutor and judge -- the transcript of the original guilt phase trial was made a part of the appellate record to facilitate review of this issue in this resentencing appeal (13/645-47)].

Later, during the charge conference, the trial court denied defense counsel's requests that the jury be instructed on the

statutory mitigating factors that the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor, and that the defendant acted under the substantial domination of another person, as well as the nonstatutory mitigating factor that an equally culpable co-perpetrator was treated disparately (17/1248-50, 1255; see 4/602-03). Defense counsel acknowledged that "based on the Court's ruling on my motion in limine, that there has not been evidence presented to the jury in that regard" (17/1249). Counsel stated that he was requesting the instructions on these mitigators to preserve his record; and that if the Court had allowed him to present the supporting evidence (of Neil Thomas' greater culpability in the crime), he would have done so (17/1249).

The trial court's rulings excluding the proffered evidence and refusing the requested instructions were prejudicially erroneous. A jury in a capital resentencing cannot be expected to make an informed penalty recommendation without a full explanation of the factual circumstances surrounding the homicide. Bonifay v. State, 680 So. 2d 413, 419 (Fla. 1996). A resentencing jury, unlike the ordinary capital-case jury which hears both the guilt and penalty phases, has not had the benefit of hearing the trial evidence. See

Richardson v. State, 437 So. 2d 1091 (Fla. 1983). Florida's standard jury instructions tell jurors who have heard both phases, "Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings." [Needless to say, they are not told to consider only the prosecution's guilt-phase evidence and disregard that of the defense]. Resentencing jurors are simply instructed that their advisory verdict should be based on the evidence "that has been presented to you in these proceedings." (See 18/1368).

In Valle v. State, 581 So. 2d 40, 45 (Fla. 1991), this Court held that the state was properly allowed, on resentencing, to retry its entire case as to guilt, because (1) "[w]e cannot expect jurors impaneled for capital sentencing proceedings to make wise and reasonable decisions in a vacuum" [See Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986)] and (2) during resentencing the state must prove the aggravating circumstances beyond a reasonable doubt. Appellant submits that, in order for a resentencing proceeding to satisfy the requirements of due process, if the state is allowed to introduce evidence bearing on guilt or innocence to acquaint the jury with its view of the circumstances of the offense and to prove aggravating circumstances, then the defense must also be allowed to

introduce evidence bearing on guilt or innocence to acquaint the jury with its view of the circumstances of the offense, to rebut the aggravating circumstances, or to show mitigating circumstances. In addition to basic fairness, this view is supported by Downs v. State, 572 So. 2d 895, 899 (Fla. 1990) [footnote omitted], a capital resentencing appeal in which this Court stated:

> A defendant has the right in the penalty phase of a capital trial to present any evidence that is relevant to, among other things, the nature and circumstances of the offense. E.g., Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (plurality opinion). Evidence that Downs was not the triggerman certainly was relevant to the circumstances of his participation in the crime, and, if true, it would have been valid mitigation. [Citations omitted]. Likewise, proof that Downs was not the triggerman would have been valid mitigation in light of the fact that his codefendants got lesser sentences or were not prosecuted at all. [Citations omitted].
>
> In this case the evidence presented to support Downs's assertion that he was not the triggerman is inextricably intertwined with evidence pertaining to the issue of guilt. We do not find that fact sufficient to bar the relevant evidence.

See, generally, Breedlove v. State, 413 So. 2d 1, 6 (Fla. 1982); McCrae v. State, 549 So. 2d 1122, 1124 (Fla. 3d DCA 1989)

(evidence inadmissible for one purpose may, however, be admissible for another purpose).

Downs was distinguished in Hitchcock v. State, 578 So. 2d 685, 690 and n.7 (Fla. 1990). In that case, the excluded evidence was the testimony of the defendant James Hitchcock's two sisters that their other brother Richard had exhibited physical and sexual violence toward them when they were growing up [578 So. 2d at 689-90]. This testimony -- remote in time and disconnected from the circumstances surrounding the homicide -- was in effect bad character evidence, intended to suggest that Richard, not James, committed the murder. It would probably not even meet the standard for admissibility in a guilt phase trial on a "reverse Williams Rule" theory. See State v. Savino, 567 So. 2d 892 (Fla 1990). In the instant case, in sharp contrast to Hitchcock, the excluded evidence came from witnesses all of whom testified for the state in the original guilt phase trial (and three of whom testified for the state in the resentencing trial as well), and the excluded evidence went directly to the events that occurred at the time of the crime and at the scene of the crime. Neil Thomas admitted to being the person who was mad and looking for someone to provoke, and who started taunting and insulting Jim Newton while Troy was apparently content to walk away. Neil Thomas also admitted to driving the car

away from the scene, and to helping to conceal evidence and running from a police cruiser. Since it is clear that Thomas was involved in this crime, it was error to prevent the defense from developing the full extent of his involvement.[17] The evidence relating to penalty and the evidence relating to guilt are, as in Downs, inextricably intertwined. The jury was given what was purportedly a complete picture of the offense, but in reality was not. See Coxwell v. State, 362 So. 2d 148, 152 (Fla. 1978). Under these circumstances, the reliability of the jury's death recommendation and the ensuing death sentence is undermined. Infringement of a capital defendant's right to present evidence relevant to the

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[17] It is also important to recognize that much of the evidence relied on by the prosecutor to argue HAC (18/1282,1294, 1314) and by the trial judge to support her finding of the HAC aggravator (4/765-66) came from the mouth of Neil Thomas. If Thomas was the person who actually stabbed the victim, or if his culpability was greater than what he admitted to, that would give him an obvious motive to testify against Merck. Even the fact that the defense was accusing Thomas of being the assailant gives rise to a likely bias or motive to testify against Merck. "Any evidence tending to establish that a witness is appearing for the state for any reason other than to tell the truth should not be kept from the jury." Lavette v. State, 442 So. 2d 265, 268 (Fla. 1st DCA 1983).

> Evidence that is relevant to the possible bias, prejudice, motive, intent or corruptness of a witness is nearly always not only admissible, but necessary, where the jury must know of any improper motives of a prosecuting witness in determining that witness' credibility.

Jaggers v. State, 536 So. 2d 321, 327 (Fla. 2d DCA 1988).

nature and circumstances of the offense is harmful error of constitutional dimension [Lockett; Eddings; Skipper; Downs], and appellant's death sentence must be vacated.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests the following relief:

Reduction of his sentence to life imprisonment on proportionality grounds (Issues I, II, III, and IV].

Reversal of the death sentence, and a remand for a new penalty trial before another jury [Issue V, and as alternative relief as to Issue IV].

Reversal of the death sentence, and a remand for resentencing by the trial judge [Alternative relief as to Issues I, II, and IV].

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of July, 2000.

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