

IN THE SUPREME COURT OF FLORIDA

TROY MERCK, :
Appellant, :
vs. : Case No. SC04-1902
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 THE CASE AND FACTS

On November 14, 1991, Appellant Troy Merck, Jr. was charged by indictment in Pinellas County with the first-degree murder of James Newton (1s/1-2). A trial held before Judge Luten in November 1992 ended in a hung jury (1s/3-8). After a second jury trial held before Judge Luten in September 1993, Mr. Merck was found guilty as charged and sentenced to death (1s/1, 9-18). On appeal, this Court affirmed the conviction, but reversed the death sentence and remanded for a new penalty trial (1s/20-34), *Merck v. State*, 664 So. 2d 939 (Fla. 1995).

In July 1997, a resentencing proceeding was held before Judge Khouzam (1s/35-41). The jury recommended a death sentence (1s/41), and in September 1997 Judge Khouzam imposed the death penalty (1s/42-46). On appeal, this Court reversed the death sentence, finding that the trial court failed to properly find, evaluate, and weigh evidence of Mr. Merck's alcohol abuse within the list of nonstatutory mitigating circumstances in the sentencing order and that application of the felony probation aggravating factor violated the ex post facto clause (1s/48-57), *Merck v. State*, 763 So. 2d 295 (Fla. 2000).

On May 12, 2003, at a hearing held before Judge Downey, the defense moved to bar imposition of death sentence (v1/94-110; v3/412-436). The defense asserted Florida's capital sentencing procedure is unconstitutional because: it is

contingent on factual findings of aggravating factors by the trial judge, not by the jury; the jury's recommendation need not unanimous and is merely advisory; the aggravating factors are not charged in the indictment or found by the jury unanimously and beyond a reasonable doubt; and rewriting the standard jury instructions cannot cure the constitutional infirmities (v1/94-10). Life imprisonment was the only sentence that can be constitutionally imposed (v1/94, 107-110). The motion was denied (v3/435-436).

On March 1, 2004, a motion hearing was held before Judge Downey (1a/616-676). The defense sought to present evidence to the jury that Mr. Merck did not cause the death of Mr. Newton or that his participation was minor (v2/212; 1a/618). Neil Thomas supplied alcohol to Mr. Merck (1a/619-620). Mr. Thomas provoked the confrontation (1a/619). Eyewitness Katherine Sullivan's description of the clothing worn by the person who did the stabbing was consistent with the clothing worn by Neil Thomas during the incident (1a/619). A fingerprint examiner also testified about fingerprints consistent with Mr. Thomas (1a/619). Mr. Thomas was never prosecuted as an accomplice or an accessory after the fact (1a/620).

The defense asserted Mr. Thomas received preferential treatment from the State (1a/620). During the last sentencing proceeding, the State assisted Mr. Thomas with an outstanding arrest warrant for violation of probation, and after the trial the probation was dismissed (1a/620). The evidence should be

heard by the jury and was relevant to mitigating factors that Mr. Merck's involvement was minor or Mr. Thomas stabbed Mr. Newton (1a/620-623, 628). Although Mr. Thomas was never charged, the Court has found the mitigating factor to apply in a case where another person was not charged (1a/631). This motion was denied at the previous sentencing, but the Court did not address this matter on appeal (1a/622-626, 632-633). To exclude this evidence would deny due process guarantees of the U.S and Florida Constitutions (1a/623).

The State asserted the motion should be denied because it was previously denied by Judge Khouzam, and the Court did not overturn that ruling on appeal (1a/624-625). The trial court denied the motion, holding the ruling was not overruled or was affirmed on appeal, the matter could not be relitigated, for the mitigator of minor involvement to apply another person must be charged in the case which did not happen in this case, and Mr. Merck could not argue participation was minor because the jury found him guilty of first-degree premeditated murder (v2/216; 1a/626-633).

The defense also sought to prevent the State from using as an aggravating factor Mr. Merck's 1989 Florida convictions, despite the denials of motions to set aside those convictions, because the trial courts failed to make proper findings on the record when sentencing a minor as an adult (v1/45-46, 49-51, 66-93; v2/208-210, 218-221; 1a/657-673). The motion was denied

(1a/671-672). A joint stipulation to use video conferencing footage of several witnesses at trial was filed (v2/217).

On March 15-16, 2004, a jury trial held before Judge Downey ended in mistrial (v2/225-226).

On March 17-19, 2004, a jury trial was held before Judge Downey (v3-4/1-370; 2a1-4/1-612). During a sidebar conference, the defense objected to the actions of the bailiffs:

Also, we need to do something about the bailiffs. I know that they are trying to do their job, but the minute Troy moves this guy is up our butt. If I want Troy up here at the bench, which he has a right to be up at the bench, this bailiff is not letting him come up here.

(2a1/22). The trial court indicated it would allow Mr. Merck to approach the bench and stated, "We won't worry about that now." (2a1/22). The defense later reminded the trial court to address the issue of the bailiffs' actions (2a1/69). The trial court agreed and instructed the jurors, "You may have noticed that there are several bailiffs sitting close to Mr. Merck up here. Please understand that this is standard operating procedure for our bailiffs and our security within the building. Do not concern yourself with it at this point. Thank you." (2a1/70-71).

Katherine Sullivan testified she was a bartender at City Lights, but she was off-duty on the night of October 10-11, 1991 (2a2/265). She drove her blue Camaro to the bar at 10:00 or 10:30 p.m. that night, accompanied by her boyfriend, Glenn Sharpenstein, and his friend, Don Ward (2a2/265, 267, 289).

They went there to celebrate the birthday of another friend, Jim Newton (2a2/265-266). Ms. Sullivan drank "two or three beers and a couple of shots," then decided to stop drinking at midnight because she could not safely drive home (2a2/265-266, 289). She asked a co-worker to drive her home (2a2/290). She did not see Mr. Newton have any problems with anyone in the bar (2a2/267).

Ms. Sullivan testified that after the bar closed at approximately 2:00 a.m., she sat in her car talking with her boyfriend (2a2/268, 290-291). She sat in the driver's seat and Mr. Sharpenstein sat in the passenger seat (2a2/268). They planned to go get breakfast with Mr. Newton and Mr. Ward (2a2/268). Mr. Newton intended to ride with them because he believed he had too much to drink and he wanted a ride home (2a2/291).

Ms. Sullivan testified that a man, identified in court as Mr. Merck, leaned on her car (2a2/268, 276). Mr. Sharpenstein asked him to not lean on the car (2a2/268). Mr. Merck and his companion sarcastically apologized while popping their heads in and out of the window, but Ms. Sullivan did not believe there was a problem with them (2a2/268-269, 291-294). Mr. Newton and Mr. Ward moved Mr. Newton's car near her car, then they approached her car, Mr. Ward on the passenger side and Mr. Newton on the driver's side (2a2/268-269, 292-293). Mr. Newton asked if everything was all right (2a2/269, 292). Ms. Sullivan got out of her car, said everything was fine, and

congratulated him on his birthday (2a2/269, 292). They stood face-to-face on the driver's side of her car, near the rear of the car (2a2/269, 295). As a joke, Mr. Sharpenstein rolled up the passenger window, trapping Mr. Ward's hands, then lit a cigarette in his hand (2a2/294).

Ms. Sullivan testified that someone snidely said, "congradu-fucken-lations" (2a2/269-270). Mr. Newton had done nothing to provoke anyone and had nothing in his hands (2a2/270). Mr. Merck tried to goad Mr. Newton into fighting and called him a pussy (2a2/270, 293). Mr. Newton said, "that's right, I'm a pussy, but I'm still not going to fight" (2a2/270). Ms. Sullivan and Mr. Newton talked and tried to ignore the other people (2a2/270).

Ms. Sullivan testified Mr. Merck continued to goad Mr. Newton (2a2/270). He walked towards his car, perhaps a red Pinto, parked two spaces away from her car (2a2/270-271, 278). He asked his companion to throw him the keys (2a2/270). The companion threw the keys to him from approximately ten feet away (2a2/270-271). Mr. Merck caught the keys, walked to the passenger side door, unlocked it, removed his light-colored buttoned-down oxford shirt, threw it in the back seat, fumbled around for something, then returned the keys to his companion (2a2/270-272, 279). He stood by front passenger side of Ms. Sullivan's car and said to Mr. Newton, "I'm going to teach you to bleed" (2a2/270, 272).

Ms. Sullivan testified Mr. Merck ran toward Mr. Newton, Mr. Newton turned to face him, and she stepped back a few steps (2a2/273, 295). Mr. Newton did not move toward him, did nothing to provoke him, and held nothing in his hands (2a2/273). Mr. Merck struck Mr. Newton four or five times with both hands, apparently punching him (2a2/273-277, 295-296). Mr. Merck began inflicting uppercut blows (2a2/274-277). Mr. Merck had no problem walking or delivering blows (2a2/276). Ms. Sullivan saw blood on Mr. Newton's back, then realized the blows were not just punches (2a2/274). She believed she saw Mr. Merck pull back Mr. Newton's head, and she saw light reflect from something in his hand (2a2/274-275, 296). Mr. Newton did not defend himself (2a2/274-275).

Ms. Sullivan testified she ran into the bar and asked employees to call 911 (2a2/274, 296). Time froze for her and she could not estimate how much time elapsed while she witnessed the incident (2a2/297). She remained in the bar until police arrived 2½ hours later and did not observe what happened outside (2a2/290, 296). She had been impaired by alcohol, but she knew what occurred (2a2/287). She asserted Mr. Newton's attacker had a slight southern drawl, but after the incident she apparently told an officer that the man had a southern accent, but no drawl (2a2/272, 296-297). She described his eyes as "buggy" (2a2/298). The police later showed her six photographs and she identified a photograph of Troy Merck as the man who committed the crime (2a2/287-288).

The defense renewed its objection to the trial court's exclusion of evidence about the involvement in and/or commission of the crime by Neil Thomas (2a2/285).

Neil Thomas testified he had been convicted of felonies or crimes of dishonesty eleven times (2a2/317). He met Mr. Merck in Ocala in October 1991 (2a2/299, 325). They became "road dogs," "buddying around" and drinking alcohol together (2a2/299-300). They went to North Carolina to visit Mr. Merck's relatives and stayed in his home (2a2/299, 325). Mr. Thomas met Mr. Merck's mother and believed Mr. Merck and his mother had a good relationship (2a2/299). Mr. Merck's brother gave him a fixed-handled Buck knife (2a2/302, 308). They drove from North Carolina to Pinellas County in a red Mercury Bobcat that Mr. Merck bought from his brother (2a2/300, 325).

Mr. Thomas testified on October 10, 1991, they went to City Lights, looking for a good time (2a2/300, 323). Mr. Thomas was then 25 years old and Mr. Merck was then 19 years old, below the legal drinking age (2a2/300-301, 320-321). Mr. Thomas knew no one at the bar (2a2/300). Mr. Thomas bought 5 or 6 beers and 3 or 4 shots of liquor, and he illegally bought the same for Mr. Merck (2a2/301, 321-322, 325). They had "a buzz on," but they were not falling down drunk and Mr. Merck had no trouble walking and talking (2a2/302, 322). Mr. Thomas was 5'10" tall and weighed between 170 and 180 pounds (2a2/328-339). They stayed at the bar until it closed at approximately 2:00 a.m. (2a2/302, 321).

Mr. Thomas testified that after the bar closed, they went to the parking lot and tried to talk to girls (2a2/302). There were many people in the parking lot (2a2/327). Mr. Thomas, and perhaps Mr. Merck, leaned against a blue Camaro (2a2/303). The occupants of the Camaro were about to leave (2a2/303). Mr. Newton stood the driver's side of the Camaro and sarcastically told Mr. Thomas to get off the car (2a2/303). Mr. Thomas by the interruption to his talking to girls, said he would get off the car, and called Mr. Newton a pussy (2a2/303, 323). Mr. Newton said "yeah, I'm a real pussy" and he crossed his hands across his chest (2a2/303, 324).

Mr. Thomas testified that Mr. Merck became aggravated by Mr. Newton disrespecting Mr. Thomas, walked to the Bobcat, removed his shirt, and put his shirt in the car (2a2/304-305, 324-325). Mr. Thomas told Mr. Newton he should leave or he would probably be beaten (2a2/304, 326). Mr. Thomas stood by the rear passenger side of the Camaro, but he was tall enough to easily see over the car (2a2/328). Mr. Merck charged at Mr. Newton, grabbed him, and punched his back (2a2/304-307, 326-329). Mr. Thomas believed Mr. Merck and Mr. Newton were face to face (2a2/329). There was a popping sound, similar to the sound of a screwdriver going through a carpet (2a2/306-307, 326-328).

Mr. Thomas testified he was aware of "a lot going on," but he paid no attention, he was not interested, he did not enjoy watching fights, and he did not know whether the man

defended himself (2a2/305, 307, 326-327, 329). The next thing he knew, Mr. Merck ran to the car, holding his arm stiffly as if concealing something in his hand, and saying they should leave (2a2/305-306, 329). Mr. Thomas decided leaving was a good idea (2a2/330). He jumped in the car and drove away with Mr. Merck sitting in the passenger seat (2a2/305, 329). As they left, Mr. Thomas looked toward the Camaro and saw the back of Mr. Newton's shirt looked shiny and saw many people rushing to the scene (2a2/305-306, 329).

Mr. Thomas testified that as they drove away, he asked Mr. Merck whether he stabbed the man (2a2/307, 330). Mr. Merck held up his bloody knife and said, "I fucken killed him. If I didn't fucken kill him, I'll go find him in the hospital and finish the job." (2a2/307-308, 330-331). Mr. Merck said he repeatedly stabbed the man, attempted to kill him by twisting the knife in the man's throat, then sliced his throat to make sure he killed him (2a2/312-313, 332-333). Mr. Merck said he tried to stab the man again, but he struck the man's head and cut his finger on the slippery bloody knife (2a2/312). He said blood squirted from the man's throat (2a2/313). He said he knew the man was dead, so he stopped attacking the man (2a2/333-334).

Mr. Thomas testified he drove the car for five minutes, then they stopped and abandoned the car (2a2/313, 331). They removed the license plate and changed their clothes in order to avoid being caught by the police (2a2/313, 330). Mr. Thomas

denied cleaning the knife (2a2/332). The knife was left in the car (2a2/317, 331). They walked and ran three blocks, taking an hour to do so because they repeatedly hid behind bushes (2a2/315-316, 334-335). Mr. Merck had no problems walking (2a2/317). They then called a cab to take them a bowling alley (2a2/334-335). Mr. Merck won a game of pool they played at the bowling alley (2a2/317).

Mr. Thomas testified they returned to look for the car and learned the police had seized it (2a2/318). Mr. Merck told the same account of the incident at least six times during several days following the incident (2a2/312-313, 318, 339). They were subsequently arrested at a motel (2a2/317). Mr. Thomas made a sworn statement to officers indicating Mr. Merck told him he stopped stabbing the man and left when he knew the man was dead (2a2/333-334). Mr. Thomas was not charged with supplying the underage Mr. Merck with alcohol, with accessory after the fact, or with any other offense relating to the incident (2a2/330).

Mr. Thomas denied receiving preferential treatment from the State (2a2/335). He had outstanding charges for violating probation in Pinellas County in 1994, but he did not turn himself in until 1997 at the suggestion of Assistant State Attorney Daniels who he knew from this case (2a2/335-337, 340-341). He was born in St. Petersburg and lived there for 15 years, but he claimed to be unfamiliar with St. Petersburg and knew no other person than Assistant State Attorney Daniels

(2a2/337-338). Assistant State Attorney Daniels arranged for Mr. Thomas to be released on recognizance (2a2/336-337, 341). A couple of years before this trial, Mr. Thomas was arrested on another old outstanding warrant (2a2/339-340). He had now turned his life around and worked as a computer programmer (2a2/340-341).

Salvatore Pensiero, a disk jockey at City Lights, testified that after closing on October 11, 1991, an off duty employee entered the bar, screaming that someone had been stabbed in the parking lot (2a2/344). He and other employees went to the parking lot and saw a man on the ground, holding his throat and gasping for air (2a2/344-345). There was blood on his hands and clothes and a puddle of blood on the ground (2a2/344-345). The man had earlier been in the club (2a2/345). The man kicked his legs, then stopped moving and prayed for the easing of his pain (2a2/345). The time seemed endless, but Mr. Pensiero estimated he saw the man moving for five to ten minutes (2a2/345).

Donald Ward testified he was intoxicated on the night of October 10-11, 1991 (2a2/349, 352). After City Lights closed, he stood beside Ms. Sullivan's Camaro, "hanging out" with Ms. Sullivan and Mr. Sharpenstein (2a2/349). Mr. Sharpenstein joked around by rolling the car window up on Mr. Ward's hands and lighting a cigarette in his hand (2a2/349). A man said happy birthday, approached Mr. Newton, grabbed his neck, and repeatedly punched him (2a2/349-350). Mr. Ward thought it was

playful roughhouse from a friend and he saw no knife, but Mr. Newton subsequently fell on the hood of the Camaro and bled from his mouth (2a2/351). Mr. Ward handed his shirt to a person who used it to attempt to stop the blood pumping from Mr. Newton's neck (2a2/349, 351-352). For five to six minutes, Mr. Newton moved around, gagged and tried to breath, repeatedly reached for his neck, and his eyes rolled in his head (2a2/350). The incident occurred quickly, but time slowed after the attack (2a2/352-353).

James Carter, doorman and foreman of security for the bar, testified that after closing, Ms. Sullivan reported a stabbing in the parking lot and the police were repeatedly called (2a2/354-356). He went to the parking lot, saw a small red car leaving, unsuccessfully tried to stop the car, and got the tag number (2a2/354, 358). Others in the parking lot tried to treat Mr. Newton, who moved, moaned, and coughed up blood for twenty to thirty minutes (2a2/354-356, 358). There was a large pool of blood (2a2/354, 356). When the police arrived thirty minutes after they were called, Mr. Carter gave them the tag number (2a2/355, 357). The scene was hectic (2a2/357-358).

Detective Thomas Nestor testified he was assigned to lead the investigation of the homicide and went to City Lights in the early morning of October 11, 1991 (2a2/360, 372). The homicide occurred at approximately 2:10 a.m., it was reported at 2:15 a.m, and paramedics and police arrived at 2:15 a.m.

(2a2/372-373). The area around Ms. Sullivan's car was bloody (2a2/361).

Detective Nestor testified officers found the abandoned red Bobcat at a parking lot two miles from the bar (2a2/364). A knife bearing blood spatter and a pink shirt were on the backseat of the car (2a2/365-367). Mr. Newton's blood was found in the car (2a2/366). Mr. Merck's fingerprints and a North Carolina license tag were also found in the car (2a2/366-367, 370-371). The tag led police to consider Mr. Merck a suspect (2a2/367). Ms. Sullivan identified photos of Mr. Merck and Mr. Thomas from separate photopacks (2a2/368-372). As the result of a tip from Mr. Thomas' grandmother, Mr. Merck and Mr. Thomas were found (2a2/369). Upon arrest, Mr. Merck gave a false name (2a2/369).

Detective Mike Madden testified that on October 11, 1991, he checked on the victim at Northside Hospital (2a2/374-375). There had been attempts at medical intervention, and it was difficult to examine the wounds because of blood, but he saw numerous wounds to his back, neck and chest (2a2/375). Later that day he attended the autopsy (2a2/376). There were four stab wounds to the left back, a stab wound to the left neck, a stab wound to the left armpit, a laceration between the lip and chin, several lacerations on the left cheek, a laceration across the Adam's apple, an abrasion on the forehead, and a wound on the left ear which penetrated the skull (2a2/275-281). The stab wounds were consistent with a blade with a

sharp side and a dull side (2a2/379, 381). There were no wounds to the arms, but there were defensive wounds to the left hand (2a2/375, 379-380).

Dr. Noel Palma, a Pinellas County medical examiner, testified an autopsy was performed on October 11, 1991 by a former associate medical examiner, Dr. Robert Davis (2a2/387). The autopsy report and photographs indicated: James Newton was 25 years old, he was 5'10" tall, and he weighed 188 pounds; there were four stab wounds to the back; he had a blood alcohol level of .18 (blood) or .21 (vitreous), in excess of the legal limit for driving; there was one stab wound to the throat that severed the carotid artery and the jugular vein and that could have been consistent with twisting of a knife or the body moving; there was one stab wound to the head that penetrated the skull; there was one stab wound to the left lower chest; the stab wounds were inflicted by a knife with a sharp edge and a blunt edge; there were 13 or 14 incise wounds including facial wounds and defense wounds to the left hand; the injuries would have cause pain; and death was homicide caused by multiple stab wounds to the neck and trunk, each of which was potentially fatal (2a2-2a3/388-407, 410-412, 423-424).

Dr. Palma testified Mr. Newton would have remained conscious for approximately one minute after the infliction of the stab wounds, especially the stab wound to the neck, and perhaps only 30 seconds if the jugular vein or carotid artery

was completely severed, but placing pressure on the wound could have slowed the loss of consciousness (2a3/407-409, 415-423, 425-426). He would have felt no pain after losing consciousness (2a3/423). When asked whether testimony of witnesses that he gasped, groaned, kicked and moved arms toward his throat for one to five minutes indicated he was conscious, Dr. Palma stated that purposeful movements such as moving his arms toward his throat indicated consciousness and he could have remained conscious for one to three minutes (2a3/407-409, 425). He could have remained technically alive for several minutes after losing consciousness (2a3/408-409). The wounds were not survivable (2a2/409). The paramedics indicated he was dead at 2:20 a.m. (2a3/409). The pronouncement of death at the hospital at 3:14 a.m. was a mere formality (2a3/409).

The State introduced documents showing Mr. Merck's had five Florida convictions in 1989: in Marion County case no. 89-786 he was adjudicated guilty of robbery with a deadly weapon and sentenced to four years imprisonment followed by one year probation; in Lake County case no. 89-383, he was adjudicated guilty of robbery with a deadly weapon and sentenced to six years imprisonment; in Lake County case no. 89-894 he was adjudicated guilty of robbery with a deadly weapon and sentenced to six years imprisonment; in Lake County case no. 89-895 he was adjudicated guilty of robbery with a deadly weapon and sentenced to six years imprisonment; and

Pasco County case no. 89-1617 he was adjudicated guilty of robbery and sentenced to five years imprisonment (1s/6-7, 44-48; 2a3/427-432). The defense stipulated they were Mr. Merck's convictions (2a3/427-429). The State then rested its case (2a3/432).

The defense sought to present testimony of Felix Ruiz, an administrator for the Parole Commission concerning Mr. Merck's presumptive parole date (2a3/432-434). The alternative to the death penalty was life imprisonment without the possibility of parole for 25 years, and Mr. Merck had already been imprisoned for 12 years (2a3/434). The defense moved to prevent the State from arguing that if a life sentence was imposed, Mr. Merck would be eligible for parole in 13 years (2a3/434-435). The State said that other than informing the jury that the choice was a death sentence or a life sentence without the possibility of parole for 25 years, it would not make this argument (2a3/435). The defense proffered the testimony of Mr. Ruiz (2a3/435-441).

Felix Ruiz testified he was the Regional Administrator in the Tampa Bay Area for the Florida Parole Commission (2a3/436). As part of his job, Mr. Ruiz renders advisory opinions on the possibility of parole in cases where capital life sentences were imposed for crimes that occurred prior to 1994 (2a2/436). A potential parolee's first parole hearing is held within 18 months of completion of a minimum mandatory term, and the Parole Commission has a responsibility to review

each case of parole eligibility every five years (2a3/437-438). The Commissioners have ultimate say on whether to grant parole (2a3/437-438).

Mr. Ruiz testified that the Florida Administrative Code contains a scoring matrix for determining a presumptive parole date (2a3/436). The matrix considers the seriousness of the offense, use of a deadly weapon, and prison disciplinary reports, and the parole date may be mitigated by participating in treatment programs (2a3/437). A capital life felony is scored at the high end of the matrix (2a3/437). Mr. Merck would not be automatically released on parole upon becoming parole eligible (2a3/437).

Mr. Ruiz calculated Mr. Merck's presumptive parole date at 9,998 months, or 833 years, from his date of conviction, minus time served in county jail (2a3/436-437, 440-441). The lowest possible presumptive parole date for Mr. Merck would be 300 months from his date of conviction plus time for aggravating factors such as the use of a deadly weapon, but the Commissioners instruct Administrators to use the high end of the matrix (2a3/438-439). Mr. Ruiz knew of no persons convicted of first-degree murder and sentenced to life without the possibility of parole for 25 years who had been granted parole (2a3/440).

The trial court ruled the testimony of Mr. Ruiz was not admissible (2a3/433, 441).

Defense exhibit 12, a videotape of Nancy Pate, Troy

Merck's elementary school counselor/evaluator and later his school psychologist, was admitted and played for the jury and defense exhibit 10, Ms. Pate's reports about Troy Merck, was admitted (v1/244, 247; 1s/49, 52; 2a3/449). Troy was referred for testing by his first grade teacher in May of 1979 because of social-emotional and study skill problems. At the time of testing he was a second grader in a structured class with a remedial reading lab because of reading difficulties. Troy was neat and attractive, and was enthusiastic about the testing and responded well to praise. He was asthmatic and had poor vision in one eye, but was otherwise in good health. His test results indicated average intelligence with strengths in word knowledge and visual retention, but with weaknesses in visual perception and alertness. His ability in arithmetic was appropriate to his age, but he had serious difficulties in reading and spelling. She determined he did not qualify for any special programs and she recommended he continue in the structured second grade class where he would receive individualized instruction and a remedial reading program. She also recommended: he be seated away from visual distractions; he participate in outdoor games and indoor activities to sharpen his visual acuity; and he be evaluated by an ophthalmologist.

Later that school year, Ms. Pate again tested Troy. She noted Troy failed to profit from the structured second grade program due to social-emotional problems. He had extremely low

self-esteem, saying he was ugly, people hated him, and no one wanted to be around him. Troy's eyelids drooped and he had to tilt his head up an exaggerated amount because the lids fell down over his eyes. His dental hygiene was poor. 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. She recommended that Troy be placed as an emotionally handicapped student at the psychoeducation center because of his strong anti-social tendencies.

In September 22, 1982, when Troy was ten years old, Ms. Pate tested him for a third time. Testing established average intelligence, good visual attentiveness, but problems with fine motor skills and speed. He did well in mathematics, but did poorly in reading and spelling. He had emotional difficulties including mental confusion, withdrawal, and impulsiveness. He scored low for self-reliance, feeling of belonging, social standards, social skills, antisocial tendencies, and school relationships. Ms. Pate recommended Troy continue in the self-contained emotionally handicapped class with George Olbon.

Ms. Pate felt some of Troy's responses on the Weschler Intelligence Scale 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." Ms. Pate believed these responses from a ten year old were consistent with someone who had been exposed to violence at a very young age. Years later, Troy's sister Stacy told Ms. Pate about violence in the home that could relate to the results of that test.

Defense exhibit 16, a videotape of George Olbon, Troy's teacher in a self-contained emotionally handicapped class, was admitted and played for the jury, and defense exhibit 9, Troy's fifth grade report card and a 1983 annual review, was also admitted (v2/246, 248; 1s/51, 53; 2a3/451-452). Troy had normal intelligence, but he had emotional problems. He also had drooping eyelids, he had to tip his head in order to see people, and children teased him about this. Mr. Olbon was having some success in improving Troy's self-esteem and ability to get along in groups, and in curbing his impulsive behavior. Troy had problems reading, but mathematics was his best subject and Mr. Olbon planned to place him in a mainstream mathematics class. However, that did not occur because Troy was placed in the Collins Children's Home. While Troy was at the Collins Home, his behavior, his self-esteem, and his ability to get along in groups improved. However, Troy left the Collins Home to live with his mother.

Stacy France testified she was ten years older than her brother Troy Merck who was the youngest child in the family

(2a3/453). Her sister Roberta was six years older than her, and was now deceased (2a3/454, 456). She had another brother who was 18 months younger than her (2a3/454).

Ms. France testified their mother became pregnant with Troy while her husband served in Viet Nam (2a3/454). She denied she was pregnant and tried to conceal it (2a3/454). Things changed drastically at home and fighting began (2a3/454). His mother unsuccessfully tried to abort him by drinking, rubbing turpentine on her belly, and sniffing rubbing alcohol (2a3/454-455, 461-462). Upon returning from Viet Nam, Mr. Merck took her to a doctor, learned she was pregnant, and learned it was not his child (2a3/454). He left her and she blamed Troy (2a3/454-455).

Ms. France testified their mother showed no love to Troy (2a3/455). She was mentally abusive to Troy, and beat him physically, perhaps an average of every other day (2a3/455, 463). She held him down and beat him with her fist, a shoe, a broom handle, or whatever object was handy (2a3/455). She believes her mother's attempts at abortion handicapped Troy in numerous ways (2a3/456, 462). His eyes did not open for three months, he had problems with his eyes, and he had a series of eye operation beginning when he was four years old, but he still has eye problems (2a3/456-457).

Ms. France testified that when she was 10 or 11 years old and in the fourth grade, she was placed in a boarding school, the Tamassee School, for two or three years (2a3/459). Troy

was then the only child at home, but their sister Roberta was around (2a3/459, 462). Ms. France returned home for holidays and summer vacations (2a3/459, 465-466). She witnessed their mother's continuing abuse of Troy and heard about it from Roberta and others (2a3/456, 462-463).

Ms. France testified that she visited Troy in prison and they exchanged letters (2a3/460). Troy also corresponds with her daughter and brother (2a3/460). He wrote to his mother and his sister Roberta before they died (2a3/460). He has pen pals (2a3/460). He stays positive and upbeat, tries to raise the spirits of others, and counsels others about their problems (2a3/460-461).

Ms. France testified she worked at a community college and formerly worked as a paralegal at a law firm (2a3/464). She was a single mother and received child support from the children's father (2a3/464, 466). She saw her mother slap the children and they fought over this (2a3/466). She used a neighbor as a regular babysitter, but on occasion used her mother as a babysitter reluctantly and for as short a time as possible and only to avoid losing her job and going on welfare (2a3/464, 466).

Mr. Merck's birth certificate was admitted (v2/245, 247; 1s/50, 52, 58; 2a3/471). It indicated he was born on January 9, 1972, in Oconee County, South Carolina (1s/58; 2a3/471-472).

Ann Rackley testified she and her husband founded the

Collins Children's Home, a licensed group home for children who have been abandoned, abused, neglected, or have emotional problems (2a3/472-473). They strive to help children from deprived backgrounds to realize their potential (2a3/473). Since 1980, they raised over 50 children (2a3/473). They usually accept children who are voluntarily placed with them (2a3/573).

Ms. Rackley testified that in November 1982, when Troy Merck ten years old, he was referred to the home through the school system (2a3/473, 476, 486). Troy had been in an emotionally handicapped class with teacher George Olbon (2a3/476-477). The class contained only children with behavioral problem, and they were segregated from other students (2a3/477). Ms. Rackley also met with Troy's mother, Lois Merck, because she had custody of him (2a3/474). The home environment was obviously troubled and dysfunctional (2a3/475-476). His mother lacked knowledge and skills to be a mother (2a3/476). She resented Troy from the time he was in her womb and said Troy was so stupid he could not die right (2a3/480). She made admissions about behaviors and inappropriate responses (2a3/476). She hit Troy with whatever object was at hand whenever she was angry about anything (2a3/480). Ms. Rackley did not believe a child could survive, let alone thrive, in that home (2a3/476).

Ms. Rackley testified she received documents including psychological reports, school records, and medical records

(2a3/474). She prepared an admission intake summary (2a3/474). The psychological reports, school records, and an intake summary were admitted into evidence (1s/59-61; 2a3/475).

Ms. Rackley testified the Collins Children's Home's environment was more restrictive than his former school's emotionally handicapped program (2a3/476-477). Troy did well in the extremely structured environment (2a3/477, 491). It was difficult in the beginning, but he made real progress (2a3/481). He ran away to the woods behind the school once because of frustrations at school, and perhaps he ran away more than once and perhaps went to his mother's home, but she could not recall him staying away from the school overnight (2a3/486-488). He performed chores, shared family activities, and attended church (2a3/480). He was not used to hugging, but learned to hug and initiated hugs (2a3/480). He participated in a Christmas play and loved acting (2a3/478-480). He progressed emotionally and academically so much that they decided to place him in a regular mainstream class with normal children in the next school year (2a3/482, 488). However, the placement in the mainstream class did not occur (2a3/482)

Ms. Rackley testified that in June 1983, his mother decided to withdraw him from the Collins Children's Home (2a3/482-483). She could not be persuaded to leave him at the home for another school year (2a3/483). Ms. Merck insisted Troy live with her so she could collect government assistance (2a3/483; 1s/59). Troy left with tears in his eyes (2a3/484).

Ms. Rackley indicated on the intake summary, "Discharged June '83 - Mother insists Troy move to Sylva so that she could collect payment for dependent care, food stamps, etc. - Big mistake!" (1s/59).

Ms. Rackley testified that she was contacted by the State when the trials in this case began (2a3/484). She and her husband have since corresponded with Troy by mail, spoke with him on the telephone, and twice visited him face-to-face (2a3/484, 489-490). Initially she believed Troy could not change during his incarceration, but she witnessed changes in him (2a3/485). He matured, became more logical, learned to control his temper, and came to appreciate the effect of his behavior on others and the need for personal responsibility for his behavior (2a3/485). Troy responds well to a structured environment and needs a structured environment (2a3/491).

Linda Snyder testified she and her husband lived on a large farm (2a3/493). They became involved with the foster care program because they wished to share their farm with children (2a3/493). She was Troy's foster mother in 1984, when he was 12 or 13 years old (2a3/493, 498-499). He behaved while living at their home, got in no trouble, made friends with other children, did well in school, and made good progress (2a3/493, 502).

Ms. Snyder testified she met Troy's mother and found their relationship disturbing (2a3/493). His mother expected him to express hostility to society (2a3/493). He loved his

mother, wished to please her, and therefore acted hostile toward society (2a3/494-495). Troy's behavior deteriorated when he frequently visited his mother and he once returned from a visit with a knife given to him by his family (2a3/495). The school bus driver took the knife from Troy, and there were no threats involved in the incident (2a3/495, 499). Troy had eye surgery while living with the Snyders (2a3/494). He was scheduled to stay with them for six months, but he was allowed to go home after four months because he made so much progress (2a3/495). Ms. Snyder feared his return to his bad home environment (2a3/496).

Ms. Snyder testified she had no contact with Troy until contacted by his attorney during his first trial (2a3/496). They reconnected and had been in contact since then (2a3/496). She corresponded regularly with him and visited him monthly during a year she lived in Florida (2a3/496, 500-501). She also corresponds with other persons who have relationships with Troy (2a3/501). She thought she would help him, but he has been a good and supportive friend (2a3/496-497). He has matured, is an uplifting person, and gives of himself (2a3/497-498, 501-502).

Tara Wilkinson testified she lives in Texas and is developmental director at a nonprofit open adoption agency (2a3/503). In 1998, she accompanied a friend who visited a prison inmate (2a3/504-505, 508, 510). She met with Troy for three days, and has been his pen pal since then (2a3/504). She

writes to him monthly (2a3/506). He has matured since they met and his intellectual capacity has expanded (2a3/506). He is studious, creative, intelligent, and humorous (2a3/506). He is supportive of her and offers advice like a big brother (2a3/506).

Assistant Public Defender Nora McClure testified she met Troy Merck in October 1991 (2a3/514). He had a tough life (2a3/514). Although he was youthful, immature, undereducated, brash, and defensive, they had a good relationship (2a3/514, 516). He educated himself and is now a mature young man (2a3/514, 519). He is an intelligent, articulate, and sociable person (2a3/517, 519). He loves his mother (2a3/519). She did not recall Mr. Merck having "Mom" tattooed on his arm (2a3/519). She is fond of Mr. Merck and would enjoy meeting him socially (2a3/516, 518).

Troy Merck testified he had five or six prior felony convictions (2a3/536). He had been drinking alcohol since he was a young child (2a3/530, 536-537). Drinking became part of his lifestyle before his arrest in this case, and "he was an alcoholic or well on his way to it" (2a3/530, 537). He was drinking during his trip to his sister's home in Sylva, North Carolina before the incident (2a3/539-540). He loved his mother and visited her daily while he was there (2a3/540).

Mr. Merck testified that when attorneys had him tested, he learned he had a high IQ (2a3/530). He realized he had not done well in life and he decided to educate himself (2a3/531-

532, 538). He hoped to help others avoid following his path in life (2a3/532). Reading about science, history, sociology, and human behavior have helped him to better understand himself and others (2a3/531-532). This has helped him in his daily life (2a3/530). Mr. Merck testified that he corresponds with his friends and family (2a3/534-535). He advises his hardheaded young adult nieces to stay out of trouble (2a3/534-535). He discusses a wide range of topics with others, and particularly enjoys discussing books (2a3/534). He and Ms. Wilkinson discuss her relationships and frustrations with work (2a3/535).

Mr. Merck testified that a friend, Mary Kay, sent him books to read (2a3/532). After reading the books, he donated them to juvenile education program in the jail, seeking to help others (2a3/533-534). He received a letter of thanks from the students at that program and forwarded it to Ms. Kay (2a3/353; 1s/62, 63).

The defense moved to prevent the State from arguing to the jury that Mr. Merck was released from prison one month before the crime occurred, as it did at the previous trial, because this is an impermissible non-statutory aggravating factor (2a3/555). The State asserted it would not do so (2a3/555).

At the onset of closing argument, the State asserted:

The Defendant was described to you today as a kind man, a man with positive values. One has to wonder on October 11, 1991, how kind Jim Newton felt when the Defendant jabbed this into his throat and twisted it.

Twisted it until blood squirted out of his neck, as the Defendant described it, like a squirt gun.

(2a3/556-557). The State noted Mr. Merck first removed his shirt, and claimed he did so because he cared more for his shirt than Mr. Newton's life (2a3/557, 570). The State argued: "The Defense will be talking to you about what we call mitigation. Things about his background they believe should warrant you affording him some mercy that he never afforded Mr. Newton." (2a3/559). The defense objected and requested the comment be stricken (2a3/559). The objection was overruled (2a3/559). The State asserted, "Alcohol in this case is not mitigation, it is just an excuse." (2a3/562). The State was dismissive of testimony about Mr. Merck's childhood, claiming he was "the guy who spent the night drinking and watching the fake orgasm contest and decided that he was going to teach Mr. Newton to bleed in the parking lot." (2a3/564). The State asserted:

It is interesting to hear [the defense witnesses] laying it on real thick of how bad the mother is, but he cannot even tell you here on the stand that he didn't love his mother." He got "Mom" tattooed on his arm. He was visiting her in Sylva, South Carolina. He seen her every day in the house. This monster that they want you to blame for everything that happened there.

(2a3/563). The State claimed "This is one of the worst most aggravated murders" (2a3/568), and asked the jurors, "isn't this among the worst ways to die?" (2a3/568) and, "How did that feel to have a knife penetrate his skull?" (2a3/569). The State later asserted it was a mere strategy of the defense

to say that Mr. Merck was reading great literature and science books (2a3/572). The State then asked the jury: "Since 1991, how many books could Jim Newton have read? How many Penthouse could he have read?" (2a3/572). The State also noted Mr. Merck committed other crimes involving violence to persons shortly before this crime (2a3/573).

The jury was provided with the evidence during deliberations (2a3/596). During deliberations, the jury had a question:

When the term "Life in prison without the penalty of parole for 25 yrs" is used, when does the time start counting? From this day forward or does the time served count toward the 25 yrs?

(2a4/601; v2/250). The trial court noted the jury wrote "penalty" of parole, but meant "possibility" of parole (2a4/601). The defense noted that it tendered Mr. Ruiz to inform the jury about this matter (2a4/601-602). The jury was instructed "to rely only upon the evidence and the testimony that has been presented, the arguments of the lawyers, and the instructions I have now given you each a copy. Further response to your question I cannot make." (2a4/605).

The jury recommended death by a vote of 9 to 3 (2a4/606-609; v2/251).

On March 26, 2004, the defense filed a motion for new trial (v2/261-262). The motion asserted the trial court erred by: excluding the proffered testimony of Felix Ruiz about parole; finding sufficient evidence of the heinous, atrocious

or cruel aggravating factor; allowing use of five prior felony convictions because proper procedures were not followed in adjudicating the juvenile as an adult; and allowing numerous bailiffs to surround Mr. Merck during the trial, presenting the jury with the image of a very dangerous person (v2/261).

On May 28, 2004, a Spencer hearing was held before Judge Downey (v3/526-547; 2a4/613-686). The trial court noted that mitigation evidence would be presented that was not presented to the jury (2a4/613). The State noted it had victim impact evidence (2a4/614-615). The trial court was concerned about considering victim impact evidence because it was not recognizable at the time of the offense, and it suggested the State file the letters and the clerk seal them (2a4/615-618). Mr. Merck waived objection to consideration of the letters (2a4/618). The State filed letters from Mr. Newton's family and photographs of Mr. Newton and his family, and the letters were read by Mr. Newton's father (2a4/619-628; v2/265-266; 1s/491-504).

The defense, with the agreement of the State, filed a transcript of testimony of the Medical Examiner's Office chief toxicologist (2a4/628-630; v1/267-268; 1s/504). Toxicologist Bell estimated the blood alcohol concentration of Neil Thomas and Mr. Merck based on the trial testimony of Mr. Thomas (v1/267-268; 1s/504/752-754, 756-759). Mr. Thomas' blood alcohol concentration would have been approximately 0.15 grams per deciliter (1s/504/753). Mr. Merck's blood alcohol

concentration would have been approximately 0.21 grams per deciliter and between 0.16 and 0.26 grams per deciliter (1s/504/753-754, 757-758). Under the Florida DUI law, a person is considered impaired with a blood alcohol concentration of 0.08 grams per deciliter (1s/504/754, 760-761). Approximately 0.21 grams per deciliter would be consistent with significant impairment, and persons who consumed alcohol regularly would be impaired psychologically although they might exhibit less symptoms of intoxication (1s/504/754, 761-763). Alcohol may change personality traits and cause a lack of control (1s/504/755-756).

The defense noted everyone in the case was under the influence of alcohol (2a4/631). Mr. Thomas was intoxicated (2a4/630). Mr. Merck previously testified he had considerably more to drink than the nine drinks indicated in the testimony of Mr. Thomas, but based on the testimony of Mr. Thomas, Mr. Merck's blood alcohol concentration was estimated at 0.21 grams per deciliter (2a4/630-631). The autopsy established the victim had a blood alcohol concentration of 0.18 grams per deciliter (2a4/631). Alcohol was a factor in the case (2a4/631).

Dr. Maher was presented by the defense and accepted as an expert in forensic psychology (2a4/631-632). Dr. Maher testified he was hired by various attorneys to work with Mr. Merck on possible mitigation (2a4/633). He met with Mr. Merck periodically from 1992 through 2004, for a total of six to

eight hours (2a4/633). He had discussions with Mr. Merck's attorneys and members of his family (2a4/633). He also digested a tremendous amount of material including medical records, police records, and information about his family background (2a4/633).

Dr. Maher testified Mr. Merck had a neglected, disordered, abusive childhood (2a4/634-635, 637). He was exposed to violence as a regular basis, as an observer and as a victim (2a4/637). His family believed it was amusing to give Mr. Merck alcohol when he was a child and to watch his reactions (2a4/634). He had a history of impulsivity, hostility toward others, and violence toward others (2a4/635).

Dr. Maher testified Mr. Merck was placed in public school programs for emotionally challenged children, but those programs lacked the resources he needed (2a4/649). When he was approximately ten years old, he was sent to the Collins Children's Home (2a4/633). His year at the Collins Children's Home was the best year of his life (2a4/633). He responded well to the consistent structured environment of stability and reasonable nurturing, but he was not cured of his childhood problems and he went on to do many bad things (2a4/636).

Dr. Maher testified Mr. Merck continued to drink alcohol, and it led to a pattern of significant alcohol abuse during his teens (2a4/634). By age 19, he had a consistent pattern of alcohol abuse, dependency, and addiction, and he habitually engaged in excessive abusive incautious drinking of alcohol

(2a4/634). This behavior was normal and acceptable to him in his distorted immature view of the world, and was unlike other teenagers experimenting with alcohol and misusing it against social prohibitions (2a4/635).

Dr. Maher testified Mr. Merck was 19 years old at the time of the offense, but he was not equivalent to a normal 19 year old, he was developmentally an adolescent due to environmental factors including his bad home life and his alcohol abuse (2a4/639-642). His IQ score may then have been 110, in the normal range and he may have had normal intellectual capacities, but in terms of academic exposure and achievement he was closer to 13 or 14-year-olds (2a4/639, 648-649). Also, in terms of social norms and expectations, he was at the stage of 13 or 14-year-olds (2a4/639). This was a result of his abnormal home life and alcohol (2a4/640). He then had an antisocial personality and had no regret or guilt about the death of Mr. Newton (2a4/643). He then had symptoms of post-traumatic stress disorder caused by neglect and abuse during his childhood and violent interactions during his childhood and adolescence (2a4/646-647).

Dr. Maher testified Mr. Merck was under the influence of an extreme mental or emotional disturbance when the crime was committed (2a4/636-637, 649). He was impaired due to severe alcohol intoxication, his immature personality, and his impulse control disorder which was a manifestation of his childhood developmental experiences (2a4/637, 649).

Dr. Maher testified Mr. Merck's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired at the time of the offense as a result of severe alcohol intoxication and his personality traits (2a4/637-638, 649). Specifically, Mr. Merck had been raised to believe fear is respect and kindness is weakness, to be impulsive, and to strike first when there was a potential conflict (2a4/637-638, 645). He believed one either exploited another person or was exploited by the other (2a4/641-642). Mr. Merck was surprised by people who did not share this value system, and believed they were weak (2a4/638).

Dr. Maher testified that alcohol played a critical part in the offense (2a4/649-650). Although alcohol was not a prerequisite for Mr. Merck to react violently, he would not have killed Mr. Newton absent alcohol (2a4/650).

Dr. Maher testified Mr. Merck's value system had changed (2a4/638). He matured considerably during his incarceration (2a4/638, 640, 643-644). His recent IQ score was 128, slightly above normal (2a4/648). His demeanor and his willingness to interact improved since 1992 (2a4/641). He now understands fear is not respect and kindness is not weakness, and he now seeks respect but not fear from people (2a4/640, 645). He now openly and honestly corresponds and communicates with others (2a4/641). Mr. Merck struggles with depression, guilt, and regret, and his disorders are still present, but not to the

same degree (2a4/642). He feels remorse and guilt about the death of Mr. Newton and accepts responsibility, but denies the incident occurred as it has been described (2a4/643-644). He no longer meets the diagnosis of antisocial personality (2a4/643).

Dr. Slomin testified he was retained by the State in this case in 1993 (2a4/659). He reviewed a substantial amount of materials including police reports, school records, depositions of other mental health professionals, psychological test results, materials relating to Mr. Merck's prior criminal history, and the autopsy report (2a4/659-660). In March 2004, he conducted an interview and administered the MMPI pursuant to a court order, which was his only direct meeting with Mr. Merck (2a4/660-661, 669). Dr. Slomin spent three hours and fifteen minutes with Mr. Merck (2a4/671, 673). Dr. Slomin never talked to anyone who developed a relationship with Mr. Merck since he had been on death row (2a4/671).

Dr. Slomin testified that Mr. Merck failed to avail himself of educational opportunities and special programs afforded him in school in North Carolina (2a4/667). He had eye problems, but he had surgery to correct it (2a4/668). He had people who cared about him (2a4/668). Dr. Slomin opined that Mr. Merck's conduct was the result of choices he made (2a4/668).

Dr. Slomin concluded based on the MMPI and the clinical interview that Mr. Merck suffers from an antisocial

personality disorder characterized by impulsiveness, aggressive violent acts, a reckless disregard for the safety of self or others, and indifference about the consequences of his actions (2a4/661-662). His belief that kindness is weakness and fear is respect is found in narcissists and is part of antisocial personality disorder (2a4/668-669). Dr. Slomin believed the same diagnosis applied to the time of the offense, the MMPI results had not changed, he had not changed, and he had no new value system (2a4/661-664). Dr. Slomin asserted consciousness does not develop during incarceration, Mr. Merck has been isolated from others in prison, and the best predictor of future behavior is past behavior (2a4/663, 673). Dr. Slomin conceded that persons who had contact with Mr. Merck over 13 years might have greater input and greater insight as to whether he changed and the tests do not provide findings of maturation (2a4/669-673).

Dr. Slomin testified that in 1992, the Wexler indicated Mr. Merck's IQ was 110 (2a4/664). This is above the average IQ of 100, and is at the 75% level (2a4/664). Dr. Slomin believed the 1992 score was inaccurate and should probably be 120 (2a4/664). Mr. Merck was recently tested and found to have a 128 IQ, which is at the 92-93% level (2a4/664). Dr. Slomin believed Mr. Merck has not gotten smarter, he just tested better (2a4/664-665).

Dr. Slomin testified that although Mr. Merck suffered from an antisocial personality disorder at the time of the

offense, he was not under the influence of an extreme mental or emotional disturbance when the crime was committed, and the disorder did not cause his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law to be substantially impaired (2a4/665). Alcohol use and his personality disorder did not result in being under the influence of an extreme mental or emotional disturbance when the crime was committed, and it did not cause his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law to be substantially impaired (2a4/667-668). Dr. Slomin did not believe he suffered from post-traumatic stress disorder at the time of the offense, and opined that the traumatic incidents of his childhood could not rise to the level of causing such (2a4/665-667).

The defense urged the trial court to impose a life sentence (2a4/674-683). The defense evidence established Mr. Merck was a changed man (2a4/677). The jury was prevented from learning that Mr. Merck would probably be imprisoned for life and not released on parole, the State stressed that the offense was committed soon after prior convictions, the actions of the bailiffs at trial indicated to the jury that Mr. Merck was dangerous, and it was likely that the jury reached death recommendation because of concerns about parole (2a4/674-683).

On July 14, 2004, the State filed a sentencing memorandum (v2/269-294). The State asserted two aggravating factors were established, mitigating factors were not established or were entitled to no weight, and the death penalty should be imposed (v2/269-293).

On the same date the defense sentencing memorandum was filed (v2/295-304). The defense asserted the jury's recommendation of death was likely influenced by inflamed emotions, caused by factors including actions of bailiffs which portrayed Mr. Merck as a dangerous person, evidence and argument about lack of remorse, and concern about Mr. Merck's eligibility for parole (v2/296-298). If the trial court should find as an aggravating factor that Mr. Merck was previously convicted of felonies involving the use or threat of violence to a person, it should give the factor little weight because the prior convictions may be susceptible to collateral attack (v2/298). The trial court should not find as an aggravating factor that the crime was heinous, atrocious, or cruel because it was uncontroverted the crime occurred on a spur of the moment, lasted a brief time, and resulted in rapid onset of unconsciousness and death of the victim (v2/298-299). Dr. Palma testified a person would survive "a minute or so" with a severed jugular and a person would lose consciousness in a minute, or two, or three (v2/299). The evidence of twisting the knife relies on the credibility of Neil Thomas who provided Mr. Merck with alcohol, drove him away, and hid him,

then received continuing assistance from the State - Dr. Palma indicated the wound was the result of body movements or a result of twisting the knife (v2/299). The heinous, atrocious or cruel factor should be based on perceptions of the victim, not on enjoyment by the defendant (v2/299-300).

The defense asserted the following mitigating factors were established: Mr. Merck was 19 years old at the time of the offense; his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; the crime was committed while he was under the influence of extreme mental or emotional disturbance; Mr. Merck's abusive family background; his alcoholism, alcohol abuse, and intoxication; and his capacity to form and maintain positive relationships and his capacity for growth (v2/300-303). However, Mr. Merck's maturation and rehabilitation of himself led the jury to believe he would be released on parole in twelve years, and the obvious concern of numerous bailiffs to every move of Mr. Merck sent the jury a message that he was dangerous (v2/303). He should be sentenced to life without the possibility of parole for 25 years (v2/304).

On August 6, 2004, a sentencing proceeding was held before Judge Downey (v3/548-569). The trial court found two aggravating factors: Mr. Merck was previously convicted of another capital felony or of a felony involving the use or threat of violence to a person (great weight); and the capital

felony was especially heinous, atrocious or cruel (great weight) (v2/310-312, 314; v3/552-555, 562-563). As to the especially heinous, atrocious or cruel factor, the trial court explained:

This aggravating factor was addressed in Merck I by the Supreme Court and found to be applicable in this case. The facts surrounding the killing were presented to the penalty phase jury and were the same as were outlined in Merck I and II. The defense argument that the crime was committed on the spur of the moment and did not take very long to commit is not well taken. The testimony of the medical examiner was clear and convincing that the victim would have been alive for five minutes or longer from the time of the first stab wound to his back. And the testimony of the other eyewitnesses, including the companion of the defendant Neal Thomas, was that the knife slice to the victim's neck was one of the later slashes made by the defendant.

Even considering the diversion of the testimony of some of the state's witnesses as to how long a time period passed from the start of the attack until the police and medical personnel arrived on the scene, it is uncontroverted and acknowledged by the defense that it was at least five minutes. The Supreme Court in Merck I acknowledged that this was a sufficient period of time for the victim of the stabbing to be alive to bring this factor into play. This fact coupled with the defendant's statements before, during and after the stabbing convinced this Court that this factor exists.

This Court does not agree with the defense contention that this factor is totally shown by the testimony of Neal Thomas. The various eyewitnesses all stated that the victim was grasping for air to breathe and groaning and he was conscious for at least a short while, long enough in this Court's opinion that he, the victim, knew what was happening to him, that he had been stabbed and he was in pain and was dying.

This testimony is confirmed by the medical examiner. There were 13 separate stab wounds to the body of the victim and there was evidence that some twisting had taken place during the incident. Whether this was done by the defendant twisting the knife as he had said he did after the killing to witness Thomas, or the victim moving while being

stabbed is of no matter. Seven of the wounds were as deep as they were long. Thomas said that the defendant stated after the killing that he recalled pulling the victim's head back so he would be sure to slice his neck open, which he did according to the medical examiner.

It is un rebutted that the victim was conscious throughout the attack and knew of his impending death. This killing was consciousless and pitiless and was outrageously wicked. And it was designed to inflict a high degree of pain on the victim to the admitted enjoyment of the defendant and was certainly unnecessarily torturous to the victim. This aggravating factor has been proved beyond a reasonable doubt and will be given GREAT weight.

(v2/311; v3/553-555).

The trial court considered three statutory mitigating factors: Mr. Merck was 19 years old at the time of the offense (some weight); his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (not established, no weight); and the capital felony was committed while he was under the influence of extreme mental or emotional disturbance (not established, no weight) (v2/312-313; v3/556-560).

As to the mitigating factor that Mr. Merck's capacity of to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, the trial court found:

There was some testimony that the defendant was impaired by alcohol at the time of the killing. Testimony from Neal Thomas was that both he and the defendant had five or six beers and more than several shots and this in conjunction with the defendant's emotional disturbance and immaturity resulted in his inability to understand the criminality of his actions. No question that the defendant was introduced to the use of alcohol at a very young age. He testified he started drinking at

age 11. This early start however might have only served in building up a tolerance to the effects of alcohol that other 19-year-olds might not have.

Very telling in this Court's opinion is the fact that immediately before the stabbing the defendant walked to his car and asked companion Thomas for the car keys. Thomas stated and the other witnesses confirmed that Thomas threw the keys to the defendant at 2:30 in the morning in a dimly lit parking lot for a distance of at least 15 feet and the defendant caught the keys in the air. He did not drop them. He did not stumble on his way to the car.

He unlocked the car and took off his shirt.

He then returned to the area of the victim with a knife in his hand, concealing it behind his back. It was also at this time that the defendant had the ability to tell witness Thomas not to use his real name after Thomas said nice catch Troy.

In addition to this there was testimony from Dr. Maher that the defendant had an impulsive attitude which coupled with his alcohol abuse could cause a first-strike attitude which impaired his ability to conform his actions. This Court is not convinced that this impairment existed at the time of the incident.

The defendant provoked the fight with the victim even after the victim told him he did not want a confrontation. The defendant could have walked away.

Unfortunately he did not. His actions on that night in question belie this factor. This factor was not established by the evidence and this Court will give it NO weight.

(v2/312-313; v3/557-558).

As to the mitigating factor that Mr. Merck was under the influence of extreme mental or emotional disturbance, the trial court found:

The defense relies upon the testimony of Dr. Maher to establish this factor and Dr. Mayer relies on his feeling that the defendant's use of alcohol on the night in question coupled with his lack of impulse control to establish this factor. Dr. Maher also relies upon the defendant's dysfunctional family life, the fact that the defendant was born while his legal father was overseas in Vietnam and was not his biological father, a fact which caused his parents to divorce and which caused the defendant's mother to be bitter and very mean to the defendant when he

was young. Dr. Maher could not explain however after all this abuse the defendant remained close to his mother, wrote her from prison and even took witness Thomas to visit her in North Carolina immediately before this incident.

Dr. Slomin testified that the defendant suffered from an antisocial disorder. A disorder which the Supreme Court has repeatedly said is not a statutory mitigator. Dr. Slomin testified that an antisocial person may be impulsive, irritable and aggressive. He may have a lack of remorse and be indifferent to the consequences of his actions and may be an abuser of drugs and/or alcohol.

Dr. Slomin diagnosed the defendant as antisocial in 1992 and again this year. His I.Q. of 110 as of 1992 was certainly within the normal range. He further stated that impulsivity is merely a part of antisocial disorder. There was no testimony that this defendant was under the influence of extreme mental or emotional disturbance. Thus this factor has not been established and this Court will give it NO weight.

(v2/313; v3/559-560).

The trial court found three nonstatutory mitigating factors: Mr. Merck's family background (little weight); his alcoholism, alcohol abuse and intoxication (little weight; and his capacity to form and maintain positive relationships and his capacity for growth (some weight) (v2/313-314; v3/560-562). Mr. Merck was sentenced to death (v2/305, 306-309, 315; v3/563). As to the nonstatutory mitigating factor of Mr. Merck's family background, the trial court found:

There was ample testimony that this defendant was abused by his mother for the reasons stated above. He was singled out for abuse by her. He was placed in a children's home where he apparently thrived but was removed by his mother. He was placed in emotionally handicapped classes in school and did well until again he was removed by his mother. At age 13 the defendant was placed in foster care on a farm but again was not allowed by his mother to stay long enough to adequately grow and prosper from the experience. Interestingly the defendant ran away

from his foster home twice to be with his mother. However it should be noted that despite all this, the defendant said he loved his mother, wrote her from prison, visited her upon his release along with Neal Thomas. This factor has been established to this Court's satisfaction and will be given SOME weight.

(v2/313-314; v3/560).

As to the nonstatutory mitigating factor of Mr. Merck's alcoholism, alcohol abuse and intoxication, the trial court found:

There was testimony from toxicologist Ron Bell read into evidence at the Spencer Hearing, that the defendant's blood alcohol level was somewhere between .16 and .26 at the time of the killing. This estimate is based on the testimony of Neal Thomas who bought the drinks for the defendant. While it cannot be denied that the defendant was under the influence of alcohol, the testimony of witness Thomas was that the defendant did not display any of the classic alcohol signs such as slurred speech, poor balance, difficulty walking, talking or standing and was lucid in his conversation. Other witnesses who had a chance to observe the defendant confirmed Thomas' assessment of the defendant's behavior. Also the key catching incident referred to above and the defendant's deliberate actions and words somewhat mitigate this factor.

While it is taken as true that the defendant started drinking at a very young age, there was no testimony that he was an alcoholic or suffered from alcoholism. In fact the testimony of witness Thomas was that he and the defendant had not been drinking on the day of the killing before they arrived at the City Lights bar at 10:30 at night. Due to the defendant's alcohol consumption on the night in question, it cannot be denied he was under the influence of alcohol on the night in question and thus this factor has been established. But the facts belie the seriousness of the problem and thus this factor is given LITTLE weight.

(v3/561-562).

As to the nonstatutory mitigating factor of Mr. Merck's capacity to form and maintain positive relationships and capacity for growth, the trial court found:

There was testimony at the penalty phase and at the Spencer hearing that this defendant has changed enormously since his arrest in this case. He is a different person, a better person. He reads and writes letters to family and friends. He has maintained contact with his remaining family through letters and visits. He has made new friends while in prison. Dr. Mayer stated that his I.Q. had increased to 124, putting him in the 92nd percentile of the population since he was first tested in 1992. This defendant has apparently adjusted well to prison life and made the best of that situation. Certainly this factor has been established and will be given SOME weight.

(v2/314; v3/561).

The trial court found the aggravating factors outweighed the mitigating factors (v2/314-315; v3/562-563). The trial court sentenced Mr. Merck to death (v2/305, 306-309, 315; v3/563).

The defense noted it had filed a motion for new trial, and Mr. Merck would waive his presence for a hearing on the motion (v3/564). The State filed Pinellas County Sheriff's Office reports and orders from 1991-1993 and 1996-1997 as relevant to the motion for new trial (v3/586; 2s1-3/58-483).

On August 25, 2004, a hearing was held before Judge Downey on the defense new trial motion (v3/570-600). Defense counsel asserted a new trial was required because of the exclusion of testimony of Felix Ruiz about parole (v3/576-584, 596-597). A new trial was especially necessary in light of the

jury, within five minutes of the onset of deliberation, asking when eligibility for parole began (v3/576-577, 596-597). The jury may have believed Mr. Merck may be released on parole in twelve years if he was not executed, especially where there was evidence that Mr. Merck was now a changed and mature person (v3/578-581). Additionally, Mr. Merck was surrounded by numerous bailiffs throughout the trial who responded to every move of Mr. Merck and each time he approached the bench, he was surrounded by three bailiffs, which communicated to the jury that Mr. Merck was dangerous (v3/581-582). Although Mr. Merck misbehaved in 1992 and 1997, he presented no problems to bailiffs or jailers through the current proceedings (v3/582-583). Due process requires the jury be properly informed about parole ineligibility when the defendant's future dangerousness becomes an issue (v3/577-584).

The State asserted the proffered testimony was speculative and the jury was properly informed Mr. Merck is parole eligible (v3/584-586). Mr. Merck's history of outbursts in court, his history of violence in jail, and the crime he was convicted of justified the security measures at trial (v3/595-596).

The State presented Bailiff Christine Nichowich (v3/587-595). She testified Mr. Merck had been aggressive at the jail through 1997 and he was considered a "red dot" at the jail which meant he was cuffed and shackled at all times (v3/588-589, 590, 593). A "red dot" can result from one's charges or

one's behavior in jail, and a death row inmate was always "red dot" (v3/589). A fourth bailiff instead of the usual three were used in the courtroom because Mr. Merck was not cuffed and shackled in court (v3/588-591, 594-595). Bailiff Nichowich, the fourth bailiff, was armed with a 9mm handgun and a taser during the trial, but they were covered by her blazer (v3/592-593). The bailiffs watched all movements of Mr. Merck because they were informed that at his prior trial he jumped up and became belligerent toward the judge and the victim's family (v3/590-591). However, Mr. Merck made no disturbance and the bailiffs did not threaten or restrain him (v3/591-592, 594-595).

The motion for new trial was denied (v3/599).

A timely notice of appeal was filed on September 23, 2004 (v2/317).

SUMMARY OF THE ARGUMENT

The trial court improperly excluded evidence concerning the parole process and Appellant's presumptive parole release date. The potential sentences were death or life in prison with the possibility of parole in 25 years. This resentencing occurred in 2004, while the offense occurred in 1991. The jury was concerned about Appellant being soon released on parole because of the many years he already served in jail and in prison, but they were denied evidence that would have clarified their question about the parole process. The sentencer should not be precluded from considering any aspect of a defendant's character or record and any of the circumstances of the offense that is a basis for a sentence less than death. Appellant's death sentence must be vacated and the cause reversed for a new jury penalty phase hearing.

The trial court improperly excluded evidence that Appellant did not cause the death of the victim or that his participation in the crime was minor. The defense must be allowed to present evidence concerning the nature and circumstances of the offense. The sentencer should not be precluded from considering any aspect of a defendant's character or record and any of the circumstances of the offense that is a basis for a mitigating factors. Appellant's death sentence must be vacated and the cause reversed for a new jury penalty phase hearing.

The State relied upon improper and inflammatory argument

in closing. The State urged the jury to show Appellant the same mercy shown to the victim. The State made Golden Rule arguments. The State offered dogmatic statements as to what the evidence proved. The State asserted as fact matters on which there was no testimony. The State urged the jury to consider factors outside the proper scope of the deliberations. The State attacked the personal integrity and credibility of defense counsel. Prosecutorial misconduct taints the validity of the jury's death recommendation. Appellant's death sentence must be vacated and the cause reversed for a new jury penalty phase hearing.

The trial court's consideration of mitigating factors was flawed. The trial court failed to find mitigating factors and underweighed mitigating factors based on evidence that was not in the record. The trial court failed to find any evidence of alcoholism and alcohol abuse despite uncontroverted evidence of such. Appellant's death sentence must be vacated and the cause reversed for resentencing by the trial judge.

The death sentence is not proportionate. Substantial mitigation outweighs the two aggravating factors. Appellant's death sentence must be vacated and a life sentence imposed.

Florida's capital sentencing scheme is unconstitutional. Appellant's death sentence must be vacated and a life sentence imposed.

ARGUMENT

ISSUE I

THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE RELATING TO APPELLANT'S PRESUMPTIVE PAROLE DATE THAT WAS RELEVANT TO THE JURY'S DETERMINATION OF SENTENCE.

The Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering any aspect of a defendant's character or record and any of the circumstances of the offense that is proffered as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). "The defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors, in addition to future dangerousness, that a jury may consider in fixing appropriate punishment." *Simmons v. South Carolina*, 512 U.S. 154, 161 (1994).

"Jurors are naturally interested in how long a convicted murderer will actually be imprisoned in making a choice between life and death, and, logically, the jury would want to know any information that would impact on the life sentence alternative ..." *Booker v. State*, 773 So. 2d 1079, 1097 (Fla. 2000) (Anstead, J., concurring in part and dissenting in part.). "The Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.' *Gardner v. Florida*, 430 U.S. 349, 362 97 S.Ct. 1197, 1207, 51 L.Ed.2d 393 (1977)." *Simmons v. South Carolina*, 512 U.S. 154, 161 (1994).

Mr. Merck faced a capital sentencing in 2004 for a murder that occurred in 1991. Because the incident occurred in 1991, the only sentencing options were death or life imprisonment without the possibility of parole for twenty-five years. See § 775.082(1), Fla. Stat (1991) ("A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in § 775.082(1), Fla. Stat (1991) results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death."). See also *Hess v. State*, 794 So. 2d 1249, 1269 n18 (Fla. 2001) ("Because Hess committed this crime in 1993, he must be sentenced in accordance with the statutes in effect at that time. Under the 1993 statutes, capital felonies were punished either by a sentence of death or by life imprisonment without possibility of parole for twenty-five years. See § 775.082(1), Fla. Stat (1993).").

The delay in sentencing is not attributable to Mr. Merck, but was caused by errors at prior sentencing proceedings. *Merck v. State*, 664 So. 2d 939 (Fla. 1995); *Merck v. State*, 763 So. 2d 295 (Fla. 2000). However, this delay caused prejudice to Mr. Merck. His statutory eligibility for parole in less than twenty-five years worked against him. It is

obvious that the jury would be concerned about a man convicted of premeditated murder being soon released on parole because of the many years he already served in jail and in prison. See *Hitchcock v. State*, 673 So. 2d 859, 863 (Fla. 1996) ("Hitchcock claims that he was prejudiced by the State's argument that if given a life sentence, he would be eligible for parole after twenty-five years. We agree, based on the peculiar facts in this case, that the State's argument was improper. Because the resentencing occurred so close to the expiration of the twenty-five-year sentence, the State's argument unfairly prejudiced Hitchcock. Upon remand, the State is directed not to make a similar argument.").

The defense sought to present testimony of Felix Ruiz, the Regional Administrator in the Tampa Bay Area for the Florida Parole Commission, about Mr. Merck's presumptive parole date (2a3/432-434). The defense noted the alternative to the death penalty was life imprisonment without the possibility of parole for 25 years, and Mr. Merck had already been imprisoned for 12 years (2a3/434). The trial court ruled this was not admissible (2a3/433, 441). The defense proffered the testimony of Mr. Ruiz (2a3/435-441).

Felix Ruiz testified Mr. Merck would not be automatically released on parole upon becoming parole eligible (2a3/437). As part of his job, Mr. Ruiz renders advisory opinions on the possibility of parole in cases where capital life sentences

were imposed for crimes which occurred prior to 1994 (2a2/436). See § 947.16 (1), Florida Statutes (2005) ("Every person who has been convicted of a felony or who has been convicted of one or more misdemeanors and whose sentence or cumulative sentences total 12 months or more, who is confined in execution of the judgment of the court, and whose record during confinement or while under supervision is good, shall, unless otherwise provided by law, be eligible for interview for parole consideration of her or his cumulative sentence structure ..."); Fla. Admin. Code 23-21.006(1) ("Inmates shall be eligible for parole consideration on all sentences which were not imposed pursuant to Sentencing Guidelines.")

Mr. Ruiz testified a potential parolee's first parole hearing is held within 18 months of completion of a minimum mandatory term, and the Parole Commission has a responsibility to review each case of parole eligibility every five years (2a3/437-438). See § 947.16 (2)(g)3, Fla. Stat. (2005) ("3. An inmate serving a mandatory term of 15 years or more shall have an initial interview no sooner than 18 months prior to the expiration of the mandatory minimum portion of the sentence."); 23-21.006(5)c ("Inmates serving a minimum mandatory term of 15 years or more shall be scheduled for an initial interview within 18 months of the expiration of the mandatory portion of the term.").

Mr. Ruiz testified that the Florida Administrative Code

contains a scoring matrix for determining a presumptive parole date (2a3/436). See Fla. Admin. Code 23-21.009 ("Matrix Time Ranges"). Mr. Ruiz calculated Mr. Merck's salient factor to be 8 (2a3/437). "Salient Factors are the indices of the offender's present and prior criminal behavior and related factors found by experience to be predictive in regard to parole outcome." Fla. Admin. Code 23-21.002(44). Florida Administrative Code 23-21.007 provides the basis for salient factor scoring calculations. Inmates who meet the criteria of the Recidivist Criminal Factor automatically fall within the Recidivist Criminal Factor time ranges on the matrix; others have their salient score determined by factors in the rule including points for prior convictions, prior incarcerations, time imposed for all prior incarcerations, age at offense which led to first incarceration, prior probation revocations, and prior escape convictions. Mr. Ruiz apparently did not find or did not consider whether Mr. Merck met the criteria of the Recidivist Criminal Factor, four or more prior adult felony convictions from four or more separate criminal episodes, at least two of which resulted in incarceration." Fla. Admin. Code 23-21.002(39).

Mr. Ruiz testified that the lowest possible presumptive parole date for Mr. Merck would be 300 months from his date of conviction plus time for aggravating factors such as the use of a deadly weapon, but the Commissioners instruct

administrators to use the high end of the matrix (2a3/438-439). He calculated Mr. Merck's presumptive parole date at 9,998 months, or 833 years, from his date of conviction, minus time served in county jail (2a3/436-437, 440-441). The Matrix Time Ranges indicate a Presumptive Parole Release Date of 300-9888 months for a capital offense if the salient factor is 8-11, and a Presumptive Parole Release Date of 400-9888 months for a capital offense if the person meets the criteria of the Recidivist Criminal Factor. Fla. Admin. Code 23-21.002(39).

Mr. Ruiz testified that the Commissioners have ultimate say on whether to grant parole (2a3/437-438). Mr. Ruiz testified that the parole date may be mitigated by participating in treatment programs (2a3/437). See Fla. Admin. Code 23-21.010(5)(b)1h (the Presumptive Parole Release Date may be rendered outside the matrix time range based on mitigating factors including that "The inmate has made a record of clearly exceptional program achievement"). The Presumptive Parole Release Date may also be rendered outside the matrix time range based on aggravating factors including: "The offense involved the use of a firearm or dangerous weapon;" "The offense resulted in great bodily injury or pecuniary loss;" and "The offense involved exceptionally brutal or heinous behavior indicative of wanton cruelty." Fla. Admin. Code 23-21.010(5)(a)1a,b,&d. Mr. Ruiz knew of no persons convicted of first-degree murder and sentenced to life without the possibility of parole for 25 years who had been

granted parole (2a3/440).

Although the State somewhat limited its presentation of evidence of Mr. Merck's future dangerousness, the issue was effectively presented to the jury. The trial court repeatedly informed the jury that it was to recommend punishment, "either death or life imprisonment without the possibility of parole for a period of 25 years." (2a1/19; 2a2/254; 2a3/587-589, 593-595). The State's evidence about the offense portrayed Mr. Merck as a dangerous person (2a2/265-432). An impression of Mr. Merck's dangerousness was also communicated by numerous bailiffs who surrounded Mr. Merck at trial and apparently reacted to his every move, a security measure the State believed was necessary because of outbursts at earlier trials in the 1990s and because of Mr. Merck's behavior in jail in the 1990s (2a1/22,69; 2a4/681-682; v2/296-298; v3/581-582, 587-596). The State introduced documents showing Mr. Merck had five Florida convictions in 1989: in Marion County case no. 89786 he was adjudicated guilty of robbery with a deadly weapon and sentenced to four years imprisonment followed by one year probation; in Lake County case no. 89-383 he was adjudicated guilty of robbery with a deadly weapon and sentenced to six years imprisonment; in Lake County case no. 89-894 he was adjudicated guilty of robbery with a deadly weapon and sentenced to six years imprisonment; in Lake County case no. 89-895 he was adjudicated guilty of robbery with a deadly weapon and sentenced to concurrent terms of six years

imprisonment; and Pasco County case no. 89-1617 he was adjudicated guilty of robbery and sentenced to five years imprisonment to run concurrent with any active sentences (1s/6-7, 44-48; 2a3/427-432). The jury was provided with the evidence during deliberations (2a3/596).

During cross-examination of Linda Snyder, the State established that her opinion about Mr. Merck becoming mature and a better person was based on telephone conversations and correspondence while he was imprisoned, not while he was out in the community (2a3/490). During cross-examination of Tara Wilkinson, the State established that her opinion about maturation and intellectual growth of Mr. Merck was based on a meeting and correspondence from him while he was imprisoned, not while he was out in the community (2a3/500-501). During cross-examination of Assistant Public Defender Nora McClure, the State established that her opinion about maturity of Mr. Merck was based on interactions while he was incarcerated, not while he was out in the community or while he was drinking (2a3/516-501). During cross-examination of Mr. Merck, the State established that his change of lifestyle occurred while he was in solitary confinement for the prior two years (2a3/538, 501).

During closing argument, the State portrayed Mr. Merck as a dangerous, conscienceless, and pitiless person who brutally attacked the victim without provocation and who was unnecessarily tortuous to the victim (2a3/556-562, 566-570).

The State asserted that witnesses who testified Mr. Merck was a changed man were not credible or met with Mr. Merck while he was incarcerated, "in the very alcohol free safe environment" (2a3/572-573). The State also noted Mr. Merck committed other crimes involving violence to persons shortly before this crime (2a3/573).

During deliberations, the jury asked whether the possibility of parole in 25 years started from the time of this trial or whether time served counted toward the possibility of parole in 25 years¹ (2a4/601; v2/250). The jury was instructed "to rely only upon the evidence and the testimony that has been presented, the arguments of the lawyers, and the instructions I have now given you each a copy. Further response to your question I cannot make." (2a4/605). "That the jury was concerned about the defendant's early release if a life sentence was imposed was made abundantly evident on the record when the jury came back into court with a specific question about this immediately after retiring to deliberate." *Booker v. State*, 773 So. 2d 1079, 1097 (Fla. 2000) (Anstead, J., concurring in part and dissenting in part). See *Green v. State*, 907 So. 2d 489, 505 (Fla. 2005). (Anstead, J., concurring in part and dissenting

¹ The record does not otherwise indicate how long the jury deliberated before posing this question, but neither the trial judge nor the Assistant State Attorneys took issue with defense counsel's assertion at the hearing on the motion for a new trial that this occurred within five minutes of the onset of deliberations (v3/576).

in part: "It is apparent on the face of the jury's question that the jurors were seriously considering a recommendation of life, but wanted to know in advance how such recommendations would work in this case, since the defendant had been incarcerated since 1987 for these two murders. The questions are logical for jurors considering a recommendation, with the obvious implication being that the defendant's eligibility for parole in less than twenty-five years would work against him."). The jury subsequently reached a verdict, recommending death by a vote of 9 to 3 (2a4/606-609; v2/251).

In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole.

Simmons v. South Carolina, 512 U.S. 154, 163-164 (1994).

In *Jackson v. State*, 530 So. 2d 269, 272 (Fla. 1988), this Court rejected an issue claiming the trial court erred by "failing to allow evidence that the parole commission does not consider for parole inmates serving life sentences without eligibility for parole as a mitigating circumstance." This Court held:

In his final point, appellant maintains he was prohibited from presenting the philosophy of the present parole commission to not grant parole to defendants convicted of capital offenses as a mitigating circumstance. We find that claim without merit. That fact does not concern the appellant's character and, in any event, it is probable that none

of the present parole commission would be serving at the time Jackson could be eligible for parole in twenty-five years had a life sentence been imposed.

Jackson, 530 So. 2d at 274. However, the evidence proffered in this case was more than the philosophy of the present parole commission, there was evidence that Mr. Merck would not automatically be granted parole, evidence of parole procedure, evidence of the calculation of a presumptive parole release date, and evidence that Mr. Ruiz knew of no persons convicted of first-degree murder and sentenced to life without the possibility of parole for 25 years who had been granted parole (2a3/435-441). In *Jackson*, the offense occurred in 1985 and the issue was raised in the trial court well before the opinion was issued in 1988, while in this case, Mr. Merck has been incarcerated since shortly after the offense occurred in 1991, and the issue was raised at trial in 2004, therefore there is a much greater probability the present parole commission would be serving when Mr. Merck could be eligible for parole consideration. In this case, and unlike *Jackson*, the record indicates the defense was concerned about evidence of future dangerousness and the jury was concerned about Mr. Merck's release on parole in a relatively short time. The decision in *Jackson* predates United States Supreme Court cases holding that the actual duration of a defendant's prison sentence is indisputably relevant in assessing future dangerousness. See *Simmons v. South Carolina*, 512 U.S. 154

(1994); *Shafer v. South Carolina*, 532 US. 36, 39 (2001) (when a capital defendant's future dangerousness is at issue, due process entitles the defendant to inform the jury of his parole ineligibility); *Kelly v. South Carolina*, 534 U.S. 246, 252-257 (2002) (where the State inferred to the jury that Kelly would be dangerous in the future, he was entitled to a requested jury instruction concerning parole ineligibility).

"[T]he Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence." *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987). Under the Eighth Amendment, Mr. Merck's presumptive parole date is "'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death,'" *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986), quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). "[T]he failure to provide this sentencing information to the jury in this case resulted in the jury being misled about the defendant's term of imprisonment and eligibility for parole, and forced to make its life and death decision on a false premise." *Booker v. State*, 773 So. 2d 1079, 1097 (Fla. 2000) (Anstead, J., concurring in part and dissenting in part.).

Withholding these facts about parole eligibility from the jury impermissibly diminished the reliability of the jury's determination that death was the appropriate punishment. The

jury's grievous misperception that Mr. Merck could soon be released on parole if he were not executed had the effect of creating a false choice between sentencing him to death and sentencing him to a short period of incarceration. Mr. Merck's due process right to rebut the evidence and argument that he posed a future danger to society was violated by the trial court's refusal to permit him to show that life sentence adequately could protect the public from any future acts of violence by him. Mr. Merck's death sentence must be vacated and the cause reversed for a new jury penalty phase hearing.

ISSUE II

THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE THAT WAS RELEVANT TO THE NATURE AND CIRCUMSTANCE OF THE OFFENSE, HAD BEARING ON THE FINDING OF AN AGGRAVATING FACTOR, AND COULD HAVE BEEN THE BASIS OF ADDITIONAL MITIGATING FACTORS.

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).

Downs v. State, 572 So. 2d 895, 899 (Fla. 1990). "All evidence of mitigating circumstances may be considered by the judge or jury. . . ." *Alford v. State*, 307 So. 2d 433, 44 (Fla. 1975) (quoting Dixon). "In discharging his duty of imposing a proper sentence, the sentencing judge is authorized, *if not required*, to consider all of the mitigating and aggravating circumstances involved in the crime." Statutory mitigating circumstances include "The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor" and "The defendant acted under extreme duress or under the substantial domination of another person." §921.141(6)(d)&(e), Fla. Stat. (1991).

"A jury in a resentencing proceeding must render an advisory sentence without the benefit of hearing all of the evidence presented in the guilt phase." *Bonifay v. State*, 680 So. 2d 413, 419 (Fla. 1996).

"[I]t is within the sound discretion of the trial court during resentencing proceedings to allow the jury to hear or see probative evidence which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence. We cannot expect jurors impaneled for capital sentencing proceedings to make wise and reasonable decisions in a vacuum.

Teffeteller v. State, 495 So. 2d 744, 745 (1986). The 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.

On March 1, 2004, a motion hearing was held before Judge Brandt Downey (1a/616-676). The defense sought to present evidence to the jury that Mr. Merck did not cause the death of Mr. Newton or that his participation was minor (1a/618). Neil Thomas supplied alcohol to Mr. Merck (1a/619-620). Mr. Thomas provoked the confrontation (1a/619). Eyewitness Katherine Sullivan's description of the clothing worn by the person who did the stabbing was consistent with the clothing worn by Neil Thomas during the incident (1a/619). A Sheriff's Office fingerprint examiner also testified about fingerprints consistent with Mr. Thomas (1a/619). Mr. Thomas was never prosecuted as an accomplice or an accessory after the fact (1a/620). The State provided preferential treatment to Mr. Thomas during prior proceedings in this case (1a/620). During the last sentencing proceeding, Assistant State Attorney assisted Mr. Thomas with an outstanding arrest warrant for violation of probation, and after the trial, the probation was

dismissed (1a/620). This evidence should be heard by the jury and was relevant to the statutory mitigator that Mr. Merck's involvement was minor or Mr. Thomas stabbed Mr. Newton (620-623, 628). Although Mr. Thomas was never charged, the Court has found the mitigator to apply in a case where another person was not charged, citing *Downs v. State*, 572 So. 2d 895 (Fla. 1990) (1a/631). This motion was denied at the previous sentencing, but the Court did not address this matter on appeal (1a/622-626, 632-633). To exclude this evidence would deny due process guarantees of the U.S. and Florida Constitutions (1a/623).

The State asserted the motion should be denied again because it was previously denied by Judge Khouzam, and on appeal, the Court did not overturn that ruling (1a/624-625).

The trial court denied the motion, erroneously holding the ruling was not overruled or was affirmed on appeal, the matter could not be relitigated, for the mitigator of minor involvement to apply another person must be charged in the case which did not happen in this case, and Mr. Merck could not argue his participation was minor because the jury found him guilty of first-degree premeditated murder (1a/626-633).

In *Merck v. State*, 763 So. 2d 295 (Fla. 2000), this Court reversed the death sentence and remanded for a new penalty trial, finding that the trial court failed to properly find, evaluate, and weigh evidence of Mr. Merck's alcohol abuse

within the list of nonstatutory mitigating circumstances in the sentencing order and that retroactive application of the aggravating circumstance that Merck was on felony probation at time of murder violated the ex post facto clause. This Court found the remaining claims on appeal, including that the trial court erred in excluding evidence as to another suspect in the crime, to be moot in light of finding reversible error. *Id.* at 297.

This Court did not affirm the trial court's denial of a defense motion to present evidence concerning Mr. Thomas' participation in the crime. This Court instead found the issue to be moot in light of finding reversible error. *Merck*, 763 So. 2d at 297. A prior trial court ruling on the motion was not fatal to raising the issue at this resentencing. [A] resentencing is a completely new proceeding ...” *Preston v. State*, 607 So. 2d 404, 408-409 (Fla. 1992). “The resentencing should proceed *de novo* on all issues bearing on the proper sentence which the jury recommends be imposed.” *Teffeteller v. State*, 495 So. 2d 744, 745 (1986). The clean slate principle applies to a new penalty phase, and “even if law of the case applied, ‘[t]his Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice.’” *State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997).” *Parker v. State*, 873 So. 2d 270, 278 (Fla. 2004). See also

Clark v. State, 690 So. 2d 1280, 1283 (Fla. 1997) ("Clark will begin the resentencing proceeding with a clean slate. We direct the trial court to allow Clark to present any relevant evidence in mitigation including the life sentence of his codefendant which was imposed after this Court affirmed Clark's death sentence."); *Merck v. State*, 664 So. 2d 939, 945 (Fla. 1995) (Wells concurring: "Upon remand, the resentencing will be governed by the "clean slate" rule ..."). Penalty phase evidence may be admissible to establish the mitigating factor of minor participation in the crime and the mitigating factor that a codefendant was not prosecuted at all. *Downs v. State*, 572 So. 2d 895, 899 (Fla. 1990).

The trial court's ruling that "The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor" statutory mitigating factor could not be argued subsequent to the guilt phase verdict is absurd - the considering, finding, and weighing of mitigating factors necessarily occurs after a guilt phase verdict. See *Downs v. State*, 572 So. 2d 895, 899 (Fla. 1990) ("In this case the [penalty phase] evidence presented to support Downs's assertion that he was not the triggerman is inextricably intertwined with evidence pertaining to the issue of guilt. [Footnote deleted.] We do not find that fact sufficient to bar the relevant evidence. Michael's testimony should have been admitted.").

The trial court erred by excluding evidence about Mr. Thomas's participation in the crime. Mr. Thomas: admitted he illegally bought many alcoholic drinks for Mr. Merck who was too young to buy alcohol; admitted he initiated a confrontation with Mr. Newton by calling him a pussy; claimed Mr. Merck became aggravated by Mr. Newton disrespecting Mr. Thomas and therefore attacked Mr. Newton; admitted he drove the getaway car, avoided the police, and helped conceal evidence; and claimed Mr. Merck made admissions (2a2/301-308, 312-317, 321-335). His testimony conflicted with that of Ms. Sullivan who asserted that one person, identified by her in court as Mr. Merck, both taunted Mr. Newton seeking to provoke a fight, and then stabbed him (2a2/268-279, 291-296). Mr. Ward, the only other witness to testify about the attack, testified that a man said happy birthday, approached Mr. Newton, grabbed his neck, and repeatedly punched him (2a2/349-350). Mr. Ward thought it was playful roughhouse from a friend and he saw no knife, but Mr. Newton subsequently fell on the hood of the Camaro and bled from his mouth (2a2/351). Mr. Ward did not identify Mr. Newton's assailant (2a2/348-353).

Mr. Thomas' testimony about purported statements of Mr. Merck was strongly relied on by the State in arguing the crime was especially heinous, atrocious, or cruel and "one of the worst aggravated murders" (2a3/556-558, 561-562, 567, 570), and the trial court relied on the same in finding the heinous, atrocious, or cruel aggravating factor applied and assigning

the factor great weight (v2/311-312, 314; v3/553-555, 562-563). Further evidence about the extent of Mr. Thomas' participation in the crime should have been admitted. It would have been relevant to the credibility of Mr. Thomas and it could have affected the heinous, atrocious, or cruel aggravating factor.

Further evidence about the extent of Mr. Thomas' participation in the crime would have been essential to raising additional mitigating factors not considered by the jury or the trial judge. See *Downs v. State*, 572 So. 2d 895, 899 (Fla. 1990) ("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.]"). "This evidence was relevant to explain to the jury the factual circumstances surrounding this murder, thus enabling it to make an informed recommendation." *Bonifay v. State*, 680 So. 2d 413, 419 (Fla. 1996).

The reliability of the jury's death recommendation and the trial court's imposition of a death sentence is undermined by the exclusion of evidence relevant to aggravating and mitigating factors. Infringement of Mr. Merck's right to

present evidence relevant to the nature and circumstances of the offense is harmful error of constitutional dimension. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering any aspect of a defendant's character or record and any of the circumstances of the offense that is proffered as a basis for a sentence less than death); *Simmons v. South Carolina*, 512 U.S. 154, 161, 114 S.Ct. 2187 (1994) ("The Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.' *Gardner v. Florida*, 430 U.S. 349, 362 97 S.Ct. 1197, 1207, 51 L.Ed.2d 393 (1977)."); *Eddings v. Oklahoma*, 455 U.S. 104, 113-114 (1982) ("Just 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."). Mr. Merck's death sentence must be vacated and the cause reversed and remanded for a new jury penalty phase hearing.

ISSUE III

IMPROPER REMARKS TO THE JURY, MADE BY THE ASSISTANT STATE ATTORNEY DURING CLOSING ARGUMENT, DENIED APPELLANT A FAIR PENALTY PHASE PROCEEDING.

A criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence:

A criminal trial provides a neutral arena for the presentation of evidence upon which alone the jury must base its determination of a defendant's innocence or guilt. Attorneys for both sides, following rules of evidence and procedure designed to protect the neutrality and fairness of the trial, must stage their versions of the truth within that arena. That which has gone before cannot be considered by the jury except to the extent it can be properly presented at the trial and those things that cannot properly be presented must not be considered at all.

Ruiz v. State, 743 So. 2d 1, 4 (Fla. 1999). Closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985). "While wide latitude is permitted in closing argument, see *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982), this latitude does not extend to permit improper argument." *Gore v. State*, 719 So. 2d 1197, 1200 (Fla. 1998).

During its closing, the State noted Mr. Merck removed his shirt before attacking the victim, and twice claimed he did so because he cared more for his shirt than Mr. Newton's life (2a3/557, 570). The State argued, "The Defense will be talking to you about what we call mitigation. Things about his background they believe should warrant you affording him some

mercy that he never afforded Mr. Newton." (2a3/559). The defense objected and requested the comment be stricken (2a3/559). The objection was overruled (2a3/559). The State's final remark in closing was, "What he did here, there should be no mercy for a merciless crime, ladies and gentlemen. On behalf of the People of State of Florida and Jim Newton, I ask you all to recommend that he die." (2a3/573).

"[A]sking a jury to show as much mercy to a defendant as he showed the victim is a clear example of improper prosecutorial misconduct, which constitutes error and will not be tolerated." *Thomas v. State*, 748 So. 2d 970, 984 n.10 (Fla. 1999); *Urbini v. State*, 714 So. 2d 411, 421 (Fla. 1998) ("the prosecutor improperly concluded his argument by stating, "If you are tempted to show this defendant mercy, if you are tempted to show him pity, I'm going to ask you to do this, to show him the same amount of mercy, the same amount of pity that he showed Jason Hicks on September 1, 1995, and that was none." This line of argument is blatantly impermissible under *Rhodes v. State*, 547 So. 2d 1201, 1206 (Fla. 1989) (finding same no mercy argument improper because it was "an unnecessary appeal to the sympathies of the jurors calculated to influence their sentence recommendation"), and *Richardson v. State*, 604 So. 2d 1107, 1109 (Fla. 1992) (finding error where prosecutor asked jury to show defendant "as much pity as he showed his victim")."); *Brooks v. State*, 762 So. 2d 879 (Fla. 2000) ("the

prosecutor concluded his argument as follows: "I'm going to ask you not to show mercy or pity to these defendants. What mercy or pity did they show Darryl Jenkins that night? But if you are tempted to show the defendants mercy or pity, I'm going to ask you to show them the same mercy, the same pity that they showed Darryl Jenkins on August 28, 1996, and that is none." [Footnote deleted.] Again, long before the issuance of *Urbin*, this precise line of argument was specifically denounced by this Court. See *Richardson v. State*, 604 So. 2d 1107, 1109 (Fla. 1992); *Rhodes v. State*, 547 So. 2d 1201, 1206 (Fla. 1989)."). Urging the jury to show a defendant the same mercy shown to the victim is "an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation." *Rhodes v. State*, 547 So. 2d 1201, 1206 (Fla. 1989).

This Court has found comments similar to the "no mercy" arguments in this case to be harmless where there were no other errors. See *Kearse v. State*, 770 So. 2d 1119 (Fla. 2000) (the prosecutor assertion that Kearse "wants to live, even though he denied that right to Officer Parrish" and urging the jury to show "this Defendant the same mercy he showed Officer Parrish," but this Court found this single erroneous comment standing alone did not require reversal of the resentencing proceeding); *Richardson v. State*, 604 So. 2d 1107 (Fla. 1992) ("Richardson argues that the state committed error in asking

the jury to show Richardson as much pity as he showed his victim. We agree this was error. *Rhodes v. State*, 547 So. 2d 1201 (Fla. 1989). However, in light of the entire record, the error is harmless beyond any reasonable doubt."); *Reed v. State*, 875 So. 2d 415 (Fla. 2004) (trial counsel's failure to object to prosecutor's penalty-phase closing argument to "show that defendant the same mercy and sympathy that he showed Betty Oermann on February 27, 1986 and that was none" did not constitute ineffective assistance of counsel where the "no mercy" argument stood alone).

Other improper arguments were made by the State, albeit without objection by defense counsel. However, the cumulative effect of the improper argument denied Mr. Merck a fair trial. This is especially so when considered cumulatively to the preserved errors addressed in Issues I and II. An appellate court may look to "cumulative effect" of errors, including errors lacking objection, in determining whether "substantial rights have been affected." *Pollard v. State*, 444 So. 2d 561, 563 (Fla. 2d DCA 1984) ("The other issues raised by appellant concern matters not objected to at trial. These issues, being the improper use by the prosecutor of a prior recorded statement, improper argument by the prosecutor, and the trial court's remarks during appellant's closing argument, though waived, do have a cumulative effect and the combined weight of these errors should be considered with others to determine

whether substantial rights of the appellant have been affected."); *Ruiz v. State*, 743 So. 2d 1 (Fla. 1999) ("When the properly preserved comments are combined with additional acts of prosecutorial overreaching set forth below, we find that the integrity of the judicial process has been compromised and the resulting convictions and sentences irreparably tainted.").

At the onset of closing argument, the State asserted:

The Defendant was described to you today as a kind man, a man with positive values. One has to wonder on October 11, 1991, how kind Jim Newton felt when the Defendant jabbed this into his throat and twisted it. Twisted it until blood squirted out of his neck, as the Defendant described it, like a squirt gun.

(2a3/556-557). The State claimed "This is one of the worst most aggravated murders" (2a3/568), and asked the jurors, "isn't this among the worst ways to die?" (2a3/568) and, "How did that feel to have a knife penetrate his skull?" (2a3/569). The State argued that the heinous, atrocious, or cruel aggravating factor applied, noted Mr. Newton may have suffered for a few minutes gasping for breath before he died, stated a minute was a long time (2a3/569-570), then said:

Now. That's one minute. How many thoughts went through your mind in that one minute? Did he live two minutes? Did he live three minutes? Four minutes? Enough time for his life to go, roll his eyes, to think of the people he would never see again. Was that an unnecessarily tortuous way for the man to lose his life that night for no good reason?

(2a3/570). The State clearly, repeatedly, and improperly invited the jury to imagine the victim's final pain, terror

and defenselessness. Violations of the "Golden Rule" against placing the jury in the position of the victim and having them imagine the victim's pain are clearly prohibited. See *Bertolotti v. State*, 476 So. 2d 130, 133 n2 (Fla. 1985) (the prosecutor made an improper Golden Rule argument: "And if that's not heinous, atrocious and cruel, can anyone imagine more pain and any more anguish than this woman must have gone through in the last few minutes of her life, fighting for her life, no lawyers to beg for her life."); *Garron v. State*, 528 So. 2d 353, 358-359 (Fla. 1988) (the prosecutor made an improper Golden Rule argument: "[Y]ou can just imagine the pain this young girl was going through as she was laying there on the ground dying.... Imagine the anguish and the pain that Le Thi Garron felt as she was shot in the chest and drug [sic] herself from the bathroom into the bedroom where she expired.").

In closing, the State sought to nullify the substantial mitigation of parental neglect and abuse by stressing that Mr. Merck loved his mother²:

² Although the State implied otherwise, victims often have conflicting emotions about their abusers. "Family violence also creates highly difficult emotional crises for children. For example, children from violent homes are often confused by conflicting feelings towards the violent parent; they love the abuser, but hate the abuse and violence." Amy Allen & Susan Myres, *The Impact of Domestic Violence on Children*, 42 Houston Lawyer 18, 21 (2004), citing Jeffrey L. Edleson, Problems Associated With Children's Witnessing of Domestic Violence, <http://www.vaw.umn.edu/documents/vawnet/witness/witness.html>.

It is interesting to hear [the defense witnesses] laying it on real thick of how bad the mother is, but he cannot even tell you here on the stand that he didn't love his mother." He got "Mom" tattooed on his arm. He was visiting her in Sylva, South Carolina. He seen her every day in the house. This monster that they want you to blame for everything that happened there.

(2a3/563). There was no evidence that Mr. Merck had "Mom" tattooed on his arm. During cross-examination of Mr. Merck's former attorney, the State asked if she recalled whether Mr. Merck had "Mom" tattooed on his arm (2a3/519). She indicated she was not aware of that (2a3/519). Counsel must not become an unsworn witness and assert as fact matters on which there has been no testimony. *Smith v. State*, 74 Fla. 44, 76 So. 334 (1917).

The State asserted, "He is responsible for his actions. He used the alcohol, he chose to, and he did what he did. Alcohol in this case is not mitigation, it is just an excuse." (2a3/562) and "The fact that he was not born with a silver spoon in his mouth, those factors cannot diminish what he did to Jim Newton, or any of these other aspects." (2a3/565). "Counsel may argue what deductions in his judgment the evidence would reasonably support, but under no circumstances is he warranted in offering dogmatic statements as to what the evidence proves." *Carlile v. State*, 129 Fla. 860, 176 So. 862 (1937).

The State impermissibly interjected the nonstatutory aggravator of future dangerousness into the case. *Walker v.*

State, 707 So. 2d 300, 314 (Fla. 1997) ("This Court has explained that 'the probability of recurring violent acts by the defendant if he is released on parole in the distant future' is not a proper aggravating circumstance in Florida. *Miller v. State*, 373 So. 2d 882, 886 (Fla. 1979); *White v. State*, 403 So. 2d 331, 337 (Fla. 1981)."). During cross-examination of Linda Snyder, the State established that her opinion about Mr. Merck becoming mature and a better person was based on telephone conversations and correspondence while he was imprisoned, not while he was out in the community (2a3/490). During cross-examination of Tara Wilkinson, the State established that her opinion about maturation and intellectual growth of Mr. Merck were based on a meeting and correspondence from him while he was imprisoned, not while he was out in the community (2a3/500-501). During cross-examination of Assistant Public Defender Nora McClure, the State established that her opinion about maturity of Mr. Merck was based on interactions while he was incarcerated, not while he was out in the community or while he was drinking (2a3/516-501). During cross-examination of Mr. Merck, the State established that his change of lifestyle occurred while he was in solitary confinement for the prior two years (2a3/538, 501).

During closing argument, the State portrayed Mr. Merck as a dangerous, conscienceless, and pitiless person who brutally

attacked the victim without provocation and who was unnecessarily tortuous to the victim (2a3/556-562, 566-570). The State noted Mr. Merck committed other crimes involving violence to another person shortly before this crime (2a3/573). The State asserted that witnesses who testified Mr. Merck was a changed man were not credible or met with Mr. Merck while he was incarcerated, "in the very alcohol free safe environment" (2a3/572-573). The State clearly and improperly communicated to the jury that future dangerousness of Mr. Merck was a matter to be considered in this case. See *Davis v. State*, 698 So. 2d 1182, 1192 (Fla. 1997) ("Davis also argues that the prosecutor improperly introduced the nonstatutory aggravator of future dangerousness into the penalty phase by stating to Dr. McClane during cross-examination that he couldn't predict "from this point forward" whether Davis would commit a crime such as the one he committed here. We agree that the trial court should have sustained defense counsel's objection.")

The State suggested it was a mere strategy of the defense to have Mr. Merck read great literature and science books so that it could assert that he changed in the years since the incident (2a3/572).

It is both improper and unethical for either the prosecutor or defense counsel to attack the personal integrity and credibility of opposing counsel. *Briggs v. State*, 455 So. 2d 519 (Fla. 1st DCA 1984); see also *Fuller v. State*, 540 So. 2d 182 (Fla. 5th DCA 1989); *Knight v. State*, 672 So. 2d 590 (Fla. 4th DCA 1996). Furthermore, it is improper to argue facts not in

evidence. *Knight*, 672 So. 2d at 591. *Wolcott v. State*, 774 So. 2d 954, 956 (Fla. 5th DCA 2001); See also *Landry v. State*, 620 So. 2d 1099 (Fla. 4th DCA 1993) (a prosecutor's argument that implies that the defense is presenting false testimony is highly improper).

The State noted Mr. Merck is able to read books, then asked, "Since 1991, how many books could Jim Newton read?" (2a3/572-573). It was improper for the State to urge the jury to consider factors outside the scope of the deliberations. *Jackson v. State*, 522 So. 2d 802, 809 (Fla. 1988) ("We agree with Jackson's argument that the prosecutor's comment that the victims could no longer read books, visit their families, or see the sun rise in the morning as Jackson would be able to do if sentenced only to life in prison was improper because it urged consideration of factors outside the scope of the jury's deliberations.").

The State was dismissive of testimony about Mr. Merck's deprived and abusive childhood, then claimed Mr. Merck was not that little boy, he was "the guy who spent the night drinking and watching the fake orgasm contest and decided that he was going to teach Mr. Newton to bleed in the parking lot." (2a3/564). There was no evidence presented that Mr. Merck watched a fake orgasm contest. "Comments on matters outside the evidence are clearly improper." *Pope v. Wainwright*, 496 So. 2d 798, 803 (Fla. 1986); *Huff v. State*, 437 So. 2d 1087,

1090 (Fla. 1983) ("[T]he state attorney is prohibited from commenting on matters unsupported by the evidence produced at trial."). Through this "testimony" of the prosecutor about Mr. Merck watching a fake orgasm contest, and his subsequent comment about the dead victim's inability to read Penthouse (2a3/572), an implication that Mr. Merck could do so, the State bizarrely interjected sexual matters into a case where the jury was presented with no evidence relating to sex. "[W]hile the State is free to argue to the jury any theory of the crime that is reasonably supported by the evidence, it may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts."

When comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument. These statements when taken as a whole and fully considered demonstrate the classic case of an attorney who has overstepped the bounds of zealous advocacy and entered into the forbidden zone of prosecutorial misconduct.

Garron v. State, 528 So. 2d 353, 359 (Fla. 1988). In the penalty phase of a murder trial, prosecutorial misconduct that taints the validity of the jury's recommendation warrants vacating the sentence and remanding for a new penalty-phase trial. *Bertolotti v. State*, 476 So. 2d 130, 133 (Fla. 1985). The State, as the beneficiary of the errors, cannot sustain its burden of proving beyond a reasonable doubt that the prosecutor's improper arguments did not contribute to the

verdict. See *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).
Mr. Merck's death sentence must be vacated and the cause
reversed for a new jury penalty phase hearing.

ISSUE IV

THE DEATH SENTENCE MUST BE REVERSED BECAUSE
THE TRIAL COURT FAILED TO FIND OR GAVE TOO
LITTLE WEIGHT TO MITIGATING FACTORS.

The trial court, in considering mitigating evidence, must determine whether the facts alleged in mitigation are supported by the evidence. See *Bonifay v. State*, 680 So. 2d 413, 416 (Fla. 1996). (citing *Rogers v. State*, 511 So. 2d 526, 534 (Fla. 1987)). A trial court is obligated to find and weigh all valid mitigating evidence available in the record at the conclusion of the penalty phase. See *Cheshire v. State*, 568 So. 2d 908, 911 (Fla. 1990). Evidence is mitigating if, in fairness or in the totality of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed. See *Wickham v. State*, 593 So. 2d 191, 194 (Fla. 1991).

Merck v. State, 763 So. 2d 295, 298 (Fla. 2000).

A trial court's decision with regard to the weight to be assigned to a mitigating circumstance that it determines has been established is "within the trial court's discretion, and its decision is subject to the abuse-of-discretion standard." *Kearse v. State*, 770 So. 2d 119, 1133 (Fla. 2000); see also *Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000); *Cole v. State*, 701 So. 2d 845, 852 (Fla. 1997). Under the abuse of discretion standard, a trial court's ruling will be upheld unless the "judicial action is arbitrary, fanciful, or unreasonable, ... discretion is abused only where no reasonable [person] would take the view adopted by the trial court." *Trease*, 768 So. 2d at 1053 n. 2 (alteration in original) (quoting *Huff v. State*, 569 So. 2d 1247, 1249 (Fla. 1990)).

Perez v. State, 919 So. 2d 347, 372 (Fla. 2005).

The trial court considered three statutory mitigating factors: Mr. Merck was 19 years old at the time of the offense (some weight); his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (not established, no weight);

and the capital felony was committed while he was under the influence of extreme mental or emotional disturbance (not established, no weight) (v2/312-313; v3/556-560).

As to the statutory mitigating factor that Mr. Merck's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, the trial court erroneously found that "Thomas stated and the other witnesses confirmed that Thomas threw the keys to the defendant at 2:30 in the morning in a dimly lit parking lot for a distance of at least 15 feet and the defendant caught the keys in the air." (v2/312-313; v3/557-558). Mr. Thomas did not testify that he threw keys to Mr. Merck. The sole witness to testify about the keys was Ms. Sullivan who testified that Mr. Merck's companion threw the keys to him from approximately ten feet away, not "at least 15 feet" (2a2/270-271). No one testified the parking lot was dimly lit or that they had difficulty seeing anything. The trial court relied on facts not in the record and/or exaggerations of the record to support its finding that this mitigating factor was not established.

The trial court also improperly opined that Mr. Merck had a tolerance to alcohol that negated the psychological effects of severe alcohol intoxication and/or his ability to walk without staggering and catch keys thrown to him indicate the intoxication had no psychological effect. Although Dr. Slomin opined that alcohol use and Mr. Merck's antisocial personality

disorder did not cause his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law to be substantially impaired, he did not assert that he was not intoxicated, that he had a tolerance for alcohol that negated the psychological effect of intoxication, or that ability to perform physically indicated no psychological effect (2a4/667-668). Chief Toxicologist Bell testified Mr. Merck's approximately 0.21 grams per deciliter blood alcohol concentration would be consistent with significant impairment, and persons who consumed alcohol regularly would be impaired psychologically although they might exhibit less symptoms of intoxication (1s/504/754, 761-763). Chief Toxicologist Bell also testified that alcohol may change personality traits and cause a lack of control (1s/504/755-756). Dr. Maher testified Mr. Merck's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired at the time of the offense as a result of severe alcohol intoxication and his personality traits (2a4/637-638, 649). Specifically, Mr. Merck had been raised to believe fear is respect and kindness is weakness, to be impulsive, and to strike first when there was a potential conflict (2a4/637-638, 645). He believed one either exploited another person or was exploited by the other (2a4/641-642). Contrary to the trial court's conclusion, Mr. Merck attacking the victim and failing to walk away from the incident does not belie the mitigating

factor -- it is consistent with him acting impulsively because of intoxication, his personality traits, and his first-strike attitude.

As to the statutory mitigating factor that Mr. Merck was under the influence of extreme mental or emotional disturbance, the trial court confusingly noted that the defense relied on the testimony of Dr. Maher that Mr. Merck's use of alcohol on the night of the incident coupled with his lack of impulse control to establish this factor, but subsequently states "There was no testimony that this defendant was under the influence of extreme mental or emotional disturbance." (v2/313; v3/559-560). There clearly was testimony about this statutory mitigating factor. Dr. Maher testified Mr. Merck was under the influence of an extreme mental or emotional disturbance when the crime was committed (a2/636-637, 649). He was impaired due to severe alcohol intoxication, and his immature personality and his impulse control disorder which was a manifestation of his childhood developmental experiences (a2/637, 649).

The trial court improperly rejected that Mr. Merck's impulse control disorder was a manifestation of his dysfunctional family life during his childhood because "Dr. Maher could not explain however after all this abuse the defendant remained close to his mother, wrote her from prison and even took witness Thomas to visit her in North Carolina immediately before this incident." (v2/313; v3/559-560).

However, Dr. Maher was never asked about Merck's continuing love for his mother.

The trial court suffers from a misconception that victim's of domestic abuse cannot love their abusers. "Abused children love their abusers." *Tate v. Tate*, 1998 WL 170142, *7 (Conn. Feb. 10, 1998). Victims of domestic abuse often have conflicting emotions about their abusers, loving the abuser while hating the abuse. See *People v. Ellis*, 2003 WL 22884026, *6 (Cal. App. Dec 08, 2003) (psychotherapist Cusick testified, "it is common for domestic violence victims to continue in a relationship with their abuser, due to love, loyalty, self-blame, fear, or economic reasons."); *In re Moriah P.*, 1998 WL 234841, *4 (Conn. May 05, 1998) (Dr. Hanley testified, "Typical of children who have suffered abuse, they both love and do not love their abuser."); *People v. O'Hara*, 2004 WL 2191318, at *9 (Cal. App. Sep 30, 2004) (an expert "testified that victims of battered women's syndrome will typically attempt to accommodate or placate the abuser in the hope the abuse will stop; minimize or deny the nature and extent of the abuse; stay with the abuser despite ongoing abuse, becoming increasingly 'isolated' and 'entrenched' in a 'traumatically bonded' relationship; live in fear of their abuser at the same time they love him; feel ashamed that someone who supposedly loves and cares for them is abusive towards them; blame themselves for the abuse; and recant reports of abuse or

altogether avoid reporting abuse to law enforcement authorities out of shame, fear of retaliation by the abuser, and desire to protect the abuser or avoid publicity."); *Lucio v. State*, 2005 WL 607698, at *1 (Tex. App. Mar 17, 2005) ("[T]he State called a domestic violence counselor who testified that it is common for a woman who is the victim of domestic abuse to remain in the abusive relationship. She said that it is also common for a domestic violence victim to minimize the extent of the abuse she has suffered and profess her continuing love for the abuser"); *People v. Robinette*, 2003 WL 1861551, *3 (Cal. App. Apr. 11, 2003) (Linda Barnard, Ph.D. testified, "It is common for victims to continue relationships with abusers due to their confusion between fear and love and self-blame."); *People v. Wright*, 2002 WL 31187860, *2 (Mich. App. Oct. 01, 2002) (the State's expert in domestic violence testified "that victims of domestic violence are likely to remain in or return to abusive relationships, and are prone to write love letters to the abuser even if the abuser is incarcerated.").

The trial court found three nonstatutory mitigating factors: Mr. Merck's family background (little weight); his alcoholism, alcohol abuse and intoxication (little weight); and his capacity to form and maintain positive relationships and his capacity for growth (some weight) (v2/313-314; v3/560-562). "[A] 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 *Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990).

As to the nonstatutory mitigating factor of Mr. Merck's family background, the trial court there was testimony of abuse by his mother and gave this factor some weight (v2/313-314; v3/560). However, the trial court's consideration of this factor is tainted by its misconception that Mr. Merck's love for his mother was inconsistent with the abuse. Additionally, the trial court noted "Interestingly the defendant ran away from his foster home twice to be with his mother." (v2/314; v3/560). The record does not include this "interesting" fact. During the State's cross-examination of Mrs. Rackley, she recalled Troy running away to the wood because of frustrations at school, but she did not recall him staying away from school overnight (2a3/486-487). When the State asked specifically whether Troy ran away to stay at his mother's home, she could not recall but she agreed that "just thinking logically" he would have had no other place to stay (2a3/487-488).

As to the nonstatutory mitigating factor of Mr. Merck's alcoholism, alcohol abuse and intoxication, the trial court found Mr. Merck was under the influence of alcohol, but found "the facts belie the seriousness of the problem" and gave this

factor gave this little weight because he "did not display any of the classic alcohol signs such as slurred speech, poor balance, difficulty walking, talking or standing and was lucid in his conversation," his ability to catch keys thrown to him, and his deliberate actions and words (v2/314; v3/561-562). The trial court again improperly rejected the uncontroverted testimony that Mr. Merck's approximately 0.21 grams per deciliter blood alcohol concentration would be consistent with significant impairment, and persons who consumed alcohol regularly would be impaired psychologically although they might exhibit less symptoms of intoxication (1s/504/754, 761-763).

In *Merck v. State*, 763 So. 2d 295, 298 (Fla. 2000), this Court found the previous sentencing judge "erred in that her explanation in the sentencing order of her evaluation as to nonstatutory mitigation failed to include Merck's drinking on the night of the murder or Merck's long-term alcohol abuse." This Court ordered that on remand, "The nonstatutory mitigation section of the sentencing order for this resentencing must deal directly with any evidence, including Merck's alleged alcohol abuse, that Merck presents to the court as nonstatutory mitigation." *Id.*, at 298-299. However, the trial court again failed to properly deal with evidence of Mr. Merck's alcoholism and alcohol abuse.

The trial court erroneously found:

While it is taken as true that the defendant started drinking at a very young age, there was no testimony that he was an alcoholic or suffered from alcoholism. In fact the testimony of witness Thomas was that he and the defendant had not been drinking on the day of the killing before they arrived at the City Lights bar at 10:30 at night.

(v2/314; v3/561-562). Mr. Thomas never testified that he and Mr. Merck had not been drinking before going to the club. His only testimony about their actions earlier that day was agreeing that they "hung out at the bench that day" (2a2/325). More importantly, there was copious evidence of Mr. Merck's alcohol abuse and alcoholism.

Dr. Maher testified extensively about Mr. Merck's alcohol abuse and alcoholism. Mr. Merck's family believed it was amusing to give him alcohol when he was a child and to watch his reactions (2a4/634). Mr. Merck continued to drink alcohol, and it led to a pattern of significant alcohol abuse during his teens (2a4/634). By age 19, he had a consistent pattern of alcohol abuse, dependency, and addiction, and he habitually engaged in excessive abusive incautious drinking of alcohol (2a4/634). This behavior was normal and acceptable to him in his distorted immature view of the world, and was unlike other teenagers experimenting with alcohol and misusing it against social prohibitions (2a4/635). Mr. Merck was 19 years old at the time of the offense, but he was not equivalent to a normal 19 year old, he was developmentally an adolescent due to environmental factors including his bad home life and his alcohol abuse (2a4/639-642). Alcohol played a critical part in

the offense (2a4/649-650). Although alcohol was not a prerequisite for Mr. Merck to react violently, he would not have killed Mr. Newton absent alcohol (2a4/650).

Troy Merck testified he had been drinking alcohol since he was a young child (2a3/530, 536-537). Drinking became part of his lifestyle before his arrest in this case, and "he was an alcoholic or well on his way to it" (2a3/530, 537). He was drinking during his trip to his sister's home in Sylva, North Carolina before the incident (2a3/539-540). Neil Thomas indicated he and Mr. Merck became "road dogs," "buddying around" and drinking alcohol together (2a2/299-300, 325).

"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." *Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990) (footnotes deleted). The trial court abused its discretion by arbitrary, fancifully, and unreasonably rejecting Mr. Merck's uncontroverted evidence of alcoholism and alcohol abuse as mitigation.

Just 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 Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration. [Footnote deleted.]

Eddings v. Oklahoma, 455 U.S. 104, 114-115 (1982).

This Court is not bound to accept the trial court's findings when "they are based on misconstruction of undisputed facts and a misapprehension of law." *Pardo v. State*, 563 So. 2d 77, 80 (Fla. 1990), *cert. denied* 500 U.S. 928 (1991). "[W]hen a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." *Nibert v. State*, 574 So. 2d 1059, 1062 (Fla. 1990). Appellant's death sentence must be vacated and the cause reversed for resentencing by the trial judge.

ISSUE V

THE DEATH SENTENCE IS NOT PROPORTIONATE.

Proportionality review "requires a discrete analysis of the facts," *Terry v. State*, 688 So. 2d 954, 965 (Fla. 1996), entailing a *qualitative* review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis. We underscored this imperative in *Tillman v. State*, 591 So. 2d 167 (Fla. 1991):

We have described the "proportionality review" conducted by this Court as follows:

Because 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*. It is not a comparison between the number of aggravating and mitigating circumstances.

Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. Art. I, § 17, Fla. Const. It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. *Id.* Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Art. I, § 9, Fla. Const.; *Porter*.

... Thus, proportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law.

Id. at 169 (alterations in original) (citations and footnote omitted). As we recently reaffirmed, proportionality review involves consideration of "the totality of the circumstances in a case" in comparison with other death penalty cases. *Sliney v. State*, 699 So. 2d 662, 672 (Fla. 1997) (citing *Terry*, 668 So. 2d at 965).

Urbin v. State, 714 So. 2d 411, 416-417 (Fla. 1998).

Further, this Court has consistently held that because death is a unique and final punishment, the

death penalty must be reserved only for those cases that are the most aggravated and least mitigated. *Kramer v. State*, 619 So. 2d 274, 278 (Fla. 1993). In *Almeida v. State*, 748 So. 2d 922 (Fla. 1999)., we explained: "Thus, our inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of *both* (1) the most aggravated, and (2) the least mitigated of murders." *Id.* At 933. Hence, our proportionality review requires us to consider the facts and circumstances in Crook's case to determine whether the case is among the most aggravated and least mitigated so as to justify the imposition of death as the penalty.

Crook v. State, 908 So. 2d 350, 356 (Fla. 2005). "[T]his Court has an independent duty to perform a proportionality review of all death sentences." *Crain v. State*, 894 So. 2d 59, 76 (Fla. 2004).

The trial court improperly found the two aggravating factors (prior convictions involving violence and heinous, atrocious, or cruel) outweighed the mitigating factors (age of 19, family background, intoxication, capacity to form and maintain positive relationships, and his capacity for growth) and sentenced Mr. Merck to death (v2/305, 306-309, 314-315; v3/562-563). It is undisputed that when Mr. Merck was 17 years old he was convicted of offenses involving violence (1s/6-7, 44-48; 2a3/427-432), but those convictions might be subject to collateral attack because the trial courts may not have followed proper procedure (v1/45-46, 49-51, 66-93; v2/208-210, 218-221, 261, 298; 1a/657-673). Although the heinous, atrocious, or cruel factor was found, the incident occurred quickly, unexpectedly, and on the spur of the moment, the

victim had little time for apprehension, the victim lost conscious within one to three minutes, and the victim died within minutes of losing consciousness. Also, this case involves substantial mitigation, which may make the death penalty inappropriate even if one of the aggravating factors is heinous, atrocious, or cruel. See *Morgan v. State*, 639 So. 2d 6, 14 (Fla. 1994).

The senseless stabbing occurred after a pointless confrontation between a severely intoxicated young defendant and an intoxicated victim (v1/267-268; 1s/504/752-759; 2a2/268-279, 291-296, 300-308, 312-313, 320-334, 349-356; 2a3/409-412; 2a4/633-650). This Court has recognized alcohol's diminishment of a defendant's ability to make rational decisions is powerful mitigation. See *Voorhees v. State*, 699 So. 2d 602, 614-615 (Fla. 1997) (two codefendants drank heavily with victim, then a dispute arose and they tied him, repeatedly beat him, then repeatedly stabbed his throat - mitigating factors including alcohol abuse outweighed the two aggravating factors, in the course of a robbery and heinous, atrocious, or cruel), *Sager v. State*, 699 So. 2d 619, 623-624 (Fla. 1997) (codefendant of Voorhees and same result of proportionality review); *Nibert v. State* 574 So. 2d 1059 (Fla. 1990) (the intoxicated alcoholic defendant stabbed the victim seventeen times - mitigating factors outweighed the two aggravating

factors, in the course of a robbery and heinous, atrocious, or cruel).

There was compelling evidence about Mr. Merck's neglected, disordered, abusive childhood. Mrs. Merck became pregnant with Troy while her husband was serving in Viet Nam. She unsuccessfully tried to abort him by unorthodox and extreme means. He suffered from ailments including drooping eyelids, perhaps as a result of the abortion attempts. Upon returning from Viet Nam, her husband learned Troy was not his child, he left her, and she blamed Troy. Troy loved his mother, but she showed no love to Troy, was mentally abusive to Troy, and frequently beat him with whatever object was handy. His mother expected him to express hostility to society. He also observed violence to others in the troubled dysfunctional home which was a shack with newspaper stapled to the walls for insulation. (v1/244, 246, 247, 248; 1s/49, 52; 2a3/449, 453-463, 474-480, 493-495; 2a4/634-642, 645, 688)

Mr. Merck had emotional problems as a result of his bad home environment - he was mentally confused, impulsive, withdrawn, and antisocial. Starting in the second grade, he was placed in emotionally handicapped class, he did well in mathematics, but did poorly in other subjects, and his emotional problems continued. When he was ten years old, he was placed in the Collins Children's Home. He responded well to the structured and nurturing environment, but he was not cured of his childhood problems. His mother withdrew him from

the Collins Children's Home and took him to live with her because she needed him to qualify for dependent care payments and food stamps. He was later placed in foster care and did well there, but again his mother took him back to the horrible home environment. He began drinking alcohol when very young and intensely abused it as an adolescent. (v1/244, 246, 247, 248; 1s/49, 52, 59-61; 2a3/449, 472-491, 493-502, 2a3/530, 536-537; 2a4/633-638, 649-650, 667-669)

This Court has recognized an abusive childhood as a significant mitigating factor especially when coupled with factors such as youth, immaturity, and/or substance abuse. See *Mahn v. State*, 714 So. 2d 391, 400 (Fla. 1998) ("[T]he record shows that Mahn was far from a normal nineteen-year old boy at the time of the killings. Rather, Mahn had an extensive, ongoing, and unrebutted history of drug and alcohol abuse, coupled with lifelong mental and emotional instability. [Footnote deleted.] Mahn's unrefuted, long-term substance abuse, chronic mental and emotional instability, and extreme passivity in the face of unremitting physical and mental abuse provided the essential link between his youthful age and immaturity which should have been considered a mitigating factor in this case."). See also *Urbin v. State*, 714 So. 2d 411, 417 (Fla. 1998); *Clark v. State*, 609 So. 2d 513, 515 (Fla. 1992); *Nibert v. State*, 574 So. 2d 1059, 1061-1063 (Fla. 1990); *Livingston v. State*, 565 So. 2d 1288, 1292 (Fla. 1988).

Mr. Merck was 19 years old at the time of the offense (1s/58; 2a2/300-301, 320-321; 2a3/471-472; 2a4/639-642). "The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Roper v. Simmons*, 543 U.S. 551, 578 (2005). "[T]he closer the defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigator becomes. This is especially true when there is extensive evidence of parental neglect and abuse that played a significant role in the child's lack of maturity and responsible judgment." *Urbini v. State*, 714 So. 2d 411, 417 (Fla. 1998). The evidence supporting the mitigating factor of age went beyond Mr. Merck merely being 19 years old. As a result of his abnormal home life and alcohol abuse, he was at the stage of 13 or 14-year-olds in terms of academic exposure and achievement, and in terms of social norms and expectations (2a4/634-635, 637, 639-642, 648-649). By age 19, he had a consistent pattern of alcohol abuse, dependency, and addiction, and he habitually engaged in excessive abusive incautious drinking of alcohol (2a3/530, 537; 2a4/634-635, 637, 649).

There was also evidence that Mr. Merck matured emotionally, gained control of his temper, developed intellectually, and became a caring person who was supportive of friends and family (2a3/460-461, 484-485, 489-491 496-502,

503-510, 514-519, 530-538). Age in combination with other mitigating factors can be an extremely weighty mitigation. *Urbini v. State*, 714 So. 2d 411, 418 (Fla. 1998).

Proportionality review "requires this Court to consider the totality of the circumstances in a case and to compare the case with other capital cases. No case is identical to this case, but the circumstances of *Kramer v. State*, 619 So. 2d 274 (Fla. 1993) compare favorably to the circumstances of the instant case. In *Kramer*, the intoxicated victim was beaten to death by the intoxicated defendant. *Id.*, at 275. There was evidence that the victim was attacked "while in passive positions, including facedown." *Id.*, at 275. The victim had defensive wounds while Kramer had no visible injuries when arrested within 48 hours of the murder. *Id.*, at 275. In his separate opinion, concurring in part and dissenting in part, Justice Grimes noted Kramer "systematically pulverized" the victim who did not struggle, Kramer delivered at least 9 or 10 blows, and the final fatal blows to the head were delivered with a concrete block while the victim's head lay on concrete. *Id.* at 278. This Court found the prior violent felony aggravating factor was established and assumed the heinous, atrocious, or cruel aggravating factor existed. *Id.* at 278. This Court found:

The factors establishing alcoholism, mental stress, severe loss of emotional control, and potential for productive functioning in the structured environment of prison are dispositive here. While substantial competent evidence supports a jury finding

of premeditation here, the case goes little beyond that point. The evidence in its worst light suggests nothing more than a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk. This case hardly lies beyond the norm of the hundreds of capital felonies this Court has reviewed since the 1970s. See *Teffeteller v. State*, 439 So. 2d 840, 846 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). Our law reserves the death penalty only for the most aggravated and least mitigated murders, of which this clearly is not one. Accordingly death is not a proportional penalty here.

Id. at 278. Mr. Merck and the victim were both intoxicated. With little premeditation, he inflicted numerous blows on the victim who did not struggle, and the final blows were fatal. This was also "a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk." Mr. Merck's aggravating factors are identical to Kramer's and his mitigation compares favorably with that of Kramer.

Mr. Merck's mitigation outweighs the two aggravating factors, making life imprisonment, not death, the appropriate penalty. See *Urbin v. State*, 714 So. 2d 411, 416-18 (Fla. 1998) (murder during the commission of a robbery aggravating factor and merged aggravating factors of during the commission of a robbery and pecuniary gain were outweighed by substantial mitigation); *Robertson v. State*, 699 So. 2d 1343, 1347 (Fla. 1997) ("Although the trial court found two valid aggravating circumstances [in the course of a robbery and heinous, atrocious, or cruel], we find that death is not

proportionately warranted in light of the substantial mitigation present in this case: 1) Robertson's age of nineteen; 2) Robertson's impaired capacity at the time of the murder due to drug and alcohol use; 3) Robertson's abused and deprived childhood; 4) Robertson's history of mental illness; and 5) his borderline intelligence."); *Voorhees v. State*, 699 So. 2d 602, 615 (Fla. 1997) ("The two aggravators in this case [in the course of a robbery and heinous, atrocious, or cruel] are overshadowed by the mitigation and circumstances of this murder: the murder occurred after a drunken episode between the victim and the defendant."); *Sager v. State*, 699 So. 2d 619, 623-624 (Fla. 1997) ("The two aggravators in this case [in the course of a robbery and heinous, atrocious, or cruel] are overshadowed by the mitigation and circumstances of this murder: the murder occurred after a drunken episode between the victim and the defendant."); *Livingston v. State*, 565 So. 2d 1288, 1292 (Fla. 1988) ("Livingston's childhood was marked by severe beatings by his mother's boyfriend who took great pleasure in abusing him while his mother neglected him. Livingston's youth, inexperience, and immaturity also significantly mitigate his offense. Furthermore, there is evidence that after these severe beatings Livingston's intellectual functioning can best be described as marginal. These circumstances, together with the evidence of Livingston's extensive use of cocaine and marijuana,

counterbalance the effect of the factors found in aggravation [previous conviction of violent felony and during armed robbery]."). *Wilson v. State*, 493 So. 2d 1019, 1023 (Fla. 1986) ("We ... recognize that the trial court properly found two aggravating circumstances [prior violent felony and heinous, atrocious, or cruel] while finding no mitigating circumstances, we conclude that the death sentence is not proportionately warranted in this case.").

This is not one of the most aggravated, and not one of the least mitigated, first-degree murders. Mr. Merck's death sentence should be reduced to life imprisonment.

ISSUE VI

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

It is unconstitutional to remove from the jury the assessment of factors that increase the prescribed range of criminal penalties. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Due process and the role of the jury under the Sixth Amendment require notice of the State's intent to establish factors that will enhance the defendant's sentence, including pleading them in the charging document, and determination by the jury that the factors have been established beyond a reasonable doubt. *Id.* Also, in *Ring v. Arizona*, 536 U.S. 584 (2002), the Court held the Sixth and Fourteenth Amendments to the U.S. Constitution require the jury to decide whether a death qualifying aggravating factor has been proven beyond a reasonable doubt.

Florida's capital sentencing scheme unconstitutionally provides: (1) the State is not required to provide notice of the aggravating circumstances it intends to establish at the penalty phase; (2) the jury is not required to make any specific findings regarding the existence of aggravating circumstances, or even of a defendant's eligibility for the death penalty; (3) there is no requirement of jury unanimity for finding individual aggravating circumstances or for making a recommendation of death; and (4) the State is not required to prove the appropriateness of the death penalty beyond a

reasonable doubt.

Although the facial constitutionality of the capital sentencing statute may be challenged on appeal without objection below, *Trushkin v. State*, 425 So. 2d 1126, 1129-1130 (Fla. 1983); *State v. Johnson*, 616 So. 2d 1, 3-4 (Fla. 1986), the defense preserved these issues (v1/94-110; v3/412-436). This is an issue of law, therefore the standard of review is de novo. *State v. Glatzmayer*, 789 So. 2d 297, 301 n.7 (Fla. 2001). No aggravating circumstances were alleged in the indictment, no aggravating circumstances were expressly found by the jury, there was no jury unanimity as to the death sentence, and the State had not been required to prove death was appropriate beyond a reasonable doubt, therefore the death sentence should be vacated and a life sentence imposed. Mr. Merck's death sentence should be reduced to life imprisonment.

CONCLUSION

Based on the foregoing reasons, arguments, and authorities, Appellant respectfully asks this Honorable Court to reduce his sentence to life imprisonment (Issues V and/or VI); reverse the death sentence and remand for a new penalty trial before another jury [Issues I II, and/or III, as alternative relief); or reverse the death sentence and remand for resentencing by the trial judge (Issue IV and/or V as alternative relief).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Charles J. Crist, Jr., Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of April, 2006.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

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