THE SUPREME COURT OF FLORIDA

MARK ANDREW BURCH,)

Appellant,)

vs.)

THE STATE OF FLORIDA,)

Appellee.)

_____)

CASE NO. 65-168

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE

On January 12, 1983 the Appellant was indicted for the first degree Murder of Allen Calloway. The Appellant's first trial for this offense commenced November 14, 1983 and continued through November 18, 1983. After approximately 14 hours of deliberation, the Court declared a mistrial because the jury could not reach a unanimous verdict. The final split was 10 votes for Second Degree Murder and 2 votes for First Degree Murder. (Vol. 4, p. 677-679)

The second trial of the Appellant commenced January 23, 1984 and continued through January 26, 1984. After one hour and fifty minutes of deliberation, the jury returned a verdict of guilty as charged. (Vol. 7, p. 1259-1260)

The trial reconviened on January 27, 1984 for the jury's advisory penalty phase. After hearing testimony and argument, the jury retired for deliberations. After an hour of deliberation, the jury sent word to the Court that they had a question concerning the written instructions and as to whether they would be polled concerning their vote on the advisory sentence. The Court formulated an answer to the jury's questions, and submitted it to them in writing. After another hour of deliberation, the jury returned an advisory sentence recommending by a vote of 9 to 3 that the death penalty be imposed. (Vol. 7, pgs. 1339-1353)

On March 8, 1984, the Court reconviened for the purpose of sentencing. After hearing from both sides, the Court rendered an

oral pronouncement of its findings of aggravating and mitigating circumstances. The Court thereupon sentenced the Appellant to death. (Vol. 8, pgs. 1356-1380)

On March 23, 1984, the Court heard the Appellant's Motion for Arrest of Judgment, Motion for Judgement of Acquittal, and Motion for New Trial. (Vol. 7, pgs. 1382-1386; Vol. 9, pgs. 1552-1553) On April 10, 1984 the Court entered an Order denying the aforementioned motions. (Volume 9, p. 1561) The Appellant's Notice of Appeal was filed on the same day as the Court denied the aforementioned motions. (Vol. 9, p. 1562)

STATEMENT OF FACTS

In Re: The Prosecution's Case

In July, 1982, Laura Carr agreed to sell Allen Calloway her 1969 Ford Mustang for $500.00. The terms of the agreement were that Calloway would pay her $100.00 per week til the debt was satisfied. Calloway paid her a total of $300.00 dollars and then fell behind in his payments. He told Carr that he was having some money problems, and asked her to wait for the rest of her payment. (Vol. 4, p. 769)

After purchasing the car, Calloway spent money repairing the car and putting new tires on it. (Vol. 4, p. 770)

The day before Calloway's death, Carr went to his apartment. She demanded the delinquent payment of $200.00, or the return of the car. Calloway asked her to give him some time to make the payment, because it was just after Christmas, and he was broke.

Carr left without the car or the money owed. (Vol. 4, p.770)

The next morning, while Calloway was at work, Carr went to Calloway's residence with a friend named David Bill. They pushed the car down the street to a service station so a new ignition key could be installed in the car. (Volume 4, p. 772)

Carr went to a nearby doughnut shop to wait while the mechanic installed the new ignition key. As she sat there, she observed Calloway pull up to the doughnut shop in the truck he used for work. Knowing that he would be angry about the car, she decided to hide in the ladie's restroom. Calloway chased her into the restroom. She barracaded herself in one of the toilet stalls. He jumped over the top of the stall and unlocked the door. (Vol. 4, pgs. 773-774)

Calloway pulled her from the stall, slammed her up against the wall, and started choking her. Calloway told her that he was going to kill her for taking the car. She screamed and he ran from the restroom. (Vol. 4, pgs. 747-748)

She then used the doughnut shop's telephone to call the police. The police came to the scene, and as she was making a report, Calloway was observed outside in the parking lot. The police left the doughnut shop and questioned Calloway. (Vol.4, pgs. 749-750)

A few minutes later her boyfriend, Roy Folsom, came to the doughnut shop. She showed Folsom the strangulation marks on her neck. Folsom became upset over what had happened. Calloway was again observed hanging around the doughnut shop. Folsom and a friend of his, Ray Swearinger, encountered Calloway and had a converation with him. (Vol. 4, p. 775) Calloway threatened to

kill both Carr and Folsom (Vol. 5, p.822)

Earlier Calloway had informed Carr that he wanted the tires and improvements that he had made to the car returned to him, or to be compensated for them. Carr refused. Concerned that Calloway might slash the tires, destroy the engine, or attempt to repossess it, Carr and Folsom decided to sell the car. They drove the car to a used car lot where they received a $700.00 trade in allowance toward the purchase of a 1972 Oldsmobile. (Vol. 4, pgs. 751-752, 776-777)

After trading in the car, Carr and Folsom returned to the shopping center where the doughnut shop was located. Carr worked at a drug store located in the shopping center. Earlier in the day, after the strangulation incident, she had informed her employer that she was too upset to work. She returned to tell her employer that she would work the next day. When she and Folsom attempted to leave, they had a problem starting the car. She went inside to borrow some battery jumper cables. While attempting to get the car started, Calloway came up to them. Concerned that he might cause trouble, she went into the drug store to call the police. When she returned from making the telephone call, she observed Folsom sitting in the car with a bloody face. Calloway had left the scene. (Vol. 4, p. 779; Vol. 5, p. 803-804)

The police came to the scene. However, Folsom declined to press charges. Whereupon Carr and Folsom returned to his house. (Vol. 4, 780 p. 78)

Folsom was upset over the altercation with Calloway. He

became angry and walked out of the house. Carr and Folsom's mother followed him. They caught up with him halfway down the block and talked him into returning home. (Vol. 4, p. 781)

A short while later Carr and Folsom decided to take a drive. They returned to the shopping center where the doughnut shop and drug store are located. There they encountered David Bill, Ray Swearinger, and the Appellant. The Appellant asked if she and Folsom could take him to an apartment complex. They agreed. (Vol. 4, p.781-783) Upon exiting the car, he asked them to wait. Within moments he returned to the car carrying a shotgun. (Vol. 4, p. 761)

Folsom testified he thinks Carr gave the Appellant Calloway's address. (Vol. 5, p. 828-830) The Appellant then asked them to drive him to the area of Calloway's apartment. A few blocks from Calloway's apartment the Appellant exited the car carrying the shotgun. (Vol. 4, p.762)

During the drive from the apartment, Carr noted that the Appellant was acting strangely. Carr noted that his reactions were unusual, that something was mentally wrong with him, and that he appeared to be disturbed. (Vol. 5, p. 790) Folsom testified the Appellant was acting very hyper like he was under the influence of drugs. Folsom knew the Appellant took drugs and in particular PCP. The Appellant's hyper actions made Folsom believe he was under the influence of PCP. (Vol. 5, p. 816-817, 825)

Carr testified as the Appellant exited the car he said that he was going to shoot Calloway. Folsom testified the Appellant did not threaten to kill Calloway when he got out of the car.

(Volume 5, p.824) They agree Appellant told them that he would meet them back at the doughnut shop. (Vol. 4, p. 763)

Within five to ten minutes, the Appellant appeared at the doughnut shop. He appeared to be out of breath and did not have the shotgun with him. He jumped into the car and asked them to drive him to Holiday Park Trailer Park located on the edge of the Florida Everglades. (Vol. 4, p. 763-764)

On the drive out to the Holiday Park Trailer Park, the Appellant told Carr and Folsom that he had shot Calloway. (Vol. 4, p. 765; Vol. 5, p. 812)

Billy and Elida Hahn lived in the same apartment complex as Calloway. In the late afternoon of the day of the shooting, Billy Hahn was in the parking lot of the apartment complex working on his car. He had a discussion with Calloway about Calloway's car. Calloway was very upset and mad about the fact that Carr had taken the car. (Vol. 5, p. 852)

Later that evening, Billy and Elida Hahn, were on their way to a local convenience store. As they were getting into their car, they observed the Appellant coming down the street with a shotgun. The Appellant approached Billy and asked him his name. Billy told him his name. The Appellant asked if he knew Calloway and where apartment #2 was located. Billy responded "no". (Vol. 5, p. 855-856)

The Appellant then went to the door of Calloway's apartment and banged on the door with the shotgun. When Calloway answered the door, the Appellant asked his name. When Calloway responded, the Appellant shot him. (Vol. 5, p. 856)

Immediately after the shooting, the Hahn's jumped in their car and drove away. As they were driving away, they observed the Appellant walk to the trash dumpster located at the corner of the apartment complex, and put the shotgun into the dumpster. (Vol. 5, p. 858)

Billy Hahn testified that after the shooting, the Appellant did not run from the scene, but casually walked away. (Vol. 5, p. 872)

Elida Hahn was surprised that the Appellant did not run, but merely walked away. (Vol. 5, p. 893-894)

Rebecca Bealey, the live-in manager of the apartment complex where Calloway lived, looked out her window and saw the Appellant walking towards Calloway's apartment carrying the shotgun. Moments later she heard the shotgun blast. She again looked out the window, and observed the Appellant standing at Calloway's door. He turned and merely walked away. (Vol. 5, p. 908-909) She rushed outside her apartment and screamed at the Appellant. The Appellant merely looked at her and continued walking. (Vol. 5, p. 912)

Kevin Cooper was unavailable as a witness, therefore his testimony from the first trial was read into evidence. (Vol. 5, p. 917-921) Cooper lived in the same apartment complex as Calloway. He heard the shotgun blast. He looked out his window and observed the Appellant walking away from Calloway's apartment carrying the shotgun. Vol. 5, p. 923)

Joseph Mahon testified that the Appellant brought a shotgun to his apartment and left it there. (Vol. 6, p. 1000) A while later, the Appellant returned to Mahon's apartment, retrieved the

shotgun and left. When the Appellant came to get the shotgun, he was acting unusual. (Vol. 6, p. 1010) Mahon has known the Appellant for a period of years and knew him to use drugs frequently. That night the Appellant appeared to be high. Mahon asked him not to take the shotgun because he was concerned in his condition the Appellant might do something crazy. (Vol. 6, p. 1011-1012)

Randy Robson identified the shotgun that was found in the trash dumpster outside of Calloway's apartment as being his. He testified that the Appellant had borrowed the shotgun from him without his permission. Robson knew the Appellant used the drug PCP. (Vol. 6, p.1013-1026)

Betty Robson testified that the evening of the shooting, that at 10:30 p.m. the Appellant knocked on the door of her trailer which is located at the Holiday Park Trailer Park. Vol. 6, p. 1049-1051) The Appellant asked to speak with her husband. She heard him remark to her husband that he had blown a man away in Davie. (Vol. 6, p. 1052) The Appellant was acting irrational, strange, and appeared to be two thirds drunk. (Vol. 6, p. 1053-1056)

Benjamin Robson was awakened by his wife, Betty. He spoke with the Appellant who told him that he had put a gun to a man's chest and blew him across his living room. He asked if Robson would take him back to Davie, but Robson declined. (Vol. 6, p. 1064) The Appellant appeared to be high, or two thirds drunk. (Vol. 6, p. 1066)

Dr. Tate, the deputy Broward County Medical Examiner,

testified that death would have insued within 3 minutes of Calloway being shot. (Vol. 5, p. 879) He testified that Calloway would have become unconscious very quickly after sustaining the wound. (Vol. 5, p. 884)

In Re: Court's Refusal to Appoint Dr. Steven Lerner As An Expert Witness

At a hearing August 18, 1983, the Appellant informed the Court that he was going to assert a defense of voluntary intoxication by the use of alcohol and the controlled substance, PCP. The Appellant informed the Court that Angie Brady, a friend of the Appellant, had frequent contact with the Appellant in the 3 month time period prior to the shooting of Calloway. She knew the Appellant consumed on a daily basis large amounts of alcohol and the drug PCP. The Appellant informed the Court that the defense was attempting to secure the services of Dr. Steven Lerner, the nationally recognized expert on the drug PCP. (Vol. 1, p. 52-53)

On August 26, 1983, the Appellant filed a comprehensive motion titled, "Motion to Appoint Expert In Re: Defense of Intoxication by use of Phencyclidines Commonly Known as "P.C.P.". The Motion requested that Dr. Steven Lerner be appointed to examine the Appellant in regards to the preparation of the defense of Voluntary Intoxication by Inhalation of P.C.P. As a factual predicate the Appellant proffered the following:

The Defendant has confided in the undersigned that from the time of his release from prison in the summer of 1982 until the time of his arrest in January of 1983, that on almost a daily basis he consumed large amounts of alcoholic beverages and the drug PCP. Specifically, he has confided in the undersigned that on December 7, 1982, the date of the attempted murder in the first degree of Frederick Edwrd Munz, Jr., as charged in Broward Circuit Court Case No. 83-1420CF, that he had consumed alcoholic beverages and PCP. The Defendant has further confided in the undersigned that on January 3, 1983, the date of the first degree murder of Allen Calloway as charged in Broward Court Case No. 83-274CF, that he had consumed alcoholic beverages and the drug PCP.

The undersigned has interviewed an individual identified as Angie Brady who was formerly a barmaid at a local bar frequented by the Defendant. She has informed the undersigned that from the point that the Defendant was released from prison up until the time of his arrest that he frequented the establishment where she worked almost on a daily basis. She has informed the undersigned that she has observed the Defendant on a regular basis consume large amounts of alcoholic beverages and has observed him snorting a white powder she believes to be the drug PCP. On several occasions she has observed the Defendant, after he had ingested this drug, acting in a bizarre aggressive manner. She stated to the undersigned that the Defendant appeared to be out of touch with reality when under the influence of the drug.

The undersigned has spoken with an individual identified as Linda Amos, a girlfriend of the Defendant. She has confided in the undersigned that during the time period before his arrest, the Defendant ingested large quantities of alcoholic beverages and a drug believed by her to be PCP.

In regards to the offense of first-degree murder (i.e., Broward Circuit Court Case No. 83-274CF) the State of Florida intends to call Ray Folsom and Laura Call as witnesses. Folsom and Carr drove the Defendant to the scene of the alleged murder, and immediately after the shooting of Allen Calloway, they drove the Defendant from the area to a location in Western Broward County. Folsom, in sworn testimony given to Assistant Public Defender T. Don Tenbrook and Assistant State Attorney Thomas

> F. Kern, has testified that immediately prior to the shooting of Allen Calloway that the Defendant appeared to be very hyped up on drugs (i.e., see deposition taken March 8, 1984).
>
> Laura Carr, in sworn testimony to Assistant Public Defender T. Don Tenbrook, has stated that immediately prior to the shooting of Allen Calloway that the Defendant acted like there was something mentally wrong with him. She stated that his actions scared her, and that he had a strange look. She stated that she was of the opinion that he was disturbed (i.e., see deposition of March 8, 1983).
>
> In regards to the offense of attempted first-degree murder as charged in Broward Circuit Court Case 83-1420CF, the victim, Frederick Munz, Jr., has testified that prior to the shooting incident he and the Defendant had no prior difficulties. On the night of the shooting incident, the Defendant did not attempt to commit a robbery. Rather, the Defendant with no particular motive and without provocation, walked up to Mr. Munz, placed a gun to his head, and pulled the trigger (i.e., see deposition of March 11, 1983)(Vol. IX p. 1454-1456)

A copy of the full text of the motion, including Dr. Lerner's qualifications is included in the Appendix of this brief.

On September 6, 1983, the aforementioned motion was heard. In addition to the aforementioned factual predicate set forth in the motion, Counsel offered the Appellant's testimony that on the date of the shooting he had consumed alcohol and the drug PCP. (Vol. 1, p. 72) Counsel proffered to the Court that Dr. Lerner is the only expert he had been able to locate with extensive expertise in the drug PCP. (Vol. 1, p. 79) The Court denied the motion. (Vol. 9, p. 1489)

At a hearing on October 4, 1983, Counsel again informed the Court that the Appellant would assert a defense of lack of a specific intent by reason of voluntary intoxication. Counsel informed that Court that he was still seeking an expert witness.

(Vol 1, p. 89)

On November 9, 1983, the Appellant filed a motion titled, "Second Motion to Appoint Dr. Steven E. Lerner as an Expert Witness." As a factual predicate for the motion Counsel informed the Court follows:

> The undersigned has attempted to find locally an expert witness with Dr. Lerner's qualifications and experience in regards to the abuse and effects of PCP on human behavior. In that regards, the undersigned contacted Ms. Sharon Williams of the Court Psychiatric Screening Program. Ms. Williams has been working here locally in the area of mental health for a number of years. As this Court is well aware, she is acquainted with those persons in South Florida who work in the mental health area, and she suggested that I contact the Department of Pharmacology Clinic at the University of Miami. The undersigned contacted the Department of Pharmacology Clinic. The personnel there related that the doctors do not get involved in testifying in court cases. However, they referred the undersigned to Dr. Kenneth Lassiter.
>
> The undersigned contacted Dr. Kenneth Lassiter, who is with a private group of doctors who do testing for drug companies. Dr. Lassiter related that his group tests drugs that are manufactured for human consumption. He related that in that PCP is not manufactured for human consumption, but rather animal consumption, that his group had no familiarity with the drug. The undersigned was attempting to find an expert witness who was qualified to testify to the medical effects of sniffing or snorting PCP upon human behavior. Dr. Lassiter referred the undersigned to Dr. Bert Goldstein, who is the Chairman of the Department of Psychiatry at the University of Miami Medical School.
>
> The undersigned contacted Dr. Goldstein, who in turn referred the undersigned to Dr. Ronald Ersay of the Department of Psychiatry of the University of Miami. Dr. Ersay specializes in the effects of drug and alcohol abuse upon human behavior. Dr. Ersay related to the undersigned that his primary field of expertise was the effects of alcohol on human behavior, but he was also familiar with the

> effects of barbituates and other commonly prescribed and abused controlled substances. However, he was unfamiliar with the medical effects of sniffing or snorting PCP upon human behavior. Dr. Ersay was unable to refer the undersigned to any expert in the South Florida area who was familiar with the medical effects of sniffing or snorting PCP on human behavior.
>
> The undersigned has contacted the National Association of Criminal Defense Lawyers Resource Bank. The Association maintains a data bank of expert witnesses in various fields. The Association was unable to provide the undersigned with any expert witness in this specialty other than Dr. Steven E. Lerner. (Vol. IX, p. 1494-1496)

In regards to the second motion, Court in denying the motion found that, "...Assuming that Dr. Lerner would find that the Defendant was under the influence of PCP at the time these offenses were committed that his testimony in regards to the Defendant's ability to form a specific intent would not be admissible, nor would such testimony be admissible at the capital sentencing phase." (Vol. 9, p. 1501)

In Re: The Denial of Dr. Dan Roche's Testimony

After the Appellant's first trial, Counsel moved the Court to appoint an expert witness to examine the Appellant in regards to his defense of voluntary intoxication by use of alcohol and PCP. The factual predicate for the motion was as follows:

> The Defendant would incorporate the facts, argument, and reasoning set forth in the two previously filed motions for the appointment of an expert witness.
>
> As additional grounds the Defendant would ask the Court to take judicial notice of the testimony given at the Defendant's trial for First Degree Murder which ended in a mistrial when the jury could not arrive at a unanimous verdict. The jury was finally split ten jurors voting for Second Degree Murder, a non-specific intent crime, and two voting for First Degree Murder.

> At trial the State's witness, Joe Mahon, testified that immediately prior to the shooting that the Defendant was high on drugs, acting crazy, and did not appear to be in a normal state of mind. Mr. Mahon testified that he had knowledge of the Defendant's frequent ingestion of PCP and alcohol.
>
> Defense witnesses Barbara Cooper and Sandra Marini testified that for months prior to the incident that the Defendant on a daily basis ingested large amounts of PCP and alcohol. They each testified to bizarre conduct that the Defendant engaged in while under the influence of these substances.
>
> Lastly, the Defendant testified that he ingested PCP and alcohol on a daily basis. He testified that in the time frame immediately preceding the shooting he had ingested PCP. He testified that he had no recollection of the shooting incident and has no recollection of what happened in the hours immediately after the shooting.
>
> Mr. Larry Davis of the Court's Forensic Services Division recommended that the undersigned talk to Dr. Keith Burnstein and his associate biochemist, Dan Roche. The undersigned did communicate with Dr. Burnstein. He related that he had experience in the area of impairment by controlled substances. He stated that he works in conjunction with Mr. Roche in examining and evaluating persons who abuse controlled substances. (Vol. IX, p. 1503-1504)

The Court granted the motion. (Vol. 9, p.5007)

At trial, the Appellant sought to introduce the testimony of Dr. Dan Roche. As a factual predicate, Counsel asked the Court to take judicial notice of the testimony that the Court had heard at the first trial. Laura Carr testified that she had known the Appellant about two weeks prior to the shooting. The first time she had met him he appeared to be intoxicated. On the other times that she saw him prior to the shooting, he appeared to be intoxicated. (Vol. 2, p. 359) Roy Folsom testified that he had seen people under the influence of PCP and that was the way the Appellant acted the night of the shooting. (Vol. 2, p.392-

394) Joe Mahon testified that he knew the Appellant to use drugs frequently. The night of the shooting when he came to his house to retrieve the shotgun, the Appellant was acting unusual and appeared to be high. Mahon was concerned that because of the way he was acting, the Appellant might do something crazy and asked him not to take the shotgun. (Vol. 3, p. 517-518)

Barbara Cooper was a roommate of the Appellant who lived with him in the 3 month time period preceding the shooting. She observed the Appellant on a daily basis snort PCP. While under the influence of PCP, the Appellant would not know where he was, what he was doing, or where he had been. The Appellant would engage in aggressive or violent behavior under the influence of PCP. When the drug induced state was over, he would not have any recollection of what he had done. (Vol. 3, p.526-543)

Sandra Marini testified that in the two to three month time period prior to the shooting incident, she had occasion to come into contact with the Appellant 4 to 5 times a week. She knew the Appellant to snort a lot of the hallucinogenic drug PCP. During the time period that she knew him she had only actually seen the Appellant not intoxicated 2 times. He was either under the influence of drugs or alcoholic beverages. On one occasion while under the influence of PCP, the Appellant attacked her without provocation and strangled her. Two friends interceded and pulled the Appellant off of her. The next day she encountered the Appellant, and he asked what had happened to her neck. She told him that he had tried to strangle her the night before. Appellant told her that he did not remember doing the

act, and she felt that he was sincere in his belief. (Vol. 4, p. 594-601)

The Appellant testified at that in the 2 month time period prior the shooting incident, that he was using PCP, cocaine, hallucinogenic mushrooms, and qualudes. He was snorting PCP, injecting it intraveniously, and smoking it at the rate of 2 to 3 grams per day. He was also drinking alot of Jack Daniels whiskey. Under the influence of PCP, he would hear the walls of the room vibrating then lapse into a phase of total amnesia. On the day of the shooting, he was using PCP. He remembers Ray Swearinger telling him about the incident involving Carr, Folsom, and Calloway. The last thing he remembers prior to the shooting incident was being behind the laundry adjacent to the doughnut shop ingesting PCP. (Vol. 3, p. 545-557)

After requesting that the Court take judicial notice of the aforementioned testimony, Counsel proferred the following testimony of Dr. Roche:

> Now, what Dr. Roche would testify to is as follows: That he has a Ph.D from the University of Missouri in analytical biochemistry, he is presently employed as a professor of chemistry at the South Campus of Miami-Dade Community College, that he is a licensed clinical laboratory director for eight years, that he directed a toxicology laboratory, specialized in drug analysis during that time, that he has published over ten scientific publications and he was co-author of four textbooks in chemistry.
>
> With that background, he would testify as follows: That PCP, or phencyclidine, was introduced in 1963 by Parke-Davis and Company. He will testify it was originally intended for use as an anesthetic. Although phencyclidine proved to be generally effective as an anesthetic, it also proved to have some adverse side effects.
>
> He will testify that the literature reflects patients who emerged from sedation from PCP

reported extreme aggitation, disorientation, delirium and hallucinations, and, because of thest serious side effects, Parke-Davis and Company requested all human investigations with PCP be stopped in 1965.

He would testify phencyclidine was reintroduced in 1967 for veterinarian use. He will testify PCP first became used as a street drug in and around 1967, that it in its pure form appears a white crystalline powder which has a bitter taste, that PCP is usually used as a street drug one of three ways.

First it can be snorted or sniffed, secondly, it can be ingested by smoking or drinking or, thirdly, it can be ingested by means of hypodermic syringe.

He would testify when phencyclidine was tested for its physiological responses, it was found to increase both respiration and blood pressure and to produce a moderate slowing of EEG pattern.

Some of the other reactions to PCP in doses of five to ten milligrams are loss of response to pinprick, droopy eyelids, profuse sweating, flushing, analgesia, double vision, muscular incoordination and many times nausea and vomiting.

He will testify further that it has been found the primary symptoms of schizophrenia are closely approximated by the effects of phencyclidine. Blood levels of only .06 milligrams of phencyclidine per 100 millimeters of blood have caused toxic psychosis and hallucinations in over 50 percent of the patients tested; phencyclidine acts primarily as a nervous system depressant; that paranoia auditory hallucinations, violent behavior, severe anxiety and depression have been recorded in chronic users of phencyclidine Numerous deaths due to phencyclidine overdoses have been reported.

The symptoms produced by phencyclidine overdose depends--The consequences of a high overdosage may result from a one time use or by chronic use. Overdosing with phencyclidine has shown to produce the following psychological changes: Body image changes, estrangement, disorganization, hostility, apathy, feelings of inebriation and sometimes amnesia.

Clinically, phencyclidine is a lipid or fat soluble substance, thus it has potential to be stored in any of the lipids or lipid proteins of the body. Once it has become stored in fatty tissue, there's always the

potential to be reabsorbed in the blood stream and again circulate through the body. This, apparently, is the cause of flashbacks reported with phencyclidine use.

Phencyclidine is a powerful central nervous system depressant and should never be used with alcohol since the depressant alcohol enhances the effect of phencyclidine.

He will testify in summary that phencyclidine is a powerful nerve depressant shown to cause symptoms from inebriation to severe psychologic changes, will testify it's probably the most dangerous of all street drugs, that all the opinions which he has stated, which are aforestated, are within reasonable scientific and biochemical probability.

I would ask the Court, in evaluating that potential testimony, to take into account, take judicial notice of the prior testimony in the last trial of Sandra Marini, of Barbara Cooper. Both of those girls testified as to the defendant's frequent use of phencyclidine in a three month period prior to this crime being committed.

Specifically, Sandra Marini testified that there was an incident whereby Mr. Burch was under the influence of this particular drug, that he didn't recognize who she was, that when she identified hereself as being who she was, he didn't believe her, that he strangled her, that persons with her had to pull him off of her, that the next day he did not remember the incident.

That would be consistent with the literature saying that one of the side effects is possible amnesia, and would be consistent with the literature saying hostilities, et cetera, are common side effects of the use of this drug.

You also have the testimony of the defendant at the last trial--

After proffering Dr. Roche's testimony, counsel demonstrated the nexus between Dr. Roche's testimony and the Appellant's testimony at the first trial. The Appellant testified that he did not have any recollection of the shooting incident which would be consistent with Dr. Roche's testimony that one of the psychological changes is an occurrence of amnesia. The Appellant testified that the drug PCP made him feel like he was out of his

body which would be consistent with Dr. Roche's testimony about users experiencing body image changes. Dr. Roche's testimony would have shown that users experience disorganization which would be consistent with the Appellant's actions of shooting Calloway in front of a number of eye witnesses and then merely walking off. Dr. Roche's testimony would have shown that users experience a lack of muscular coordination which would have been consistent with the eye witnesses testimony that the Appellant walked away in a slow, deliberate fashion after shooting Calloway. (Vol 6, p. 1077-1081)

The Court recognized that Dr. Roche would be testifying as a toxicologist concerning the properties and effects of the drug PCP. The Court denied his testimony on the grounds that there was no evidence that the Appellant had ingested the drug PCP. (Vol. 6, p. 1089, 1091)

After excluding Dr. Roche's testimony, the Appellant called Barbara Cooper to testify. She testified consistent with her testimony at the first trial which is set forth above. She testified that the Appellant snorted the drug PCP on a daily basis. She testified that when he was under the influence of PCP he would forget who he was, and where he was. (Vol. 6, p. 1112-1116)

Angela Brady testified that in the months prior to the shooting incident, she worked at a bar that the Appellant frequented four to five nights per week. He drank alcoholic beverages quite heavily. She observed him on numerous occasions snorting a white powder she believed to be the drug PCP. (Vol.

6, p. 1125-1128)

The former testimony of Sandra Marini, has set forth above, concerning her knowledge of the Appellant's use of the drug PCP was read into evidence. (Vol. 6, p. 1098-1111)

The Appellant testified consistent with his testimony at the first trial. He testified that during the months preceding the shooting incident, he was using the drug PCP, cocaine, and qualudes. He was using the drug PCP four to five days per week. On an average day he would snort the drug at various times throughout the day. He was also drinking a lot of alcoholic beverages at the same time. When using the drug PCP, he would feel the walls of a room vibrating and then his mind would go blank. While under the influence of PCP he would have little or no recollection of his actions. On the day and the evening of the shooting incident, he was using the drug PCP. The Appellant had no specific recollection of the shooting incident. (Vol. 6, p. 1133-1167)

In Re: The Death Penalty

On March 8, 1984, the Court sentenced the Appellant to death. The Court found that four of the statutory aggravating circumstances applied, and that none of the statutory mitigating circumstances applied. However, the Court did find that one non-statutory mitigating circumstance did apply. (Vol. 8, p. 1377-1376; Vol. 9, p. 1557-1560)

As to the aggravating circumstances, the Court found as follows.

> (1) That the crime for which the Defendant is to be sentenced was committed while the Defendant was

under a sentence of imprisonment, to wit: the Defendant was on parole at the time of the offense.

(2) That at the time of the crime for which the Defendant is to be sentenced, he had previously been convicted of a felony involving the use of violence to some person, to wit: Burglary of the Dwelling, Robbery, and Unlawful Possession of a Firearm While Engaged in a Criminal Offense. (Vol. 7, p. 1279; Vol. 8, p. 1373-1374; Vol. 9, p. 1558)

(3) That the crime for which the Defendant is to be sentenced is especially heinous, atrocious or cruel because the evidence presented during the trial was that the Appellant confronted the victim in the case, whom he did not know, and who was, by the evidence, an innocent person who may have had some disagreement with two people with whom the Appellant unfortunately came into contact. The Appellant went to the victim's residence, and without provocation or warning, shot him at point blank range in the abdomen, killing him almost instantly. The Appellant casually approached the victim's residence carrying a weapon and in the presence of at least three witnesses. After the shooting, the Appellant casually left the scene, discarded the weapon and proceeded to the Holiday Park Trailer Park where he related his actions to two witnesses. (Vol. 8, 1373-1374, Vol. 9, p. 1558)

(4) That the capitol felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification because the Appellant killed a person unknown to him, who was an innocent victim. The killing was totally unjustified, and in some sense, a type of assassination committed for the benifit of the Appellant's new found friends, whom the Court believed contributed to the Appellant's commission of the crime. (Vol. 8, p. 1373-1374; Vol. 9, p. 1559)

Counsel objected to the Court's finding that the crime was especially heinous, atrocious, or cruel. (Vol. 8, p. 1379-1380)

As to the statutory mitigating circumstances, the Court found that none applied. Counsel objected to this finding. (Vol. 8, p. 1375, 1379-1380) Counsel argued that the Court had heard the unrebutted or unrefutted testimony of Dr. Robert K. Berntson, who testified that the capacity of the Appellant to appreciated the criminality of his conduct, or to conform his conduct to the requirements of law was substantially impaired. (Vol. 7, p. 1316)

Dr. Berntson was appointed as an expert to examine the Appellant. His educational background consists of a Bachelor in Science degree in Psychology from the University of Utah, a Master degree in Psychology from Utah State University, and a Doctor's degree in Clinical Psychology from Purdue University. He has actively been practicing in Broward County for 24 years, and is routinely appointed as an expert by the courts in Broward County.

Dr. Berntson ran a battery of tests on the Appellant. In his opinion, the Appellant had a personality disorder, anti-social type with minimal brain disfunction. The Appellant has suffered brain damage from the cronic and intense ingestion of neurotoxins. (Vol. 7, p. 1304)

Concerning the Appellant's use of the drug PCP, Dr. Berntson testified as follows.

> Q: What is your knowledge of the drug PCP?
>
> A: Well, it's a very dangerous drug in terms of destroying the integration of personality and unleashing sub-

cortical behavior that is animalistic. The person's behavior is bereft of social intelligence or normal impulse controls or evaluation of consequences.

Q: When you say bereft, what do you mean?

A: Without. Actually removed. It's like part of the cortex is neutralized so your reduced to a subhuman level in the way you function and the way you act and the way you behave. It destroy's the socialized elements of behavior, the civilized, socialized aspects of it.

Q: Can you tell us anything else about the substance PCP?

A: It's such an intense anesthesia that you feel little pain. In our experience, for example, with the police departments, it often has taken six police officers to put down a man high on PCP. They will shoot him three or four times and he'll keep coming.

Q: In regards to the drug PCP, does that cause any form of amnesia, abuse of that drug?

A: Yes. All of the neurotoxins, to my knowledge, alter memory to some extent, and PCP and alcohol and LSD all have some effect on memory functions.

Q: Now, Mr. Burch is charged here with the offense of first degree murder, having shot someone. Could the extensive abuse, based on what you gleened from him was his use of the drug- you said an ounce a week, I think-is it possible that, considering even a circumstance such as shooting someone, is it possible his memory could be blurred as to that event?

A: Yes, I think so.

Q: Blurred to the extent he would have no recall of even having performed the act?

A: I think so.

The Court found a non-statutory mitigating circumstance.

Specifically, the Court found that the Appellant had a tumultuous childhood with little, or no, parental guidence. This resulted in the Appellant being convicted of the aforementioned offenses as a juvenile, and being sentenced to a lengthy term of incarceration in an adult prison. This lengthy incarceration during his formative years exacerbated his sociopathic personality. (Vol. 8, p. 1376; Vol. 9, p. 1559)

The Appellant's mother, Jean Warren testified at the penalty phase that her marriage to Mark's father broke up when Mark was twelve. Shortly thereafter, he began using PCP and drinking alcoholic beverages. (Vol. 7, p. 1287) She sought help for him through the county funded Henderson Clinic, but their solution was to sedate him with valium. He was in a stupor when taking this medication so he discontinued its use.

After his release on parole, the Appellant attempted to get gainful employment. However, his efforts were unsuccessful because the Florida Parole and Probation Commission insisted that he inform prospective employers of his criminal history. The continued rejection resulted in his again turning to alcohol and drugs. His mother refused to allow him to continue living at home because of his drug usage. (Vol. 7, p. 1292-1294)

POINT I

THE TOXICOLOGIST SHOULD HAVE BEEN ALLOWED TO TESTIFY ABOUT THE EFFECTS OF THE DRUG "PCP" ON THE HUMAN BODY WHEREIN THE DEFENSE WAS VOLUNTARY INTOXICATION BY INGESTION OF PCP.

This Court has long held that whenever a "specific" intent is an essential element of a criminal offense, intoxication, through voluntary, becomes a matter of consideration, or is relevant evidence, with reference to the capacity or ability of the accused to form or entertain a specific intent. Gardner v. State, 9 So. 835 (1891); Cirack v. State, 201 So. 2d 706 (Fla. 1967)

The Appellant informed the Court and prosecution on August 18, 1983, five months before his conviction, that he was going to assert the defense of voluntary intoxication by ingestion of the drug PCP and alcohol. The Appellant presented three pre-trial motions in regards to the appointment of an expert to aid and assist the Appellant in asserting the defense. After the first two motions were denied, the Court appointed toxicologist, Dr. Dan Roche, to aid and assist the Appellant with the defense. (Vol. 1, p.52-53; Vol. 9, 1454-1484, 1489, 1494-1496, 1501-1504, 1507)

At trial as a predicate for Dr. Roche's testimony, the Appellant asked the Court to take judicial notice of the testimony it had heard at the Appellant's first trial.

Specifically, that Laura Carr had testified that prior to the shooting she had observed the Appellant intoxicated. Moments before the shooting, Carr noted his reactions were unusual, that something was mentally wrong with him, and that he appeared to be disturbed. (Vol. 2, p. 359, Vol. 5, p. 790) Roy Folsom had testified he knew the Appellant took the drug PCP. The night of the shooting the Appellant's actions made Folsom believe the Appellant was under the influence of PCP. (Vol. 5, p. 816-817, 825, Vol. 2, p. 392-394)

Joe Mahon had testified that moments before the shooting the Appellant appeared to be "high". Mahon asked him not to take the shotgun because he was concerned in his condition the Appellant might do something crazy. (Vol. 3, p. 517-518, Vol. 6, p. 1010-1012)

Barbara Cooper, the Appellant's roomate, had testified she had previously used and was familiar with the drug PCP. In the three month time period prior to the shooting, she observed the Appellant on a daily basis snort what she in her experience believed to be PCP. She observed the Appellant commit violent acts while under the influence of PCP and then have no recollection of having committed them. (Vol. 3, p. 526-543)

Sandra Marini testified in the three month time period prior to the shooting, she had contact with the Appellant almost daily. She knew the Appellant snorted a lot of the drug PCP. She only observed the Appellant not intoxicated or "high" on two occasions. On one occasion, while under the influence of PCP, he violently attacked her without provocation. Two friends pulled

the Appellant off of her. The next day the Appellant had no recollection of having strangled her. (Vol. 4, p. 594-601)

The Appellant testified that for months prior to the shooting, he had been using cocaine, PCP, qualudes, and drinking large quantities of alcohol. The day of, and night of, the shooting he was "high" on PCP and had no recollection of the shooting. He testified when under the influence of PCP he would first hear the walls of the room vibrating, and then lapse into a period of total amnesia. (Vol. 3, p. 545-557)

The Appellant profferred what Dr. Roche's testimony would be. (see Statement of Facts, p. 16-18)

The Court denied Dr. Roche's testimony because there was no scientific evidence or chemical analysis that the substance the Appellant had consumed was in fact PCP. (Vol.6 p. 1089-1091)

The testimony of lay witnesses, who are known or admitted addicts, or even mere users of controlled substances, has been held admissible to identify suspect material as a particular controlled substance where the substance itself was not available for chemical analysis or evaluation.

United States v. Sweeney, 688 F. 2d 1131 (7CA 1982);
United States v. Atkins, 473 F. 2d 308 (8 CA 1973);
United States v. Jones, 480 F. 2d 954 (5 CA 1973);
United States v. Ferguson, 555 F. 2d 1372 (CA 1977);
Pennacchio v. United States, 236 F. 66 (2 CA 1920);
Ewing v. United States, 386 F. 2d 10 (9 CA 1967);
Jones v. State, 339 So. 2d 1042 (Ala. App. 1976);
Moses v. State, 557 S.W. 2d 385 (Ark. 1977);
People v. Winston, 293 P. 2d 40 (Ca. 1956);
Osborn v. State, 291 S.E. 2nd 22 (Ga. App. 1982);
Pettit v. State, 281 N.E. 2d 807 (Ind. 1972);
Miller v. Commonwealth, 512 S.W. 2d 941 (Ky 1974);
Mills v. State, 279 A. 2d 473 (Md. App. 1971);
People v. Boyd, 236 N.W. 2d 744 (Mich. App. 1975);
State v. Neal, 624 S.W. 2d 182 (Mo. App. 1981);
State v. Pipkin, 245 A 2d 72 (N.J. Sup. 1968);
Commonwealth v. Aikens, 118 A. 2d 205 (Pa. Sup. 1955);

State v. Frazier, 252 S.E. 2d 39 (W. Va. 1979)

In United States v. Sweeney, supra the Court held, ". . . a witness is qualified to testify as to the identity of a drug based upon his prior use and knowledge of that drug and his sampling of the substance which he identified, coupled with his statement that the drug about which he is testifying affected him in the same manner as the drug he had previously ingested." The Court held the lay witnesses could properly identify the substance they had taken was PCP.

Based upon the factual predicate as applied to the case law, the Court erred in ruling that the lay testimony of the Appellant, Barbara Cooper, Sandra Marini, Angie Brady, and Roy Folsom was not sufficient to establish that the drug the Appellant had ingested was PCP. It having been sufficiently established that the drug ingested was PCP, the toxicologist's testimony was clearly admissible for the following reasons.

"Toxicology" is defined as the science of studying the adverse effects of "poisons", chemicals or drugs on the human body. "Poisons" have been defined as "any substance which, when ingested, inhaled, or absorbed, or when applied to, injected into or developed within the body, may cause damage to structure or disturbance of function." Dorland, The American Illustrated Medical Dictionary. **The courts have long held that a chemist with toxicological training or experience in the field of toxicology is qualified to testify as an expert to the effects of ingested substances upon the human body.** Rigby v. Eastman, 217 N.W. 2d 604 (Iowa 1973); Vroom v. Arundel Gas Co., 278 A. 2d 563 (Md. 1971); Nicholas v. City of Alton, 437 N.E. 2d 757 (Ill. App.

1982); Scott v. State, 37 So. 357 (Ala. 1904); People v. Torres, 192 P. 2d 45 (Ca. App. 1948); Stertz v. Briscoe, 334 P. 2d 357 (Kan. 1959); State v. Smoak, 195 S.E. 72 (N.C. 1938); People v. Cox, 172 N.E. 64 (Ill. 1930); Gaston v. Hunter, 588 P. 2d 326 (Ariz. App. 1978); Lingsay v. Ortho Pharmaceutical Corp., 481 F. Supp. 314 (E.D.N.Y. 1979); 70 ALR 2d 1029.

In State v. Guzman, 676 P. 2d 1321 (N.M. 1984) the defendant was convicted of first degree murder and sentenced to death. The defendant sought to introduce testimony that he was under the influence of drugs and alcohol the night of the murder. He introduced expert testimony as to what effect the drug and alcohol mixture would have on a person who had extreme emotional problems.

The Court held it was proper for a psychopharmacologist to testify as to what effect a particular medication and alcohol would have on a person who had extreme emotional problems. However, the Court held the doctor could not testify as to the particular effect on the defendant until the defendant testified he had taken the drug and alcohol. The defendant never testified.

Compare, in the case subjudice, the Appellant sought to have Dr. Roche testify as to what effect PCP would have on a person. Unlike Guzman, the Court knew that the Appellant had testified at the first trial he was under the influence of PCP the night of the shooting. The Court knew that the Appellant was again going to testify he was under the influence of PCP the night of the shooting, and the Appellant did in fact testify he was under the influence of PCP. In accord with the reasoning of Guzman, Dr.

Roche should have been allowed to testify as to the effects of PCP upon the human body.

In Mullin v. State, 425 So. 2d 219 (Fla. 2 DCA 1983), the defendant was charged with the crime of kidnapping. The defendant sought to interpose the defense of voluntary intoxication by inhalation of volatile hydrocarbons to negate the specific intent necessary for the crime of kidnapping. The trial court excluded the defendant's expert testimony regarding his condition. In reversing the defendant's conviction, the Second District Court of Appeal stated, ". . . We note no support for the lower court's exclusion of testimony regarding appellant's condition. Appellant's expert witness, a neurologist, was qualified to testify to the medical effects of sniffing glue and other hydrocarbons upon human behavior if he knew the effects. Appellant's testimony of his prior abuse, if relevant to the above medical opinion, would also be admissible to establish a voluntary intoxication defense to the specific intent crime."

The situation in the case subjudice, was identical to that in Mullin v. State, supra. The Appellant sought to introduce expert testimony in regards to the effects of ingesting a chemical substance upon the human body. The predicate for such testimony was the Appellant's lay testimony that he had in fact ingested the substance. The Court's exclusion of the testimony directly conflicts with, and is contrary to, the Second District Court of Appeal's ruling in Mullin v. State, supra.

The exclusion of Dr. Roche's testimony cannot be considered to be harmless error. There was no expert testimony in regards

to the effects of the drug PCP on the human body. The effects of the drug PCP on the human body would not be a matter of common knowledge about which the ordinary layman would have a general knowledge or common experience. Florida Statute 90.702 provides that expert testimony should be allowed if the specialized knowledge will assist the jury in understanding the evidence, or in determining a fact in issue. Dr. Roche's testimony would have assisted the jury in determining a fact in issue.

Dr. Roche's testimony would have assisted the jury in understanding evidence as follows:

(1) it would have informed the jury that the ingestion of doses of PCP 200-300 times smaller than that ingested by the Appellant daily produces significant physiological changes;

(2) it would have informed the jury that the ingestion of PCP produces toxic psychosis;

(3) the jury would have been informed that ingestion of PCP causes paranoia, auditory hallucinations, and violent behavior, which would have corroborated the Appellant's testimony about the vibrating walls, and which would have verified and explained Sandra Marini and Barbara Cooper's testimony that the Appellant engaged in uncontroled violent behavior when under the influence of PCP;

(4) it would have verified and explained Sandra Marini and Barbara Cooper's testimony that afterwards the Appellant had no recollection of his violent behavior;

(5) most importantly, it would have corroborated the

Appellant's testimony that he had no recollection of the shooting incident. Without expert testimony the jury, or any jury, would find it impossible to believe that the Appellant could shoot someone and not remember the incident. Dr. Roche's testimony was crucial to the jury understanding the Appellant's testimony of having suffered amnesia;

(6) it would have informed the jury that the scientific community considers PCP to be the most dangerous of all street drugs because of serious side effects of delirium, hallucinations, extreme aggitation and disorientation that it produces.

In addition to explaining the evidence to the jury, Dr. Roche's testimony would have assisted the jury in determining the only issue in the case, to wit: whether the Appellant had the ability to form a specific intent?

In conclusion, no amount of lay testimony could have supplanted the toxicologist's expert testimony of the effects of the drug PCP upon the human body. Accordingly, because the Court erred in not admitting his testimony, this cause should be remanded for a new trial.

POINT II

THE COURT ERRED IN REFUSING TO APPOINT DR. LERNER TO ASSIST THE APPELLANT IN THE PREPARATION OF, AND PRESENTATION OF, HIS DEFENSE OF VOLUNTARY INTOXICATION

The Sixth Amendment right to counsel is a meaningless gesture if counsel for an indigent defendant is denied the use of working tools essential to the establishment of what would appear to be a tenable or possible defense. The right to counsel includes the right to the use of experts that will assist counsel in preparing a defense and presenting it at trial. Torres v. Municipal Court of Los Angeles Jud. District, 123 Cal. Rptr. 553 (Ca. App. 1975)

Equal protection demands that in a proper factual situation a court must appoint an expert that is needed to assist an indigent defendant in his defense. Jacobs v. United States, 350 F. 2d 571 (4 CA 1965); United States v. Theriault, 440 F. 2d 713 (5 CA 1971); State v. Green, 258 A. 2d 889 (N.J. 1969); State v. Hancock, 164 N.W. 2d 330 (Iowa 1969); People v. Watson, 221 N.E. 2d 645 (Ill. 1966);

The due process test of fundamental fairness requires, when necessary, the appointment of expert witnesses for indigent defendants in order to insure effective preparation and presentation of their defenses. Bush v. McCollum, 231 F. Supp. 560 (N.D.Tex. 1964)

In People v. Gunnerson, 141 Cal. Rptr. 488 (Ca. App. 1977)

the Court reversed the defendant's first degree murder conviction because the court denied the appointment of a cardiological expert to assist in advising the defense, and in testifying as an expert for the defense, as to the cause of death of the victim.

In United States v. Durant, 545 F. 2d 823 (2 CA 1976) the Court held the denial of the defendant's request for a fingerprint expert was reversible error. The Court noted that the appointed expert's testimony may have corroborated the State's expert. However, at the very least, the appointed expert could have educated defense counsel as to the technicalities of the field so as to make cross-examination more effective.

In Williams v. Martin, 618 F. 2d 1021 (4 CA 1980) the Court reversed the defendant's conviction for murder because the Court denied the defendant's request for the appointment of an independent forensic pathologist to evaluate the medical evidence concerning the victim's cause of death where the defendant's defense centered around the cause of death. The Court declared the failure to appoint the expert denied the defendant equal protection of law, the effective assistance of counsel, and due process of law.

In United States v. Patterson, 724 F. 2d 1128 (5 CA 1984) the Court reversed the defendant's conviction because the Court denied the defendant's request for the appointment of a fingerprint expert. The defendant's fingerprint was a crucial fact of identification. The assistance of an expert would have facilitated either the defendant's showing that the latent palm print lifted from the scene was blurred, or assisted counsel with cross-examination of the government's expert.

In State v. Wood, 648 P. 2d 71 (Utah 1982) the defendant was convicted of first degree murder and sentenced to death. The defendant, an indigent, sought the appointment of a psychiatrist to establish his theory of defense (ie: innocence). The Court had already appointed a psychiatrist to aid his defense counsel in exploring the defense of insanity which ultimately was not presented at trial. The Court held that the defendant was entitled to the appointment of his own expert to assist him. Particularly, where that expert's testimony may be relevant to establishing mitigating circumstances at sentencing such as, (1) the fact the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, or (2) the fact of the defendant's inability to conform his conduct to the law because he was substantially impaired by mental disease, intoxication, or the use of drugs.

In summary, constitutional considerations mandate the appointment of experts where there is a reasonable likelihood that he will materially assist in the preparation of a defense. Particularly, where the expert's testimony may have a bearing on the ultimate question of guilt or innocence, or the degree of culpability. Bush v. McCollum, supra.; Hoback v. Alabama, 607 F. 2d 680 (5 CA 1979);

Normally, the Court would appoint an impartial expert, as opposed to a particular expert who is sought after by a defendant. However,a particular expert should be appointed when there is a specific showing of why no other expert can perform the task as well, or as adequately. The Appellant sought the

appointment of a particular expert, and made the requisite showing of why it was necessary to appoint Dr. Lerner.

In a motion heard September 6, 1983, months before the Appellant's conviction, the Appellant moved the Court to appoint Dr. Steven Lerner, a nationally recognized expert on the drug PCP, to assist the Appellant in the preparation of, and presentation of, his defense of voluntary intoxication by ingestion of the drug PCP. (Vol. 1, p. 52-53, 79; Vol. 9, p. 1454-1484) The Appellant informed the Court that Dr. Lerner has a doctorate in clinical psychology and specializes in forensic toxicology. The Appellant presented the Court with Dr. Lerner's comprehensive curriculum vitae consisting of twenty-four pages. (See Appendix)

The curriculum vitae reflected that he has been qualified as an expert to testify to the medical effects of ingesting the drug PCP upon human body in the States of Arizona, California, Hawaii, Nevada, and Pennsylvania. It further revealed he has taught and given instruction on this subject matter to the United States Air Force, the United States Navy, the California Narcotics Officers Association, the Louisiana District Attorneys Association, the United States Drug Enforcement Administration, the California District Attorneys Association, the California Police Chiefs Association, the Los Angeles Police Department, the Douglas County, Nevada Sheriff's Office, the Los Angeles County District Attorney's Office, the Honolulu Police Department, the Santa Clara District Attorney's Office, the San Bernardino County District Attorney's Office, the Santa Rosa District Attorney's Office, the Santa Cruz County District Attorney's Office, the

Almeda County District Attorney's Office, the Marin County District Attorney's Office, the Orange County District Attorney's Office, the Honolulu Prosecuting Attorney's Office, and the Prosecutor's School of the California District Attorneys Association; and at numerous public defender and criminal defense attorney seminars.

The Court was apprised that aside from being recognized as an expert by the criminal justice community that the news media recognized his expertise. He has been a technical advisor to the CBS television show "60 Minutes" on at least two occasions for segments dealing with the drug PCP. He has appeared on the NBC television show, "The Today Show" to discuss the horrors of the use of PCP.

The Court denied the request, and asked counsel to find a local expert. Two months later, counsel again moved for the appointment of Dr. Lerner. Counsel set forth what efforts had been made to find a local expert. Counsel related that he had contacted, at the Court's suggestion, the court psychiatric screening program. From there he had been referred to the University of Miami Department of Pharmacology; however, they would render no assistance because of a policy of non-involvement in court cases. They did refer counsel to Dr. Kenneth Lassiter.

Dr. Lassiter is the head of a private company that performs testing for pharmacitical companies of drugs manufactured for human consumption. He related that because the drug PCP is not manufactured for human consumption that his laboratory had no data or studies on its effects on the human body. He in turn

referred counsel to the University of Miami Department of Psychiatry.

Dr. Bert Goldstein, the chairman of the Department of Psychiatry, referred counsel to Dr. Ronald Ersay, who specializes in the effects of drugs and alcohol abuse upon human behavior. Dr. Ersay related that while he has experience with many controlled substances, he was unfamiliar with the medical effects of the drug PCP upon human behavior. Dr. Ersay said he was not aware of anyone in South Florida who was an expert in PCP's effects on human behavior.

Counsel again turned to the National Association of Criminal Defense Lawyers which maintains a data bank of experts in various fields. The Association again informed counsel that Dr. Lerner was the only expert they were aware of who specializes in the effects of this particular drug.

Nonetheless, the Court refused to appoint Dr. Lerner holding that, notwithstanding his expertise in forensic toxicology, that his testimony concerning the ability to form a specific intent would not be admissible, nor would his testimony be admissible at the capital sentencing phase. (Vol. 9. p. 1501)

The Court's ruling was in error for three reasons. First, the courts have long held that a person with toxicological training or experience in the field of toxicology is qualified to testify as an expert to the effects of ingested substances upon human behavior. (see citations Point I) The Florida Evidence Code, Section 90.703, specifically provides an expert may render an opinion on an ultimate issue to be decided by the jury, such

as the Appellant's ability to form a specific intent. Secondly, the Appellant presented a particularized and specific showing of why he needed the services of Dr. Lerner. There was simply no other expert in South Florida that possessed his expertise in the effects of the drug PCP on human behavior. Lastly, the Court erred in ruling Dr. Lerner's testimony would not be admissible at the capital sentencing phase. Florida Statute, 921.141(6)(b)&(f) provides that evidence establishing; the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, or that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired is admissible, Dr. Lerner's testimony would have dealt with, or addressed both of these statutory mitigating circumstances.

The law is clear that the jury may consider non-statutory or non-enumerated mitigating circumstances. Dr. Lerner's proposed testimony concerning the effects of the drug PCP upon human behavior would fall under the broad umbrella of being, related to the Appellant's character, or a circumstance of the incident.

Because the Court erred in refusing to appoint an expert who could give unique testimony relative to the Appellant's defense of voluntary intoxication, this cause should be remanded for a new trial with instructions directing that Dr. Lerner be appointed as an expert.

POINT III

THE COURT ERRED IN IMPOSING THE DEATH PENALTY

In reviewing a death sentence, this Court must first determine that the jury and ultimately the judge acted with procedured regularity. Then, this Court must compare the case under review will all past capital cases to determine whether or not the punishment is too great. Profitt v. Florida, 428 U.S. 242 (1976); Adams v. State, 412 So. 2d 850 (Fla. 1982) The Appellant challenges that his death sentence does not withstand procedural scrutiny, and is disportionate.

In imposing the death penalty, the Court found four (4) aggravating circumstances applied: (1) Appellant under sentence of imprisonment, to wit: on parole, (2) Appellant previously convicted of a felony involving the use of violence to some person, (3) the homocide was especially heinous, atrocious or cruel, and (4) the homocide was committed in a cold, calculated and premeditated manner. The Court found that no statutory mitigating circumstances existed, but that one non-statutory mitigating circumstance existed. The Appellant challenges that the Court was in error in finding that the homocide was especially henious, atrocious, or cruel; in finding the homocide was cold, calculated, and premeditated, and finding that the statutory mitigating circumstance, that the Appellant's capacity to appreciate the criminality of his acts and to conform his conduct to the requirements of law as substantially impaired, did not exist.

The law is clear that to be considered heinous, atrocious, or cruel, the homocide must be accompanied by such additional acts as to set the homocide apart from the norm of homocide. The homocide must be a consciousless or pitiless crime which is unnecessarily torturous to the victim. State v. Dixon, 283 So. 2d 1 (Fla. 1973). Tedder v. State, 322 So. 2d 908 (Fla. 1975; Lewis v. State, 398 So. 2d 432 (Fla. 1981) In the case sub judice, within split seconds of encountering the victim, the Appellant shot the victim. The victim died of a single shotgun would inflicted from only two feet away. The medical examiner testified the victim would have died within 3-5 minutes, would have been stopped dead in his tracks, and would have been rendered immediately unconscious upon being shot. (Vol. 5 p. 879-884) The shooting occurred the instant the victim opened his door, such that the victim had no time to reflect on, or agonize over what was going to happen to him. The victim was not expecting any violence to occur, such that he had any concern or worry that he might be killed.

The law is clear that a quick, sudden death caused by gunshot wounds is not sufficient for a finding of heinous, atrocious, or cruel. In the recent decision of Jackson v. State, 451 So. 2d 458 (Fla. 1984) the victim was shot in the back, put in the trunk of car while still alive, wrapped in plastic bags, and then shot again while still alive. This Court in reversing the finding of heinous, atrocious, and cruel noted that the victim was rendered unconscious within moments after being shot for the first time, and thereafter was incapable of suffering to

the extent contemplated by this aggravating circumstance.

In Raulerson v. State, 420 S. 2d 567 (Fla. 1982) this Court reversed the trial court's finding that the homocide was heinous, atrocious or cruel. The victim was a police officer who was shot during his attempt to abort an armed robbery in progress. Raulerson's co-defendant shot the officer in the chest causing him to cry out. Raulerson then encountered the wounded victim and shot him five more times.

In Tedder v. State, supra this Court reversed the trial court's finding of heinousness. Tedder fired a shot at his mother-in-law. She and her daughter, Tedder's wife, fled inside the house. Tedder followed them inside and shot his mother-in-law. She was left dying in the hallway and he prohibited his wife, the victim's daughter from rendering aid.

In Lewis v. State, supra, this Court in reversing the trial court's finding of heinousness held, ". . . a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious, or cruel." The victim and Lewis had an ongoing dispute over money, with each having threatened the other's life. Lewis went to the victim's house and shot him through a window as he lay watching television. The victim died instantly of gunshot wounds without having time to reflect on his fate.

In Lewis v. State, 377 So. 2d 640 (Fla. 1980) the victim and Lewis had been friends for years. However, their relationship deterioated because of a dispute over money. After months of accusations back and forth, Lewis drove to the victim's house and

encountered him outside his house. After talking for a few minutes, Lewis shot the victim several times, and continued to shoot him as he attempted to flee. This Court found this was not the especially heinous type of killing the Legislature had envisioned when it enacted this category.

In finding the homocide cold, calculating, and premeditated the Court found the Appellant killed an unknown, innocent person by shooting him at point blank range after injecting himself in a dispute between the victim, and Carr and Folsom. This aggravating circumstance has been construed as being applicable to those murders characterized as executions or contract murders. McCray v. State, 416 So. 2d 804 (Fla. 1982); Jent v. State, 408 So. 2d 1024 (Fla. 1981); Combs v. State, 403 So. 2d 418 (Fla. 1981)

In the case sub judice, the victim had no prior contact or problems with the Appellant. The victim was immediately and instantly killed upon coming into contact with the Appellant. The Prosecution witnesses agree the killing occurred within minutes of their coming into contact with the Appellant, and within minutes of his obtaining the shotgun. The prosecution witnesses agree the Appellant was acting strange or "high" prior to the shooting. One prosecution witness, Carr, testified the Appellant said he was going to kill the victim, while the other prosecution witness, Folsom, testified the Appellant made no mention of planning to kill the victim, but rather said he was going to talk to the victim.

If the prosecution's witnesses, Carr and Folsom, are to be

believed, they did not solicit or encourage the Appellant to intercede in their dispute with the victim, or seek his assistance for purposes of vengence. Thus it cannot be concluded that the killing was a "contract" murder. To come within this category, it must be concluded that the killing would come within this Court's definition of an execution.

In Cannady v. State, 427 So. 2d 723 (Fla. 1983), the defendant robbed a motel and kidnapped the clerk. He drove the clerk to a wooded area and shot him five times. This Court found the killing was not cold, calculated and premeditated.

In McCray v. State, supra, this Court found the killing did not fall within this category. The defendant and his co-conspirators went to the victim's place of business, a gun shop. They inspected some guns and left. They returned to the rear of the store and burglarized the victim's van stealing some guns. They left again. The defendant left his co-conspirators stating he didn't want to leave empty-handed. The defendant returned to the rear of the store, approached the victim and a companion. He yelled, "this is for you, motherfucker," and shot the victim three times.

In Washington v. State, 432 So. 2d 44 (Fla. 1983), the defendant and his companions went to a neighborhood tire store to sell stolen guns. An off-duty deputy sheriff was at the store. The deputy asked one of Washington's companions for identification. The deputy's attention distracted, Washington got off the car, approached the deputy, drew a pistol, and ordered the deputy to "freeze". Washington reached for the

deputy's gun. As he did, the deputy moved and Washington shot him four times. This Court held the killing did not fall within this category.

Based on the aforementioned cases, the killing cannot be characterized as an execution. Thus, because the killing was not a contract killing, nor an execution, the finding of cold and calculated is erroneous.

The Court erred in not finding that the statutory mitigating circumstance, that the Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, did not exist.

Dr. Robert K. Berntson, a court appointed clinical psychologist, testified that based upon the totality of his findings the Appellant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (Vol. 7, p. 1316) Dr. Berntson's testimony was unrebutted and uncontradicted. His testimony established this statutory mitigating circumstance as a matter of law.

The Appellant would challenge that his death sentence is disportionate to other death sentences which have been approved and disapproved by this Court. The following cases have been reversed by this Court: Drake v. State, 441 So. 2d 1079 (Fla. 1983), victim found with her hands tied and stabbed eight times; Herzog v. State, 439 So. 2d 1372 (Fla. 1983), victim forced to take pills, beaten, suffocated, and eventually strangled with a telephone wire; McKennon v. State, 403 So. 2d 389 (Fla. 1981), victim killed by having her head beaten against the wall and

floor, strangled, throat slit, ten ribs broken and finally stabbed to death; Neary v. State, 384 So. 2d 881 (Fla. 1980); Richardson v. State, 437 So. 2d 1091 (Fla. 1983); Washington v. State, supra; Webb v. State, supra; Cannady v. State, supra; Chabers v. State, 339 So. 2d 204 (Fla. 1976); Swan v. State, 322 So. 2d 485 (Fla. 1975); Phippen v. State, 389 So. 2d 991 (Fla. 1980); Welty v. State, 402 So. 2d 1159 (Fla. 1981); Brown v. State, 367 So. 2d 616 (Fla. 1979); Norris v. State, 429 So. 2d 688 (Fla. 1983)

In conclusion, the Court improperly considered two aggravating circumstances and ignored a statutory mitigating circumstance. With these errors corrected, the Court has for its consideration two aggravating circumstances and two mitigating circumstances. The Appellant would pray this Court therefore find that the aggravating circumstances do not outweigh the mitigating circumstances, and impose a sentence of life. In the alternative should the Court reject the aforementioned prayer of relief, the Appellant would pray this Court remand this cause for resentencing directing the Court to review its sentence predicted upon the existence of two aggravating circumstances and two mitigating circumstances.

CONCLUSION

The Appellant would pray as to Points I and II that his case be remanded for a new trial. As to Point III, the Appellant would pray the Court impose a life sentence, or in the alternative remand his case for resentencing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of this brief has been supplied to the Offices of the Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida, this 5 day of ~~September~~ October, 1984.

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