IN THE SUPREME COURT OF FLORIDA

MARK ANDREW BURCH,

Appellant,

vs. CASE NO. 68,881

STATE OF FLORIDA,

Appellee.

_____/

APPELLANT'S BRIEF

A Death Penalty Appeal from the Circuit Court of the Seventeenth Judicial Circuit, Honorable Mark A. Speiser

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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 trial 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.

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. The jury returned an advisory sentence recommending by a vote of 9 to 3 that the death penalty be imposed. On March 8, 1984, the court reconvened for the purpose of sentencing. The trial court sentenced the Appellant to death.

The Appellant appealed his conviction, judgment, and sentence. In an opinion filed October 3, 1985, this Court reversed the Appellant's first-degree murder conviction and remanded his case for a new trial because, the trial court abused its discretion in denying the Appellant's proof of voluntary intoxication by ingestion of the highly dangerous drug, phencyclidine (PCP), thereby effectively removing from the jury the critical question of whether the Appellant was capable of forming a specific intent to commit first-degree murder.

On April 21, 1986, the Appellant's third trial commenced.

On April 26, 1986, the jury returned a verdict of guilty of first-degree murder. (Vol. 9, p. 1441). On April 28, 1986, the penalty phase was held, and the jury, by a vote of 8 to 4, returned an advisory sentence recommending a sentence of life imprisonment without possibility of parole for 25 years. (Vol. 7, p. 1332, 1333; Vol. 9, p. 1445).

On May 21, 1986, the trial court overrode the jury's recommendation of a life sentence and sentenced the Appellant to death. (Vol. 9, p. 1453, 1456-1464). On June 2, 1986, the Appellant filed a notice of appeal. (Vol. 9, p. 1468).

STATEMENT OF FACTS

In Re: The Facts of the Crime

In July, 1982, Laura Carr agreed to sell Allen Calloway her 1969 Ford Mustage 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 money. (Vol. 3, p. 441-487).

After purchasing the car, Calloway spent money repairing the car and putting new tires on it. (Vol. 3, p. 441-487).

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 her money. (Vol. 3, p. 441-487).

The next morning, while Calloway was at work, Carr went to Calloway's residence with a friend, David Bill. They pushed the car down the street a service station so a new ignition key could be installed in the car. (Vol. 3, p. 441-487).

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 ladies 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. 3, p. 463-487).

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. 3, p. 463-487).

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. 3, p. 463-487).

A few minutes later her boyfriend, Roy Folsom, same 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 conversation with him. (Vol. 2, p. 379-399; Vol. 3, p. 400-442).

Calloway threatened to kill both Carr and Folsom. (Vol. 2, p. 379-399; Vol. 3, p. 400-442).

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 respossess 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 another car. (Vol. 3, p. 463-487).

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 same shopping center. 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, she observed Folsom sitting in the car with a bloody face. Calloway had left the scene. (Vol. 3, p. 470-475).

The police came to the scene. However, Folsom declined to press charges. Whereupon Carr and Folsom returned to his house. (Vol. 3, p. 428).

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 him halfway down the

block and talked him into returning home. (Vol. 3, p. 423-430).

A short time later, Carr and Folsom decided to take a drive. They returned to the shopping center where the doughnut shop and drug store are located. 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. 3, p. 430-487). He exited the car, and asked them to wait. Within moments he returned, carrying a shotgun. (Vol. 3, p. 406-410).

Folsom testified he thinks Carr gave the Appellant Calloway's address. (Vol. 3, p. 433). 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. 3, p. 433-437). Appellant told them that he would meet them back at the doughnut shop.

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. 3, p. 430-487). On the drive out to trailer park, the Appellant told Carr and Folsom that he had shot Calloway.

During the drive from the apartment, Carr noticed that the Appellant was acting strangely. Carr noticed that his reactions were unusual, that something was mentally wrong with him, and that he appeared to be disturbed. (Vol. 3, p. 433-437). 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. 3, p. 433-437).

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. 4, p. 603-661).

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 his name. Billy told him his name. The Appellant asked if he knew Calloway and where apartment #2 was located. Billy responded "no". (Vol. 4, p. 603-661).

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. 4, p. 603-661).

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. 3, p. 603-661).

Rebecca Viele, the resident manager of the apartment complex, looked out her window and saw the Appellant walking towards Calloway's apartment carrying the shotgun. Moments later

she heard the shotgun blast. She observed the Appellant standing at Calloway's door. He turned and merely walked away. She rushed outside her apartment and screamed at the Appellant. The Appellant merely looked at her and continued walking. (Vol. 4, p. 693-711).

Kevin Cooper lived in the same apartment complex. He heard the shotgun blast. He looked out his windoww and saw the Appellant walk from Calloway's apartment carrying the shotgun. (Vol. 4, p. 675-692).

Joseph Mahon testified that the Appellant brought a shotgun to his apartment. (Vol. 5, p. 873-889). A while later, the Appellant returned, retrieved the shotgun, and left. When the Appellant came to get the shotgun, he was acting unusual. (Vol. 6, p. 1010). Mahon had known the Appellant for years and knew him to use drugs frequently. That night the Appellant appeared to be "high". Mahon begged him not to take the shotgun, because he was concerned in his condition the Appellant might do something crazy.

Randy Robson identified the shotgun found in the trash dumpster as his. He testified that the Appellant borrowed the shotgun without his permission. Robson knew the Appellant used the drug PCP. (Vol. 4, p. 712-742).

Betty Robson testified that the evening of the shooting, the Appellant knocked on her trailer door at the Holiday Park Trailer Park. The Appellant asked to speak with her husband. She heard him remark that he had blown a man away in Davie. The Appellant was acting irrational, strange, and appeared to be two-thirds

drunk. (Vol. 5, p. 831-847).

Benjamin Robson was awakened by his wife. He spoke with the Appellant who told him tht 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. The Appellant appeared to be "high", or two-thirds drunk. (Vol. 4, p. 743-764).

Dr. Tate, the deputy Broward County Medical Examiner, testified that death would have been within 3 minutes. He testified that Calloway would have become unconscious very quickly after sustaining the wound. (Vol. 3, p. 572-583).

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

At hearings on February 28, 1986, March 7, 1986, April 10, 1986 and April 17, 1986, the trial court considered the appointment of an expert to aid in the preparation of presentation of the defense of voluntary intoxication by the use of alcohol and the controlled substance, PCP. The trial court was informed that Angie Brady, a friend of the Appellant, had frequent contact with the Appellant in the three 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 trial court was informed that the defense was attempting to secure the services of Dr. Steven Lerner, the nationally recognized expert on the drug PCP. (Vol. 1, p. 29-48).

The trial court reviewed the comprehensive motion titled, "Motion to Appoint Expert In Re: Defense of Intoxication by use of Phencyclidines Commonly Known as "P.C.P.". The Appellant moved that Dr. Steven Lerner be appointed to examine the

Appellant in regards to the preparation of the defense of voluntary intoxication by inhalation of PCP. The motion apprised the trial court as follows:

> 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 Edward Munz, Jr., as charged in Broward County 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 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 she 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 quantites of alcoholic beverages and a drug believed by her to be PCP.
>
> In regards to the offense of first-degree murder (i.e., Broward County 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 tht 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 No. 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 particualar 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).

The comprehensive motion, which the Appellant re-adopted, is before this Court in the Appellant's prior case no. 65,168,

At the hearing on April 17, 1986, the trial court denied the Appellant's motion to appoint Dr. Lerner because of the projected cost of $14,000.00. The trial court in denying the motion commented on the experts the Appellant would call in lieu of Dr. Lerner:

> ...All I said, these people that you are calling probably do not have the status or recognition that this gentleman who wants $14,000.00 has, but nonetheless, they are going to be permitted to testify to the same subject matter. (Vol. 1, p. 70).

The trial court recognized that the experts that testified in support of the Appellant's defense of voluntary intoxication were not as qualified as Dr. Lerner.

Dr. Robert Berntson, one of the experts the Appellant called in lieu of Dr. Lerner, testified he had very limited knowledge of the drug PCP (Vol. 5, p. 997).

In Re: PCP Intoxication

Barbara Cooper was a roommate of the Appellant who lived with him in the three month time period before the shooting. She observed the Appellant daily 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. 5, p. 911-929).

Sandra Marini testified that in the three month time period before the shooting incident, she had occasion to come into contact with the Appellant 4 to 5 times a week. She knew the Appellant snorted a lot of PCP. During the time she knew him, she had only actually seen the Appellant not intoxicated two 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. 5, p. 980-903).

The Appellant testified at that in the two month time period prior to the shooting incident, that he was using PCP, cocaine, hallucinogenic mushrooms, and qualudes. He was snorting PCP, injecting it intraveiniously, 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 mat adjacent to the doughnut shop snorting PCP. (Vol. 5, p. 930-989).

Dr. Robert Berntson, a local clinical psychologist, examined the Appellant. The Appellant's case history reflected that the Appellant began using marijuana at age 9 and progressed to LSD, herion, cocaine and PCP. During the time period proceeding the death of Calloway, he was consuming a fifth of whiskey per day and an ounce of PCP per week. (Vol. 5, p. 992).

Dr. Berntson administered a battery of neuro-psychological tests, including Wechsler Adult Intelligence Scale and the Halstead-Wepman Screening Test. Based upon his oral examination and the test results, Dr. Berntson came to the following conclusions:

(1) that the Appellant had an anti-social personality disorder

(2) that the Appellant had brain dysfunction

(3) that the Appellant had brain damage caused by trauma and the prolonged ingestion of neurotoxins

(4) that neurotoxins such as PCP, caused memory loss or amnesia. (Vol. 5, p. 989-999; Vol. 6, p. 1000-1015)

Dr. Don Roach, a biochemist/toxicologist, testified concerning the toxicological effect of PCP on the human body. PCP was developed as an anesthetic. It was disallowed for use on

humans because of the bizarre side effects. The side effects included, agitation, erratic behavior, and hallucinations.

Abuse of PCP has several different effects on humans. Excess ingestion may result in an immobile stupor. Users may engage in violent behavior, including self-mutilations and unprovoked attacks on other people. (Vol. 6, p. 1016-1038).

Dr. Roach opined that PCP was one of the most dangerous drugs. He considered it more dangerous than cocaine. (Vol. 6, p. 1028).

In Re: The Death Penalty

The Appellant had prior convictions for breaking and entering, robbery, and unlawful possession of a firearm. At the time of the homocide, the Appellant was on parole. (Vol. 7, p. 1204). When the Appellant committed the aforementioned offenses, he was a juvenile. (Vol. 7, p. 1207)

The parole records reflect that his parole officer had the discretion, at any time, to demand an on-the-spot drug test. During the six (6) months the Appellant was on parole before the homocide, there was never a request for a drug test. (Vol. 7, p. 1209).

The parole records reflected that he was a junior high school dropout. Upon release from prison, the parole authorities gave him no assistance in obtaining a job, or obtaining vocational training in order that he could comply with the terms of his parole. (Vol. 7, p. 1211).

After his first conviction of the Calloway homocide, the

Appellant was convicted of attempted first-degree murder and possession of a firearm by a convicted felon. (Vol. 7, p. 1217). Over the Appellant's objection, the State read to the jury the attempted murder victim's discovery deposition detailing the crime. (Vol. 7, p. 1219-1249).

Jo Ann Gill, the Appellant's sister, testified about the Appellant's upbringing and chronic drug abuse. The Appellant's natural father was an alcoholic who routinely physically abused the family. At age 6, his parents divorced. As a preteen, the Appellant abused alcohol, marijuana, acid, mescaline and transmission fluid. Drugs were often supplied by his stepfather whom his mother married when the Appellant was 11 years old. (Vol. 7, p. 1249-1270).

The Appellant's involvement in criminal activity which resulted in his being sentenced to an adult prison at age 16 was the result of his association with older men, who were friends of his sister. (Vol. 7, p. 1252-1257).

As a young man in prison, the Appellant received dozens of tatoos that cover his body. (Vol. 7, p. 1258).

Upon release from prison, he went to live with his mother. Because of his physical appearance (i.e. tatoos), the fact he was on parole, and the high unemployment rate, it was impossible for him to find a job. Unemployed and depressed, he began using drugs again. He ingested heavy does of PCP. (Vol. 7, p. 1260). About a month before the homocide, he was forced to leave his mother's house because of his drug abuse.

On the afternoon of the homocide, his sister picked the

Appellant up at a bar and took him to a trailer where he was living. There he met his girlfriend. The three of them proceeded to his sister's house. His sister became angry when she observed the Appellant and his girlfriend snorting PCP. The Appellant was "high" on PCP when she dropped him off at his trailer late that afternoon. (Vol. 7, p. 1264-1265).

Dr. Brentson was recalled at the penalty phase. He opined that the Appellant's brain dysfunction, or brian impairment was caused by the ingesting of toxins. He opined that the Appellant's prolonged use of drugs resulting in brain dysfunction substantially impaired the Appellant's capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law. (Vol. 7, p. 1277-1278). This expert opinion was unrebutted.

The Appellant testified that his natural father beat him severely as a young child. He began drinking alcoholic beverages and using marijuana at age 9. When his mother remarried, he used drugs with his stepfather. (Vol. 7, 1284-1288).

At age 13, a group of older men schooled him on how to commit burglaries. He was taught how to by-pass burglar alarms, etc. During the criminal episode for which he was sentenced to prison as a juvenile, he was shot by the police. (Vol. 7, p. 1290). As a juvenile/adult offender, he served time at DeSota, Sumter, Florida State Prison and Belle Glade.

Shortly after being placed in prison, another inmate tried to rape him. He stabbed him and was transferred to the maximum security prison at Florida State Prison. While in prison, he observed fellow inmates raped and murdered. His cellmate was

stabbed and died in his arms.

Just prior to his parole, he received a psychological examination. The doctor advised him that he was not psychologially ready for release. (Vol. 7, p. 1284-1308).

On May 21, 1986, the trial court overrode the jury's 8 to 4 vote recommending a life sentence, and imposed the death penalty. The trial court found the following aggravating circumstances:

> (1) that the Appellant committed the homocide while on parole;
>
> (2) that the Appellant was previously convicted of a felony involving violence to some person; and
>
> (3) that the homocide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

Concerning the statutory and non-statutory mitigating circumstances, the trial court found:

> (1) that the evidence of the Appellant's drug abuse, does not support a finding that the crime for which the Appellant was convicted was committed while he was under the influence of extreme mental or emotional disturbance. (Vol. 9, p. 1460).
>
> (2) that the capacity of the Appellant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (Vol. 9, p. 1461-1462).
>
> (3) that there was no other aspect of the Appellant's character or background that merited a finding of mitigation. (Note: The trial court ignored the testimony concerning physical abuse by the Appellant's natural father, the fact that his stepfather supplied him drug as a preteen, and that as a teenager, he came under the influence of older organized crime figures who started him on a life of crime.) (Vol. 9, p. 1462).

The trial court emphasized the Appellant's past

criminal history. The Appellant inquired whether the trial court had reviewed the comprehensive pre-sentence investigation report prepared in connection with the Appellant's 1974 convictions. Those earlier convictions constituted two of the three statutory aggravating circumstances. The trial court replied that it had not reviewed the report, and did not do so after the matter was brought to its attention. (Vol. 8, 1379-1381). The trial did order that both 1984 and 1974 presentence investigation reports be forwarded to this Court. (Vol. 8, p. 1332-1383; Vol. 9, p. 1465-1466).

Eight days later, on May 29, 1986, the Appellant moved the trial court to reconsider its imposition of the death penalty. (Vol. 8, p. 1384-1388; Vol. 9, 1454-1455). The Appellant moved the trial court to consider the following evidence as a non-statutory mitigating circumstances:

> (1) the Appellant's behavior and disciplinary reports from the time of his arrest in January, 1983 to the present, including his lengthy incarceration on death row until he was returned for a new trial
>
> (2) the testimony of correctional personnel concerning his behavior while incarcerated. (Vol. 9, p.1454-1455)

The Appellant opined that the reports would reflect the Appellant as a well-behaved, well-adjusted inmate who had reacted favorably and within the prescribed limits of conduct for a penal environment such that his future behavior in prison, while serving a life sentence, would conform to the norm. (Vol. 9, p. 1455).

The trial court denied the motion, and declined to review the reports, or hear the testimony. (Vol. 9, p. 1467).

SUMMARY OF ARGUMENT

The Appellant complains that the trial court should have appointed a nationally recognized expert in the drug PCP to aid him in his PCP intoxication defense. The trial refused because of the projected cost. This Court must balance the financial burden of the State verus the Appellant's right to effectively pursue his defense.

The Appellant complains that there were sufficient mitigating factors to justify the jury's life recommendation. Therefore, the imposition of the death penalty was error.

The Appellant, relying upon Skipper v. South Carolina, infra complains that the judge erred in refusing to consider the records of the Appellant's years of incarceration, after his arrest for the charge herein, as a mitigating factor.

Lastly, the Appellant recognizes that a capital defendant is not entitled to a presentence investigation report, or to the updating of an existing report. However, the judge should review an existing presentence investigation report dealing specifically with the aggravating circumstances upon which the judge is predicating an override of the jury's life recommendation.

POINT 1

THE TRIAL COURT ERRED IN REFUSING TO APPOINT A "SPECIFIC" EXPERT WITNESS TO AID IN THE APPELLANT'S DEFENSE OF VOLUNTARY INTOXICATION

The Appellant, an indigent defendant, complains that he was denied the effective assistance of counsel and due process of law when the trial court refused to appoint Dr. Steven Lerner, as

an expert witness, to aid in his defense. The theory of the Appellant's defense was that he had volunatarily ingested a highly dangerous drug, phencyclidine (PCP), for a period of months before the homocide, including the day of the homocide, along with quanities of alcohol and was incapable of forming a specific intent.

Before the Appellant's first trial, the Appellant moved the trial court to appoint Dr. Lerner, a nationally recognized expert in the drug PCP. The trial court denied the motion. Before the Appellant's second trial, the Appellant did not renew his motion to appoint Dr. Lerner. However, the trial court appointed two local expert witnesses, Dr. Berntson, a psychologist, and Dr. Roach, a toxicologist. Neither had qualifications of Dr. Lerner.

After the Appellant's first conviction, the Appellant complained that the trial court erred in not appointing Dr. Lerner. This Court ruled the issue was not preserved for review, because the motion was not renewed before the second trial.

After this Court reversed the Appellant's conviction and remanded his case for a new trial, the Appellant sent a letter to every psychologist and psychiatrist in Broward County, an area with a population of 1.1 million. The Appellant inquired of their expertise in the drug PCP, and how their expertise compared with Dr. Lerner. None responded that they had the expertise or qualifications of Dr. Lerner. (Vol. 1, p. 43-44).

The Appellant renewed his motion to appoint Dr. Lerner. The trial court denied the motion because of the projected cost of $14,000.00. The trial court in denying the

motion commented on Dr. Berntson and Dr. Roach:

> ...All I said, these people that you are calling probably do not have the status or recognition that (Dr. Lerner) who wants $14,000.00 has, but nonetheless they are going to be permitted to testify to the same subject matter. (Vol. 1, p. 70).

Dr. Berntson had limited knowledge of the drug PCP. (Vol. 5, p. 997).

The law is clear that when the State brings its judicial power to bear on an indigent defendant in a criminal trial, it must take steps to assure that the defendant has a fair opportunity to present his defense. "This elementary principle, grounded in significant part of the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his proverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake". Ake v. Oklahoma, ___ U.S.___, 105 S.Ct. 1087 (1985). In recognition of this right, indigent criminal defendants are entitled to the effective assistance of counsel at trial, may not be required to pay a fee for filing an appeal, must be provided necessary trial transcripts, and must be provided the effective assistance of appellate counsel. Griffin v. Illinois, 351 U.S. 12 (1956); Burns v. Ohio, 360 U.S. 252 (1959); Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963); Evitts v. Lucey, 489 U.S. ___, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); Strickland v. Washington, 466 U.S. ___ 80 L.Ed.2d 674, 104 S.Ct.

2052 (1984).

"...Mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." Justice Marshall went on to state, "...fundamental fairness entitles indigent defendants to an adequate opportunity to present their claims within the adversary system". To implement this principle an indigent defendant must be provided adequate tools for his defense. Ake v. Oklahoma, supra. Consistent with this theme, in a capital case where an indigent defendant's mental state is a significant factor at trial, or the sentencing phase, the State must assure the defendant access to a competent psychiatrist in the evaluation, preparation and presentation of his defense. Ake v. Oklahoma, supra.

The Ake decision stated that an indigent does not have a constitutional right to choose a psychiatrist of his own personal liking, or to receive funds to hire his own. However, the Court stressed the indigent defendant must have access to a competent expert. Ake v. Oklahoma, supra. The Court recognized that where the potential accuracy of the jury's determination is enhanced by the expert testimony, and where the interests of the defendant and the State in an accurate proceeding are substantial, the State's interest in its fisc must yield. "...(T)he financial burden is not always so great as to

outweigh the individual interest". Ake v. Oklahoma, supra at footnote 9 (emphsis added). The Court recognized that there must be a balancing between the State's financial burden and the defendant's entitlement the effective assistance of a competent expert. Justice Burger stated, "In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases." Ake v. Oklahoma, supra.

Applying these standards to the facts of the case sub judice, it is clear that the Appellant's mental state at the time of the offense was a substantial factor in his defense. The trial court was on notice of Appellant's sole defense was that he had voluntarily ingested the dangerous neurotoxin, PCP, and alcohol which rendered him incapable of forming a specific intent.

While the substantial effects of PCP on the human body may be well-known to segments of the drug subculture, its effects are beyond the general knowledge of the average juror. More importantly the Appellant's exhaustive efforts to find an expert in the drug PCP revealed that the subject matter of PCP was beyond the expertise of the average psychiatric-psychological expert. The average expert had no clinical experience with the substantial effects of PCP, and their knowledge was limited to a review of the scientific literature.

The only two local experts the Appellant could locate had "qualified" experience with the drug. Dr. Berntson, the psychologist, testifed that he had very limited knowledge of the drug PCP. (Vol. 5, p. 997). Dr. Roach, the biochemist/toxicologist, reviewed the scientific literature and

gave the jury an overview of his findings. The trial court acknowledged that neither of these experts had the qualifications or experience of Dr. Lerner. (Vol. 1, p. 70). The Appellant challenges that the experts he was allowed were not the competent experts that an indigent accused must be provided in accord with the Ake decision.

The potential accuracy of the jury's determination rested solely upon its understanding and appreciation of the substantial effects of PCP upon the Appellant's mind and how it guided or controlled his behavior. Because death penalty cases are unique, the State's interest in its fisc should have yielded in favor of providing the Appellant a true expert in the drug, PCP. Under the circumstances of this case, the Appellant's entitlement to the assistance of Dr. Lerner outweighed the financial burden.

Accordingly, the Appellant's entitlement to the assistance of Dr. Lerner and the denial of that assistance deprived him of due process and the effective assistance of counsel.

POINT 2

THE TRIAL COURT'S OVERIDE OF THE JURY'S 8 TO 4 VOTE RECOMMENDING A LIFE SENTENCE AND ITS IMPOSITION OF THE DEATH PENALTY WAS ERROR

The trial court in overriding the jury's recommendation of a life sentence found three aggravating circumstances:

(1) that the Appellant committed the homocide while on parole;

(2) that the Appellant was previously convicted of a felony involving violence to some person and;

(3) that the homocide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The trial court found one mitigating factor. In light of the Appellant's substantial drug useage his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired.

"In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). "Where there are aggravating circumstances making death the appropriate penalty, and the jury's recommendation is not based on some valid mitigating factor (statutory or non-statutory) discernable from the record, it is proper for the trial judge to overrule the jury's recommendation and impose a sentence of death." Brown v. State, 473 So.2d 1260, 1270 (Fla. 1985). Because the weighing process is not a mere tabulation of aggravating and mitigating circumstances, the record must be devoid of any valid mitigating circumstances before the trial court may override the jury's recommendation.

In Amazon v. State, 11 FLW 105 (Fla. 1986), the trial court found four aggravating circumstances and no mitigating factors. He overrode the jury's life recommendation and sentenced the defendant to death. This Court vacated the death sentence stating:

...(W)e are persuaded that the jury could have property

> found and weighed mitigating factors and reached a valid recommendation of life imprisonment. We believe that was sufficient evidence for the jury to have found that Amazon acted under extreme mental or emotional disturbance. The defense theory in the guilt phase was that Amazon had acted from a "depraved mind", i.e. committed second degree murder. There was some inconclusive evidence that Amazon had taken drugs the night of the murders, stronger evidence that Amazon had a history of drug abuse, and testimony from a psychologist indicated Amazon was an 'emotional cripple' who had been brought up in a negative family setting... 11 FLW 107

This Court found that in light of these mitigating factors the facts are not so clear and convincing that no reasonable person could differ that death was the appropriate penalty.

In Brookings v. State, 11 FLW 445 (Fla. 1986), the trial court overrode the jury's life recommendation and sentenced the defendant to death. The trial court found five aggravating circumstances and three non-statutory mitigating factors. This Court found that the jury's recommendation of life was based upon the fact that one coconspirator pled guilty to the lesser offense of second degree muder and another coconspirator received total immunity. This Court re-affirmed that a jury may consider the treatment accorded another equally culpable perpetrator. See also, McCampbell v. State, 421 So.2d 1072 (Fla. 1982).

In Irizarry v. State, 11 FLW 568 (Fla. 1986), the jury by a 9 to 3 vote recommended life. However, the trial court found four aggravating circumstances and two mitigating circumstances, and sentenced the defendant to death. This Court found that the two mitigating circumstances could have influenced the jury to return a recommendation of life.

Applying these standards, what mitigating circumstances are discernible from the record? The case sub judice mirrors

Amazon. The gravaman of the Appellant's defense was that his voluntary ingestion of the neurotoxin PCP and alcohol prevented him from forming a specific intent. The trial court found that in light of the Appellant's substantial drug useage his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law was substantially impaired. The trial court found as a matter of law that at the time of the homocide the Appellant's mental state was substantially impaired. By the trial court's own finding, the record was not devoid of a valid mitigating circumstances upon which a life recommendation could be based.

Several other statutory and non-statutory factors justified the jury's life recommendation. The jury may have believed that Carr and Folsom, who were never charged, were equally culpable and the Appellant should not have to suffer the ultimate punishment. The trial court recognized Carr's culpability and found as follows, "...this Court believes ... that Carr knew that the (Appellant) was an explosive, physical person who would always be willing to accept and undertake a violent challenge. Carr may have prevailed upon the (Appellant) to teach Calloway a lesson, or as they say in street vernacular, 'to even a score'." (Vol. 9, p. 1462).

The Appellant's family history provided further mitigating evidence. The Appellant was physically abused as a child by an alcoholic father. Chemical dependency is believed to be a combination of heredity and environment. Consistent therewith, the Appellant began abusing alcohol and drugs at age 9. By age 11, he was using drugs with his stepfather. By age 16, he was

under the influence of older organized crime figures, with whom this Court is familiar, Peter Salerno and Carmine Stanzione. Salerno v. State, 347 So.2d 659 (Fla. 4 DCA 1977) and State v. Stanzione, 315 So.2d 500 (Fla. 4 DCA 1975).

As a juvenile high school drop-out, he was tried and convicted as an adult. He received a lengthy sentence in an adult prison. Rather than being rehabilitated, educated, or trained, he was warehoused. He was paroled notwithstanding a psychological examination that he was not fit for release.

The unrebutted expert testimony was that the Appellant had brain dysfunction and brian damage caused by physical trauma and the prolonged ingestion of neurotoxins.

The aforementioned are valid mitigating factors upon which a reasonable jury could have recommended a sentence of death. Accordingly, the death sentence should be reversed and a life sentence imposed.

POINT 3

THE TRIAL COURT ERRED IN NOT CONSIDERING AS A NON-STATUTORY MITIGATING CIRCUMSTANCE THE APPELLANT'S BEHAVIOR IN JAIL AND ADJUSTMENT TO INCARCERATION

Eight days after sentencing, the Appellent moved the trial court to reconsider its imposition of the death penalty. The Appellant moved the trial court to consider as a non-statutory mitigating circumstance his adjustment to incarceration as an indication of his future conduct if sentenced to life imprisonment. The Appellant moved the trial court to consider the following evidence: (1) his behavioral or conduct reports

from his arrest in January, 1983, through the date of his sentencing, including his lengthy stay on death row, and (2) the testimony of Broward County Jail and Florida State Prison personnel concerning his past conduct as it relates to his future behavior. (Vol. 9, p. 1454-1455). The Appellant opined that this evidence would reflect that the Appellant "has reacted favorably and within a prescribed limits of conduct for a penal environment such that his future behavior in prison will conform to the norm." (Vol. 9, p. 1455). The trial court, in declining to review the reports or hear the testimony, re-affirmed its sentence to death. (Vol. 9, p. 1467).

The law is clear that the accused may present as a "mitigating factor" any aspect of his character or record he proffers as a basis for a sentence less than death. Equally clear is the corrollary, the sentencer may not refuse to consider any relevant mitigating evidence. Eddings v. Oklahoma, infra; Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). (emphasis added).

In Skipper v. South Carolina, 106 S.Ct. 1669 (1986), the defendant sought to introduce testimony regarding his good behavior during the seven months he spent in jail awaiting trial. The trial court ruled the evidence was irrelevant and hence inadmissible. The Court held that, "...evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." Evidence of a defendant's probable future conduct in prison is a factor to be considered both in aggravation or mitigation. Evidence of

adjustibility to life in prison unquestionably goes to a feature of the defendant's character that is highly relevant to the sentencing determination. 106 S.Ct. 1669 at footnotes 1 and 2.

In the recent decision of Valle v. State, 12 FLW 51 (Fla. 1986), this Court adopted Skipper and found that evidence of probable future conduct in prison is relevant mitigating evidence that must be considered by the sentencing judge.

In the case sub judice, the Appellant was incarcerated in the county jail for fifteen months before his conviction and sentence of death. Thereafter, he was transferred to death row, where he remained for approximately twenty-one months until he was returned to the county to jail to await retrial. The Appellant was continuously incarcerated for forty-one months before the trial court imposed the death penalty. Under these circumstancees, the evidence bearing upon the Appellant's behavior in jail (and hence, upon his likely future behavior in prison) is evidence the trial court should have considered.

Accordingly, the death sentence cannot stand. The cause should be remanded for resentencing with directions that any and all relevant mitigating evidence be considered.

POINT 4

THE TRIAL COURT ERRED IN NOT REVIEWING THE APPELLANT'S 1974 PRESENTENCE INVESTIGATION REPORT BEFORE TO IMPOSING THE DEATH PENALTY

The trial court overrode the jury's 8 to 4 vote recommending life imprisonment, and imposed the death penalty. The trial court emphasized the Appellant's prior convictions, committed while he was a juvenile, but tried as an adult. These

prior convictions constituted two of the three aggravating factors. The Appellant inquired whether the trial court had reviewed the 1974 presentence investigation report which was in the possession of the probation officer, who testified in the above-styled cause. The trial court replied "no", and declined to review the report.

The Appellant recognizes that in a capital case the trial court is not required to have prepared a presentence report. Perri v. State, 441 So.2d 606 (Fla. 1983). Nor, is the trial court required to update a pre-existing presentence investigation report before referring to it. Rose v. State, 461 So.2d 84 (Fla. 1984).

The sentencing judge may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character, or a record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death. "Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence' ...These rules are now well estasblished..." Skipper v. South Carolina, supra; Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d (1982); Lockett v. Ohio, 435 U.S. 586, 98 S.Ct. 2854, 57 L.Ed.2d 973(1978).

Applying these standards to the case sub judice, the Appellant did not request the preparation of a report, or the updating of a pre-existing report. Rather, the Appellant requested the trial court to review an existing report that was in the possession of the probation officer who testified at the

penalty phase. The Appellant requested a review of the report which dealt with the Appellant's character, record, and the circumstances of his prior convictions, which constituted two of the three aggravating circumstances. The trial court's refusal to review the report was a refusal to consider relevant mitigating evidence.

Accordingly, because the trial court may not refuse to consider any relevant mitigating evidence, the sentence of death must be set aside. The cause should be remanded for resentencing with directions that 1974 presentence investigation report be considered.

CONCLUSION

As to Point 1, the Appellant prays for a new trial with the appointment of the requested expert witness. As to Point 2, the Appellant prays that his cause be remanded for resentencing with directions that a life sentence be imposed. If Point 2 is rejected, the Appellant in Points 3 and 4, prays that his cause be remanded for resentencing with directions that the trial court consider the mitigating evidence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Assistant Attonrey General, Jay B. Shearer, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33402 this 27 day of January, 1987.

Respectfully submitted,

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