IN THE SUPREME COURT OF FLORIDA

MARK ANDREW BURCH, Appellant, v. STATE OF FLORIDA, Appellee.	)	CASE NO. 68,881

Tanya

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant was the defendant and Appellee was the prosecution in the Criminal Division of the Seventeenth Judicial Circuit, in and for Broward County, Florida. The parties will be referred to as they appeared before the trial court. The following symbols will be used:

"T"	Trial Transcript
"AB"	Defendant's Appellate Brief
"PSI"	Presentence Investigation

STATEMENT OF THE CASE AND FACTS

The State modifies Defendant's Statement of the Case and Facts as follows:

1. Initially the State and Court agreed with Defendant that Dr. Lerner would be appointed, afraid of a second reversal on this issue by the court (T.54, 69). However, his fee of $14,000, when the two other experts were paid $2,000 in total, was ultimately found to be prohibitive (T.70).

2. Dr. Berntson examined Defendant and testified regarding the numerous psychological and neuropsychological tests administered (T.992-995) which revealed "abnormal brain function" and anti-social personality disorder (T.995). His results corroborated Defendant statements of excessive drug abuse (T.996).

3. Dr. Roach, a toxicologist and expert in "abuse substances", testified as to the nature of PCP and its effect on the body (T.1018-1022, 1024-1025). He testified that the amount Defendant had been using was a "very high dosage" which could result in "schizophrenic bahavior" and/or "auditory hallucinations" (T.1027).

4. The facts adduced at trial proved the murder to be more severe than the norm of capital felonies. The court, in its sentencing order stated that there was "total absence of any justifiable motive" other than to "even a score for a vengeful

female acquaintance (T.1364, 457). The killing occurred with "coolness" in an "assassin-like" manner (T.1363) and Defendant possessed a "brazen homocidal attitude" (T.1361). The murder occurred when Defendant hadn't even been on parole for 6 months (T.1352) and only 28 days after the commission of a different attempted murder (T.1359).

5. The facts established Defendant was not high at the time of the crime (T.737, 754, 747, 777, 787-791, 819-820, 438, 440, 483) and that he did not have amnesia afterwards, which Defendant testified consistently happened after using PCP (T.959-960, 953, 894-896, 940, 748-749, 833-834).

6. The court in imposing sentence considered a 1984 PSI from Defendant's second trial wherein the death penalty was stated to be warranted (PSI, p.6a).

7. The jury was improperly persuaded towards mitigation by seeing Defendant's mother and wife weeping in the courtroom and the noticeable absence of representation by the victim's family (T.1353).

8 There was no evidence adduced that anyone other than Defendant participated or conspired in the murder.

9. Defendant's poor family history was not "remarkable" and did not merit consideration in mitigation of Defendant's sentence (T.1371-1372).

10. Defendant did not seek to introduce mitigating evidence of his behavior in jail until after Defendant's death

sentence had been rendered. A Motion to Mitigate Sentence was filed (R. 1454-1455).

11. Defendant did not make a proffer as to who from jail would testify, what they would testify to and what specific reports would be introduced. He merely asked the court to conduct an "inquiry of the persons who supervised the Defendant during this [3 1/2 year] period of incarceration" and to "review" the Florida State Prison and Broward County Jail reports covering this same 3 1/2 year period (R.1454-1455).

12. The facts adduced proved Defendant not to be a "well-behaved" "well-adjusted" prisoner. The Broward County jailers had requested the Court to sign an order transferring Defendant back to Florida State Prison as Defendant was "too much to handle" (T.1387). Defendant had given another prisoner cigarettes to "cut up" a third prisoner. The prisoner was actually "cut up" very badly (T.1386-1387).

13. Defendant did not seek to introduce mitigating evidence of his 1974 PSI until after Defendant's death sentence had been rendered. He then immediately argued the 1974 PSI should have been considered (T.1378-1379).

14. The argument at trial for the consideration of the 1974 PSI was that it would serve to prove that the additional statutory mitigating factor of 'mental and emotional disturbance' in fact existed as well as persuade the court to accord more weight to the 'substantial impairment' mitigating factor actually

found by the court to exist (T.1378-1379). On appeal Defendant argues that the 1974 PSI would serve to reduce the weight accorded the two aggravating circumstances specifically dealing with Defendant's prior convictions.

POINTS INVOLVED

POINT I

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

POINT II

WHETHER THE TRIAL COURT'S OVERRIDE OF THE JURY'S VOTE RECOMMENDING A LIFE SENTENCE WAS IN ERROR?

POINT III

WHETHER THE TRIAL COURT ERRED IN REFUSING TO CONSIDER AS A NON-STATUTORY MITIGATING CIRCUMSTANCE THE DEFENDANT'S BEHAVIOR IN JAIL AND ADJUSTMENT TO INCARCERATION?

POINT IV

WHETHER THE TRIAL COURT ERRED IN REFUSING TO REVIEW DEFENDANT'S 1974 PRESENTENCE INVESTIGATION REPORT?

SUMMARY OF THE ARGUMENT

I. The trial court did not err in refusing to appoint a specific expert witness to aid in Defendant's intoxication defense. Defendant received the benefit of two experts who provided complete intoxication testimony. Dr. Berntson examined Defendant by use of numerous psychological and neuropsychological tests which established abnormal brain funtion and an antisocial personality disorder. The defense posture of excessive drug use was corroborated. Dr. Roach, a toxicologist with extensive experience in the field of PCP and other abuse drugs, testified as to the effects of PCP and the fact that Defendant's dosage was very high. Dr. Lerner could add nothing to the testimony already given. Lastly, any error is merely harmless in light of the overwhelming evidence of guilt.

II. The trial court did not err in overriding the jury's recommendation of a life sentence. The killing occurred in an assassin like manner with coolness and a homocidal attitude. There was a total absence of any justifiable motive other than to even a score for a vengeful female acquaintance. The murder was also committed while Defendant was on parole for merely six months and only 28 days after the commission of a separate offense of attempted murder. Defendant was previously convicted of attempted murder which occured without provocation where the victim was totally defenseless as was the instant

victim. The evidence adduced did not establish that Defendant was intoxicated or even 'high' at the time of the crime. Further the court had access to Defendant's 1984 PSI, from Defendant's second trial for the instant crime, which the jury did not see. The Parole and Probation Officer stated that the instant crime warranted the death penalty and the earlier charges of attempted murder/possession of a firearm by a convicted felon charge warranted the maximum life imprisonment/guideline departure. The sentences were recommended to run consecutively. Additionally, the jury could have been improperly emotionally swayed by Defendant's mother and wife's weeping in the courtroom and the noticeable absence of any representatives from the victims family.

III. The trial court did not err in refusing to consider Defendant's behavior in jail and adjustment to incarceration as a non-statutory mitigating circumstance. First, this point has not been preserved for appellate review as Defendant raised said issue after the court had already rendered its sentence, in a Motion to Reconsider Sentence and/or Motion to Mitigate Sentence. At that time the courts decision to reopen the case for additional evidence was discretionary. An abuse of discretion was not shown. Second, Defendant never made a detailed proffer of the testimony/evidence sought to be introduced. He merely asked the court to conduct an "inquiry of the persons who supervised the Defendant during this [3 1/2 year]

period of incarceration" and sought "review" of the Florida State Prison and Broward County Jail reports covering the same 3 1/2 year period. Thirdly, the facts established that Defendant could not prove himself to be a well behaved, well adjusted prisoner as the jailers had requested the court to sign an order transferring Defendant from the Broward County Jail back to the State Prison as he was "too much to handle". Any error in this regard is harmless.

IV. The trial court did not err in refusing to review Defendant's 1974 Presentence Investigation. First, this point has not been preserved for appellate review. As in Point III, Defendant raised this issue after the court had rendered its sentence. Second, the Defendant sought to introduce the PSI to prove the existence of the mitigating factor of mental and emotional disturbance and to convince the court to accord more weight to the substantial impairment factor proven. On appeal Defendant argues that the evidence would have reduced the weight accorded the two aggravating factors dependent on Defendant's prior conviction. Third, no error is shown as the trial court is not required to review a PSI even where it contains relevant, mitigating evidence. The purpose of the instant introduction of the PSI remains the same -- to determine an appropriate sentence -- and as such its introduction similarly remains discretionary. Fourth, any error is harmless as a similar 1984 PSI was reviewed by the court.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN REFUSING TO APPOINT A "SPECIFIC" EXPERT WITNESS TO AID IN THE APPELLANT'S DEFENSE OF VOLUNTARY INTOXICATION.

Defendant argues that he was denied due process of law when the trial court refused to appoint a specific expert witness, Dr. Steven Lerner, to aid in his defense (Appellant's Brief, p. 18-19).[1]

Initially it must be noted that the State and the court had agreed with Defendant that Dr. Lerner should be appointed in fear of a second reversal on this issue by this court (T.54, 69). However, once it was established that the two original experts fees (Dr. Berntson and Dr. Roach) totalled solely $2,000 (T.37), the requested expert fee for Dr. Lerner of $14,000 was found to be exorbitant (T.70). The court then denied Defendant's motion (T.70).[2]

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[1]Defendant also argues he was denied the effective assistance of counsel, however, this is not cognizable on direct appeal and will not be addressed herein, State v. Barber, 301 So.2d 7 (Fla. 1974)

[2]In Ake, infra, it was recognized that the State had a legitimate economic interest in precluding psychiatric assistance of indigents, however, said interest must give way as the provision of one competent psychiatrist will not be a burden, Ake, infra, 84 L.Ed.2d at 63. Clearly the court did not envision the appointment of an expert with the financial requirements of Dr. Lerner.

Defendant relies on Ake v. Oklahoma, ___ U.S. ___, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), however, his reliance is misplaced. It is true that Ake, Id, requires appointment of a psychiatric expert where Defendant's sanity at the time of the offense is a significant factor at trial. In Ake there was no expert testimony on Ake's sanity at the time of the offense -- for either side, Ake, 84 L.Ed.2d 59, 60. Albeit Ake merely requires that Defendant be provided "a psychiatrist", "one competent psychiatrist". Defendant is not given the constitutional right to "choose a psychiatrist of his personal liking", an "expert who would agree to testimony in accordance with his wishes", or to "receive funds to hire his own" Ake, 84 L.Ed.2d at 66; Martin v. Wainwright, 770 F.2d 918, 934 (11th Cir. 1985). Defendant, similarly, is not entitled to a battery of experts or repeated psychiatric examination after substantial competent evidence has already been obtained, Finney v. Zant, 709 F.2d 643, 645 (11th Cir. 1983).

The reason for the appointment of an expert as a constitutional requirement is that juries are the primary fact-finders on the issue of sanity and intoxication and as such require the assistance of a psychiatrist to make a determination about this "complex and foreign" issue, Ake, 84 L.Ed.2d at 65. The purpose of the psychiatric testimony is to:

> . . .conduct a professional examination on issues relevant to the defense, to help determine whether the insanity [intoxication] defense is viable, to present testimony, and

> to assist in preparing the cross examination of a state's psychiatric witnesses. . .
>
> Ake, 84 L.Ed.2d at 65

In the case at bar the requirements of Ake, supra, are satisfied. Defendant had the benefit of two, not solely one expert, both were clearly competent in their fields, a professional examination was conducted, and an intoxication defense presented.[3]

The first expert to testify was Dr. Robert Berntson. Dr. Berntson had been a practicing clinical psychologist since 1956 (T.990). He had worked for a year at the Norman Baety Memorial Hospital as Chief Psychologist in the criminally insane division (T.99) and had been actively engaged in his profession in Broward County since 1959 (T.990). He had also been court appointed in Broward County as an expert for the "last 25 years," "several times a year" (T.990).

Dr. Berntson examined Defendant twice in 1984 (T.991). At those times he took a history from Defendant regarding his prior use of drugs (T.991). His courtroom testimony established Defendant's extensive drug use which began at 9 years of age and included an extensive use of PCP (T.992):

> [Defendant] started with marijuana, then progressed to acid, heroin, cocaine and PCP. He was using alchohol concurrently. He [Defendant] estimates that he was going through an ounce of PCP a week and drinking

[3]The State presented no psychiatric witnesses.

about a fifth of Jack Daniels a week or a day.

(T.992)

Dr. Berntson also testified regarding the numerous psychological tests administered -- the Wechsler Adult Intelligence Scale, composed of 11 subtests; a neuropsychological battery test that measured brain function and included a test which determined "ability to make reasonable inferences and form a hypothesis to guide their thinking behavior" (T.992); a tactile performance test which tested "Kinesthetics" "a measure of the right and left hemisphere and the efficiency of the transmission between the hemispheres [of the brain]", which included a "memory component" (T.993); two tests of Defendant's ability to "interpret sound, auditory perception", one called a rhythm test and the second a "speech sound perception test" (T.993); a finger-tapping test (T.993-994); a strength of grip test; a Halstead Wepman screening test for aphasia and passive disorder (T.994); a word association test to test whether Defendant's "thought processes are intact and normal or whether they're bizarre and peculiar" (T.994); an incomplete sentence test (T.994); and, a rorschach test (T.994). These tests were testified to as being an "accepted measure of testing and evaluation" in the field (T.995).

The battery of neuropsychological test results revealed that Defendant "was having some dysfunction in normal behavior, presumably due to abnormal brain function and that he was also

the victim of or suffering from what is called a personality disorder" "an antisocial type" (T.995). It was testified that the battery of tests corroborated Defendant's statements regarding his excessive drug abuse (T.996). The doctor further testified that PCP use will affect memory function and result in total or partial amnesia (T.997).

Dr. Berntson's testimony was complemented and made complete by Dr. Roach's testimony, a toxicologist. Dr. Roach's testimony stressed the effects of PCP on the body. He had extensive experience with what he termed "abuse drugs" which included PCP (T.1018) had "coauthored three books in chemistry" and had "about 10 research publications" (T.1018).

Dr. Roach explained that PCP had once been used as an anestetic on humans but in 1978 was discontinued as the side effects were too severe (T.1020-1021). Currently PCP solely has veterinary use (T.1020). Side effects include "stupor" if taken in excess, and "violent behavior" including, self mutilation, or attacks on other people (T.1021-1022).

Dr. Roach actually worked with people who had abused PCP as director of a laboratory with a contract with the narcotics treatment administration in Washington, D.C. Dr. Roach was director of the Dade County Laboratory as well as the laboratory located in Washington, D.C. (T.1022). While director of these laboratories he gained further experience in PCP working with physicians and psychiatrists (T.1022).

Dr. Roach further testified that Defendant's dosage of

2-5 grams per day was a "very high dosage" which could result in "schizophrenic behavior" (T.1024-1025), "auditory hallucinations" (T.1027) and the feeling that the walls are shaking or closing in (T.1027). Dr. Roach testified that "PCP is one of the most dangerous of all of the [street] drugs" (T.1027), "it's a more dangerous drug than cocaine" (T.1028).

Clearly a complete intoxication defense was established through the testimony of these experts. Dr. Berntson had taken Defendant's history and had run between 10-20 neuropsychological tests on Defendant which established brain damage corroborating Defendant's statements of extensive drug abuse. Dr. Roach clearly enumerated the dangers and effects of PCP and the great amount utilized by the Defendant. The Ake standard of appropriate examination, "assistance in evaluation, preparation and presentation of the defense" is met, Ake, 84 L.Ed.2d 66.

Dr. Lerner, the desired expert, could add little, if anything to the testimony already given and would have been cumulative thereof, see Morgan v. State, 415 So.2d 6, 10-11 (Fla. 1982). The experts who actually testified did so within their area of expertise, and were extremely credible. Together, they provided complete defense testimony, if believed. However, the jury chose not to believe the evidence established intoxication. It did however, utilize said evidence to improperly mitigate the sentence (See Point II).[5] At the Defendant's second trial no expert testimony was presented to the

jury on the effects of PCP abuse and the jury recommended the death penalty. In the instant trial, Defendant's third trial, the jury with the benefit of the expert testimony recommended life.

Clearly Defendant is seeking the appointment of the 'the perfect witness' -- one who would have expertise in both clinical psychology and toxicology who could administer and interpret the psychological tests as well as explain the effects of PCP. Defendant has no such constitutional right, see Ake, supra; Martin, supra; Finney, supra. Defendant does not contend that his court appointed experts were biased or in any way argue with the validity of their testimony, see Finney, supra. As such Defendant is not entitled to "repeated psychiatric examination". Dr. Berntson had previously examined Defendant as the result of Defendant's earlier trial and Dr. Roach had similarly been court appointed but not allowed to testify (T.60), see Finney, at 645. Even if additional psychiatric testimony might have been desirable, it is not required under the Constitution, see Magwood v. Smith, 791 F.2d 1438, 1443 (11th Cir. 1986).

Lastly, any error in denying Defendant's motion for

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[5] To find drug use/abuse constituted a factor in mitigation of the death penalty, the jury merely needed to find that the capacity of Defendant to appreciate the criminality of his conduct or to form his conduct to the requirements of the law was substantially impaired and not legal intoxication.

appointment of a specific expert is merely harmless in light of the overwhelming evidence of Defendant's guilt. Defendant's sole defense was intoxication and the evidence proved the contrary (See Point II).

POINT II

THE TRIAL COURT'S OVERRIDE OF THE JURY'S VOTE RECOMMENDING A LIFE SENTENCE WAS NOT ERROR.

The trial judge has the ultimate decision as to whether the death penalty should be imposed, Hoy v. State, 353 So.2d 826, 832 (Fla. 1977). Where the jury's advisory recommendation is a life sentence which the court deems inappropriate under the law the court "not only may, but must overrule the jury", (emphasis supplied), Brookings v. State, 11 F.L.W. 445, 449 (Fla. August 28, 1986). The override will be sustained where the facts are "clear and convincing that virtually no reasonable person could differ", Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).

"Mere disagreement with the force to be given [mitigating] evidence is an insufficient basis for challenging a sentence", Porter v. State, 429 So.2d 293, 296 (Fla. 1983); Quince v. State, 414 So.2d 185, 187 (Fla. 1982). The trial court within its discretion properly makes a determination of the weight to be applied to a mitigating factor and such discretion "will not be disturbed if supported by competent substantial evidence", State v. Bolender, 12 F.L.W. 83, 84 (Fla. January 29, 1987).

In the case at bar, no reasonable person could differ with the court's override. The facts adduced at trial proved extreme circumstances. The murder was committed in an exceedingly cold and calculated manner. As described by the

trial court, the murder was committed with "total absence of any justifiable motive " other than to "even a score for a vengeful female acquaintance" (T.1364, T.457). Defendant never had a "run-in" with the victim himself nor was he ever "insulted" by the victim (T.1364):

> [Defendant] seized upon [the] opportunity to exhibit to [his] peers and the world at large, that [he] could and would kill an individual in cold blood, consciously and without fear...
>
> (T.1364)

The killing occurred with "coolness" (T.1363), in an "assassin-like" manner (T.1363). Defendant first went to the victim's apartment complex with a friend to "observe and view the area" (T.1361; T.456, 633-634). Thereafter Defendant asked his two friends, Laura Carr and Roy Folsum, who were involved in the actual altercation with the victim, to drive Defendant to another friends house. There Defendant secured a shotgun and shells (T.1361; T.406-408, 456) as well as a jacket and hat in order to avoid detection (T.723). The shotgun secured was normally utilized for deer and small game and consequently the slugs were not easily traceable (T.719). Defendant then asked these friends to drive him to the victim's residence (T.1361; 408-409, 456). Once there Defendant exited the vehicle and "toting his shotgun in broad daylight cavalierly walked to the vicinity of the victim's building" (T.1361). Defendant first stated to his friends that they "didn't deserve this and that he was going to do something about it" (T.457). Defendant then told his friends

to go to the nearby donut shop and wait for him to return (T.409, 457). They waited "just a few minutes" (T.457) when Defendant returned and stated that he "had taken care of Allen" (T.411), "just blown away Allen" (T.458).

The process of locating the victim "in and of itself demonstrated the brazeness of the homocidal attitude possessed by [Defendant]" (T.1361). Unsure as to which particular apartment the victim lived in, or for that matter what he even looked like, since Defendant never had apparently met him, the Defendant approached Billy Hahn, a neighbor who happened to be standing near his car. Defendant pointed his shotgun directly at him inquiring of him if in fact he was Allen Calloway" (T.1362; T.606, 639). After Billy said that he was not Calloway he asked where Allen lived (T.640-641). Defendant then approached Billy Hahn's wife who was similarly standing outside her apartment and "unflinchingly and without any degree of trepidation" stuck the shotgun in her stomach and repeated his inquiry as to the whereabouts of Allen's apartment (T.1362, T.606).

The Defendant then approached Allen's apartment and knocked on the door with the barrel of his shotgun (T.607, 642). When the victim opened his door Defendant stated "I don't like you messing around with my friends", "I don't like the way you slapped around my friend" referring to Carr and her boyfriend (T.607, 642). Defendant then "unhesitantly" aimed the shotgun at Allen and shot him at "point blank" range in the abdomen, killing

him almost instantly (T.1362, T.575-576, 579). The velocity of the blast catapulted Allen's body several feet from the doorway (T.1362, 749). Both the victim's kidneys were extensively disrupted with portions "blown away" and unidentifiable; the pancreas was only identifiable as small fragments of remaining tissue; the aorta, main artery of the body, had at least a four inch segment "completely gone," and the liver was disrupted as was the right lung (T.579).

Defendant then departed the crime scene with the same "coolness" with which he carried out the murder. With an "assassin-like demeanor", "unnerved" he casually walked away from the apartment, discarded the shotgun in a dumpster adjacent to the apartment complex and left the jacket and gloves in a different dumpster in the same vicinity (T.1363; T.548, 554, 768). As gloves had been worn, no fingerprints could be lifted from the shotgun or jacket (T.553-554, 556, 701). Defendant then re-entered his friends vehicle which Defendant had waiting for his escape and asked them to drive him to Holiday Park where Defendant believed there might be a party, an alibi (T.413). As there was no party Defendant unemotionally related to an elderly married couple whom he had met only once previously what he had just done and asked for a ride home (T.1363). Defendant stated to Ben Robson, Sr. that he "just blew a man away" with a shotgun and described the details:

> He said he walked up to this man's door, knocked on the door and asked him if his name

> was Allen and the man said yeah and he said "I want to talk to you."
>
> He said this guy told him, "I have nothing to talk about." He said he just got up and shot him and blew him half way across his living room.
>
> (T.749)

Betty Robson overheard the statements and corroborated that they were made (T.833-834). Astonished by this revelation and somewhat in disbelief that this disclosure was made, Ben Robson refused to drive Defendant back home (T.1363, 749, 834).

Upon arrest Defendant used an alias (T.788, 953) and sometime between the night of the crime and the line-up shaved his beard and mustache to avoid identification (T.609, 682, 724, 748, 802, 834).

There were two other aggravating circumstances. The crime was committed while Defendant was on parole. This factor was exacerbated by a) the violent nature of the crime for which Defendant was on parole -- Robbery, Breaking and Entering and Possession of a Firearm While Engaged in a Criminal Offense (PSI, p.3a) (T.1352), and, b) the fact that Defendant hadn't even been on parole, out of prison, for six months when the instant violent murder was committed (T.1352). It was also committed only 28 days after the commission of a separate offense of attempted murder (T.1359). Secondly, Defendant had been previously convicted of a felony involving violence to some person, attempted murder, which facts resemble the instant case -- Defendant, without provocation, came up behind a defenseless

victim and placed a firearm to the victims head (T.1360). It was miraculous that the victim survived (T.1360). Defendant has established his complete inability to be rehabilitated.

Contrary to Irizarry v. State, 11 F.L.W. 568 (Fla. 1986) the instant mitigating circumstances could not have influenced the jury to return a recommendation of life. As discussed, the aggravating circumstances were extreme and the one statutory mitigating factor, that the capacity of Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, was accorded little weight by the court. The court stated:

> The exact degree of mental impairment brought on by the Defendant himself by his continued use of PCP is speculative and remote and cannot be conclusively established. There is no evidence of mental retardation or borderline intelligence. It is this Court's firm belief that the Defendant's drug usage has had the primary effect of exacerbating his anti-social behavior and dulling his concern for the consequences of his ruthless and homocidal predispositions. The expert testimony in this case fails to persuade this Court that the usage of PCP and other drugs have so substantially impaired his mental capacity such that this mitigating factor outweighs the presence of the aforementioned three aggravating factors. (emphasis supplied)
>
> (T.1372-1373)

There was no proof adduced at trial that Defendant had ingested PCP immediately prior to the murder or that he was 'high' at the time of the crime. In fact the evidence proved the

contrary. Defendant's friend, Randy Robson, testified that Defendant was coherent on January 3rd, the day of the crime (T.737); Ben Robson, who saw Defendant immediately after the crime testified that Defendant was "talking just straight" (T.754) and was even "sitting on the picnic table" with no problem (T.747); this event was corroborated by Betty Robson (T.843); Detective Griffin who saw Defendant at 4:00 a.m. testified that Defendant was not under the influence of drugs, his speech was clear (T.777); Srgt. Fitzgerald who saw Defendant at 3:15 a.m. testified that Defendant was driving well, looked fine, and not under the influence of drugs or alchohol (T.787-791); Detective George testified that when Defendant was arrested he made no mention of taking drugs or alchohol, and only stated that he "got [bought] some speed" (T.819-820); Defendant's friend Roy Folsum, for whom Defendant had committed the murder, testified that at the time of the crime, Defendant did not appear to be "totally zonked out where he didn't know what he was doing (T.438), but only "hyper", "like on speed" (T.440) and his friend Laura Carr could not remember Defendant's condition at the time of the crime but testified that "I know he wasn't stumbling or anything like that" (T.483).

Further, Defendant's testimony was that once he took PCP he consistently had amnesia afterwards (T.959-960). Defendant testified that much of his life was a total blank (T.959-960) and that he had no recollection of any events

occuring on the night of the crime from 7:00 p.m. - midnight (T.953). This side effect of amnesia was corroborated by Defendant's friend Sandra Marina. She testified that on one occasion Defendant became 'high' and "tried to choke me to death" but afterwards remembered nothing of the incident (T.894-896). Defendant testified similarly as to the occurence of that event (T.940). However the facts adduced at trial proved Defendant to have complete recollection of the details of the instant crime and thusly that Defendant was not intoxicated --- Ben Robson, Sr. spoke with Defendant after the crime and Defendant stated he had "just blew a man away" with a shotgun (T.748-749) and told him the details of how it happened (T.749); Betty Robson overheard Defendant's statements and corroborated that they were made (T.833-834). Clearly the court properly accorded this 'mitigation' evidence little weight and correctly found that the jury "obviously attached disproportionate consideration" to this mitigating factor (T.1373).

In Echols, supra this court needed to decide whether the character testimony by four family members offered to mitigate Defendant's sentence was sufficient to overcome the aggravating factors. However, the court did not accord said evidence much weight as it was directly contradicted by Defendant's own statements. The jury override was then affirmed. Such is the instant case where this evidence offered in mitigation was, at best, inherently inconsistent and

unbelievable. See also Quince, supra at 187 where this court found that "the trial judge was not unreasonable in failing to give great weight to this mitigating factor, which he nevertheless did find to exist, in the light of contradictory evidence".

The cases are clear where there are extreme aggravating factors a jury override is to be upheld even in light of mitigation.

Just recently in State v. Bolender, 12 F.L.W. 83 (Fla. January 29, 1987), this court reinstated an override of four death sentences after the trial court set them aside in granting a Rule 3.850 motion. In granting the motion the trial court wrote:

> The law of the State of Florida is that a death sentence may not be imposed when any evidence of mitigating circumstances is presented.
>
> Id. at 84

This court strongly took issue with this statement and stated:

> There are several problems with this statement. That the mere presentation of mitigating evidence precludes imposition of the death penalty is not and never has been a correct statement of this state's law. (emphasis supplied)

This court went on to give a correct statement of the law:

> In determining if death is an appropriate penalty, the sentencing judge must weigh any aggravating circumstances against any mitigating circumstances. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). A trial court must allow the presentation of non-statutory mitigating

> evidence, Lockett v. Ohio, 438 U.S. 586 (1978) and if introduced, must consider such evidence. Eddings v. Oklahoma, 455 U.S. 104 (1982). Finding or not finding that a mitigating circumstance has been established and determining the weight to be given such, however, is within the trial court's discretion and will not be disturbed if supported by competent substantial evidence, Stano v. State, 460 So.2d 890 (Fla. 1984), cert. denied, 105 S.Ct. 2347 (1985).
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> Id. at 84.

Clearly, in the case at bar the trial court properly considered all evidence in mitigation of Defendant's sentence but properly found the weight of the evidence to support death. The trial court's decision is supported by competent substantial evidence. No reasonable person could differ as to the necessity of the death sentence based upon the weight assigned by the court. Defendant is really asking this court to re-weigh the evidence which can not be done. "Mere disagreement with the force to be given [mitigating evidence] is an insufficient basis for challenging a sentence", Porter v. State, 429 So.2d 293, 296 (Fla. 1983); Quince v. State, 414 So.2d 185, 187 (Fla. 1982).

In Hoy v. State, 353 So.2d 826 (Fla. 1977) a jury override was upheld where the trial court found three aggravating factors to exist and two mitigating. The court found that the mitigating circumstances are "insufficient, in the mind of [the court], to outweigh the aforesaid aggravating circumstances" Id. at 833:

> Sub judice, we have the commission of capital crimes accompanied by such additional acts as to set them apart from the norm of capital felonies.
>
> Id. at 833.

Again, in Miller v. State, 415 So.2d 1262 (Fla. 1982) this court affirmed a jury override where there was one aggravating factor, one admitted mitigating factor and evidence "susceptible of a finding" that Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, see McDonald's dissent at 1264. The override sub judice must be affirmed.

Additionally, the trial court had access to Defendant's 1984 Presentence Investigation which the jury did not see (T.1381). The PSI revealed Defendant's lengthy juvenile history and the Probation and Parole Officer weighing the pros and cons of an extreme sentence. The Officer ultimately rejected all possible mitigating factors and found that the instant crime warranted the death penalty. For the earlier attempted murder/possession of a firearm by a convicted felon charge, life imprisonment/guideline departure sentences to run consecutively were recommended:

> Presently before the Court is a 24 year old white male who has been tried and convicted for the offense of Murder in the First Degree, Case #83-274CF, and has entered an open plea of guilty to the offense of Count I, Attempted Murder and Count II, Possession of a Firearm By a Convicted Felon, Case #83-1222ICF.
>
> The subject was arrested on numerous occasions as a juvenile for property and violent type crimes and was sentenced to prison at the age of 16 and subsequently paroled on June 1, 1982. Since being paroled, the subject has a

history of anti-social behavior stemming from early childhood to the present. He appears not to have benefited from any of the institutions equipped to assist an individual throughout his course of life (i.e., educational, psychological, etc.)

The only possible mitigating factors in both cases, if they can be thought of as such, would be that the subject was admittedly using drugs during the commission of both crimes, and the fact that he had a history of psychological problems. The causative factor in Case #83-274CF, Murder in the First Degree, appears to be that subject involved himself in an ongoing argument that two individuals were having with the victim. The causative factor in Case #83-12221CF Count I, Attempted Murder and Count II, Possession of a Firearm By a Convicted Felon, appears to be that the subject was angered by the victim telling him to stay away from the premises, so he returned to take revenge.

The subject showed no responsibility for any of the instant offenses and displayed an apathetic attitude, showing no remorse, despite the serious nature of these offenses.

The subject's history of anti-social behavior makes him a threat to society now and in the future, and the offenses committed indicate that there was no reasonable motive. All of the foregoing facts certainly warrant imposition of the death penalty.

In Case #83-274CF, Murder in the First Degree, this Officer is recommending the Court considers the contents of this investigation and uses its discretion in imposing a sentence.

In Case #83-12221CF, Count I, Attempted Murder and Count II, Possession of a Firearm by a Convicted Felon, this Officer recommends departure from the sentencing guidelines and life imprisonment, both counts to run consecutive.

(PSI, p.6a)

The instant case is very similar to Porter, supra. In

Porter this court upheld a jury override where the trial court had reviewed additional exacerbating evidence which the jury did not see, Id at 296. The court's reviewing of the PSI which rejected all evidence in mitigation and found the death penalty to be appropriate certainly held great weight with the court. Additionally, as in Porter, the jury might have been improperly influenced by the weeping of Defendant's mother and wife, and the obvious lack of presence of the victim's family in the courtroom (T.1353).

Defendant argues there are several other mitigating factors which justify the jury's recommendation. The first being that Carr and Folsum were never charged but were equally as culpable (AB, p.26). However there was no testimony adduced at trial which proved their involvement in the crime. Both Carr and Folsum testified that Defendant told them where to drive, where to wait and no one, including Defendant, ever suggested that they directed, planned or were in any way involved in the murder.[6]

Clearly the instant case is not at all like Brookings

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[6]The court specifically found that Defendant was not acting under duress from Carr:

> Although the Defendant's course of conduct was undoubtedly precipitated by Carr's revelation to him of the troubles she had encountered with Calloway, there is absolutely no evidence to substantiate that Carr dominated to any degree, emotionally, psychologically or physically the Defendant's direction on the day in question.
>
> (T.1368)

v. State, 11 F.L.W. 445 (Fla. 1986), cited by Defendant in his brief, which reaffirms that a jury may consider the treatment accorded another equally culpable perpetrator. In Brookings the jury heard testimony that Murray and Lowery were principals in the crime even though they remained uncharged, Brookings at 448. One of the unfortunate side effects of admitting any and all nonstatutory mitigating evidence is that it encourages the introduction of evidence, in the instant case argument, which in the context of the case carries little weight, see Echols v. State, 484 So.2d 568, 576 (Fla. 1985). In the case at bar this unsupported argument must be accorded no weight at all.

As to Defendant's family history providing mitigation, the court specifically rejected this as a mitigating factor:

> Although there was testimony adduced at the trial from the Defendant and his sister that their natural father was an excessive drinker, that the Defendant was raised by his mother and sister from age eight until his mother remarried when he was age 12, there appears to be nothing remarkable about the Defendant's background or character or any other factor which would merit consideration of this statutory mitigating circumstance in this case. The Defendant's volatile aggressive propensity became evident at a very early age and its continued presence within the Defendant to this very date certainly does not scream out favorably on his behalf. There is likewise no circumstance surrounding the instant slaughter that points towards mitigation and consideration of this factor as a mitigation factor.
>
> (T.1371-1372)

Clearly this factor should have been accorded little if any

weight by the jury.

The instant case is readily distinguishable from Amazon v. State, 11 F.L.W. 105 (Fla. March 13, 1986). In Amazon the usual and expected fact that Defendant had a history of drug use and had been brought up in a negative family setting was proven to be extremely detrimental to Defendant's emotional development. There was expert testimony that Defendant was an "emotional cripple" and had the emotional maturity of a "thirteen year old" with some emotional development at the level of a "one-year old". Because of these emotional problems "age" became a mitigating factor as well as the fact that Defendant acted under "extreme mental or emotional disturbance", Id at 107. In the case at bar no such exacerbating testimony could be elicited. Any inability of Defendant to appreciate the criminality of his conduct was repeatedly proven to be caused by his antisocial personality and not the influence of drugs or a negative family setting.

The case at bar presents extreme aggravating factors and, at best, speculative and/or unsubstantiated mitigating factors. The aggravating factors clearly and convincingly outweigh the mitigating factors so that no reasonable person could differ as to the penalty of death, see Echols at 577.

POINT III

THE TRIAL COURT DID NOT ERR IN REFUSING TO CONSIDER AS A NON-STATUTORY MITIGATING CIRCUMSTANCE THE DEFENDANT'S BEHAVIOR IN JAIL AND ADJUSTMENT TO INCARCERATION.

First, this point has not been preserved for appellate review. Defendant raised said issue AFTER the Court had already rendered its sentence in a Motion to Reconsider Sentence and/or Motion to Mitigate Sentence (R.1454-1455). As such, Defendant's objection came too late. By Statute the proper time for the introduction of mitigating evidence is during the sentencing hearing. Section 921.141, Fla. Stat. provides that:

> "In the [separate sentencing] proceeding evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the Defendant and shall include matters relating to any of the aggravating or mitigating circumstances".

At best Defendant was, in effect, asking the court to reopen the case for additional testimony. Even in death cases this is discretionary with the court, Stewart v. State, 420 So.2d 862, 865 (Fla. 1982). In Rose v. State, 472 So.2d 1155, 1158 (Fla. 1985), as in the case at bar, Defendant argued that the trial court erred in refusing to reopen the case to allow Defendant to present evidence in mitigation of his death sentence. The court found that it was Defendant's burden to provide the court with "sufficient specific reasons" as to why he should have been allowed to reopen the case where Defendant had adequate opportunity to present evidence in mitigation. Such is the case at bar. An abuse of discretion is not shown.

Second, there is a long standing rule in Florida[7] which requires the party against whom a ruling of exclusion has been made to make a proffer of the proposed testimony. This proffer must be "sufficiently detailed" so as to enable the trial court and the appellate courts to evaluate the weight, relevancy and competency of the testimony excluded, Nava v. State, 450 So.2d 606,609 (Fla. 4th DCA 1984); Moyers v. State, 400 So.2d 769, 770 (Fla. 1st DCA 1981); §90.104(1)(b), Fla. Stat. Appellate review of excluded evidence that has not been sufficiently proferred on the record would require improper "speculation as to what the excluded witness would have said as well as what effect, if any, it would have had on the proceedings", Nava at 609. Reversible error cannot be predicated upon conjecture, Jacobs v. Wainwright, 450 So.2d 200, 201 (Fla. 1984); State v. Sullivan, 303 So.2d 632 (Fla. 1974).

In the instant case clearly no such proffer was made. Defendant's motion did not contain specific names of potential witnesses or exactly what they would testify to but asked the court to conduct an "inquiry of the persons who supervised the Defendant during this period of incarceration" (emphasis supplied) (R.1454). The period of incarceration spanned 3 1/2 years![8] Similarly Defendant sought "review" by the court of

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[7]The rule applies specifically to the instant issue of improper exclusion of nonstatutory mitigating factors at sentencing, see Jacobs v. Wainwright, 450 So.2d 200, 201 (Fla. 1984); Francois v. Wainwright, 741 F.2d 1275, 1284 (11th Cir. 1984) n.7.

[8]From Defendants arrest in January, 1983 through the date of sentencing in mid 1986 (R.1454).

Florida State Prison and Broward County Jail reports covering the same 3 1/2 year period. No specific reports were named nor was it proferred what they would state (R.1454-1455).

In Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. ___, 90 L.Ed.2d 1 (1986), the contrary is apparent. Defendant proferred three named witnesses as well as their testimony. The State did not contest the proffer or that the jury could have drawn favorable inferences from the testimony regarding Defendant's character and probable future conduct if sentenced to life imprisonment, Id, 90 L.Ed.2d 6-7. Clearly in Skipper the excluded testimony would have served as a basis for a sentence less than death. See also Valle v. State, 12 F.L.W. 51 (Fla. January 5, 1987) where three witnesses also were named and their testimony disclosed.

The instant case is very similar to U.S. v. Winkle, 587 F.2d 705 (5th Cir. 1979). In Winkle, Defendant's counsel proferred that the witness would "testify as to his version of the conversations" in question, Id at 710. The court held that "This was not sufficient to make known to the court the substance of the evidence" (emphasis supplied by court). Similarly, in the case at bar Defendant's counsel's proffer merely paralleled the language in Skipper -- the witnesses would lead the court to "find that the Defendant is a well-behaved, well-adjusted prisoner from which an inference can be drawn relating to the Defendant's character and his probable future conduct if sentenced to life in prison" (R.1454). As in Winkle, this was

not sufficient to make known to the court the substance of the evidence. Also, as in Winkle, Defendant was given the opportunity to make a full proffer albeit when the hearing on the motion was called Defendant stated "I will just stand on the motion" (T.1385).

Clearly Defendant was merely on a 'fishing expedition', hoping to achieve a reversal on appellate review in light of the then recently rendered Skipper opinion. If Defendant honestly could have proven himself to be a 'model prisoner' he certainly would have sought to place this evidence before the jury, as in Skipper, to assist them in reaching an advisory sentence. Defendant would not have sought to introduce said evidence as an afterthought -- subsequent to the jury's recommended and the courts final sentence (R.1454-1455).

Third, Defendant could not prove himself to be a well behaved prisoner. The facts in the case at bar are revealing. The court, when presented with the motion succinctly explained Defendant has proven himself not to be a "well-behaved" "well-adjusted" "model prisoner" as the court was requested by the jailers to sign an order transferring Defendant from the Broward County Jail back to the State Prison,Defendant was "too much to handle" (T.1387). The court would have granted the request had it known that it could: the court was unaware of Defendant's other prior convictions:

> THE COURT: No. Don't forget that -- I guess you were here also when they had that problem brought to my attention about when he was apparently in the jail here, he apparently

hired somebody - not hired somebody, offered somebody some cigarettes. Apparently he didn't like black prisoners and apparently he offered somebody some cigarettes to cut up some black guy who was in the same mod as him and they all came down to me for an order.

* * *

THE COURT: Teedleberg, I guess, came down here and said that apparently your client didn't like blacks in his mod, and apparently there was some other guy in the same mod who has been sentenced to 350 years or something and he was from Texas or something. He was brought here for another charge and apparently your client had offered him some cigarettes if he would cut up this black inmate and apparently he got a razor or something and cut up this guy real bad and they came back here and asked me to send him back to State Prison because he was too much to handle, and I said, there was no way I could send him back to State Prison. As a matter of fact, I said I couldn't because I wasn't aware of the other prior convictions. He pled guilty to the attempted murder and I thought that was the only reason we could have him here, and no way we could send him back to State Prison and we held him here.

(T.1386-1387)

Clearly any error in this regard is harmless.[9] The courts familiarity with Defendant's recent outrageous behavior in prison would certainly warrant the according of little weight to any positive evidence introduced by Defendant This is especially true as Defendant's recent poor behavior is a better indicator of future behavior than any past behavior.[10]

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[9]In Skipper, it was recognized that errors of this nature may be harmless however recognizing the error in Skipper as harmless was "implausible on the facts before us" Id, 90 Ed.2d at 9.

[10]Contrary to Skipper, the State did not agree that

Con't. on next page

The instant case is not at all similar to Skipper or Valle, supra and Defendant's sentence of death must be affirmed.

Defendant could have proven himself to be a well-behaved, well-adjusted prisoner or that the jury could have drawn positive inferences from the evidence regarding Defendant's character and probable future conduct.

POINT IV

THE TRIAL COURT DID NOT ERR IN REFUSING TO REVIEW DEFENDANT'S 1974 PRESENTENCE INVESTIGATION REPORT.

First, Defendant has failed to properly preserve this issue for appellate review. Defendant raised said issue AFTER the court had already rendered its sentence (T.1375; T.1379-1381). As such Defendant's objection came too late. See Point III.

Second, the law is well settled that "(i)n order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation", Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982); see also U.S. v. Hope, 714 F.2d 1084, 1087 (11th Cir. 1983).

In the case sub judice Defendant argues on appeal, as stated in his "Summary of the Argument", that the trial judge should have reviewed "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", (emphasis supplied) (AB, p.18). Clearly Defendant's argument is that error arose in the court's refusal to review the PSI as Defendant's prior convictions "constituted two of the three aggravating factors" (AB, p.30) and the PSI could shed light on Defendant's record, character and

circumstances surrounding Defendant's prior convictions" (AB, p.31). Their validity and weight in the courts eyes would be reduced and therefore Defendant would receive a concommitant reduced sentence to life in prison, see Francois v. Wainwright, 741 F.2d 1275, 1283-1284 (11th Cir. 1984).

To the contrary, Defendant's argument to the trial court for consideration of the PSI revolved around the weight accorded the 'substantial impairment' mitigating circumstance found[11] as well as proof of the specific mitigating circumstance of mental and emotional disturbance.

Defendant had argued that the trial court improperly found that the mitigating factor did not outweigh the aggravating factors:

> For the record, we object and say that that circumstance does outweigh the aggravating circumstances because there was sufficient expert testimony adduced by the Defendant with no countervening expert testimony to contradict any of our experts as to the nature and degree of his substantial impairment.
>
> (T.1378)

He had also argued that the court should have found an additional mitigating factor, that Defendant was under the influence of extreme mental or emotional disturbance:

> We submit to the Court that there is adequate expert testimony in the record and adequate lay testimony to support a finding that that

[11]That the capacity of the Defendant to appreciate the criminality of his conduct and to conform his conduct to the requirements of law is substantially impaired.

> mitigating circumstance does exist, that there was no, and I stress no expert testimony adduced or elicited by the State to contradict the testimony which we introduced.
>
> (T.1378)

Defendant then noted that in weighing the mitigating circumstance as well as in refusing to find said second circumstance to exist the court had made "repeated reference to his [Defendant's] volatile past" (T.1379). Defendant argued that if the Court would review the 1974 PSI the court would:

> . . .find that there was further corroborating evidence to substantiate our arguments that the Defendant was under the mitigating circumstance of mental and emotional disturbance and duress that his ability to conform his conduct to the requirements of the law were substantially impaired, and other non-statutory mitigating circumstances. (emphasis suppled)
>
> (T.1379)

Clearly Defendant was not arguing that the PSI would bring out additional facts surrounding the prior convictions which would reduce the weight accorded the two aggravating factors dependent thereon. Defendant was arguing that the PSI would substantiate his arguments that the additional mitigating factor that Defendant was under mental and emotional duress when the crime was committed should be found as well as great weight being placed upon the mitigating factor which was found. Consequently, the instant issue has not been preserved for appellate review.

Third, assuming arguendo that said issue has been properly preserved, no error is shown. As already properly stated by Defendant, the trial court is not required to review a

PSI before sentencing, Fla. R. Crim. P. 3.710, Committee Note. This is true even where Defendant argues that it contains "relevant evidence", see Rose v. State, 461 So.2d 84, 86 (Fla. 1984) -- relevant evidence is obviously mitigating. Assumedly every PSI contains at least some mitigating evidence.

Defendant seeks to distinguish this case by arguing that he is not asking that a PSI be prepared or updated, solely that the mitigating evidence within be reviewed by the court (AB, p..30). However this is not a distinction made under the law.

The purpose of a PSI is to assist the court in "determining an appropriate sentence", Fla. R. Crim. P. 3.710. This is the exact same reason Defendant is seeking introduction, see Rose, supra.

Lastly, even if error is shown said error is harmless. The Court did in fact consider a 1984 PSI (T.1381). There was no allegation or proof at trial or on appeal that the 1974 PSI contained information different that the 1984 PSI. When a court errs in disallowing certain evidence but substantially the same evidence is introduced through other sources, the error is harmless, Morgan v. State, 415 So.2d 6, 10 (Fla. 1982). Further, Defendant was not precluded from earlier, introducing the specific evidence through witness and other sources.

CONCLUSION

Based upon the foregoing reasons and citations of authority it is respectfully requested that the lower court's decision be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief of Appellee has been sent by U.S. Mail to H. DOHN WILLIAMS JR., at 200 Southeast 6th Street, Suite 304, Fort Lauderdale, Florida 33301 on this 18th day of March, 1987.

Diane Leeds

Of Counsel