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IN THE SUPREME COURT OF FLORIDA

HAROLD GENE LUCAS, :

Appellant, :

vs. Case No. 70,653

STATE OF FLORIDA, :

Appellee.

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

# INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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## STATEMENT OF THE CASE

On August 30, 1976 a Lee County grand jury returned a three-count indictment against Appellant, Harold Gene Lucas. (R813) Count one charged the premeditated murder of Anthia Jill Piper by shooting her with a firearm. (R813) Count two charged the attempted premeditated murder of Terri L. Rice by shooting her with a firearm. (R813) And count three charged the attempted premeditated murder of Richard Byrd, Jr. by shooting him with a firearm. (R813) These offenses allegedly occurred on August 14, 1976. (R813)

Appellant was originally convicted on all three counts and sentenced to death for the first degree murder in 1977. In Lucas v. State, 376 So.2d 1149 (Fla. 1979) this Court affirmed Appellant's conviction, but remanded for resentencing without benefit of a new sentence recommendation by a jury, because the trial judge, the Honorable Thomas W. Shands, had improperly found in aggravation that the attempted murders of Terri Rice and Richard Byrd were heinous and atrocious.[1]

The resentencing resulted in Judge Shands again sentencing Appellant to death. In Lucas v. State, 417 So.2d 250 (Fla.

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[1] Judge Shands also found in aggravation that Appellant was previously convicted of another felony involving the use of violence to the person (the two contemporaneous attempted murders), that the crimes created great possible injury to others, and that the homicide was especially heinous, atrocious and cruel. 376 So.2d at 1152. In mitigation Judge Shands found that there was "no showing of any substantial past criminal record." 376 So.2d at 1152.

1982) this Court again vacated the death penalty imposed upon Appellant, because Judge Shands failed to use reasoned judgment in reweighing the aggravating and mitigating factors.

Upon resentencing, Appellant was sentenced to death once again, this time by the Honorable Thomas S. Reese, as Judge Shands died prior to the resentencing. In Lucas v. State, 490 So.2d 943 (Fla. 1986) this Court vacated Appellant's death sentence for the third time. The Court held that both the State and the defense should have been allowed to present testimony and argument at the resentencing hearing. The Court also invalidated Judge Reese's finding that Appellant's actions created a great risk of death to many persons.[2] Finally, because the original trial judge and Appellant's defense counsel may have erroneously believed that mitigating circumstances were restricted to those enumerated in Florida's capital sentencing statute, this Court remanded for a complete new sentencing proceeding before a newly empaneled jury.

Prior to his new sentencing trial, Appellant, through counsel, filed several motions, including, among others, a motion for statement of aggravating circumstances (R833-835) a motion to preclude re-imposition of the death penalty (R841-845), and a motion to strike or amend the standard jury instructions to reflect that one who is sentenced to life imprisonment for first degree murder has no possibility of parole or release. (R846) These

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[2] The other aggravators found by Judge Reese were previous conviction of violent felony and heinous, atrocious, or cruel. 490 So.2d at 944. He found lack of significant history of prior criminal activity in mitigation. 490 So.2d at 944-945.

motions were considered by Judge Reese on March **30, 1987** prior to commencement of jury selection, and denied. **(R10-13, 19-32)**

On March **25, 1987** the State filed a motion asking the court to take judicial notice of the fact that Appellant was found guilty on January **14, 1977** of the first degree premeditated murder of Anthia Jill Piper, the attempted first degree murder of Terri L. Rice, and the attempted first degree murder of Richard Byrd, Jr. **(R847)** The defense filed a motion to strike the State's request on March **26, 1987. (R848)** The motion stated that Appellant did not object to the court taking judicial notice that Appellant was convicted of first degree murder of Piper, but did not believe it was proper for the court to take judicial notice of the convictions for attempted first degree murder. **(R848)** The defense further expressed its objections to Judge Reese at the hearing of March 30, **1987,** but the court granted the State's request to take judicial notice. **(R13-19)**

Another document the State filed prior to Appellant's penalty trial was entitled "Statement of Other Offenses." **(R846)** Filed on March **18, 1987,** this document announced that the State intended to offer at trial evidence that Appellant was arrested on August **10, 1976** for "Treaspass [sic] After Warning" at the Piper residence in Bonita Springs. **(R846)**

Appellant's new penalty trial took place in Fort Myers from March **30, 1987** through April **3, 1987,** with Judge Reese presiding. **(R1-811)**

Over defense objections, the court allowed the jurors to

take notes. (R230, 724)

Appellant proposed a number of jury instructions to be read to the jury, the majority of which the court denied. (R702-719, 850-876)

Judge Reese instructed the jury on the following aggravating circumstances, over defense objections (R690-698, 794-796): previous conviction of a felony involving violence, especially wicked, evil, atrocious or cruel, and cold, calculated and premeditated. He instructed on the following mitigating circumstances (R796-797): no significant history of prior criminal activity, extreme mental or emotional disturbance, extreme duress or substantial domination of another person, substantial impairment of capacity to appreciate criminality of conduct or to conform conduct to requirements of law, age of **Appellant**,[3] and any other aspect of Appellant's character or record, or any other circumstance of the offense.

The jury recommended by a vote of eleven to one that the trial court impose a sentence of death upon Appellant. (R807, 888)

A sentencing hearing was held before Judge Reese on May 7, 1987. (R893-915) After arguments of counsel and a brief statement by Appellant, the court again sentenced Appellant to death, reading his already-prepared sentencing order into the record. (R889-892, 909-913)

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[3] Appellant was **24** at the time of the offense. (R600-601)

Appellant filed his notice of appeal on June 2, 1987. (R921)

Appellant appeals to this Honorable Court pursuant to Article V, Section 3(b)(1) of the Constitution of the State of Florida and Florida Rule of Appellate Procedure 9.030(a)(1)(A)(i).

STATEMENT OF THE FACTS

Appellant, Harold Gene Lucas, was originally from Arkansas. (R525) As a child he was a happy-go-lucky boy who liked to fish and play. (R525) He regularly went to the Pentecostal Church on Sunday. (R525-526) He did not use drugs or alcohol. (R526)

After moving to Florida with his family, Appellant did not go to church very often. (R532)

Appellant dropped out of school after seventh grade and began working to help support his mother, father, brothers and sister. (R598) He worked mainly in construction, but also worked for his brother-in-law in the produce business, driving trucks of tomatoes and handling money. (R500-501, 537, 593) For two or three months prior to the instant homicide, Appellant worked for the Piper family at Everglades Wonder Gardens. (R481, 506, 522, 526, 592-593, 608)

Appellant began smoking marijuana when he was 17. (R601) In 1976 he was using all kinds of drugs, "[m]ost anything that was around." (R601) On a few occasions he used heroin. (R601) On a few occasions he used cocaine. (R601) He had also used LSD and smoked hashish, and was into THC and animal tranquilizers. (R526, 601) For about two years prior to the homicide Appellant had been mixing alcohol and drugs fairly regularly, on a daily basis. (R593, 602) He was "heavy in the drugs and alcohol" at the time the homicide occurred. (R593. See also R515, 526, 542, 617) He

also dealt in drugs, at times making a living from this activity. **(R610, 619)**

Like Appellant, Jill Piper had dropped out of school. **(R280)** Appellant and Piper had dated off and on for about two or three years. **(R261-262, 480, 522, 592)** Appellant had stayed overnight at the Piper house many times. **(R599)** He loved Jill very much. **(R598, 619)** At one time they had discussed getting married. **(R508, 598)**

In August of **1976** the relationship between Appellant and Jill Piper deteriorated. Appellant was a little bit upset that Piper had called the police on several occasions and had Appellant's car pulled over and searched for drugs. **(R607)** Appellant was very upset that Piper was seeing someone else during the week preceding the homicide. **(R611)**

According to State witness Franklin "Flip" Dorthy, Jill Piper had related to him two incidents involving Appellant that occurred in the days prior to the homicide.[4] The first occurred at the Post Time Tavern on the Sunday night before Piper was killed. **(R389)** Appellant allegedly put a knife to Piper's side and threatened to "cut her... guts out.'' **(R389)** The second occurred after Appellant had broken into the Piper's residence on the Wednesday preceding the homicide and been arrested. **(R390)**[5]

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[4] Dorthy's testimony regarding these incidents was admitted over defense hearsay objections. **(R389)**

[5] Former Lee County Deputy Sheriff Craig Humble testified that he arrested Appellant at the Piper residence on August **10, 1976** for trespass after warning. **(R302, 305, 310)**

When Appellant got out of jail he called the Pipers' house and, according to Dorthy, told them their daughter was not going to see her next birthday. **(R390)**

Eleanor Piper, Jill's mother, testified to a different version of the telephone call. Eleanor Piper received the call the day after Appellant was arrested, some time after **4:00** a.m., but before **6:00,** while she was still in bed. **(R490-491)** After Piper said, "Hello," several times and asked who was calling, a voice responded, "Gene." **(R491)** Piper recognized the voice as that of Appellant. **(R492)**

After these incidents, Jill Piper told Flip Dorthy that if Appellant came "around her house messing with her," she was "going to blow his shit away." **(R387-388)**

On August **13, 1976** Dan Brian Dowdal and several others went to Appellant's house to **"party,"** that is, to drink and play cards. **(R564-565, 593)** They also smoked marijuana and "hash." **(R565, 593)**

That afternoon Georgina Martin, who lived next door to Appellant, introduced Appellant and Dean Broughton to a girlfriend of Martin who had come from Miami with some drugs to sell. **(R507, 513-514)** Appellant and Broughton bought some PCP, angel dust, THC or horse tranquilizer from the girl. **(R507)** Martin was not certain what drug her girlfriend sold to Appellant, but she thought it was PCP. **(R518)** Martin had heard her girlfriend say the name of the drug at the time she sold it, but Martin was not permitted to testify at Appellant's penalty trial as to what she heard.

(R518-520)

Dan Brian Dowdal referred to the drug at Appellant's penalty trial as "PCP." (R565) On cross-examination the prosecutor elicited the fact that Dowdal had referred to the drug as "THC" at Appellant's first trial in 1977. (R572) However, Dowdal had since been through the Avon Park drug treatment program, and knew that the drug was PCP or animal tranquilizer. (R588-589)

Appellant had likewise referred to the drug in question as "THC" or animal tranquilizer at his 1977 trial. (R602)

The first time Appellant snorted the PCP (if that is what it was) that day was around 6:00 or 6:30 p.m. (R594)

That evening the partyers went out to buy more beer. (R565, 574) By that time they were all "feeling good" and were "high." (R570, 587)

On the way to buy beer, the group encountered Jill Piper at a park. (R565) According to State witnesses "Flip" Dorthy and Richard Byrd, Jr., Appellant remarked that he was "going to put [Piper] in a hole." (R380-381, 412) Piper was about 40 feet away when the comment was made. (R379-380)

When Byrd saw Appellant at the park, Appellant seemed to be high. (R446) He might have been smoking "pot" or doing other drugs. (R445) His speech was possibly slurred. (R446)

Defense witness Dan Brian Dowdal did not hear Appellant threaten Piper at the park, but he did notice the two engaged in a heated discussion. (R569) He did not remember who started the argument or what was said, but he did remember Jill Piper saying

that she had something in her purse, and that if Appellant messed with her she would blow his head off. (R569, 575-576)

Georgina Martin saw Appellant at the park that night; he wished her "Happy New Year's." (R507-508)

When Jill Piper and Terri Rice left the park, they went to a neighborhood store, where they saw Appellant. (R264) He was with his sister-in-law. (R264) Appellant got out of his car and started to walk into the store. (R264) He turned and looked in the direction of Piper and Rice and said he was "going to have fun tonight." (R264-265) Rice took this as threatening. (R265)

On the way back to Appellant's residence after the beer purchase, the car in which Appellant was a passenger was stopped by Lee County Deputy Sheriff Glen Boyette for a traffic violation at approximately 8:30 p.m. (R365, 367, 369, 577) There were five other people in the car with Appellant. (R367-368) Boyette observed one of them, Dan Brian Dowdal, in possession of quaaludes and arrested him. (R368, 569-570)

At Appellant's penalty trial Boyette could not positively identify Appellant, although he did see a man in the courtroom who resembled the man he knew as "Eugene Lucas." (R366) At the time of the traffic stop, Boyette asked the person whom he believed to be Harold Gene Lucas for identification, and was shown a photo i.d. of a Harold Eugene Lucas. (R369) Boyette said that at the time of the traffic stop Appellant's hair was dark and short and somewhat wavy or curly, but other witnesses testified that this description was not an accurate description of the way Appellant's

hair looked during that time period. **(R506, 542, 588, 596)**[6]

There were two six-packs of beer in the car, which Appellant said were his. **(R372)** Two beers were missing from the six-pack holders. **(R373)**

Appellant appeared to Boyette to be coherent. **(R370)** He had no trouble walking, standing or talking. **(R370)** His speech was not slurred. **(R370)** However, Boyette did not perform any field tests on Appellant to see if he was drunk or had been drinking. **(R373)**

Some time after the traffic stop, Appellant took a second dose of PCP. **(R596-597)**

Jill Piper and Terri Rice encountered Appellant again that night, at a Hess station at approximately **10:30. (R266, 397-398, 403)** Appellant arrived with his sister-in-law while Piper and Rice were talking with Eddie Kent. **(R266, 398)** According to Terri Rice's testimony at Appellant's penalty trial, Eddie Kent said to Appellant, "Hello, Turkey," and this remark precipitated a fight between Kent and Appellant. **(R266)** However, Kent did not remember saying this to Appellant. **(R402)** Kent's version was that the fight began after Appellant told him to stay away from Jill. **(R398)**

Kent detected alcohol on Appellant's breath. **(R401)** When Kent gave a deposition, he indicated that Appellant appeared

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[6] Boyette's inability positively to identify Appellant formed the basis for a defense objection to his testifying at Appellant's penalty trial. **(R366-367)**

to be intoxicated or under the influence of drugs at the Hess station. (R401)

Terri Rice testified that after the fight stopped, Appellant came to the car where Jill Piper was sitting and said, "You're a dead bitch." (R267)

Eddie Kent followed Appellant to his car and swung at him with a whisky bottle. (R284, 400) The bottle shattered on the door post, with part of it striking Appellant. (R400)

Kent testified that as Appellant was leaving, he said he was going to kill Jill Piper. (R399-400)

Appellant went to Georgina Martin's house between 11:10 and 11:15 that night. (R508) Blood was running down his head. (R508) He was "totally out of it." (R508) His eyes were wide open "like when you look at a little kid that's real scared." (R508) Martin asked Appellant what had happened. (R508) He responded that Eddie Kent had shot him, and flipped up his hair to show Martin where the blood was coming from. (R508)

Martin did not hear Appellant make any threats to Jill Piper at any time. (R508)

Appellant's brother, Thomas Lucas, saw him around 10:30 or 11:00 that night. (R526-527) Appellant went to Thomas' house and said he had been shot. (R527) Appellant had blood on the side of his ear. (R527) Thomas looked at it and told Appellant he had not been shot, but was "just skinned a little bit." (R527) Appellant was "carrying on," acting strange and a little bit crazy. (R527) Appellant seemed as though he was "in his own world," and

Thomas considered him to be "high." (R527-528)

Thomas did not hear Appellant make any threats against Jill Piper. (R528)

Appellant's sister-in-law, Carol Lucas, saw him at about 11:00 or 11:30 on August 13. (R542) Appellant said he had been shot, and lifted up his shoulder-length hair, showing a cut on **his** ear. (R542) Appellant seemed to be very "high." (R542) His eyes were glassy and he was staggering a little bit. (R542) He did not look the way he normally looked, and was not acting the way he normally acted. (R542) He looked like a different person. (R542-543)

Appellant did not mention Jill Piper to his sister-in-law. (R543) She newer heard him threaten Piper at any time. (R543)

After the incident at the Hess station, Jill Piper appeared to Terri Rice to be scared. (R268) Piper asked Rice to stay the night with her, and Rice agreed. (R268)

Richard Byrd, Jr. encountered Piper and Rice at the park after the incident. (R268, 413) The girls told Byrd what had happened and said they were very frightened, and asked Byrd to stay with them, which he agreed to do. (R269, 414)

The three people eventually went to the Piper residence. (R269, 414) They parked their car across the street so that if Appellant came by, he would not think they were home. (R270, 414-415)

Rice and Piper were very scared, and "kept insinuating

to [Byrd] that they were frightened for their lives.'' (R415) But Byrd did not believe there was really any danger; he thought "that this was just some scared girls." (R416)

At Appellant's penalty trial, Terri Rice and Richard Byrd, Jr. gave differing versions of what transpired at the Piper residence on August 13-14, 1976.

TERRI RICE VERSION

Jill Piper obtained a shotgun and a .38 revolver from under the bed in her parents' bedroom. (R270-271)

At Rice's suggestion it was decided to park the car in the driveway **so** that if Appellant came, they could leave. (R271) The three of them went across the street, with Piper carrying the shotgun, and Byrd carrying the .38, and the two girls drove the car into the driveway. (R271-272, 285)

After the girls got out of the car and were walking toward the front of the house, Rice saw Appellant beside the house. (R272) He aimed a rifle and fired at Piper, who went down on her knees. (R272-273)

Rice ran inside the front door of the house and told Byrd Piper had been shot. (R273) Then Rice went into the bedroom and called the sheriff's department. (R273)

Rice did not recall hearing any other shots or any yelling or screaming. (R274)

Byrd joined Rice in the bedroom. (R274)

Appellant came through the bedroom door. (R275) He raised a shotgun and shot Byrd. (R275)

Rice went into the bathroom. (R275) She was terrified. (R275)

Rice tried to hold the bathroom door shut against Appellant, but he pushed his way in. (R275) Appellant looked strange and his eyes were glassy. (R286-287) Rice tried to hold herself against Appellant and talk to him. (R275-276) She told him she had called the sheriff's department and they were on the way. (R276) She told him to leave and not shoot anyone else. (R276) Appellant said, "Okay, I'll go, let me go." (R276) He walked out the bathroom door, turned, and aimed the shotgun at Rice. (R276) She slammed the door as he was firing and was hit in the left side. (R276)

Rice called the telephone operator, who informed her that the sheriff's department was there. (R277)

Personnel from the sheriff's department lifted Rice through the bathroom window, and she was taken to the hospital. (R278)

RICHARD BYRD, JR. VERSION[7]

Jill Piper and Terri Rice went to a gun room in the den of the Piper residence and returned with a .38 pistol and a double barreled shotgun. (R415)

Piper decided to bring the car back from across the street because she was not going to be afraid in her own house.

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During Byrd's testimony, Appellant objected to any further testimony regarding the attempted murders as constituting non-statutory aggravation. (R426-428)

(R417) The three people walked to the car, with Piper carrying the shotgun and Byrd carrying the pistol. (R417) Piper and Rice drove the car back to the house. (R417)

Byrd entered the house. (R418) He heard the car pull up and Piper and Rice talking. (R418) A second or two later he heard three quick shots. (R418) They sounded like firecrackers, and Byrd thought it was a joke. (R418-419)

Piper came running up and fell down on the floor. (R419) She said, "The son-of-a-bitch has shot me." (R419) Byrd started to laugh, but then he saw bullet holes in her back and bleeding. (R419)

Rice was standing there "pretty much frozen." (R419) Byrd guessed "she was just frightened to death." (R419)

Byrd grabbed Rice by the hand and they ran into the bedroom and closed the door. (R420-421) Byrd still had the pistol in his hand. (R420) He was "so scared." (R420) They started trying to call the sheriff's department. (R421)

Byrd could hear a fight going on. (R422) He "could hear a man's voice at times cussing," and he heard Piper screaming and begging for her life, saying, "Dear God, don't kill me," and "Dear God, make him leave me alone." (R422) He also heard "what sounded like blows passed," or "very hard hitting." (R422) It was "real loud" and "real scary." (R422) Then Byrd heard more shots and it got quiet. (R423)

Byrd had never been so scared in his life as he was then. (R423)

Terri Rice was crying very hard and making a lot of noise. (R424) Byrd finally got her to be quiet. (R424)

The two of them were crouched down in a hallway off the master bedroom. (R424) Byrd realized he had the pistol and pulled the hammer back. (R424)

There was a very loud boom and Byrd realized the door had come open. (R424) He stood up. (R425) The barrel **of** the shotgun, the one Piper had been carrying, came around the corner of the hallway. (R425) Appellant was holding the shotgun, and had the .22 rifle cradled in his arm. (R425)

Byrd dropped the pistol. (R425) He was "so scared." (R425)

Byrd looked Appellant in the eyes for a second or two. (R425-426) Appellant's face indicated to Byrd that Appellant "was excited and thrilled with what he was doing," although Appellant was not laughing or smiling. (R431)

Appellant pulled the trigger of the shotgun and shot Byrd in the stomach, knocking him down. (R426) Byrd thought he was dying. (R426)

Byrd saw Appellant and Terri Rice fighting, wrestling for the gun. (R428) Appellant pulled the shotgun back at the same time the bathroom door slammed. (R428) He tried once or twice to open it, but it was blocked. (R428) He stepped back and shot through the door. (R428)

Appellant turned and looked at Byrd. (R429) He kicked or nudged Byrd with his foot, and held the shotgun about 10 inches

from his face but the gun did not go off. (R429) Appellant walked out of the room. (R429)

Appellant did not say anything. (R430-431) He was very "mechanical." (R430) He did not trip, stumble, or fall. (R430)

When Terri Rice was shot she screamed very loud for a long time, but then Byrd did not hear her any more. (R431-432) Byrd called her and she finally answered. (R432) Together they called the telephone operator. (R432) Rice was calm at first, but then "started getting real, like in a frenzy," and she screamed and screamed. (R432-433)

When Byrd stood up he was sick to his stomach and having a hard time breathing. (R433) He lay down on the bed and "blacked out" or "started blacking out." (R433-434) Eventually he heard a voice and realized it must be the sheriff's department. (R434) He went to the front doorway and out into the yard, where he collapsed. (R434-435)

There was a big hole in front of Byrd's stomach, and he thought his intestines were falling out. (R434)

Byrd fell down within six feet of Jill Piper's body. (R435) He was puzzled because the last time he heard gunshots it was inside the house. (R435)

Byrd was in the yard quite awhile before he was taken to the hospital. (R436)

* * * *

Appellant was arrested in Naples on August **21, 1976** by Collier County Deputy Sheriff Thomas Pomeroy. **(R354)** Pomeroy pursued Appellant into a palmetto field. **(R360)** Appellant came out of the field the second time Pomeroy commanded him to do **so. (R360)** Appellant did not have a weapon and offered no resistance when he came out of the palmettos. **(R360-361)**

The sheriff's deputies who investigated the shooting at the Piper residence did not find any blood in the foyer. **(R351)** The only spent **.22** caliber cartridge casings they found were outside the house. **(R348-349)**

The medical examiner who performed an autopsy on Jill Piper, Wallace M. Graves, Jr., found seven gunshot wounds caused by five different bullets. **(R459)** Piper had a superficial wound to the inner portion of the right calf, a wound over the left shoulder blade, a wound in the lower left back, a superficial wound to the top of the left shoulder, and a wound to the top of the head. **(R459-462)** Dr. Graves opined that the cause of Piper's death was brain injury due to the gunshot wound to the top of the head. **(R463)** This wound would have rendered her unconscious immediately. **(R471)** Death would have taken place within minutes. **(R462)**

None of the wounds was a contact wound; they were probably inflicted from more than a foot away. **(R474-475)**

In addition to the gunshot wounds, Piper had several recent cuts on her hands that were suggestive of defense wounds. **(R470-471)**

Dr. Graves did not perform any tests on Piper's hands to see if she had fired a weapon. (R472)

Piper had 0.12 per cent alcohol in her blood. (R476) A screening test for drugs was negative. (R476)

Appellant testified in his own defense at the penalty trial below. (R592-611) He did not recall ever threatening Jill Piper. (R599-600) He said he never held a knife to Piper and said he was going to cut her guts out, and never made the threatening telephone call to Mrs. Piper the morning after his arrest for trespassing. (R600) Nor did Appellant recall saying in the park on August 13 that Jill Piper had better find a hole to get into. (R600)

Appellant did not remember anything exactly after he took the last PCP. (R597) He vaguely remembered the fight with Eddie Kent. (R595) He had no recollection at all of shooting Terri Rice, Ricky Byrd, or Jill Piper, nor did he recall any of the circumstances. (R597) The next thing he remembered clearly was waking up in the woods the next morning. (R597)

Appellant first became fully aware that the shootings had taken place and that he was wanted when he read it in the newspaper. (R597-598) At that time he felt afraid and very sad. (R598)

Appellant never planned to shoot anyone on August 13. (R598) He wished the shooting had never happened. (R598)

Not a day went by that Appellant did not think about Jill and the time they were together. (R598)

Appellant concluded that the tragedy would not have occurred if it had not been for drugs and alcohol. **(R599)** He begged the jury to spare his life. **(R599)**

Dr. Daniel Sprehe, a psychiatrist, examined Appellant at Lee County Jail on February **25, 1987. (R613, 617)** The history Appellant gave Sprehe included that Appellant was "pretty much flipped out" on alcohol and drugs, mainly PCP, when the homicide occurred. **(R617)** Appellant did not remember making any threats or firing any shots. **(R619)**

Appellant recited to Dr. Sprehe things that had been told to him about the incident, including reports that told Appellant that Piper had shot at him. **(R618)** Although there were no shotgun pellets in him, Appellant did remember seeing some blue lights flashing. **(R618)**

Dr. Sprehe's opinion was that Appellant was under the influence of extreme mental or emotional disturbance at the time of the homicide. **(R619-621, 635)** He was unable fully to control his actions. **(R620)** Appellant's ability to conform his conduct to the requirements of law was substantially impaired. **(R635)** Appellant probably knew right from wrong, but had increased impulsiveness and lessened social awareness. **(R620)**

Dr. Sprehe found the element of premeditation not to be present here. **(R621)** And the senseless aspects of the killing and the shooting of the other people did not sound premeditated, cold, and calculated. **(R636)**

Dr. Sprehe discussed the effects of PCP, or phency-

clidine, which was originally used as an animal tranquilizer. **(R621)** It is a drug which causes violent impulsive acting out in people, sudden senseless striking out, extreme anger. **(R621)** It is very often associated with senseless violence. **(R621)**

On cross-examination Dr. Sprehe testified that THC is tetrahydrocannabinol, the active ingredient in marijuana in a more concentrated form. **(R633)** Dr. Sprehe testified that marijuana generally removes inhibitions and makes one feel somewhat euphoric. **(R634)** Feelings of intense anger would be a very bizarre, unusual response to marijuana or THC, but would be very common in use of PCP. **(R634)**

Dr. Sprehe's examination of Appellant revealed that he was depressed and remorseful because he had lost the person he loved. **(R619)**

Georgina Martin and Betty Waldron also testified that Appellant had expressed sorrow over the incident. **(R506, 538)**

Waldron, Glenda Ann Saunders Shue, and Carol Lucas testified to Appellant's generally non-violent character. **(R522, 537, 542)**

Paul Waldron and Betty Waldron said they trusted Appellant, and trusted him to watch their children. **(R501-502, 537)**

Both Waldrons had noticed that Appellant had calmed down a lot during the time he was in prison. **(R503-504, 537-538)**

Before resting, Appellant proffered the testimony of Robert Wesley, who was director of the Sentencing Guidelines Project until **1984,** to the effect that parole has been abolished,

and that one who is sentenced to life imprisonment for a capital offense is imprisoned for his natural life. **(R642-651)** The court refused to permit the jury to hear Wesley's testimony. **(R652-653)**

The State presented one rebuttal witness, Lee County Deputy Sheriff Don Schmitt, over defense objections. **(R657-659, 664-667, 671)** Using a written report he had prepared on August **23, 1976,** Schmitt testified concerning certain statements Appellant allegedly made when he was being transported in a squad car from Collier County Jail to Lee County Jail. **(R671-684)** Appellant stated that he was in the Piper house on the night of the incident, and that no one else was present other than himself and the victims. **(R677)** Appellant said he did not know what stimulated the shooting, other than that he had had all of the lies from the Piper girl he could stand. **(R678)**

Appellant told Schmitt that after the shooting he fled into the woods and stayed in a wooded area on the eastern edge of Bonita Springs until some time on Thursday, August **19, 1976** when he started to walk and hitchhiked to Collier County. **(R678)**

When asked about the gun used in the shooting, Appellant became vague, and would only state that he lost the gun in the woods. **(R681-683)**

Appellant did not specifically say to Schmitt that he shot anyone. **(R679)** Appellant said he did not remember shooting the two victims and was not too clear about the details of the other shootings. **(R679)** Appellant also said he did not know exactly why it happened. **(R680)**

At Appellant's sentencing hearing on May 7, 1987, Appellant again expressed great remorse for Jill Piper's death. (R908) He did not feel the homicide would have occurred had it not been for the drugs and alcohol. (R908)

In the ten and one-half years Appellant had been in prison, he had incurred only two "DR"s, both of them coming in his first three years in the system. (R908) The first came in 1977 when 40 inmates received "DR"s for participating in a riot. (R908) The second was in 1979 when all 101 inmates on Appellant's wing received "DR"s for "flooding." (R908) Since then Appellant had had a clean record, and had started taking correspondence courses trying to better himself. (R908)

## SUMMARY OF THE ARGUMENT

I. During his voir dire of prospective jurors, the prosecutor below was permitted to inquire whether the jurors believed someone who was intoxicated on alcohol or high on drugs should be held accountable for his actions. This line of questioning was improper, because it suggested that a life recommendation would somehow not amount to holding Appellant accountable for what he did.

During closing argument the prosecutor incorrectly argued that the statutory mental mitigators did not apply to Appellant because he knew right from wrong, and that the mitigating circumstance of no significant history of prior criminal activity did not apply because Appellant had been convicted of the contemporaneous attempted murders of Terri Rice and Richard Byrd, Jr.

**11.** The trial court should not have taken judicial notice that Appellant was found guilty of the attempted first degree murders of Terri Rice and Richard Byrd, Jr., nor communicated this fact to the jury. The State's request to take judicial notice was not timely filed. The court improperly relieved the State of part of its burden of proving aggravating circumstances. And the statute pursuant to which the court took judicial notice was inapplicable here, because the homicide of Jill Piper occurred long before the effective date of the statute.

111. Extensive testimony concerning the pain and suffering, both mental and physical, of Terri Rice and Richard Byrd should not have been admitted at Appellant's penalty trial. This evidence did not add anything to the character analysis of the defendant, which is the justification for allowing into evidence details of other violent felonies committed by the defendant and, like victim impact statements, served only to distract the jury from the task at hand. Any relevance it may have had was outweighed by its prejudicial impact.

IV. It was fundamentally unfair for the court below to allow the State to adduce prejudicial hearsay testimony from "Flip" Dorthy concerning what Jill Piper allegedly told him about threats Appellant had made against Piper in the days preceding the homicide, while preventing Appellant from adducing hearsay testimony from defense witness Georgina Martin on the all-important question of exactly what drug Appellant consumed on August 13, 1976. Hearsay does not add to, but rather detracts from, the heightened reliability required in capital sentencing procedures, and may infringe upon constitutional rights of confrontation and cross-examination. But if hearsay is allowed, the defense has at least as much right as the State to present this type of evidence.

V. The court below should have granted Appellant relief after State witness Eleanor Piper suggested that Appellant had committed a burglary at her home. The State had notified Appellant it intended to introduce at his trial evidence of the collateral crime of "Treaspass [sic] After Warning," but had not notified him

the State would introduce evidence of a collateral felony (the alleged burglary).

**VI.** Appellant's jury should not have been allowed to take notes with no guidance from the court as to the correct way to take and use the notes. Permitting the jurors to take their notes into the jury room for use during deliberations violated the Florida Rule of Criminal Procedure.

**VII.** Appellant's constitutional rights were violated by the prosecutor's exercise of peremptory challenges to systematically exclude all prospective jurors who had reservations about capital punishment, but whose views on the death penalty were not such as to render them excusable for cause.

**VIII.** It is not clear from the sentencing order entered by the court below just what he found in aggravation and mitigation. The confused nature of the order renders meaningful review by this Court virtually impossible. Because the order does not establish that the court engaged in the reasoned weighing of aggravating and mitigating circumstances required under Florida's capital sentencing statute, Appellant's sentence of death cannot stand.

**IX.** The court below unconstitutionally misapplied Florida's capital sentencing statute by including improper aggravating circumstances and excluding existing mitigating circumstances in the sentencing weighing process.

**A.** The State did not prove that Jill Piper's killing was especially heinous, atrocious or cruel. She was killed almost

instantly by a shot to the head, and the circumstances preceding her death were not established with sufficient definiteness to support this aggravating factor. Furthermore, the decedent was intoxicated at the time she was shot, and so her perception of events and pain may have been diminished. Appellant's own use of alcohol and drugs on the day in question must be considered as lessening his culpability for acts that might be considered especially heinous, atrocious, or cruel if committed by one in sound mental condition.

Finally, nothing sets this homicide apart from the norm such that this aggravating circumstance should apply.

B. To apply the cold, calculated and premeditated aggravating circumstance to Appellant's case, when this provision was not added to the statute until long after Appellant was originally tried and sentenced, violates constitutional prohibitions against **ex** post facto laws. Because the State did not argue, and the circuit court did not find, the applicability of this aggravating circumstance in 1985 when Appellant's case was last before the court for resentencing, to use it now in support of Appellant's death sentence constitutes arbitrary imposition of capital punishment.

The terms in section 921.141(5)(i), Florida Statutes, are vague and overbroad, and Appellant's jury was not provided with sufficient guidance as to their meaning.

The facts herein will not support the aggravating circumstance of cold, calculated, and premeditated, without

pretense of moral or legal justification. Jill Piper's killing was not well-planned and thought out, but was an act of passion. Appellant's upset over the fact that Piper was seeing someone else, and the fact that Piper had a shotgun and may actually have shot at Appellant, provide at least a pretense of justification for his conduct.

C. The trial court should have permitted the jury to hear (and should have himself considered) Robert Wesley's testimony. A defendant's parole eligibility is a legitimate consideration when the jury is considering what alternative punishment to the death penalty is available.

If the court did not do so, he should have found in mitigation that Appellant had no significant prior history of criminal activity. The court had found this mitigator before, and neither Appellant's convictions for the attempted murders of Terri Rice and Ricky Byrd, nor any other evidence presented by the State, disqualified Appellant from receiving the benefit of this mitigating circumstance.

The court also had a duty at least to consider the evidence of non-statutory mitigators Appellant presented such as his remorse, etc.

Finally, the court should have considered Appellant's good prison record and efforts to better himself while incarcerated. But evidence as to these matters was presented at the sentencing hearing before the court, at which the court read his already-prepared sentencing order into the record, and so he

could not have considered them.

D. Appellant's sentence of death is unconstitutional and must be vacated.

X. The ultimate punishment of death is not warranted in this case. Two of three potential aggravating circumstances are inapplicable, and the third is entitled to little weight. Appellant presented substantial mitigation, both statutory and non-statutory. His case falls within a long line of cases where death sentences for murders committed during domestic disputes or lovers' quarrels have been reduced to life.

The killing of Jill Piper was out of character for Appellant, and he should not have been sentenced to death for this act.

## ARGUMENT

## ISSUE I

THE JURY'S SENTENCING RECOMMENDATION HEREIN WAS TAINTED BY THE PROSECUTOR'S IMPROPER VOIR DIRE AND CLOSING ARGUMENT, WHICH MISLED THE JURY IN ITS CONSIDERATION OF MITIGATING EVIDENCE.

Several times during his voir dire and closing argument to the jury, the prosecutor below asked questions and offered comments that misled Appellant's jury as to the correct manner in which they should examine mitigating circumstances. For example, on voir dire questioning the prosecutor was permitted to ask prospective jurors, over defense objections, whether they believed someone who was intoxicated from alcohol or high on some sort of drugs should be held accountable for what he did. (R119-121) This line of questioning had no place at a penalty trial. Appellant clearly was going to be held accountable for his actions; the only question was whether he should be sentenced to death or to life imprisonment. The prosecutor's questioning suggested that the jurors would not be holding Appellant accountable for his actions if they returned a life recommendation, and so was improper.

During his closing argument to the jury the prosecutor urged the jury to reject as a mitigating circumstance that Appellant had no significant history of prior criminal activity because Appellant had been convicted of the attempted murders of Terri Rice and Richard Byrd, Jr. He said (R744):

> You will hear that a mitigating circumstance can be that the defendant has no significant history of prior

> criminal activity. How much more significant cantwoattemptedmurders be as prior criminal history? That is significant. He attempted to kill two other people and he was convicted of that.

Appellant would first note that the State previously conceded the existence of the mitigating circumstance of no significant prior criminal history when Appellant's case was before the circuit court for sentencing on a prior occasion, on May 8, 1985. (R27-28) Therefore, it is difficult to see how the prosecutor could, in good faith, urge the jury to reject this mitigating circumstance.

Furthermore, under current law the two attempted murders clearly could not disqualify Appellant from receiving the benefit of this mitigating factor. In Scull v. State, 533 So.2d 1137 (Fla. 1988) this Court receded from its position in Ruffin v. State, 397 So.2d 277 (Fla. 1981) and held that a "history" of prior crimes cannot be established by contemporaneous crimes, such as the shooting of Byrd and Rice herein. While the assistant state attorney's argument might not have been improper under the case law existing when he made it, it clearly would be improper today, and "[t]he decisional law in effect at the time an appeal is decided governs the issues on appeal, even where there has been a change of law since the time of trial. [Citations omitted.]" Wheeler v. State, 344 So.2d 244, 245 (Fla. 1977). This Court therefore should apply Scull and find that Appellant's jury was fundamentally misled by the prosecutor's argument.

Also during closing argument the prosecutor argued against the applicability of the mitigating factor of impairment of capacity to appreciate the criminality of one's conduct by saying that Appellant knew right from wrong. (R752-753) Defense counsel objected and asked the court to instruct the jury, noting that "it's not the M'Naughton [sic] standard which is applicable," and arguing that the State was attempting to mislead the jury. (R752-753) The court not only overruled the objection, finding the prosecutor's remarks to be "fair comment," but asked defense counsel not to interrupt opposing counsel's argument. (R753) The prosecutor later made another reference to the fact that Appellant knew right from wrong at the time of the homicide. (R761)

As defense counsel quite rightly argued, whether Appellant knew right from wrong, the test for insanity under the M'Naghton Rule, was not the proper legal context within which the jury was to consider the mental mitigating elements found in sections 921.141(6)(b) and 921.141(6)(f) of the Florida Statutes. In Ferauson v. State, 417 So.2d 639 (Fla. 1982) and Mines v. State, 390 So.2d 332 (Fla. 1980) this Court vacated death sentences where the trial court had misconceived the standard to be applied in assessing the existence of these mitigating factors by applying the test for insanity. There is too great a danger that Appellant's jury may have been led by the prosecutor into making the same error to allow Appellant's death sentence to stand.

Appellant was entitled to have his mitigating evidence viewed by the jury in the proper legal light. The erroneous que-

stioning and arguments of the prosecutor below may well have prevented this from happening. In accordance with principles of due process law, and Appellant's right not to be subjected to cruel and unusual punishment, his sentence of death must be vacated. Amendments VIII, XIV, U.S. Const.; Art. I, §§ 9, 17, Fla. Const.

## ISSUE II

THE COURT BELOW ERRED IN TAKING JUDICIAL NOTICE OF THE FACT THAT APPELLANT WAS FOUND GUILTY ON JANUARY 14, 1977 OF THE ATTEMPTED FIRST DEGREE MURDERS OF TERRI L. RICE AND RICHARD BYRD, JR., AND IN SO INFORMING THE JURY.

On March 25, 1987 the State filed a written request for the trial court to take judicial notice, pursuant to sections 90.202 and 90.203 of the Florida Statutes, that Appellant was found guilty on January 14, 1977 of the first degree premeditated murder of Anthia Jill Piper, the attempted first degree murder of Richard Byrd, Jr., and the at empted first degree murder of Terri L. Rice. (R847) Appellant filed a motion to strike the State's request, because the State was attempting to have the court take judicial notice of potential aggravating circumstances which are required to be proven beyond a reasonable doubt, and because the convictions for attempted first degree murder represented non-statutory aggravating factors that should not be considered in the resentencing proceedings. (R848)

The court considered the State's request on March 30, 1987 prior to the commencement of jury selection and, over further defense objections, agreed to judicially notice the items the State requested. (R13-19)

Appellant renewed his objections after the jury was selected, when the court stated that he was going to inform the jury of the fact that he was taking judicial notice of Appellant's convictions. (R232-233)

Before counsel made opening statements, the court informed the jury as follows (R239):

> The Court has taken judicial notice of the Court records in this case, and to that extent **I** will announce to you that -- make sure **I** have my date correct -- on January 14, 1977, Harold Gene Lucas was found guilty of first degree murder of Anthia Jill Piper. On January 14, 1977, Harold Gene Lucas was found guilty of attempted first degree murder of Terri L. Rice. On January 14, 1977, Harold Gene Lucas was found guilty of attempted first degree murder of Richard Byrd, Jr.

For several reasons, it was improper for the trial court to take judicial notice of the attempted first degree murders of Terri Rice and Richard Byrd. Firstly, as defense counsel noted below (R13), the State's request to take judicial notice was not timely filed. It was filed and served on defense counsel on March 25, 1987, just five days before Appellant's penalty trial began. Section 90.203(1) of the Florida Statutes requires the party requesting judicial notice to give the adverse party timely written notice of the request, to enable the adverse party to meet the request. This the State failed to do, and its request should have been denied. See Milton v. State, 429 So.2d 804 (Fla. 4th DCA 1983).

More importantly, the State bears the burden of proving applicable aggravating circumstances beyond a reasonable doubt in a case where it seeks the death penalty. Johnson v. State, 438 **So.** 774 (Fla. 1983). The trial court's taking of judicial notice of

the fact that Appellant had been found guilty of the two attempted murders relieved the State of its burden of proving the aggravating circumstance found in section 921.141(5)(b) of the Florida Statutes, that Appellant **was** previously convicted of another felony involving the use or threat of violence to the person.[8]

The Milton court indicated that it is error for a part of the prosecution's burden of technical and specific proof of a criminal offense to be supplied through judicial notice. Proof of aggravating circumstances beyond a reasonable doubt is part of the State's technical and specific burden of proof that must be met before a death sentence can be imposed pursuant to section 921.141 of the Florida Statutes, and it was error for the trial court to, in effect, at least partially direct a verdict against Appellant by not requiring the State to prove up all aggravating circumstances it wished the jury to consider.

Not only did the prosecutor below argue to the jury that the attempted murder convictions qualified Appellant for the aggravating circumstance of previous conviction of a violent felony (R729-730), he also argued that these convictions disqualified Appellant for the mitigating circumstance of no significant history of prior criminal activity. (R744)[9] Thus the trial court provided the State with both a sword and a shield when he judicially noticed

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[8] In his final instructions the court informed the jury that "attempted murder is a felony involving the use of violence to another person." (R794)

[9] As discussed in Issue I, the State's argument in this regard was improper.

that Appellant had been found guilty of trying to kill Terri Rice and Richard Byrd.

Finally, the evidence code pursuant to which the court below took judicial notice applies only to criminal proceedings related to crimes committed after the effective date of the code, July 1, 1979. § 90.103(3), Fla. Stat. (1987); In re Florida Evidence Code, 376 So.2d 1161 (Fla. 1979); Manaram v. State, 392 So.2d 596 (Fla. 1st DCA 1981). Appellant's penalty trial related to a crime committed on August 14, 1976 (R813), which was almost three years before the evidence code took effect. Before the code, judicial notice could not be taken of records in a case disposed of even in the same circuit. Mangram. The files instead had to be introduced into evidence. Manaram. And to be admissible copies of records and judicial proceedings of any court had to be authenticated by the attestation of the officer having charge of the court records, with the seal of the court annexed. § 92.10, Fla. Stat. (1975); Manaram. The State did not comply with the pre-code requirements for introduction of Appellant's convictions for attempted murder, and the court was not authorized to use the code to take judicial notice that Appellant had been found guilty of these offenses.

The court's taking of judicial notice that Appellant had been found guilty of the attempted murders of Terri Rice and Richard Byrd, and *so* informing the jury, deprived Appellant of the

due process of law to which he was entitled, and subjected him to cruel and unusual punishment. Amends. VIII, XIV, U.S. Const., Art. I, §§ 9, 17, Fla. Const. His sentence of death must be vacated.

## ISSUE III

THE COURT BELOW ERRED IN ALLOWING THE STATE TO INTRODUCE AT APPELLANT'S PENALTY TRIAL EVIDENCE OF THE MENTAL ANGUISH AND PHYSICAL PAIN ENDURED BY TERRI RICE AND RICHARD BYRD, JR.

As discussed in Issue II herein, the court below, over defense objections, took judicial notice of the fact that Appellant was found guilty of the attempted murders of Richard Byrd, Jr. and Terri Rice, and conveyed this information to the jury. (R13-19, 232-233, 239) But the State's case included not only the fact that Appellant had been found guilty of these offenses, but extensive and graphic testimony concerning the mental anguish and physical pain suffered by Rice and Byrd.

This Court has held it permissible in a capital case for the State to introduce at penalty phase evidence regarding the details of other capital crimes or crimes of violence for which the defendant has been convicted. Justus v. State, 438 So.2d 358 (Fla. 1983); Elledse v. State, 346 So.2d 998 (Fla. 1977). In Elledge this Court stated that the reason for allowing details of other violent crimes committed by the defendant to come into evidence is that "[p]ropensity to commit violent crimes surely must be a valid consideration for the jury and the judge." 346 So.2d at 1001. But the fact that Appellant committed two attempted murders during the course of the same episode in which he committed a homicide hardly tends to prove his propensity for committing acts of violence. See Scull v. State, 533 So.2d 1137 (Fla. 1988) in which this Court observed that a "history" of criminal activity is not established

by other crimes the defendant committed contemporaneously with the first degree murder.

Assuming, arguendo, that evidence concerning the details of the attempted murders was relevant, the Florida Statutes provide for even relevant evidence to be excluded where its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. §90.403, Fla. Stat. (1987); State v. Vazquez, 419 So.2d 1088 (Fla. 1982). Appellant was unduly prejudiced here, and the jury was necessarily misled and confused, by the mass of evidence the State presented of the physical and mental pain and suffering of Terri Rice and Richard Byrd, which became a feature of Appellant's penalty trial, and which went beyond that which could pass constitutional muster.

Terri Rice testified that she was scared when she went to the Piper residence on the night in question. (R271) After Jill Piper was shot, and Rice was in the bedroom trying to call the sheriff's department, she was "frightened." (R274) After Appellant shot Ricky Byrd in the bedroom, and Rice ran into the bathroom, she was "terrified." (R275)

Richard Byrd, Jr. testified that Jill Piper and Terri Rice "were very scared" at the Piper residence,[10] and that the girls "kept insinuating to [Byrd] that they were frightened for

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[10] One wonders how Byrd could tell what other people were feeling. If it was by what they told him, this was, of course, hearsay.

their lives." (R415) After Piper was shot, Terri Rice "was just standing there ... pretty much frozen," and Byrd guessed "she was just frightened to death." **(R419)**[11]

When Byrd and Rice ran into the bedroom, he did not remember he still had the pistol in his hand, because he "was so scared." (R420)

While the struggle was occurring in another room between Appellant and Jill Piper, it was "real scary," and Byrd had "never been as scared in his life." (R423)

After the last shots were fired, Terri Rice "was really crying very hard, making a lot of noise." (R424)

When Appellant entered the bedroom carrying the shotgun, Byrd "was ***so*** scared" he did not "even know if [he] was thinking very clear." (R425)

The shot from the shotgun knocked Byrd down and backwards. (R426) He landed on the floor, and thought a second or two afterwards that he was dying. (R426) He was just lying there, and did not know if he "was too scared **to** move or too hurt to move." (R426) It did not seem as though Byrd could move a muscle in his body. **(R426)**[12]

When Terri Rice was shot, she screamed very loud for a long time. (R431-432)

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[11] Obviously, Byrd was speculating.

[12] It was after Byrd offered this testimony that defense counsel objected to any further testimony regarding the attempted murders. (R426-428)

Byrd started to get up and "everywhere [he] looked there was blood. It was a mess in there." (R432) At first Byrd could not get up, and he crawled to the telephone. (R432)

Terri Rice told Byrd "she was hurt real bad." (R432) When the two of them called the operator, Rice was calm for a few seconds, but then "started getting real, like in a frenzy," and she screamed and screamed. (R432-433)

When Byrd stood up he was "real sick to [his] stomach" and was having a hard time breathing. (R433)

Byrd heard a lot of noise in the house, and it scared him. (R433) He thought if he tried to leave he would be seen and killed. (R433)

Byrd lay on the bed and "blacked out" or "started blacking out." (R434)

When Byrd finally left the house, he thought his "intestines were falling out," and he saw a big hole in the front of his stomach. (R434) He was trying to stop himself from bleeding, and he "thought that [his] intestines were trying to fall out through the hole." (R434-435)

As Byrd came out of the house and a sheriff's deputy told him to stop, Byrd said, "I'm hurt, I'm hurt real bad," and collapsed. (R435) Byrd told the officer he was "scared to stop because the man was still in the house." (R436)

Byrd lay in the yard for quite awhile before he was taken to the hospital. (R436)

The testimony of Rice and Byrd was not the only testimony

presented as to their pain and suffering. Deputy Craig Humble of the Lee County Sheriff's Department testified that when he arrived at the Piper residence on the early morning in question, he heard screaming from inside the house. (R294) Richard Byrd yelled that he had been shot, and came running out of the house bent over and holding his side. (R296) Byrd was yelling so loudly Humble could barely understand him. (R296-297) He was covered with blood in one area, and it looked as though he had flesh hanging out from between his fingers. (R297) Deputies Humble and John McDougall put Byrd into a patrol car to take him to the hospital, because they were afraid he would die if they waited for an ambulance. (R297-298)

After Byrd came out of the house, Humble could still hear crying and screaming from within. (R300) Humble found Terri Rice in the bathroom and lifted her out the window, as she was not able to come through the house because of her wound. (R301)

Deputy McDougall testified that when he arrived at the Piper residence he went to "the body of a young boy who had been shot." (R322) The boy "was screaming; he was in excruciating pain." **(R322)**[13] McDougall later learned that the boy was Richard Byrd. (R322)

When McDougall searched Byrd for a weapon, his hand became "saturated with blood," and McDougall could see Byrd was "bleeding profusely from the side where he had been shot." (R323)

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[13] A defense objection that this statement called for an opinion the witness could not give was overruled. (R322)

The deputies could not stop Byrd's bleeding. (R324) "He was just bleeding from the back and from the front, because the projectile had gone completely through him." (R324) Byrd's intestines were showing, and he had lost a lot of blood on the lawn. (R324) Because the deputies could not stop the bleeding, they knew Byrd would bleed to death if he did not get to a hospital, and **so** McDougall transported him to Naples Community Hospital. (R324)

Aggravating circumstances the jury and court may consider are limited to those enumerated in section 921.141(5) of the Florida Statutes. State v. Dixon, 283 So.2d 1 (Fla. 1973); Elledae v. State, 346 So.2d 998 (Fla. 1977).

In Appellant's first appeal, Lucas v. State, 376 So.2d 1149 (Fla. 1979), this Court vacated Appellant's death sentence because the trial court had considered the non-statutory aggravating factor of the heinous and atrocious nature of the attempted murders of Rice and Byrd when he imposed sentence. Defense counsel below objected to the prosecutor's final argument to the jury on the ground that the prosecutor was attempting to persuade the jury to use the allegedly heinous, atrocious, and cruel nature of the attempted murders in aggravation, after the prosecutor referred to the fact that Appellant sought out and shot Rice and Byrd, and returned to Byrd and put the shotgun to his head. (R760-761)

In Elledae this Court noted that the jury may consider details of other capital or violent felonies committed by the

accused, because this is part of the character analysis of the defendant which the jury must undertake to determine whether the ultimate punishment is called for in his particular case. With this in mind, it may be relevant to focus upon the details of what the defendant actually did in the course of committing the capital or violent felonies, as this may be relevant to an analysis of his character, but to consider collateral consequences of the defendant's actions has no bearing on whether he should be sentenced to death. See Teffeteller v. State, 439 So.2d 840 (Fla. 1983), in which this Court observed that the fact that the victim of a shotgun wound lived for a couple of hours in undoubted pain and knew that he was facing death did not qualify the shooting as especially heinous, atrocious, or cruel.

The dangers of allowing such unbridled presentation of evidence of the effects of the defendant's actions upon the victims of violent crimes he has committed are essentially those dangers identified by the Supreme Court of the United States in Booth v. Maryland, 482 U.S. ___, 107 S.Ct. ___, 96 L.Ed.2d 440 (1987), in which the Court barred use of victim impact statements from capital sentencing proceedings. Preliminary, the Court stated:

> While the full range of foreseeable consequences of a defendant's actions may be relevant in other criminal and civil contexts, we cannot agree that it is relevant in the unique circumstance of a capital sentencing hearing.

96 L.Ed.2d at 449. The introduction of evidence of the physical and mental suffering of the victims of the defendant's other

violent felonies, just as the victim impact statements condemned in Booth,

> could well distract the jury from its constitutionally - required task - determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime.

96 L.Ed.2d at 451. The presentation of such evidence

> can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant.

96 L.Ed.2d at 452.

Appellant's jury was charged with the duty of recommending his sentence for the murder of Jill Piper -- not for the attempted murders of Terri Rice and Richard Byrd. The injection into Appellant's penalty trial of such extensive inflammatory evidence concerning Rice's and Byrd's fear, physical suffering, etc. raises the spectre that the jury's death recommendation was based not upon reason, as constitutionally required, but upon caprice or emotion. See Booth; Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Appellant's sentence of death must therefore not be permitted to stand. Amends. VIII, XIV, U.S. Const.; Art. I, §§ 9, 17, Fla. Const.

## ISSUE IV

THE COURT BELOW ERRED IN PERMITTING THE STATE TO INTRODUCE DAMAGING HEARSAY TESTIMONY AGAINST APPELLANT, WHILE DENYING APPELLANT THE OPPORTUNITY TO PRESENT HEARSAY TESTIMONY THAT WAS CRITICAL TO HIS DEFENSE.

During the State's presentation of its case in aggravation against Appellant **at** his penalty trial, the State was permitted to elicit on redirect examination of Franklin "Flip" Dorthy, over defense objections, testimony regarding what Jill Piper had told Dorthy about threats Appellant allegedly made against Piper in the days before her homicide. (R389-390) Dorthy testified that Piper told him that the Sunday before the homicide, Appellant had put a knife up to Piper's side at the Post Time Tavern and threatened to cut her guts out. (R389) Dorthy also testified that Piper told him that later in the week, after Appellant was arrested for breaking into the Pipers' house, Appellant called the Pipers and told them their daughter was not going to see her next birthday. (R390) (This testimony constituted hearsay within hearsay, or double hearsay. It was Eleanor Piper, Jill Piper's mother, who actually received the telephone call (R490-492), and so Dorthy was relating what Jill Piper said her mother said about the call. As noted in the Statement of the Facts herein, Mrs. Piper's version of what was said during the call differed from that related by Dorthy.)

Hearsay evidence generally is inadmissible. § 90.802, Fla. Stat. (1987) However, in capital sentencing proceedings, any

> evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

§ 921.141(1), Fla. Stat. (1987).

Despite the foregoing statute, the State should not be allowed to present hearsay evidence to the jury in capital sentencing proceedings. Capital sentencing procedures are subject to heightened due process standards. See Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Because "death is different," more stringent procedural standards are applied to capital sentencing procedures than to non-capital sentencing. See Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977); State v. Dixon, 283 So.2d 1, 7 (Fla. 1973). "This closer scrutiny found in capital cases is demanded by the Eighth Amendment's ban on Cruel and Unusual Punishments and the Due Process Clause of the Fourteenth Amendment." State v. McCormick, 397 N.E.2d 276, 280 (Ind. 1979). The purpose of the hearsay rule is to exclude unreliable testimony. City of Miami v. Fletcher, 167 So.2d 638 (Fla. 3d DCA 1964); see also Brown v. State, 367 So.2d 616 (Fla. 1979). The introduction of such evidence at a capital sentencing proceeding thus cannot be squared with the heightened reliability called for in death penalty cases; reliability is diminished, not enhanced, when the State relies upon hearsay to obtain a death sentence.

Furthermore, Appellant's statutorily - guaranteed

opportunity to rebut the hearsay herein was limited because the declarant, Jill Piper, was deceased, and could not be called to testify.

Appellant's rights under the Sixth Amendment to the Constitution of the United States to confront and cross-examine the witnesses against him were infringed upon by the introduction of Dorthy's testimony.

Obviously, the hearsay evidence presented below was highly prejudicial, and most damaging to Appellant's plea that his life be spared. But perhaps the most disturbing aspect of this issue is that, after allowing this inflammatory hearsay to be adduced by the State, the court below refused to allow Appellant to present hearsay that was critical to his defense.

A major portion of Appellant's case in mitigation dealt with his use of drugs and alcohol in the hours preceding the homicide. A key point of contention at Appellant's penalty trial was exactly what drug he had actually consumed on August 13, 1976. Was the drug he bought at the house of his neighbor, Georgina Martin, THC or PCP? Martin thought it was PCP, but she could not say definitely. (R518) Martin had heard what the drug was called. (R519) But twice when defense counsel tried to elicit from Martin the name of the drug, which had been told to Martin by her friend from Miami who brought the drug to sell, State objections were sustained. (R518-520) Defense counsel first asked Martin if the girl who sold the drug indicated to Martin that it was called angel dust or PCP. (R518) The court sustained a State hearsay objection

to this question. **(R518)** After Martin testified that she heard what the drug was called, defense counsel asked, "What was it?" **(R519-520)** The State objected, saying, "She said she didn't know what it was," and was sustained. **(R520)**

The prosecutor repeatedly suggested that the drug Appellant used may have been THC instead of PCP. He elicited on cross-examination of Martin the fact that she was not certain what the drug was. **(R518)** He cross-examined Dan Brian Dowdal on the fact that at Appellant's first trial Dowdal had referred to the drug as THC, whereas at Appellant's new penalty he referred to it as PCP. **(R572)** On redirect the prosecutor elicited from Dowdal that at the time they were using the drug, "everybody thought they was doing" THC. **(R589)** On cross-examination of Appellant himself, the prosecutor brought out the fact that Appellant referred to the drug as THC and animal tranquilizer at his first trial, but never referred to it as PCP. **(R602)**

When Appellant's mental health expert, Dr. Daniel Sprehe, a psychiatrist, was testifying, the prosecutor elicited testimony that THC would not have as pronounced a negative impact on a person as PCP, and would be highly unlikely to produce the feelings of intense anger leading to senseless violence that could be engendered by PCP. **(R634)**

The prosecutor continued with these themes in his closing argument to the jury, emphasizing that Dowdal and Appellant had called the drug THC at Appellant's first trial, but were now calling it PCP. **(R749-752)**

The person who sold the drug to Appellant, Georgina Martin's friend from Miami, was in the best position to know what the drug actually was. Martin should have been allowed to tell the jury what her friend said the drug was called. This testimony could have gone a long way toward negating the State's insinuations that the drug was perhaps not the very dangerous, violence-provoking PCP, but was instead the much milder producer of mellow moods, THC.

If hearsay evidence is to be allowed in capital sentencing proceedings, the defense clearly has at least as much right to present it as does the State. After all, while the State is circumscribed by statutory and constitutional limitations as to what it can present in aggravation, see State v. Dixon, 283 So.2d 1 (Fla. 1973) and Elledue v. State, 346 So.2d 998 (Fla. 1977), the defense is not *so* limited, and may present all relevant evidence in its case for a sentence less than death. Eddinus v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The precise drug Appellant took at least twice on August 13, 1976 had a direct bearing on his moral responsibility for the homicide that occurred. Georgina Martin's testimony as to what her friend told her the drug was was highly relevant to this issue and should have been admitted.

The essence of due process of law must be that the parties in our adversary system of criminal justice compete on a level playing field. By allowing the State to present prejudicial

hearsay testimony against Appellant, while preventing Appellant from introducing hearsay vitally needed by the defense, the trial court tilted that playing field against Appellant. Pursuant to the Florida and United States Constitutions, his death sentence must be vacated. Art. I, §§ 9, 16, 17, Fla. Const.; Amends. VI, VIII, XIV, U.S. Const.

## ISSUE V

THE COURT BELOW ERRED IN PERMITTING THE STATE TO INTRODUCE PREJUDICIAL EVIDENCE OF A COLLATERAL CRIME (BURGLARY) WHEN THE STATE HAD FAILED TO GIVE APPELLANT THE STATUTORILY - REQUIRED NOTICE THAT IT INTENDED TO INTRODUCE THIS EVIDENCE.

Section 90.404(2)(b) 1. of the Florida Statutes requires the State to provide the defendant with at least 10 days' notice **if the State intends to introduce evidence at trial of other** crimes, wrongs, or acts allegedly committed by the defendant. The notice must be in writing, and must describe the crimes, wrongs or acts with the particularity required of an indictment or information. § 90.404(2)(b) 1., Fla. Stat. (1987).

On March 18, 1987 the State filed a "Statement of Other Offenses" pursuant to this statutory provision, notifying Appellant that the State intended to introduce evidence at trial that

> [o]n August 10, 1976, in Lee County, Florida, the Defendant, Harold Gene Lucas, was arrested for Treaspass [sic] After Warning at the Piper residence in Bonita Springs.

(R846)

At Appellant's trial, the State's final witness in its case-in-chief, Eleanor Piper, Jill Piper's mother, testified that a few days before Jill was killed, the Pipers returned to their residence in Bonita Springs, entered, and discovered that Appellant "had broken in some way or another." (R481) Defense counsel immediately objected and moved for a mistrial, which was denied. (R481-489) The court did, however, caution the witness out of the

presence of the jury against testifying about things of which she had no direct knowledge. (R488)

Burglary is a felony, the elements of which are entering or remaining in a structure or conveyance with the intent to commit an offense therein. §§ 810.02(1) and 810.02(3), Fla. Stat. (1987); Booker v. State, 397 So.2d 910 (Fla. 1981). Proof of entering the structure or conveyance stealthily and without consent of the owner is prima facie evidence of entering with intent to commit an offense. § 810.07(1), Fla. Stat. (1987).

As defense counsel argued below (R481-489), Eleanor Piper's testimony that Appellant broke into the Pipers' home when they were away suggested that he was actually guilty of the felony of burglary, not merely the misdemeanor of trespass after warning for which he was arrested by Deputy Craig Humble. § 810.09(2)(b), Fla. Stat. (1987).

As defense counsel pointed out to the trial court, the State's pretrial "Statement of Other Offenses" said nothing about the State presenting evidence of a burglary Appellant supposedly committed; it dealt strictly with a trespass. (R481-489) Appellant was surprised by this testimony, and it should not have been allowed.

In Keen v. State, 504 So.2d 396 (Fla. 1987) this Court acknowledged the extremely prejudicial nature of evidence of other crimes the defendant may have committed. Particular caution must be used in admitting such highly-charged testimony in a capital sentencing proceeding, where human life is at stake, and heightened

due process requirements therefore apply. See Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

Appellant's death sentence must be vacated. The failure of the court below to grant relief after the improper testimony of Eleanor Piper deprived Appellant of due process of law and subjected him to cruel and unusual punishment. Art. I, §§ 9, 17, Fla. Const.; Amends. VIII, XIV, U.S. Const.

## ISSUE VI

THE COURT BELOW ERRED IN PERMITTING THE JURORS TO TAKE NOTES DURING APPELLANT'S PENALTY TRIAL, AND TO USE THEIR NOTES DURING DELIBERATIONS, WITHOUT INSTRUCTING THE JURY ON THE PROPER WAY TO TAKE AND USE NOTES.

After the jury was selected, the court below informed the jurors that they would be "permitted to take notes throughout the proceeding." (R226) He said that note-taking was optional, and that no one else would read the notes. (R226-227)

Appellant objected to the jurors being allowed to take notes (R230), and later renewed his objection to the jurors being allowed to take their note pads into the jury room and use them during deliberations. (R724) The objections were overruled. (R230, 724)

Whether to allow jurors to take notes is generally within the trial court's discretion. Kelley v. State, 486 So.2d 578 (Fla. 1986); Myers v. State, 499 So.2d 895 (Fla. 1st DCA 1986); United States v. Rhodes, 631 F.2d 43 (5th Cir. 1980); United States v. Maclean, 578 F.2d 64 (3d Cir. 1978). But the courts have emphasized the importance of providing jurors with instructions on the proper taking and use of notes in cases where note-taking is to be permitted. Myers; Rhodes; Maclean. See also Biscardi v. State, 511 So.2d 575 (Fla. 4th DCA 1987).

The Maclean court identified some of the problems that may crop up when note-taking occurs. The best note takers may dominate the deliberations. Jurors may attach too much

significance to their notes merely because they are in writing, and attach too little significance to their own independent memory. While taking notes, jurors may miss important testimony, or not pay sufficient attention to witnesses' behavior, which is a key element in assessing credibility. And, finally, jurors who are not trained or experienced in note-taking may accentuate irrelevancies in their notes and ignore more substantial evidence and issues. 578 F.2d at 66.

The Maclean court noted that the dangers it listed could be substantially avoided by proper instruction to the jury. 578 F.2d at 66. Jurors should be told that their notes are only aids to memory and should not be given precedence over their independent recollection of facts, and that a juror who chooses not to take notes should rely upon his independent recollection of the evidence and not be influenced by the fact another juror has taken notes. The court should also tell jurors not to allow note-taking to distract them from the ongoing proceedings. 578 F.2d at 66.

In Rhodes the court similarly noted that jurors should be instructed that they should carefully listen to the evidence and not allow their note-taking to distract them, and that the notes taken by each juror are to be used only as a convenience in refreshing that juror's memory, and that each juror should rely upon his independent recollection of the evidence, rather than being influenced by another juror's notes. 631 F.2d at 46. The Rhodes court even proposed a specific instruction to be given where note-taking is allowed. 631 F.2d at 46, footnote 3.

The court below did not give Appellant's jury any of the instructions that would have obviated the pitfalls inherent in jury note-taking.

Furthermore, permitting the jurors' notes to accompany the jurors into the jury room for use during deliberations was in violation of Florida Rule of Criminal Procedure 3.400, which prescribes what the court may permit the jury to take into the jury room. The only items permitted are: a copy of the charges against the defendant, forms of verdict approved by the court, any instructions given, and all things received in evidence other than depositions. Jurors' notes clearly are not included in the items allowed in jury deliberations.

Yanes v. State, 418 So.2d 1248 (Fla. 4th DCA 1982) teaches that Florida Rule of Criminal Procedure 3.400 must be strictly construed. "A slipshod attitude as to such matters can only undermine the acceptance and confidence which our system has earned." 418 So.2d at 1248. This must be particularly true in the capital context, where the need for reliability in the proceedings is at its highest.

This Court dealt with note-taking in the context of a capital trial in Kelley. There the trial court informed the jurors that note-taking was optional, and that a juror's note-taking in no way gave him authority over the others on the panel. This Court rejected the appellant's assertion that the jury was inadequately instructed, and noted that no additional or different instructions had been proposed by the defense. In Kelley, however, the trial

court at least told the jury that a juror's note-taking did not imbue him with a special position vis a vis the other jurors; the court below did not provide Appellant's jury with even this minimal guidance.

Furthermore, as the Myers court noted, **499** So.2d at **897**, this Court in Kelley did not mention the applicability of Rule **3.400** of the Rules of Criminal Procedure. Perhaps defense counsel in Kelley did not raise that aspect of the case, but counsel below specifically objected to the jury members taking their note pads into the jury room and keeping them during deliberations. **(R724)**

The trial court's action in allowing Appellant's jurors to take notes and use them in the jury room during deliberations, with no instructions to guide them, deprived Appellant of his right to due process of law, and subjected him to cruel and unusual punishment, in violation of Article **I**, Sections **9** and **17** of the Constitution of the State of Florida and Amendments **VIII** and **XIV** to the Constitution of the United States. As a result, Appellant must receive a new penalty trial.

## ISSUE VII

THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES TO SYSTEMATICALLY EXCLUDE ALL POTENTIAL JURORS WHO EXPRESSED RESERVATIONS ABOUT THE DEATH PENALTY PRODUCED A JURY THAT WAS UNCOMMONLY WILLING TO CONDEMN APPELLANT TO DIE AND THEREBY VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO BE TRIED BY AN IMPARTIAL JURY.

When the first group of prospective jurors was called for voir dire examination at Appellant's penalty trial, the court asked each person if he or she was opposed to the death penalty. (R59-61) Of those 16 prospective jurors, only one, Betty Horncastle, answered in the affirmative. (R59-61) She said, however, that she would not automatically vote against the death penalty in all cases, without regard to the evidence or instructions. (R60)

Upon questioning by the prosecutor, Horncastle expressed her beliefs that in general the death penalty is not appropriate. (R87) She thought "they" called for it much too often. (R87) But she would vote for the death penalty in an "extremely exceptional circumstance." (R86-87)

When it was time for counsel to exercise challenges, the State had none for cause, and excused only Horncastle peremptorily. (R143-144) Defense counsel unsuccessfully objected on the grounds that the State was systematically excluding persons with scruples against the death penalty. (R143-144)

The next group of jurors that was called up contained no one opposed to the death penalty. (R145-147)

The next group of five that was called also all initially

indicated no opposition to the death penalty. (R178-179) But upon questioning by the prosecutor, Cheryl Johnson said she was "not for it." (R186) She explained that she guessed "it would be very hard for [her] to judge someone dying." (R187) She acknowledged that the death penalty can be appropriate in certain cases of first degree premeditated murder, but thought it would be very hard for her personally to vote to recommend the death penalty. (R187) Johnson said she hoped she could recommend the death penalty. (R187) She agreed with the prosecutor's statement that in some situations she could make that recommendation, but it would be extremely difficult. (R187)

When it came time for challenges after this group of jurors was questioned, the State had no challenges for cause, but excused Johnson peremptorily. (R200) The defense again objected to the systematic exclusion of all those who voiced some opposition to the death penalty, although not qualifying for exclusion under [Wainwriaht v.] Witt, [469 U.S. 412, 105 S.Ct. **844**, 83 L.Ed.2d 841 (1985)] or Witherspoon [v. 111inois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)]. (R200-201) Counsel indicated that Appellant would not get a jury representing a fair cross-section of the community. (R201) The objection was overruled. (R201)

Five more potential jurors were then called, all of whom initially said they did not oppose the death penalty. (R202-203) However, upon questioning by the prosecutor, Carol Gillette said she did not know how she felt about the death penalty. (R210) She was not sure she wanted the responsibility. (R210) But if she sat

on the jury, she would base her decision on the facts and the law. (R210) Gillette agreed that in some cases the death penalty may be called for, while in others it may not be. (R210-211) When defense counsel questioned her, Gillette said she could vote to recommend the death penalty in some circumstances. (R217)

At the next bench conference on challenges, the State had none for cause. (R222) The prosecutor challenged only Gillette peremptorily. (R222-223) Once again Appellant objected to the systematic exclusion of people who expressed scruples against the death penalty. (R223) The court overruled the objection, saying he "didn't find any such pattern." (R223)

In Brown v. Rice, 693 F. Supp. 381 (W.D. N.C. 1988) the court recently held it violative of the United States Constitution for the prosecutor to use peremptory challenges consistently to exclude potential jurors who express reservations about capital punishment, but who would not be excludable for cause. The court noted that peremptory challenges are not exempt from scrutiny under the Sixth Amendment after Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1987). The court relied upon Witherspoon to conclude that the prosecutor may not use the expedient of peremptory challenges to do what he could not do by way of cause challenges: remove all prospective jurors with any scruples against the death penalty. To do so would render the jury uncommonly willing to condemn the defendant to death, in violation of the defendant's right to an impartial jury under the Sixth and Fourteenth Amendments.

The Brown court distinguished Lockhart v. McCree, **476** U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1985), in which the Supreme Court rejected the petitioner's claims that removal for cause of "Witherspoon - excludable" jurors from the guilt - innocence phase of his capital murder trial violated the fair cross-section requirement of the Sixth Amendment and petitioner's right to be tried by an impartial jury. In McCree the Witherspoon excludables were not removed ***so*** as to tilt the scales in favor of the State, but to comply with the mandate of Witherspoon and achieve the State's interest in obtaining a single jury that could impartially try all issues in McCree's case. And, more importantly,

> McCree's impartial jury claim did not pertain to the special context of capital sentencing, but rather, went to the jury's more traditional role of determining his guilt or innocence.

693 F. Supp. at 392.

The views on the death penalty expressed by prospective jurors Horncastle, Johnson, and Gillette below would not have disqualified them for jury service under the Witherspoon/Witt standard; nothing they said showed that their beliefs on capital punishment would substantially impair the performance of their duty as jurors. Witt, 83 L.Ed.2d at 858. The prosecutor below apparently did not consider them excludable for cause, as he did not challenge them on that basis.

The record clearly shows that the prosecutor removed Horncastle, Johnson, and Gillette peremptorily because they were "weak" on the death penalty. Despite the fact that the trial court did not find a pattern of systematic exclusion of death-scrupled jurors, that pattern is evident. Of all the jurors examined, only Horncastle, Johnson, and Gillette expressed reservations about capital punishment. No other reason is apparent from the record why the State would wish to excuse them.

Where, as here, the defense makes a prima facie showing that the prosecutor has exercised peremptory challenges so as to remove all prospective jurors who oppose the death penalty, but who would be able to uphold the juror's oath and abide by the court's instructions on the law, the burden then shifts to the State to come forward with a neutral explanation for challenging the jurors. Brown, 653 F. Supp. at 393. The prosecutor was never called upon to justify his excusal of Horncastle, Johnson, and Gillette. The record suggests that he could not have provided neutral reasons for excluding them, had he been called upon to do so.

The jury which recommended the death penalty for Appellant was not selected in a constitutional manner. Appellant's rights to a fair and impartial jury, to due process of law, and not to be subjected cruel and unusual punishment were violated. Amends. VI, VIII, XIV, U.S. Const.; Art. I, §§ 9, 17, 22, Fla. Const. His sentence of death must be vacated.

<u>ISSUE VIII</u>

THE SENTENCING ORDER ENTERED BY THE COURT BELOW IS NOT SUFFICIENTLY CLEAR TO ESTABLISH THAT THE COURT ENGAGED IN A REASONED WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES, AND SO WILL NOT SUPPORT THE SENTENCE OF DEATH IMPOSED UPON APPELLANT.

The judge at the circuit court level performs an integral role in Florida's capital sentencing scheme. In any case in which he imposes a sentence of death, the judge must provide specific written findings of fact addressing the circumstances in aggravation and mitigation. § 921.141(3), Fla. Stat. (1987). And he must also find that there are sufficient aggravating circumstances to support a sentence of death, and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. § 921.141(3), Fla. Stat. (1987).

The court's findings must be sufficient to provide the appellant the opportunity for meaningful review of his sentence by this Court. See <u>Cave v. State</u>, 445 So.2d 341 (Fla. 1984); <u>Thompson v. State</u>, 328 So.2d 1 (Fla. 1976). In fact, "[t]he trial judge's findings in regard to the sentence of death should be of unmistakable clarity" so that this Court "can properly review them and not speculate as to what he found..." <u>Mann v. State</u>, 420 So.2d 578, 581 (Fla. 1982). The sentencing order entered by the court below (R889-892), which he read into the record at the sentencing hearing of May 7, 1987 (R909-913), does not fulfill these requirements.

It is virtually impossible to discern from the confused

and confusing sentencing order prepared by the court below what he actually found in aggravation and mitigation. On the first page of the sentencing order, he stated that he considered the following mitigating circumstances urged by Appellant: that Appellant had no significant history of prior criminal activity, that Appellant was under the influence of extreme mental or emotional disturbance, that there was substantial impairment of Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, and Appellant's age. (R889) (As will be discussed further in Issue IX, the court omitted from consideration the evidence Appellant presented of nonstatutory mitigation, such as his remorse over the homicide, etc.) The court then went on to specifically reject only one of the four mitigating circumstances he mentioned above: Appellant's age. (R891)

On the second page of the sentencing order the court mentioned that Appellant "had previously been convicted of two felonies involving the use or threat of violence as evidenced by his conviction for the attempted murders of Terri Rice and Ricky Byrd." (R890) It is not clear if the court was reciting this fact in aggravation, or to negate the mitigating circumstance of no significant history of criminal activity. If it was in aggravation, the court should have so stated. If to negate mitigation, then it was improper. A "history'' of prior criminal conduct for purposes of the mitigating circumstance in question cannot be established by contemporaneous crimes.

Scull v. State, 533 So.2d 1137 (Fla. **1988**).[14]

The court discussed on the second and third pages of its order whether at the time of the homicide Appellant was under the influence of extreme mental or emotional disturbance and whether Appellant's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired, but it is not clear what the court concluded as to these mitigators. The court found that while Appellant's "cognitive function was lessened, notwithstanding increased impulsiveness, there still remained abundant evidence that the Defendant possessed the capacity to control his actions and conform with the requirements of law." (R890) This suggests a rejection of the mitigating factor set forth in section 921.141(6)(f) of the Florida Statutes. But in the very next sentence the court found as follows (R890-891):

> The Defendant's conduct in the days and hours before the actual commission of the crime establish [sic] beyond all reasonable doubt a clear pattern of premeditated purposeful behavior with full appreciation of his actions and their intended results to such an extent that the mitigating circumstances of the Defendant's extremementalor emotional disturbance and impairment of capacity to appreciate or conform conduct of [sic] the requirements of law are insufficient to outweigh the aggravating factors which have been established beyond a reasonable

[14] Appellant recognizes that at the time of sentencing the trial court did not have the benefit of Scull, in which this Court receded from language in Ruffin v. State, 397 So.2d 277 (Fla. 1981) which represented a contrary view.

doubt.

In this sentence the court seemed to embrace the statutory mental mitigators, but found that they could not overcome the aggravators. **As** in Mann, it is not clear whether the court found the existence of the mitigating circumstances found in section 921.141(6)(b) and **(f)** of the Florida Statutes.

In Rogers v. State, 511 So.2d 526 (Fla. 1987) this Court sought to clarify the duties of the trial court when considering evidence in mitigation. (See also Lamb v. State, 532 So.2d 1051 (Fla. 1988)). The court's first task is to consider whether the facts alleged in mitigation are supported by the evidence.

> After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, thesentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

511 So.2d at 543. It does not appear with any certainty from the sentencing order than the court below engaged in the three-step analysis mandated by Rouers with regard to all the mitigating evidence presented herein.

Nor is the trial court's treatment of aggravating circumstances sufficient to pass muster under the capital sentencing statute. The court referred to the homicide of Jill

Piper as fulfilling "the meaning of atrocious and cruel" (R892), but this is not an aggravating circumstance. Section 921.141(5)(h) requires the capital felony to be _especially_ heinous, atrocious or cruel if it is to qualify under that aggravating factor. The court did not **so** find the killing of Jill Piper, nor did he specifically identify any other aggravating circumstances that apply to this case.

Furthermore, the court's discussion of the facts of the homicide does not comport with the evidence adduced at Appellant's penalty trial. The court noted Appellant pursued "the mortally wounded woman," and was undeterred by either her resistance or her pleas. (R891) However, a "mortal wound" is a fatal wound, or a wound which is death-producing. BALLENTINE'S LAW DICTIONARY 816 (3d ed. 1969) The fatal wound to Jill Piper was the bullet wound to the top of the head, which would have rendered her immediately unconscious. (R463, 471) After Piper was "mortally wounded" she would not have been capable of pleading or resisting. (R469-470) Furthermore, the court's statement that Appellant pursued Piper and overtook her in front of the house does not conform with Richard Byrd, **Jr.'s** testimony that he heard a struggle and the last group of shots within the Piper residence. (R421-423, 435, 443)

In _Lucas v. State_, 417 So.2d 250 (Fla. 1982) this Court observed that Florida's capital sentencing statute requires the trial court to "exercise a reasoned judgment in weighing the appropriate aggravating and mitigating circumstances in imposing the death sentence." 417 So.2d at 251. In order to

"satisfactorily perform" its review function, this Court "must be able to discern from the record that the trial judge fulfilled that responsibility." 417 So.2d at 251. From the muddled sentencing order entered herein, this Court cannot have any confidence that the court below properly fulfilled his statutory duty.

When the United States Supreme Court upheld Florida's capital sentencing scheme in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the Court was impressed by the fact that Florida death sentences would be imposed by judges who were "given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life." 49 L.Ed.2d at 923. Unfortunately, that guidance is not apparent in the sentencing order rendered by the court below, and Appellant's sentence was not imposed in accordance with the statutory plan upheld in Proffitt.

Where, as here, the sentencing court fails to make the findings required by section 921.141(3) of the Florida Statutes that will support a sentence of death, a life sentence must be imposed. §921.141(3) Fla. Stat. (1987); Van Royal v. State, 497 So.2d 625 (Fla. 1986).

The death sentence imposed upon Appellant contravenes the bans on cruel and unusual punishments found in Article I, Section 17 of the Constitution of the State of Florida and the Eighth Amendment to the Constitution of the United States. The manner in which the sentence was imposed also did not conform with the requirements of due process of law as guaranteed by Article I,

Section 9 of the Constitution of the State of Florida and the Fourteenth Amendment to the Constitution of the United States. The sentence cannot be allowed to stand.

## ISSUE IX

THE TRIAL COURT ERRED IN SENTENCING HAROLD GENE LUCAS TO DIE IN THE ELECTRIC CHAIR, BECAUSE THE SENTENCINGWEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The trial court improperly applied section 921.141 of the Florida Statutes in sentencing Harold Gene Lucas to death. This misapplication of Florida's death penalty sentencing procedures renders Lucas' death sentence unconstitutional under the Eighth and Fourteenth Amendments to the Constitution of the United States. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973). Specific misapplications are addressed separately in the remainder of this argument.

A. The State did not prove beyond a reasonable doubt that the homicide of Jill Piper was especially heinous, atrocious or cruel.

Although this Court has previously considered the applicability of the heinous, atrocious or cruel aggravating circumstance to Appellant's case, Lucas v. State, 376 So.2d 1149 (Fla. 1979), the evidence that came in at Appellant's new penalty trial may have differed from that presented at his first trial, and it is appropriate for the Court to re-examine this issue.

As discussed in Issue VIII herein, one cannot tell from the sentencing order entered by the court below whether he found this aggravating circumstance to exist. (R889-892) But he did instruct the jury thereupon. (R794-796)

Many of the facts surrounding Jill Piper's death remain unknown. We do know that she died from a gunshot wound to the top of her head, which would have rendered her immediately unconscious (R459, 461-462, 471) Death would have occurred within minutes. (R462) Piper had two other wounds which could have rendered her unconscious. (R462, 471) In many cases this Court has found simple shootings, even when committed execution-style, not to qualify for the heinous, atrocious, or cruel aggravating circumstance. E.g., Parker v. State, 458 So.2d 750 (Fla. 1984); Clark v. State, 443 So.2d 973 (Fla. 1983); Maggard v. State, 399 So.2d 973 (Fla. 1981); Armstrona v. State, 399 So.2d 953 (Fla. 1981). (The fact that Piper was shot several times does not render her homicide especially heinous, atrocious or cruel. In Blanco v. State, 452 So.2d 520 (Fla. 1984) this Court rejected this aggravating circumstance, even though the victim had been shot seven times.)

We also know that Piper was intoxicated at the time of her shooting; her blood alcohol level was 0.12 per cent. (R476-477) This indicates possibly a lessened awareness of what was occurring and less sensitivity to pain than if she had not consumed alcohol. See Herzog v. State, 439 So.2d 1372 (Fla. 1983), in which this Court considered the fact that the victim was under the

influence of a drug in finding the heinous, atrocious, or cruel aggravating factor inapplicable.

Beyond these facts, we do not know exactly what happened. Richard Byrd and Terri Rice gave inconsistent accounts of the events at the Piper residence. Neither of them actually saw Jill Piper killed.

Richard Byrd's account obviously was the more damaging to Appellant, in that he mentioned Piper apparently being struck before she was killed, and begging for her life. But Byrd had been drinking, having consumed three or four beers. **(R447)**[15] The medical examiner did not say anything about Piper having any bruises or other injuries on her face or elsewhere that might have corroborated the suggestion that Appellant hit her. (R453-477) (Piper did have some cuts on her hands, which could have been defensive wounds. (R470-471)) And Byrd's testimony that a struggle and the final shots occurred inside the house (R421-422, 435, 443), was inconsistent with other evidence, such as the fact that Piper's body was found outside (R295, 321-322, 337, 435), and the fact that all the spent rifle casings were found outside. (R348-349) Likewise, Byrd's testimony that Piper collapsed inside the house, bleeding (R419), was inconsistent with the fact that no blood was found in the foyer. (R351)

Unlike Ricky Byrd, Terri Rice was not using any drugs or

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[15] In Tibbs v. State, 337 So.2d 788 (Fla. 1976), one of the factors this Court took into consideration in disbelieving the testimony of the State's eyewitness was that she had been smoking marijuana on the day in question.

alcohol on the night of August **13, 1976. (R286)** Her version of events included only one series of shots being fired, and did not include the yelling or screaming from Jill Piper that Byrd claimed to have heard. **(R274)** Rice's testimony was not burdened by the many contradictions with other evidence that call into serious question Byrd's account of the episode.

Where, as here, the circumstances surrounding the homicide are unknown, there is no factual basis for finding that the killing was especially heinous, atrocious, or cruel. Bundv v. State, **471 So.2d** 9 (Fla. **1985).** Similarly, where the facts that are known are susceptible to other conclusions than that an aggravating circumstance exists, that circumstance will not be upheld. Peavv v. State, **442** So.2d **200** (Fla. **1983)**

It is impossible to know with certainty what happened in the moments before Jill Piper was killed, and Appellant is entitled to the benefit of this ambiguity. See McArthur v. State, **351** So.2d **972** (Fla. **1977)** and Mayo v. State, **71** So.2d **899** (Fla. **1954).**[16]

Even if one accepts Byrd's version as correct, there is nothing present here that would necessarily "set the crime apart from the norm of capital felonies'' ***so*** as to qualify it as especially heinous, atrocious or cruel. State v. Dixon, **283 So.2d 1, 9** (Fla. **1973).**

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**16** In this connection, it is worth noting that Appellant requested a jury instruction on circumstantial evidence at his penalty trial, which the court denied. **(R855)**

Finally, in evaluating this aggravating circumstance, it is necessary to consider Appellant's drug and alcohol consumption. This Court has frequently recognized the interrelationship between a defendant's mental condition and the commission of acts which might be considered especially heinous, atrocious, or cruel if perpetrated by a person of sound mind. E.g., Amazon v. State, 487 So.2d 8 (Fla. 1986); Mann v. State, **420** So.2d 578 (Fla. 1982); Miller v. State, 373 So.2d 882 (Fla. 1979); Huckabv v. State, **343** So.2d 29 (Fla. 1977). The extensive evidence that Appellant was "flipped out" on alcohol and PCP militates against holding him wholly responsible for acts that otherwise might be considered to qualify for this aggravating factor.

> **B.** The cold, calculated, and premeditated aggravating circumstance does not apply to Appellant's case.

Again, it is unclear whether the trial court found this aggravating circumstance to exist, but he did instruct the jury thereupon. (R795, 889-892)

Appellant would first note that this aggravating circumstance did not exist either at the time of the homicide on August **14,** 1976, or when Appellant was originally tried and sentenced in 1977. It was added to the Florida Statutes, effective July 1, 1979, and reads:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

**§** 921.141(5)(i), Fla. Stat. (1987).

Appellant recognizes that this Court has previously rejected arguments that application of this aggravating circumstance to crimes committed before its effective date is a violation of constitutional **ex** post facto prohibitions. Combs v. State, 403 So.2d 418 (Fla. 1981); Smith v. State, 424 So.2d 726 (Fla. 1982) Justus v. State, 438 So.2d 358 (Fla. 1983). But it is not clear that this aggravator should be applied where a defendant is resentenced following vacation of his original death sentence imposed prior to the effective date of section 921.141(5)(i) of the Florida Statutes.[17]

In Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), the United States Supreme Court set forth a test to determine when a law violates the **ex** post facto provision of the U.S. Constitution. The statutes must apply to events which occurred before its enactment and it must also disadvantage the defendant affected by it.

In the case at bar, the aggravating factor found in section 921.141(5)(i) was not effective until July 1, 1979, but was applied to an offense occurring August 14, 1976, thus clearly establishing the retroactivity prong of the Weaver test.

The fact that Appellant was disadvantaged is established by the entry of this additional aggravating element into the sentencing weighing process. This made it much more likely that the jury would recommend, and the court would impose, a sentence

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[17] This issue is currently pending in another case before this Court, Douslas v. State, Case No. 67,603.

of death.

As an independent basis for reversal, Article X, Section 9 of the Florida Constitution provides:

> Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

It should be noted that the Florida constitutional provision does not require that the change in prosecution disadvantage the defendant, only that it "affect" him. As stated by this Court in Raines v. State, 42 Fla. 141, 28 So. 57, 58 (Fla. 1900):

> The effect of this constitutional provision is to give all criminal legislation a prospective effectiveness.

Although this Court rejected a similar argument based upon Article X, Section 9 in Justus, Appellant's case differs because he had already been tried and sentenced before section 921.141(5)(i) went into effect; Justus had not yet been tried.

At least two United States Supreme Court justices believe all retroactive application of the section 921.141(5)(i) aggravating factor violates the ex post facto provisions of Article I, Section 10 of the United States Constitution. See Justus v. Florida, ___ U.S. ___, 104 S.Ct. 1332, 79 L.Ed.2d 726 (1984), J. Marshall, dissenting. Appellant respectfully requests this Court to re-examine this issue in the context in which it appears in his case.

Appellant would also note that when Appellant's case was last before the circuit court for resentencing in 1985, at a time

when the cold, calculated and premeditated aggravating circumstance had been a part of the capital sentencing statute for several years, the State did not argue its applicability to Appellant's case (R897-898), and the trial court did not find it applicable. Lucas v. State, 490 So.2d 943 (Fla. 1986). For this aggravating element to be relied upon now to support the death sentence, upon the same or similar facts as must have been before the court previously, amounts to arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988).

Another reason why the cold, calculated, and premeditated aggravating factor should not be applied here is that Appellant's jury was given no guidance as to what the terms used in this aggravator mean. In Maynard v. Cartwriaht, 486 U.S. ___, 108 S.Ct. 853, 100 L.Ed.2d 372 (1988), the United States Supreme Court held that the Oklahoma aggravating circumstance "especially heinous, atrocious or cruel" was unconstitutionally vague and overbroad under the Eighth Amendment because the language gave the sentencing jury no guidance as to which first degree murders met the criteria. The language used in section 921.141(5)(i), Florida Statutes, "cold, calculated, and premeditated... without any pretense of moral or legal justification," is equally ambiguous. A reasonable juror might well conclude that this factor applies to all premeditated murders. The court below provided definitions to the jury to limit its consideration of the heinous, atrocious, or cruel aggravating circumstance (R794-796), but did not similarly narrow

the focus of their consideration of cold, calculated, and premeditated. **(R795)**[18] The infirmities present in Maynard v. Cartwriuht, are present here as well.

Finally, the facts of this case will not support application of the cold, calculated, or premeditated aggravating circumstance. Florida's legislature did not intend this aggravator to apply to all premeditated killings. Harris v. State, 438 So.2d 787 (Fla. 1983). It must be limited to those having some quality to set them apart form the ordinary premeditated murder. Brown v. State, 473 So.2d 1260 (Fla. 1985). The defendant must have exhibited a heightened degree of premeditation beyond that required for the ordinary first degree murder. Mills v. State, 462 So.2d 1075 (Fla. 1985); Maxwell **v.** State, 443 So.2d 967 (Fla. 1983). Appellant testified that he did not plan on shooting anyone (R598), and Dr. Sprehe testified that the element of premeditation was not present here. (R621)

The fact that Appellant may have made threats in the time before the homicide (which Appellant denied) does not necessarily establish this aggravating element. See Amoros v. State, 531 So.2d 1256 (Fla. 1988). What is required is a careful plan or prearranged design. Amoros. The evidence did not establish such a plan or design here; in Appellant's advanced state of drug and alcohol intoxication he was not capable of planning or designing

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**18** The court did tell the jury that cold, calculated, and premeditated ordinarily applies to executions or contract murders, but added that this description is not all-inclusive. (R795).

anything.

The aggravator in question is reserved primarily for executions or contract murders or witness-elimination murders, Hansbrough v. State, 509 So.2d 1081 (Fla. 1987), Bates v. State, 465 So.2d 490 (Fla. 1985), Herzoa v. State, 439 So.2d 1372 (Fla. 1983), such as underworld or organized crime killings. Garron v. State, 528 So.2d 353 (Fla. 1988). It does not apply in a case such as this where passions get out of hand. Garron. Such a killing can hardly be termed "cold" within the meaning of the statute.

Dr. Sprehe testified that the senseless aspects of this case did not sound premeditated, cold, and calculated. (R636)

Additionally, Appellant had a least a pretense of moral or legal justification for his actions. In Banda v. State, 536 So.2d 221, 225 (Fla. 1988) this Court defined "pretense of justification" to mean

> any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

This pretense of justification is provided here by Appellant's apparent outrage that his girlfriend was seeing someone else (which upset Appellant very much (R611)), and also by the fact that Jill Piper was carrying a shotgun and may even have fired at Appellant. (R270-271, 417, 618) See Cannady v. State, **427** So.2d 730 (Fla. 1983), in which Appellant's statement in his confession that he shot the victim because the victim jumped at him was sufficient to establish at least a pretense of moral or legal justification,

protecting Cannady's life, even though the trial court disbelieved Cannady's statements.

C. The trial court erred in its treatment of mitigating evidence when he refused to admit some such evidence, and did not give adequate or any consideration to other mitigation.

A capital defendant is entitled to present and have considered all relevant evidence in support of a sentence of death. Hitchcock v. Dugger, 481 U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 896, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). And at the penalty phase of a capital trial, there should not be a narrow application or interpretation of the rules of evidence, whether in regard to relevance or any other matter (except illegally seized evidence). Alvord v. State, 322 So.2d 533 (Fla. 1975), receded from in part, Caso v. State, 524 So.2d 422 (Fla. 1988).

The court below ran afoul of these principles by excluding from the jury's consideration (and not himself considering) the testimony of Robert Wesley Appellant proffered to establish that he would not be paroled if given a life sentence, because parole had been abolished. (R642-653) As the court recognized in Doering v. State, 313 Md. 384, 545 A.2d 1281 (Md. Ct. App. 1988), the existence of an appropriate alternative sentence must be considered a relevant mitigating circumstance, and so the defendant is entitled to present evidence as to his eligibility for parole.

In Jackson v. State, 530 So.2d 269 (Fla. **1988)** this Court considered a similar, but not identical issue. There the Court rejected Jackson's argument that he should have been allowed to present at penalty phase the philosophy of the parole commission to not grant parole to defendants convicted of capital crimes. The Court pointed out that the composition of the parole commission (and, by implication, its philosophy) could change. Appellant here, however, sought to establish that parole simply is no longer available under Florida law.

This Court also said in Jackson that the appellant's evidence did not concern his character. That may be true, but evidence of parole eligibility certainly is relevant to the sentencing decision. If it were not, there would be no reason to inform jurors in capital cases that the alternative to a sentence of death is life imprisonment without possibility of parole for *25* years. See Fla. Std. Jury Instr. (Crim.), pp. 77, **80, 82.**

In his written sentencing order, the trial court listed four statutory circumstances he considered in mitigation. **(R889)** One of them was that Appellant had no significant history of prior criminal activity. **(R889)** It is not clear from the order whether the court actually found this factor in mitigation, but it appears he may have rejected it. Immediately after stating what mitigators he considered, the court noted that Appellant had two prior convictions for violent felonies in the attempted murders of Terri Rice and Ricky Byrd. **(R890)** If the court was in fact refusing to find the mitigator at issue because of the contemporaneous

attempted murders, this was improper. A "history" of prior crimes for purposes of the mitigating circumstance of no significant history of prior criminal activity cannot be established by contemporaneous crimes. Scull v. State, **533** So.2d **1137** (Fla. **1988).** Furthermore, the State did not negate this mitigator, and ***so*** it must be considered established. See Booker v. State, **397** So.2d **910** (Fla. **1981).** Finally, a failure to find this mitigating circumstance would be inexplicable in view of the fact that Judge Shands twice found it applicable in Appellant's case, and Judge Reese himself previously found it applicable herein, and the State had previously conceded the existence of this mitigator. (R28, **688, 843)** Lucas v. State, **376** So.2d **1149** (Fla. **1979);** Lucas **v.** State, **417** So.2d **250** (Fla. **1982);** Lucas v. State, **490** So.2d **943** (Fla. **1986).** Adamson v. Ricketts, **865** F.2d **1011** (9th Cir. **1988)** suggests that a failure to find mitigation upon resentencing where it had been found before may render the new death sentence arbitrary and capricious, in violation of the United States Constitution.

The sentencing order entered by the court below does not reflect that the court considered **any** of the non-statutory mitigating evidence Appellant presented ***at*** his penalty trial. **(R889-892)** As was mentioned in Issue VIII herein, this Court described the duties of the Florida trial judge when considering evidence in mitigation in Roaers v. State, **511** So.2d 526 (Fla. **1987),** as follows:

> ....[W]e find the trial court's first task in reaching its conclusions is

> to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

511 So.2d at 534. The record fails to reflect that the court engaged in the required Roaers three-step analysis in considering the mitigation that emerged at Appellant's trial. For example, there was substantial evidence of the great sorrow and remorse Appellant feels because of the homicide. (R506, 538, 598, 619, 908) Remorse has been recognized as a legitimate mitigating factor. Pope v. State, 441 So.2d 1073 (Fla. 1983). Yet the court below made no mention of this.

Nor did the court consider other non-statutory mitigation, such as Appellant's generally non-violent character (R522, 537, 542), the fact that he had grown calmer since being incarcerated (R503-504, 537-538), the fact that Appellant was capable of holding gainful employment (R500-501, 537, 593), see McCampbell v. State, 421 So.2d 1072 (Fla. 1982), and the fact that people trusted him and trusted him with money and with their own children. (R500-502, 537)

Although the court did discuss in his sentencing order Appellant's use of drugs and alcohol, it appears that he considered this only within the context of statutory mitigation. It is not clear that the court considered Appellant's usage of alcohol and drugs as a non-statutory mitigator, if he felt it somehow did not come within the parameters of the mitigating factors set forth in sections 921.141(6)(b) and 921.141(6)(f) of the Florida Statutes.

Finally, the court did not consider and could not consider, because the court had prepared his sentencing order prior to the sentencing hearing, and merely read it into the record, the evidence Appellant presented at the sentencing hearing of his good behavior in prison for many years, and his efforts to better himself by taking correspondence courses. (R908) This is precisely the type of evidence the United States Supreme Court indicated in Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) must be considered as relevant evidence that may serve as a basis for a sentence less than death. See also Craia v. State, 510 So.2d 857 (Fla. 1987); Pickens v. State, 292 Ark. 362, 730 S.W.2d 230 (Ark. 1987).

D. Conclusion

The sentencing weighing process was skewed in an unconstitutional manner by the above-mentioned defects. Appellant's sentence of death must not be allowed to stand.

ISSUE X

THE TRIAL COURT ERRED IN SENTENCING HAROLD GENE LUCAS TO DEATH BECAUSE SUCH A SENTENCE IS DISPROPORTIONAL TO THE CRIME HE COMMITTED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

As discussed in Issue IX, two of the three aggravating circumstances upon which the jury was instructed, and which the trial court may or may not have found to exist, should not be applied to Appellant's case. The single remaining aggravating factor, previous conviction of a violent felony, is entitled to little weight because it is based upon Appellant's contemporaneous attempted murders of Terri Rice and Richard Byrd, and so provides no insight into Appellant's propensity or lack of propensity to commit violent acts. Also as discussed in Issue IX, Appellant has at least one statutory mitigating circumstance to his credit, lack of a significant history of criminal activity. His drug and alcohol use must be considered in mitigation as well, either statutory or non-statutory, and Appellant presented evidence of additional non-statutory mitigation at his penalty trial and sentencing hearing.

Appellant's case falls within that line of cases in which this Court has reversed death sentences where killings have occurred in the course of domestic disputes or lovers' quarrels. Jill Piper and Appellant had dated off and on for two or three years, and had even talked of marriage. (R261-262, 480, 508, 522, 592, 598) But problems began when Piper began dating someone else

in the week before her death, a fact that made Appellant very upset (R611), and ultimately led to the homicide.

Halliwell v. State, 323 So.2d 557 (Fla. 1975) involved a triangle in which the defendant killed the husband of the woman he loved by beating him to death with a breaker bar and then dismembered the body. The jury recommended the death penalty, which this Court found not to be warranted. Like Appellant, Halliwell had no significant history of prior criminal activity.

In Kampff v. State, 371 So.2d 1007 (Fla. 1979), another case in which the jury recommended death, the defendant shot his wife five times in the retail store and bakery where she worked. They had been divorced for three years, and Rampff had brooded over the divorce during that time. He had constantly harassed and begged his former wife to remarry him. Just before the shooting, Kampff suspected that the victim was becoming romantically involved with someone else. Kampff had an extreme, chronic problem with alcoholism. This Court reversed Kampff's death sentence and remanded for imposition of a life sentence. Appellant here had a longstanding problem with both drugs and alcohol. (R515, 526, 542, 593, 601, 617) His crime is no more deserving of a death sentence than Kampff's.

In Chambers v. State, 339 So.2d 204 (Fla. 1976), this Court again reversed a death sentence imposed upon a defendant for the beating death of his girlfriend. Witnesses saw Chambers beat and drag his girlfriend by the hair in the parking lot of her place of employment. He was arrested but bonded out of jail that

evening. Chambers and the victim returned to their apartment where an argument occurred. The victim

> ...was so severely beaten that she died five days later as a result of said beating from cerebral and brain stem contusion. She was bruised all over the head and legs, had a deep gash under her left ear; her face was unrecognizable, and she had several internal injuries.

339 So.2d at 205. Appellant's crime was not as egregious as Chambers'. Jill Piper was not extensively beaten and brutalized as was the victim in Chambers.

The victim in Herzoa v. State, 439 So.2d 1372 (Fla. 1983) was the defendant's live-in paramour. She was strangled with a telephone cord following an unsuccessful attempt to smother her with a pillow. The trial court found no mitigating circumstances, but one of the potential non-statutory mitigating circumstances identified by this Court was "the domestic relationship that existed prior to the murder." 439 So.2d at 1381. This Court found the facts of Herzoq to justify a life sentence.

In Ross v. State, 474 So.2d 1170 (Fla. 1985), the jury recommended death for the defendant's killing of his wife. Her death resulted from multiple blows to the head with a blunt instrument. Her face was extensively bruised, scratched and lacerated. The bruises occurred while she was still alive, and were probably inflicted with a fist or foot. There was evidence she had tried to fight off her attacker, as she had injuries on her hands and arms. The trial court found the murder to be heinous,

atrocious and cruel and found no mitigating circumstances. In vacating the death sentence, this Court noted that the trial court should have considered in mitigation, among other things, "that the killing was the result of an angry domestic dispute." 474 So.2d at 1174. The killing of Jill Piper was accomplished with much less trauma to the victim than the killing in Ross.

The defendant in Irizarry v. State, 496 So.2d 822 (Fla. 1986) was upset because his ex-wife had taken a boyfriend. Appellant entered his ex-wife's home at night with a machete and attacked both his ex-wife and her boyfriend, injuring the boyfriend and killing his wife, nearly decapitating her. This Court reduced Appellant's death sentence to life imprisonment, citing Kampff, Herzog, Chambers, and other cases.

In Amoros v. State, 531 So.2d 1256 (Fla. 1988) the defendant threatened to kill his former girlfriend, who had found a new boyfriend. He went to her apartment the next night and, not finding his ex-girlfriend at home, shot and killed her boyfriend instead. The jury recommended death, but this Court vacated the death sentence, and noted that "the imposition of a life sentence appears to be proportionately correct," citing Kampff, Irizarry, and **Ross**. 531 So.2d at 1261.

Fead v. State, 512 So.2d 176 (Fla. 1987) presented facts quite similar to those of the instant case. Fead was very jealous of his girlfriend, felt she was leaving him, and became angered when she danced with other men at a bar earlier in the evening. He and his girlfriend argued, and he shot her to death. Like

Appellant, Fead had been drinking all day. (Appellant had also been consuming drugs.) Like Appellant, Fead presented expert testimony that his capacity to control his actions and impulses would have been diminished by use of intoxicants. Both Appellant and Fead expressed remorse over their girlfriends' deaths. Both Fead and Appellant had left school to help support their families. Both were easy-going men who were trusted.

This Court reversed Fead's death sentence, citing a line of cases dealing with "murders arising from lovers' quarrels or domestic disputes,'' including Kampff, Chambers, Ross, and Irizarry.

Fead did have a life recommendation, which Appellant does not. However, for the reasons expressed in Issues I-VII and IX herein, the death recommendation in this case is tainted, and hence is entitled to little weight, if any.

Appellant's sentence of death is disproportional to the offense he committed, and should be reversed in accordance with the cases discussed above, and a life sentence imposed. See also Garron v. State, 528 So.2d 353 (Fla. 1988); Wilson v. State, 493 So.2d 1019 (Fla. 1986); and Blair v. State, 406 So.2d 1103 (Fla. 1981).

Appellant's lack of a prior criminal record and generally non-violent character show that the episode in question was an aberration precipitated by consumption of alcohol and PCP. Appellant is not deserving of the ultimate punishment.

## CONCLUSION

Appellant's sentence of death was imposed in violation of the state and federal constitutions. He must be resentenced to life in prison. In the alternative, Appellant must receive a new penalty trial before a new impaneled for that purpose. If neither of these forms of relief is forthcoming, Appellant should be granted a new sentencing hearing before the court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished to the Attorney General's Office, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida, 33602, by mail on this 22d day of March, 1989.

RFM/an

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