IN THE SUPREME COURT OF FLORIDA

REGINALD S. WHITE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 75,571

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

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

The Hillsborough County Grand Jury indicted the Appellant, REGINALD S. WHITE, on July 26, 1989, for the first-degree, premeditated murder of Melinda Scantling on July 10, 1989. (R1054-1055)[1]

Appellant was tried by jury before the Honarable M. Wm. Graybill, Circuit Judge, on December 11-15, 1989. (R1,764) The jury found Appellant guilty as charged. (R749,1123) The jury recommended the death penalty. (R900,1128)

On January 19, 1990, the court adjudicated Appellant guilty of first-degree murder and sentenced him to death. (R915,950-954,1132-1138) Appellant filed a notice of appeal on February 15, 1990. (R1141-1142)

[1] References to the record on appeal are designated by "R" and the page number.

STATEMENT OF THE FACTS

A. The State's Case

Three witnesses, Arthur Green, Martha Jones, and Deborah Chow, testified that Melinda Scantling, the manager of the Lee Davis Service Center in Tampa, was leaving work around 5:00 p.m. on July 10, 1989. (R277-279,320-323,334-335) The Appellant, Reginald White, drove rapidly into the parking lot, squealing the car's tires and swerving, almost losing control. He stopped a few feet away from Scantling and Green, and got out with a gun. (R280-282,297,321-324,327-331,336-338,343-347) Scantling screamed and started to run. Appellant shot her, and she fell face down. Appellant walked up to her and fired a second shot into her back. (R282-284,297,325, 331-332,338-339,347) As Appellant returned to her car, he told Green, "Deac, I told you so." (R285) Appellant drove quickly away. (R285,325,333,339)

State's exhibit 4 was a photo of the car. (R284,324,1155) State's exhibit 5 was a shotgun similar to the one Appellant used. (R285-286,293-294,325,337)

Tampa Police Officer John Bennett responded to the scene of the shooting and saw Ms. Scantling lying face down in the parking lot near her car. She was being attended by fire rescue workers. Bennett saw a large wound in her back. (R272-276)

Officer Margaret Bushnell went to Tampa General Hospital around 5:30 p.m. and learned that Ms. Scantling was dead. (R307-308) The parties stipulated to the identification of the victim as Melinda Scantling, age 35. (R306,307)

Dr. Lee Miller, the medical examiner who performed the autopsy, determined that Ms. Scantling's death was caused by two gunshot wounds. (R309-311) One gunshot went through the right arm into the chest and hit the right lung. It was caused by a shotgun. (R311-313) The other gunshot, alsa inflicted by a shotgun, entered the back just below the right shoulder blade. It went through the backbone, the aorta, the esophagus, the trachea, the heart, and the right lung. (R317-318) Both wounds were fatal. (R318)

The court admitted State's exhibit 9, a restraining order entered March 1, 1989, enjoining Appellant from committing acts of repeat violence upon Melinda Scantling and excluding him from her residence for one year. (R355-358,1159-1160) Appellant stipulated that he signed the order as the respondent. (R359,1160)

Arthur Green testified that he received a telephone call from Appellant in March or April, 1989. Appellant asked whether Green was Melinda Scantling's bodyguard. Green told him no. (R286-287, 293)

Robert Curry, an employee of the Federal Equal Opportunity Commission Office in Tampa, testified that he had known Melinda Scantling for nine years and Appellant for seven or eight years. Ms. Scantling lived in an apartment on Waters Avenue with her son Desmond. Appellant and Ms. Scantling had been going together. (R364-366)

On Friday, July 7, 1989, Curry went to a card party with Ms. Scantling. The party ended around 2:30 a.m. on Saturday, and they went to Ms. Scantling's apartment. (R367-368) They were sitting on

the couch talking when Appellant broke into the apartment and hit Curry on the arm and the head with a crowbar. (R268-370) Appellant looked normal. He smiled when he rushed at Curry with the crowbar. (R375) Curry knew Appellant had a bad reputation for being a heavy drug user. (R377-378)

Curry forced Appellant to drop the crowbar. Ms. Scantling picked it up and struck Appellant's leg with it twice. She said, "I'm tired of you messin' with me and Des." (R370) Curry forced Appellant to the floar. Appellant said he thought Curry was Max, another friend of Ms. Scantling. Appellant asked Curry to let him go so the police would not find him there. (R370-371,380-381) Ms. Scantling called the Sheriff's Department. Deputies came and arrested Appellant. (R371-372)

Michael Clethen, a prison inmate serving ten years for robbery and drug charges, testified pursuant to a plea agreement with the State. (R384-385,390-391,395,400,407-408) Clethen said he encountered Appellant on Sunday, July 9, in the county jail while waiting for a first appearance hearing. (R385-386,392,394) Appellant was bandaged up and said officers had beaten him. (R386) There was blood on his clothing. (R393) Appellant said his girlfriend Melissa invited him to her house. When he arrived, another man was there, supposedly her cousin. Appellant and Melissa argued. The other man struck Appellant with a tire iron. Appellant took the tire iron away and beat the man with it, broke a window, and attacked his girlfriend. She called the police. (R386-387) Appellant also stated that if they gave him a bond, when he got out, "he

was going to go kill the 'ho' and then he was going to come back and knock on the door outside the jail and say, 'Here me; I'm back now.'" (R387,391) "Ho" means a no good woman. Appellant was referring to his girlfriend. (R388)

David Roach testified that he was a pawnbroker at City Pawn on East Hillsborough in July, 1989. He had known Appellant for about two months. (R437-438) Appellant was a regular customer who came in about twice a week. (R438,444) He had pledged and redeemed a shotgun, a revolver, jewelry and an old car several times. (R445-446) He told Roach he was a gambler. (R447)

On July 10, 1989, Appellant came into the pawn shop around 4:30 p.m. He was driving the car shown in State's exhibit 4. (R439) Appellant filled out a firearms transaction form. State's exhibit 10, on which he put 7/6/35 as his date of birth although he appeared to be in his twenties or thirties. He picked up his shotgun, State's exhibit 5. (R439-441,443,445,1160) He did not appear to be under the influence of alcohol or drugs. (R441,449) Roach notice a bruise on his cheek. (R459-460)

Appellant returned to the pawn shop around 6:00 p.m. to pick up his revolver. He still appeared normal to Roach. (R450,458-459) Roach did not see Appellant's pants the first time he was there. This time Roach noticed bloodstains on them. (R450-451)

Jeffrey Shelley was a cab driver on July 10, 1989. (R461) He was dispatched to pick up Appellant in the area of 2700 Riverside Drive at 5:40 p.m. (R462-463,470) Appellant's car was parked on the grass. It appeared that he had come from a side street, ran

over the curb, and broke hi5 wheels. **(R462-463,467)** Appellant was in the cab for six to ten minutes. He did not appear to be intoxicated on alcohol, but Shelley could not tell whether he was on drugs. **(R463-464)** Appellant was friendly and loquacious. He was in a **very good** mood, a giddy mood. **(R464-466,469)** He gave Shelley **ten** dollars for **a** five and a half dollar **fare. (R464)**

Tampa Police Detective Randy Bell testified that he picked up State's exhibit 10 at the pawn shop. The pawn **shop** was about one and a half miles from the Lee Davis Center. It would take no more than ten minutes to drive there. (R471)

In the early afternoon of July 11, 1989, Officer Kenneth Cope **saw** Appellant run from behind a large oak tree across the street after **Cope** passed by in his patrol car. Cope arrested him for the shooting and held him until two detectives arrived. **(R473-475)** Appellant **did** not resist the arrest. He **was** limping and had **dried** blood on his clothing. (R476)

Detective Richard Stanton testified that he went to the scene of the shooting around **6:00** p.m. **on** July 10. **(R447-478)** Around **7:30** p.m. uniformed officers located a Buick Regal in the area of 620 Riverside Drive. (R478) The car was shown in State's exhibits **4, 11,** and **12. It** was parked on the grass with the right front tire hanging over **a** drop-off into the river. **(R478-480,1155,1161-1162)** Stanton found a cloth shotgun case in the trunk, as shown in State's exhibit **13. (R480,1163)** Stanton recovered **two** spent shotgun shells from the edge of the river, as shown in State's exhibit **14. (R482-483,1164)**

Stanton returned to the area by the river on July 11 with a diving team. They recovered a shotgun, State's exhibit 5, from the river, as shown in State's exhibits 16 and 17. (R481-486)

Stanton determined Appellant's uncle, Wellington Williams, owned the Buick found by the river. He said Appellant borrowed it around 11:30 a.m. on July 10 to go to the cleaners. (R481) While Stanton and Detective James Noblitt were talking to Williams, they were informed of Appellant's arrest by Officer Cope. They went to the arrest site and transported Appellant to the police station. (R486-487,491,499-500)

Prior to trial, defense counsel moved to suppress Appellant's statements to the detectives because he was not given Miranda warnings. (R1066-1067) The motion was heard and denied by Judge Lazarra. (R9721-975,1010-1021) Judge Lazarra reserved ruling on the questions of relevancy and whether the probative value of the statements was outweighed by the danger of unfair prejudice under section 90.403, Florida Statutes, for determination by Judge Graybill at trial. (R975,1020-1021) Judge Graybill initially refused to consider these questions, then reviewed a transcript of the motion to suppress hearing and ruled that the statements were admissible. (R245-249,254-255) The court overruled defense counsel's renewed objection when Detective Stanton testified. (R488-489)

Detectives Stanton and Noblitt testified that they did not question Appellant about the shooting. Noblitt and Appellant discussed the deaths of their fathers. (R488-489,500-501) Appel-

lant also remarked that "while he was in Raiford, after Spinkelink had got it, they allowed him to sit in the electric chair. Now, he guessed he'll have to sit in there for real." (R489,501) Stanton did not know whether Appellant had ever been in Raiford. (R490)

B. The Defense

On July 31, 1989, defense counsel filed a motion for preservation of evidence asserting that Dr. Sidney J. Merin requested medical staff at the county jail to obtain blood and urine samples from Appellant on July 12, 1989, the day after his arrest, so the samples could be screened for drugs and alcohol. Jail personnel subsequently lost the blood and urine samples, then the samples were relocated on July 26, 1989. Defense counsel asked the court to order the preservation of these samples for testing by an independent facility. (R1056-1057)

The court heard the motion at Appellant's arraignment on July 31. (R955-956,961-963) The prosecutor had no objection to the motion. He told the court he would contact the jail officials and ask them to save the urine sample if they still had it, (R961-962) However, he also stated, "But my stipulating to this oral order preserving that sample should not affect the murder case if, in fact, for some reason during the week or something the sample has been destroyed." (R962-963) The court ordered the preservation of the blood and urine samples. (R962,1058) Copies of the order were sent to the Hillsborough County Jail and Roche Laboratory in Tucker, Georgia. (R1058)

On November 14, 1989, defense counsel filed a motion to dismiss the indictment asserting that county jail personnel had taken a urine sample from Appellant pursuant to Dr. Merin's request, but no blood sample was taken. The urine sample was forwarded to Roche Laboratory in Tucker, Georgia, without knowledge of Appellant, defense counsel, or Dr. Merin. On July 26, 1989, the laboratory notified Hillsborough County that the urine sample had been lost. Appellant learned this only upon seeing his medical chart in the jail infirmary. Jail personnel deliberately misled the prosecutor by telling him the urine sample was in their possession and subject to delivery as he told the court during the July 31, 1987, hearing. Roche Laboratory subsequently filed a report claiming that the urine sample had been poured aut and that drug screen testing had not been performed. Defense counsel further asserted that proper analysis of Appellant's blood and urine would have determined whether he was intoxicated at the time of the offense and would have irrefutably established Appellant's defense. The acts of Hillsborough County law enforcement personnel deprived Appellant of the ability to present such scientific evidence and violated his right to due process under the state and federal constitutions. (R1090-1091)

This motion was heard by Judge Lazarra on December 1, 1989. (R965,1004-1007) Defense counsel informed the court that the parties would enter a stipulation concerning the urine sample which would render the motion to dismiss moot. (R1004,1007) The prosecutor explained that the jail personnel complied with Dr. Merin's

request to take the urine sample, then the Georgia lab collected the sample along with others kept in a refrigerator at the jail. The lab conducted a presumptive test and determined that there were drugs in Appellant's urine, but they spilled the sample before conducting a confirmatory test. The lab personnel had informed the prosecutor that they had never seen an instance where a presumptive test was positive and a confirmatory test was negative. If defense counsel presented their testimony that they found drugs in Appellant's urine, the prosecutor would not attempt to argue that the results were misleading. The prosecutor was willing to stipulate that the lab conducted a drug profile and found evidence of drugs in Appellant's urine. He argued that the defense would have to show bad faith on the part of law enforcement to be entitled to dismissal of the charges and that the defense would not be able to do so. (R1005-1006) The court found that the motion was moot. (R1007,1092)

At Appellant's trial, the parties stipulated:

> 1. That a urine sample was taken from the Defendant, REGINALD S. WHITE, on July 11, 1989, by personnel of the Hillsborough County Jail.
>
> 2. That this urine sample was forwarded to Roach [sic] Laboratories, Atlanta, Georgia, where it was analyzed.
>
> 3. That such analysis showed that Defendant's urine sample contained residue of cocaine, valium and marijuana.
>
> 4. That no quantitative tests were performed and no tests are available that would indicate whether the cocaine, valium and marijuana were ingested before or after 5:00 p.m., o'clock, July 10, 1989. (R658-659,1103)

Appellant's sister, Bernadine King had sixteen years experience taking disability claims for the Social Security Administration and counseled heroin addicts for the United Methodist Ministries. (R514-515,520) Mrs. King testified that Appellant began using marijuana in college before she moved from Tampa in 1973. When she returned in 1981, he had progressed to harder drugs. (R515-516)

In 1989, Appellant underwent a complete personality change. By July 4, "We were dealing with an animal." (R516,519-521) Mrs. King sought help for him by calling defense counsel, a judge, a probation and parole counselor, and a mental health clinic. No one could help because he had not done anything violent. (R520-521,549-550)

Appellant was acting "very bizarre." He "couldn't stay still, just going and coming." (R519) Normally, Appellant was very articulate. Now, his speech was slurred; he spoke like he had cotton in his mouth. (R521,532,554) Saliva came from his mouth, his nose was running, and his eyes were red and sunken. (R522,532,554) His hands were shaking and burned from smoking drugs. (R532-533) He lost 25 pounds in a few days. (R522) Normally, Appellant was very meticulous about his clothes and food. Now, his clothes and fingernails were very dirty. He sat in the kitchen floor eating from a can with his hands. (R522-523)

In the early morning hours of Monday, July 10, 1989, Appellant called Mrs. King and said he needed help, and, "I need to talk to daddy. Please tell me where daddy is. Where is daddy? I gat to

get to daddy. I need to tell him something. I've got to go with him." **(R524-525)** Their father had died in 1984. **(R525)**

When defense counsel asked whether **Mrs.** King had an opinion concerning Appellant's capacity to form an intent to commit an act **as** the result of his drug ingestion on July 10, the court sustained the State's objection on the ground that a lay witness may state **an** opinion that someone is intoxicated and the degree of intoxication, but she is not qualified to state an opinion concerning the persons's ability to form a specific intent. (R525-531) Defense counsel proffered Mrs. King's opinion that Appellant was so intoxicated he could not formulate **a** specific intent. (R530)

The court permitted Mrs. King to testify that when Appellant called around 2:30 a.m. he was intoxicated, "he was blown out of his mind." (R536) Earlier, Appellant came by her house around **5:00** to 5:30 p.m. on Sunday. He was dirty, his teeth had not been brushed, his clothes were bloodstained and smelled bad. **(R539)** His speech **was** slurred, his nose was running, and he was shaking. (R540) In her opinion he was intoxicated. (R540,543) She said,

> Reggie hasn't always been crazy. He's a very intelligent person. But when a person is taking drugs, they aren't intelligent. And whatever he got ahold of, made him as crazy as anybody I've seen and in sixteen years of **going** to state mental hospitals I've **seen** a lot of crazy people.

On crass-examination, the prosecutor **asked** Mrs. King if Appellant had been using hard drugs since 1981, if she had warned him not to take drugs, and if he made the conscious decision to continue to take drugs. **(R540-541,549-550)** On re-direct, defense

counsel asked if she had an opinion about Appellant's ability to make a conscious decision to take drugs in the week prior to July 10, 1989. The court sustained the prosecutor's objection despite defense counsel's protest that this had been raised in cross-examination. **(R554)**

Richard Fuller testified that Appellant had been his friend for **25** years. **(R557-558)** During the past year, every time Fuller **saw** Appellant he was using drugs. (R558-559) They smoked cocaine **and** marijuana together. Appellant also took valiums. **(R559)**

Fuller had experienced highs on alcohol, marijuana, snorting cocaine, **and** smoking crack cocaine. (R559-560) The court sustained the prosecutor's relevancy objection when defense counsel asked if there were differences among the four kinds of intoxication. (R560) **When** defense counsel requested the opportunity to proffer the answer, the court said, ''No, later an." (R560) The court also sustained the prosecutor's relevancy objection when defense counsel **asked** Fuller to describe the difference between the sensations caused by smoking crack cocaine and by injecting or snorting cocaine. (R560) Again, the court told defense counsel he could proffer the answer later. (R560)

Based upon Fuller's observations, alcohol **and** marijuana **had** about the same affect upon Appellant. ,,He **was** just a normal laughing type of guy." (R562) When Appellant snorted or smoked cocaine he sometimes got so high he could hardly talk. (R563) Appellant became a totally different person when he smoked crack

cocaine. He would not bathe or eat. He drove around like a madman. You couldn't talk to him. (R563)

Fuller first saw Appellant use crack cocaine in 1988. (R563) Fuller continued to see Appellant using crack cocaine from time to time. Appellant's actions and attitudes became pragressively worse the more he smoked. (R565)

In early July, 1989, Fuller saw Appellant "everywhere crack was.'' (R565) Every time Fuller saw Appellant, "he was hitting the stem." (R566) He drove around smoking crack "like he was smoking cigarettes.'' (R566) When Appellant was smoking crack, Fuller observed,

> He would lose his speech. He would drive like a fool. You couldn't talk to him. He was just a total different person. And like, you know, I used to try to talk to him, but he he wasn't listening ta nobody. His understanding was zero. (R566)

Fuller also observed that when Appellant smoked crack, he would take 3 or 4 valiums. Sometimes he took 20 valiums per day. He smoked crack and took valiums constantly. (R566-567) On the street, people say if you take a hit, you can't quit. (R567) This applied to Appellant; he couldn't quit. (R568)

On the day Melinda Scantling was killed, Fuller saw Appellant sometime between 3:30 and 4:30 p.m. (R568-569) Appellant had just purchased a pack of rocks and was "packing a stem, getting high.'' (R569,571-572) When Fuller asked why he was sitting there in front of Mr. Coe's barber shop with Mr. Coe looking out the window seeing him get high, Appellant said, "Fuck Mr. Coe and everybody else." (R571) Appellant's eyes were bulging out. His speech was

slurred. (R571) Appellant backed his car up about 30 yards, turned, and drove away "like a bat out of hell." (R572,573)

In Fuller's opinion Appellant was high on crack cocaine. Fuller said there is no comparisan between alcohol intoxication and crack intoxication. Crack is "a whole new thing" on a different level than alcohol. (R573)

The court sustained the prosecutor's objections to opinion and speculation when defense counsel asked if Fuller had an opinion whether Appellant could stop smoking crack cocaine without help, whether Appellant was addicted to crack cocaine, and whether Appellant would voluntarily refrain from or abandon the use of crack cocaine. (R575-578)

The high from one "hit" of crack cocaine normally lasts about five minutes. (R585) But with the amount of crack Appellant had on July 10, Fuller thought he could have stayed high for about five hours. (R587-588)

Dr. Sidney J. Merin is a board certified clinical psychologist and neuropsychologist with about thirty years' experience. (R588-590) He has testified as an expert in psychology between 600 and 700 times in Florida, Georgia, Louisiana, and federal courts. (R591) About half the time he has been called by the State, and half the time by the defense. (R592)

The court excused the jury from the courtroom. (R592) The prosecutor objected that Dr. Merin could not give an opinion on diminished mental capacity because defense counsel was not pursuing an insanity defense. Defense counsel had not established the

predicate for Dr. Merin to give an opinion on the effects of drugs or alcohol upon an individual's state of mind. (R593)

Defense counsel responded that he was not going into the area of mental incapacity. He was going into the change in Appellant's mental processes attributable to long term use of narcotics as shown by differences in the results of psychological tests administered in **1984** and on July 12, 1989. **(R594-596)** Defense counsel wanted to present Dr. Merin's opinion that "he's nutty and he should be in the slam; he shauld be in the hospital." The court sustained the prasecutor's objection to that opinion. (R596)

Additionally, defense counsel intended to present Dr. Merin's testimony that he took Appellant's history of the events from Friday, July 7 to the time of the homicide. (R596) On the basis of that history and a friend's observation that Appellant was high on crack cocaine between 3:30 and **4:30** on July **10,** defense counsel wanted to ask the doctor's opinion on whether Appellant was so intoxicated that he could not form **a** specific intent. Dr. Merin had a reasonable doubt about Appellant's ability to form **a** specific intent, but he could not **say** that within a reasonable psychological probability Appellant could not form **a** specific intent. (596-608) The court ruled that this opinion was not relevant and would not be admitted. (R604,606-607,609) The court granted defense counsel a recess to decide how to proceed. (R611)

After the recess, defense counsel proffered Dr. Merin's opinion, **based** upon the results of the psychological tests administered in **1984** and July, **1989,** that Appellant was intoxicated at the time

of the offense. (R612-613) The prosecutor objected that an expert could not testify about his opinion concerning intoxication unless he personally observed Appellant at or about the time of the offense; an opinion on intoxication could not be based on hearsay reports from others or Appellant's statements to the doctor. (R613-619) Defense counsel countered that Dr. Merin could determine from the psychological test results that Appellant had been intoxicated for a long period of time before July 12, 1989, because changes in the test results were attributable to long term drug abuse. This opinion was not dependant upon Appellant's statements. (R615-616, 618) Defense counsel also argued that he should be allowed to use Dr. Merin's testimony to corroborate the testimony of other defense witnesses that they had observed a change in Appellant's personality and attitude. (R618-625) The prosecutor responded that in the absence of an insanity plea the test results and Appellant's change in mental attitude were irrelevant. (R621-624) The court sustained the State's objections. (R626).

Elbert Taylor was a drug counselor from January through July in 1989. (R629) He had been Appellant's friend for ten years. (R630-631) Taylor did not use drugs or alcohol, but he had observed Appellant when he knew Appellant was using drugs. (R631)

Appellant came to Taylor's home around 11:00 a.m. an Sunday, July 9, 1989. He was wearing bloody clothing and said he had just gotten out of jail. (R631-632) Taylor persuaded Appellant to let him take him to his uncle's house and his mother's house. (R632-633) They stopped for about an hour along the way. Appellant left

Taylor's presence for awhile. When he returned, he was high. (R633-634) His speech was so slurred you could not understand him, and his mood was altogether different. (R634)

When they arrived at Appellant's uncle's house, Taylor urged Appellant to take a bath and change clothes. (R634-635) Taylor remained in the living room until he noticed the bath water flowing aut into the hall. Taylor also noticed an odor of crack cocaine near the bathroom. When the water was turned off, Taylor took Appellant to his mother's house. (R635-636)

Between 1:00 and 2:00 p.m. on Monday, July 10, Taylor went to Appellant's mother's house to take Appellant to see his probation officer. (R636-637) Appellant was sitting in the car shown in State's exhibit 4 smoking a drug pipe. Appellant could barely talk and refused to go to the probation office, so Taylor left him there. (R637)

Appellant was normally very clean, well groomed, and well dressed. When he was high he would fail to bathe, change clothes, or comb his hair. (R638) Appellant would go on drug binges which lasted three to five days. "He would just go beyond the point of no return." (R639) When Appellant was using crack, he was constantly leaving the house, then returning. He staggered, stammered, and drooled. (R640) When Taylor talked to Appellant about stopping his drug use, Appellant said he could do it on his own or that Taylor didn't understand. (R640-641) Taylar believed Appellant was addicted because he displayed the same symptoms as the crack and cocaine addicts Taylor counseled. (R642) There is a

substantial difference between alcohol intoxication and crack cocaine intoxication; it is like the difference between a bazooka and an atomic bomb. (R642)

The court sustained the prosecutor's objection when defense counsel asked Taylor whether he had an opinion concerning Appellant's ability to form an intent to commit an act when he was high. (R643) On cross-examination the prosecutor elicited Taylor's testimony that he had seen Appellant on "different highs." sometimes he's almost passed out, sometimes he could carry on a conversation, sometimes he could barley walk. (R647) Taylor did not know whether Appellant could make decisions, sign his name, or fill out a form when he was high. (R647-648) The court then allowed defense counsel to elicit Taylor's testimony that crack cocaine could immediately cause Appellant to lose his ability to make decisions. **(R650-651)** "If you're doing crack, you can get high in a matter of seconds.'' (R652) Although the high can burn off in about five minutes, Appellant usually remained high a long time. **(R651-652)**

C. Penalty Phase

The State requested jury instructions on two aggravating circumstances: (1) previous conviction of a violent felony -- burglary with assault and aggravated battery, and (2) cold, calculated, and premeditated. **(R756-757)** Defense counsel objected to both factors. **(R756-757)** He argued that the testimony presented

during the trial negated cold, calculated, and premeditated. (R757) The court overruled the objections. (R756-758)

The court admitted State's exhibit A into evidence. The exhibit was a certified copy of a judgment entered September 19, 1989, adjudicating Appellant guilty of burglary of a dwelling with assault and aggravated battery. (R773,1170-1171)

Dr. Arturo Gonzalez is a forensic and clinical psychiatrist with 40 years of experience. He has testified as an expert for both the State and the defense about 4,000 times. (R774-776) Dr. Gonzalez examined Appellant at the jail on July 13, 14, 19, 17, and August 24, 1989, for a total of 6 1/2 hours. (R777) On July 13, Appellant displayed withdrawal symptoms. A drug screen test showed traces of cocaine, marijuana, and valium. Appellant said that in the six days before the crime he consumed five ounces of cocaine, heroin, 40 valiums, and 55 to 60 "reefers." (R778) He totalled his truck in an accident. (R778-779)

Appellant felt betrayed by Melinda Scantling. They had been involved in a relationship for eleven years. Appellant felt he had been especially kind to her. He mortgaged his house and gave her half the proceeds for her living expenses while he was in jail. He bought her a new car, let her live in his home, and helped with her son. After she began working, people told her Appellant was a gangster, so she rejected him. Appellant's obsession with her rejection caused him to use drugs. (R779,786)

Appellant told the doctor that the incident in Scantling's apartment occurred after she called and invited him to come over.

The other man attacked him with a tire iron, then broke a sliding glass door to make it appear that Appellant. had broken in. (R780,787-788)

When Dr. Gonzalez saw Appellant on July 14, he was improving, but still suffering withdrawal symptams. His condition continued to improve with successive visits on the 19th and 26th. (R780-781) Appellant gained 10 or 15 pounds. (R782)

Appellant's claim of heavy drug consumption was verified by the blood tests. (R782,789) When the prosecutor suggested that the test did not indicate the amount of drugs or when he took them, the doctor replied, "But to give you an idea that he was under the influence of some heavy drugs because you don't test positive the way he did test in this test 48 hours or 72 hours later.," (R789) When the prosecutor questioned whether Appellant may have lied, and whether that would affect the doctor's opinion, the doctor answered, "Yes, to a point, but the test is not a lie; the test is a fact." (R789)

The doctor conceded that he did not know when the drugs were taken. (R790) But Appellant's withdrawal symptoms were consistent with the six day period of drug use reported by Appellant. (R792, 793) Evidence that Appellant wrecked his car thirty minutes after the offense was consistent with motor impairment. (R793) Throwing the shotgun in the river and dropping the spent shells over the seawall showed Appellant was not thinking clearly. (R794) The testimony of the witnesses who saw Appellant smoking a crack pipe

and acting intoxicated was also consistent with Appellant's stated history of drug use. (R794-795)

Dr. Gonzalez concluded that Appellant was under the influence of drugs which caused him to lose control. (R782) There was a reasonable medical and psychiatric certainty that Appellant was under the influence of extreme mental and emotional disturbance at the time of the homicide. (R782-783,788,796) Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R788-789,796)

Dr. Sidney Merin testified that he administered the Minnesota Multiphasic Personality Inventory (MMPI) to Appellant an September 3, 1984, and again on July 12, 1989. (R797-801) Graphs showing the results of the tests were admitted as Defense exhibits A (1984) and B (1989). (R801-805,1168-1169) a "T-score" of 50 is average. Most reasonably well adjusted people scare within one standard deviation of 50, i.e., within the 40 to 60 range, on each phase of the MMPI. About 98% of the population scores within two standard deviations, no more than 70. (R805-807)

The first score on the left hand side of the chart is the "L scale," which measures the extent to which the person is distorting or is motivated to lie. Appellant's 1984 L scale scare wax in the normal range. (R807-808,1168) The next score, the "F scale," indicates whether the person has a pathological type personality. Appellant's 1984 score on the F scale was elevated, well above 70, indicting that he had personality problems. (R808-809,1168) The

third score, the "K factor'" is designed to find out whether the person is trying to make a good appearance. Again, Appellant's score was average, so he was not trying to fool Dr. Merin. (R810-811,1168)

The next ten scales deal with different phases of the personality. The first measures preoccupation with one's body caused by injury, illness, alcohol, or drug use. Appellant's score, just above 70, indicated a preoccupation with his body. (R811-812,1168) The second category is depression. Appellant's 1984 score of 70 showed that he was unhappy. (R811-812,1168) The third scale measures emotional lability, rapid changes in emotian. Appellant's score was near 70, indicating that he was very emotional and his emotions were easily aroused. (R811-813,1168)

Appellant's highest score in 1984 was on the fourth scale. It was significantly above 70, which indicated a person in trouble with the law, impulsive behavior, emotional immaturity, character disorders, and fundamental and pervasive personality problems. (R813-814,1168) Appellant also had a *70* on the "MF scale," which indicated deep internal questions about his masculinity and troublesome relationships with women. (R814-815,1168)

Appellant's second highest score in 1984, again well above *70*, was on the paranoid scale. Paranoia involves false beliefs, misinterpretation of reality, projecting responsibility or characteristics to others, and suspicion of others. Dr. Merin determined that Appellant was not psychotic. He had a paranoid type personality. He twisted and distorted events and misinterpreted what people said

to satisfy his inner needs. (R815-817,1168) Appellant's score on the "PT scale" was 70, indicating that he was very agitated, restless, and uncomfortable with himself. He was capable of developing phobias, unrealistic fears. He was compulsive and obsessive. (R817-818,1168)

Appellant's third highest score, again well above 70, was on the "SC scale," the schizophrenic scale. Given other evidence that a person is not psychotic, this score indicated that whatever he did would be done with an unusual, bizarre, strange twist, an unusual way of solving problems. Sometimes it could involve alcohol or drug abuse, hurting others, or breaking the law. (R818-819,1168)

Appellant's fourth highest score, also well above 70, on the "MA scale" indicated a high level of energy and activity. There was a high probability that Appellant would act upon his other personality characteristics. (R819-820,1168) Appellant's score on the "social isolate scale" was about 60. He did not like to be alone and formed impulsive attachments to women. (R820-821,1168) Finally, Appellant's score on the "McAndrews scale'' was well above 70, indicating a distinct potential for substance abuse. (R821-822,1168)

When the same tests were administered to Appellant on July 12, 1989, the results showed a dramatic change indicating gross pathology or severe disorganization of thinking. Appellant was clearly psychotic, "Absolutely crazy." (R822,1169) His 1989 profile indicated "a rather bizarre and virtually total mind

disorganization." (R823) Since the L scale and K scale were within normal limits, Appellant was not malingering or trying to "con" the doctor. The high F scale indicated pathological thinking, internal turmoil, and severe impairment of functioning. (R823,1169)

Severe elevation of the first scale indicated Appellant was having a lot of body symptoms and was experiencing strange internal feelings. (R823,1169) Appellant's level of depression, the second scale, was also severe. (R824,1169) The emotional lability scale was considerably above 70. The fourth scale, reflecting impulsivity and emotional immaturity, had not changed much. (R824) The masculinity scale dropped considerably, indicating that Appellant was thinking more realistically about his masculinity. (R824-825)

Appellant's score on the paranoia scale increased from 90 in 1984 to 102 in 1989. This showed an increase in the misinterpretation and craziness of his thinking, a symptom of cocaine use. (R825) His score on the agitation scale increased from about 70 in 1984 to 82 in 1989. Agitation is also associated with cocaine. (R825) Appellant's 1989 score on the SC scale "goes through the roof,'' indicating "strangeness, bizarreness, disorganization in his thinking, probably close to psychotic thinking." (R826) Again, intoxication would account for an exceptionally high SC scale. (R826)

Appellant's score on the manic scale was 84 in 1984 and 86 in 1989, showing he always had a high level of energy. (R826) His score an the social isolate scale was not too bad and showed that he liked to be around people. (R826) Three scales which were not

scored in **1984** indicated that in **1989** Appellant had heightened levels of anxiety and repression and a very low level of ego strength and sense of personal worth. (R826-827,1169) Appellant's 1989 score on the McAndrews scale was lower than in **1984** but still revealed a potential for substance abuse. (R827,1169)

Appellant told Dr. Merin that he consumed $7,500 worth of cocaine during the five days preceding his arrest. (R828) Appellant also told Dr. Merin that Ms. Scantling had him jailed in Bartow on an extortion charge. When she learned that he was out of jail, she called and told him their relationship must end. (R8828-**829)** He drove to her house around 4:00 a.m. on Friday and "cased the place." something told him it was a setup to kill him. In the doctor's opinion, this showed "the paranoia **was** well involved here." (R829) Appellant was driving a truck. Another vehicle ran him off **the** raad, causing him to run into a telephone pole and wrecked the truck. He went home to **get** his car, then returned to **Ms.** Scantling's house. He knocked on the door, and she let him in. He said he could tell someone **was** in the house. Such heightened suspiciousness was a characteristic of paranoia. Appellant believed and acted upon such thoughts. (R829) A man struck Appellant with a tire iron. Appellant took the tire iron and struck the man. Ms. Scantling picked up the tire iron, hit Appellant, and broke the sliding glass door to make it appear that Appellant broke in. **(R830)** Dr. Merin concluded that Appellant's version of what happened was probably distorted, but Appellant believed it was true. **(R830-831)**

The changes in Appellant's MMPI scores between 1984 and 1989 were consistent with either heavy cocaine abuse or psychosis. In the absence of other evidence of psychotic thinking, Dr. Merin concluded that the changes resulted from substance abuse. (R831-832) In Dr. Merin's opinion, Appellant was under the influence of extreme mental or emotional distress at the time of the offense. He was acting under extreme internal duress because of his emotional problems, instability, and addiction, and his obsession with Ms. Scantling and her rejection of him. (R832,848-849) Although Appellant knew the difference between right and wrong, his capacity to conform his conduct to the requirements of law was substantially impaired by the use of cocaine. (R832-833) Evidence that Appellant was under the influence of cocaine, that his condition deteriorated rapidly in the ten days before July 10, 1989, that he violated the restraining order on July 8, and that he was seen smoking crack and acting intoxicated on the afternoon of July 10 was consistent with the doctor's opinion. (R833-836) Appellant had always been angry with Ms. Scantling. They had many previous conflicts. What was different this time was that Appellant's excessive use of cocaine prevented him from controlling his anger and allowed him to act upon it. (R833,851,853-857)

Defense counsel's son, Bruce Edmund testified that he lived on a small horse farm near Fort Meade, Florida, with his wife and children. His two brothers and their families and defense counsel also had homes on the farm. (R858-860) Around December, 1988, Appellant stayed at the farm for about 30 days to dry out from his

heavy drug use. Edmund met Ms. Scantling and her son when they came to visit Appellant. (R860-861) Appellant returned to the farm in March and worked for Edmund. (R861-862) Edmund had seen Appellant "messed up" on drugs on one occasion when Appellant and his brother returned a car from Tampa. Even after sleeping for five hours, Appellant was "out of it." (R863-864) Edmund said, "I've seen a lot of drunks and I've never seen nothing like it.... [L]ike he went back into his own world." (R864)

Edrnund advised Appellant to drop his relationship with Ms. Scantling. Appellant replied that "when you've been with someone for eleven years, it's hard to let go." (R865)

Appellant developed a close relationship with Edmund's two year old son. (R866) Edmund loved Appellant as much as he loved his own brothers. (R867) Edmund did not think Appellant should receive the death penalty. He said, "Reggie might have killed, but he ain't a killer. I know it's hard to understand, but if you knew him the way 1 know him and you see him when he's dry and when he is there, he's the greatest...." (R867)

The court granted defense counsel's request to instruct the jury on four mitigating circumstances: (1) extreme mental or emotional disturbance, (2) extreme mental duress, (3) impaired capacity, and (4) any other aspect of Appellant's character or record and any other circumstance of the offense. (R869-872,890-891) The court reiterated that it would give the two aggravating circumstances requested by the State. Defense counsel renewed his objection to cold, calculated, and premeditated as an aggravating

circumstance. (R873) The court granted defense counsel's request to instruct the jury that the court must give great weight to the jury's advisory sentence. (R873)

During his penalty phase closing argument the prosecutor remarked,

> What is life imprisonment? What can one do in jail?
> Well, you can laugh. You can cry. You can read a book. You can watch TV. In short, you live to learn of the wonders that the future holds. In short, it is living. People want to live.
> If Miss Scantling had had a choice of being in prison for life or being in that photograph with a shotgun hole in her back, what choice would Melinda Scantling have made? The answer is clear. She would have chosen to live, but, you see, she didn't have that choice. You know why? Because that man, right there, decided for himself that Melinda Scantling should die. And for making that decision, for making that decision, he *too* deserves to die. (R882-883)

Defense counsel did not abject. (R883)

Following the jury's death recommendation (R900), the court directed counsel to be prepared to argue at sentencing whether the court was bound by the jury's recammendation unless the court found the jury was unreasonable and to be aware of the Supreme Court's Irizarry decision, which required the court to impose a life sentence in keeping with the jury's recommendation because of the defendant's "passionate obsession" with his ex-wife. (R903-908) The prosecutor responded, "You have to find them unreasonable and then override, Judge, but you still have the ability to override a jury's recommendation." (R906) The prosecutor urged the court to

avaid finding itself bound by the jury's recommendation and warned that the Supreme Court would reverse the sentence. **(R906-907)**

D. Sentencing

The court conducted the sentencing hearing on January 19, 19 0. (R915-954) The court denied Appellant's motion for new trial, again ruling that Dr. Merin's testimony was not admissible during the guilt phase of trial. **(R923-930,1129-1130)**

The prosecutor then argued that the Florida Supreme Court incorrectly decided the Irizarry case because it was dangerous to justify a jury life recommendation on the basis of the defendant's passionate obsession with his former wife. In this case, the prosecutor urged the court to find that the jury's death recommendation was reasonable and to sentence Appellant to death. (R930-935)

Defense counsel argued that the Tedder rule requiring courts to follow reasonable jury recommendations of life did not apply to death recommendations. He argued that this case was not cold, calculated, and premeditated because it was a killing of passion. He argued that the offense was mitigated by Appellant's emotional disturbance, his impaired capacity to conform his conduct to the law, his intoxicatian on cocaine, and his mental duress. **(R935-949)**

The court found two aggravating circumstances: (1) Appellant's prior conviction for felonies involving violence, burglary with an assault and aggravated battery, and (2) the crime was committed in a cald, calculated, premeditated manner without pretense

of moral or legal justification. (R950-951,1136) The court found three mitigating circumstances:

> 1. The capital crime for which the Defendant is to be sentenced was committed while he was high on cocaine and while he (questionably) was under the influence of extreme mental or emotional disturbance.
>
> 2. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law (questionably) was substantially impaired.
>
> 3. Any other aspect of the Defendant's character or record and any other circumstance of the offense, to-wit:
>
> > Personality change caused by a drug problem; upset and jealous caused by severed relationship with victim.

(R951,1137)

The court found that "the jury was reasonable in concluding that the aforesaid Aggravating Circumstances warranted the Death Penalty and were not outweighed by the aforesaid Mitigating Circumstances." (R951,1137) The court concluded that it was "bound to follow the jury's recommendation of death in the instant case since there is a reasonable basis for such recommendation and the Court is unable to find that no jury, comprised of reasonable persons, could have ever returned such recommendation." (R952,1137-1138) Finally, the court suggested that the Florida Supreme Court should recede from Tedder, hold that any death sentence is presumed correct and will not be reversed absent a clear abuse af discretion, and refrain from substituting its own judgment. (R952,1138)

SUMMARY OF THE ARGUMENT

I. The United States and Florida constitutions guarantee the right of the accused to present his defense through the testimony of favorable witnesses. Voluntary intoxication is recognized as a legal defense to specific intent crimes such as premeditated murder. Due process permits the State to require the accused to present evidence of intoxication to raise a reasonable doubt of his ability to form a specific intent, but it also requires the State to prove the essential element of premeditation beyond a reasonable doubt. The accused is entitled to present expert testimony regarding his intoxication.

The trial court imposed an excessive burden of proof upon Appellant when it excluded Dr. Merin's opinion that there was a reasonable doubt of Appellant's ability to form specific intent. The court also erred by excluding Dr. Merin's opinion that Appellant was intoxicated on the ground that the diagnosis was based in part on statements of Appellant's history of drug abuse. The court erred yet again by excluding the opinions of non-expert witnesses that Appellant was too intoxicated to form a specific intent. The court's evidentiary rulings violated Appellant's right to present his defense and deprived him of his right to a fair trial.

II. While being transported to the police station after his arrest, Appellant told detectives that he had been allowed to sit in the electric chair when he was in Raiford and naw he guessed he would have to sit in it for real. A person arrested for murder is

likely to express fear of punishment in the electric chair whether or not he is guilty of an offense punishable by death, so the statement was not relevant to show consciousness of guilt. Because the statement implied that Appellant had been imprisoned in Raiford and that death might be the appropriate penalty for the present offense, the prejudicial effect of the statement outweighed its probative value. The court's error in admitting the Statement violated Appellant's right to a fair trial.

III. The prosecutor violated Appellant's right to due process of law in the penalty phase of the trail by urging the jurors to compare the benefits of a life prison sentence with the death of Ms. Scantling. This court has previously reversed the death sentence in another case where the same prosecutor made the same argument. Appellant is equally entitled to resentencing despite defense counsel's failure to object to the prosecutor's misconduct.

IV. Appellant's shooting of Ms. Scantling was the passionate climax to a long-standing lovers' quarrel. This offense was not cold, calculated, and premeditated. The trial court violated the Eighth and Fourteenth Amendments by instructing the jury upon and finding a factually inapplicable aggravating circumstance.

V. Under Tedder v. State, a trial court must follow a jury recommendation of life if there is any reasonable basis for the recommendation. The trial court erroneously applied this standard to the jury's death recommendation and found that it was bound to sentence Appellant to death because there was a reasonable basis for the recommendation. The trial court violated the Eighth and

Fourteenth Amendments by failing to make an individualized sentencing decision based upon its awn independent and reasoned judgment,

VI. The **death** penalty imposed by the trial court was disproportionate to the circumstances of the offense. There were several substantial mitigating **circumstances:** (1) The homicide was **the** result of a long-standing domestic dispute. (2) Appellant had a long history of drug abuse and engaged in the extreme consumption of drugs during the days preceding the homicide. (3) Appellant was under the influence of extreme mental or emotional disturbance. **(4)** Appellant's ability to conform his conduct to the requirements of the law was substantially impaired. These mitigating circumstances greatly outweighed the only valid aggravating circumstance -- Appellant's commission of prior violent felonies involving Ms. Scantling and her friend two days before the homicide. The death penalty is also disproportionate **when** the circumstances of this case **are** compared to other **cases** involving similar circumstances in which this Court reversed the death sentence.

ISSUE I

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO PRESENT HIS DEFENSE THROUGH THE TESTIMONY OF FAVORABLE WITNESSES BY EXCLUDING TESTIMONY THAT APPELLANT WAS INTOXICATED AT THE TIME OF THE OFFENSE AND THAT THERE WAS A REASONABLE DOUBT OF HIS ABILITY TO FORM A SPECIFIC INTENT.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee the accused the right to present his defense through the testimony of favorable witnesses:

> The right to offer the testimony of witnesses, and to compel their attendance if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he had the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washinston v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019, 1023 (1967).

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, . . . the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." . . . We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard . . . . That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the [theory of the defense] when such evidence is central to the defendant's claim of innocence. In the absence of any valid

> state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible af meaningful adversarial testing."

Crane v. Kentucky, 476 U.S. 683, 690-691, 106 S.Ct. 2142, 90 L.Ed.2d 636, 645 (1986).

The basic right to present a defense through the testimony af favorable witnesses is protected by Florida courts. E.g., Morgan v. State, 453 So.2d 394, 397 (Fla. 1984); Story v. State, No. 89-00782 (Fla. 2d DCA Oct. 9, 1991) [16 F.L.W. D2653, 2654]; Gardner v. State, 530 So.2d 404, 405 (Fla. 3d DCA 1988). This fundamental constitutional right is also guaranteed by Article I, sectians 2, 9, and 16 of the Florida Constitution.

Appellant was indicted for premeditated murder. (R1054) His defense to this charge was voluntary intoxication. Intoxication has long been recognized as a valid legal defense to offenses requiring proof of a specific intent such as premeditated murder. Occhicone v. State, 570 So.2d 902, 904 n.2 (Fla. 1990), cert. denied, __U.S. __, 111 S.Ct. 2067, 114 L.Ed.2d 471 (1991); Linehan v. State, 476 So.2d 1262, 1264 (Fla. 1985); Gurganus v. State, 451 So.2d 817, 822-823 (Fla. 1984). But evidence of the consumption of alcohol or other intoxicants is not sufficient by itself to establish the defense. Florida law places the burden on the defendant to show that he was so intoxicated at the time of the offense that he could not form the specific intent to commit the offense. Robinson v. State, 520 So.2d 1, 4 (Fla. 1988); Linehan v.

State, 476 So.2d at 1264; Eberhardt v. State, 550 So.2d 102, 105 (Fla. 1st DCA 1989).

Florida courts have not recently addressed the extent of the defendant's burden of proof to establish an intoxication defense. But that burden should be no greater than the burden imposed upon defendants who pursue an insanity defense. A defendant claiming insanity is required to present sufficient evidence to raise a reasonable doubt about his sanity at the time of the offense; the burden then shifts to the State to prove sanity beyond a reasonable doubt. Hall v. State, 568 So.2d 882, 885 n.6 (Fla. 1990); Yohn v. State, 476 So.2d 123, 128 (Fla. 1985). Thus, a defendant claiming intoxication should only be required to present enough evidence to raise a reasonable doubt about his ability to form the specific intent required for the offense. The burden should then shift back to the State to prove specific intent beyond a reasonable doubt, like every other element of the offense.

This allocation of the burden of proof is founded upon basic principles of due process of law. It is permissible to require the defendant to come forward with evidence of an affirmative defense. Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). But the State must still be required to prove every essential element of the offense beyond a reasonable doubt. Id., 432 U.S. at 204, 215, 53 L.Ed.2d at 288, 295; Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Due process of law prohibits the State from shifting the burden of proof to the

defendant "'with respect to a fact which the State deems so important that it must either be proved or presumed.'' Patterson v. New York, 432 U.S. at 295, 53 L.Ed.2d at 295. Thus, due process allows the State to require the defendant to come forward with evidence af intoxication, but it does not allow the State *to* shift the burden of proof regarding the essential element of premeditation to the defendant. The State must prove premeditation beyond a reasonable doubt.

In the present case, the trial court violated Appellant's right to present his defense by excluding substantial and necessary portions of defense counsel's evidence of Appellant's intoxication. Most importantly, the court sustained the State's objections and excluded all of Dr. Merin's testimony from the guilt phase of the trial. (R593-626)

Before calling Dr. Merin, defense counsel established Appellant's consumption of large quantities of drugs, including crack cocaine, valium, and marijuana, during a period of several days preceding and including the afternoon of the homicide through the testimony of Appellant's sister, Bernadine King, and his friend, Richard Fuller. (R516-525,532-540,543,563-573,587-588) Moreover, the State had agreed before trial to stipulate that the laboratory analysis of Appellant's urine sample showed that it contained residue of cocaine, valium, and marijuana. (R658-659,1004-1007, 1103)

Having established Appellant's consumption of drugs, defense counsel was entitled to present evidence of a qualified expert's

opinion regarding the effects of the drugs upon Appellant's state of mind at the time of the offense. Gurganus v. State, 451 So.2d at 822; . t te, 497 So.2d 904, 905 (Fla. 2d DCA 1986).

Dr. Merin's qualifications as an expert psychologist were not questioned. (R589-593,797) Defense counsel proffered Dr. Merin's opinion that there was a reasonable doubt about Appellant's capacity to form a specific intent at the time of the offense as a result of his drug consumption. (R597-608) The court excluded this opinion on the ground that Dr. Merin could not say to a reasonable psychological prabability that Appellant could not form a specific intent. (R598-599,602-604,606-609)

The court's exclusion of Dr. Merin's opinion concerning Appellant's capacity to form a specific intent is analogous to this Court's prior rulings upon the admissibility of expert opinian regarding the defendant's impaired capacity when the defense could not establish legal insanity. In Chestnut v. State, 538 So.2d 820 (Fla. 1989), this Court held that evidence of an abnormal mental condition not constituting legal insanity was not admissible to prove a lack of specific intent to commit premeditated murder. But the defense rejected in Chestnut was diminished mental capacity resulting from brain damage and post-traumatic seizure disorder. This Court expressly distinguished that defense from the intoxication defense and extended continued recognition of the intoxication defense. Id., at 822-823. Similarly, the First District Court of Appeal held that Chestnut does not apply to intoxication in Wise v. State, 580 So.2d 329, 330 (Fla. 1st DCA 1991).

In Gurganus v. State, 451 So.2d at 821, this Court ruled that the testimony of defense psychologists was not relevant to an insanity defense because they could not state whether the defendant could distinguish between right and wrong as the result of his alcohol and drug consumption. However, this Court found that the defendant was entitled to use the opinions of the psychologists regarding his state of mind at the time of the offense based upon his consumption of drugs and alcohol in support of his intoxication defense.

> When specific intent is an element of the crime charged, evidence of voluntary intoxication . . . relating to the accused's ability to form a specific intent is relevant . . . . As such it is proper for an expert to testify "as to the effect of a given quantity of intoxicants" on the accused's mind when there is sufficient evidence in the record to shaw or support an inference of consumption af intoxicants.

Id., at 822-823.

Dr. Merin's opinion that there was a reasonable doubt about Appellant's capacity to form a specific intent was directly relevant to his intoxication defense. The evidence plainly met the defense burden to raise a reasonable doubt about Appellant's capacity to form a specific intent. The trial court's requirement that Dr. Merin would have to say to a reasonable psychological probability that Appellant cauld not farm specific intent placed an unconstitutionally high burden of praof of intoxication upon the defense. Because premeditation is an essential element of first degree murder, due process of law requires the State to prove such

specific intent beyond a reasonable doubt. Patterson v. New York; Mullaney v. Wilbur; In re Winship.

Second, defense counsel proffered Dr. Merin's opinion, based upon the results of the psychological tests administered in **1984** and **1989,** that Appellant was intoxicated at the time of the offense to a reasonable degree **of** psychological certainty. **(R612-616) The** prosecutor objected that an expert witness could not be called to testify that Appellant was intoxicated unless he personally observed Appellant at or about the time of the offense. The prosecutor argued that an expert opinion could not be based upon what other witnesses or the Appellant told the expert because such statements were hearsay. (R613-615,617-169) He also argued that the results of psychological tests were irrelevant under Chestnut. **(R621,623-624)** The court sustained the prosecutor's abjections and excluded Dr. Merin's testimony. **(R625-626)**

This ruling **was** plainly wrong. An **expert** in psychology is certainly qualified to give an opinion that the accused **was** intoxicated at the time of the offense. Gurganus v. State, **451 So.2d** at **822;** Burhanm v. State, **497 So.2d** at **905.** Statements concerning a patient's medical history are admissible under an exceptian to the hearsay rule when those statements are reasonably pertinent in diagnosis or treatment. **§ 90.803(4), Fla.** Stat. **(1989).** An expert's opinion based upon medically accepted methods of diagnosis cannot be excluded from evidence **because** the court disapproves of the methods used:

> Courts cannot establish accepted medical practices; they can only ensure that accepted

> methods are properly utilized. We conclude that . . . [the defendant] should **have** been permitted to introduce conclusions drawn from medically accepted techniques. **Here,** his mental health experts **were** effectively barred from using medically accepted procedures to diagnose him. If courts seek medical opinions, they cannot bar the medical profession from using accepted medical methods to reach an opinion.

Morgan v. State, **537** So.2d **973,** 976 (Fla. 1989). Thus, the trial court could not foreclose the use of psychological tests and reports of Appellant's history of drug abuse as diagnostic tools in the formation of Dr. Merin's opinion on Appellant's intoxication.

Third, the trial court excluded testimony by **Mrs.** King and Elbert Taylor that Appellant was so intoxicated on drugs that he could not form specific intent. The court ruled that a lay witness can state an opinion that someone is intoxicated but is not qualified to state an apinion about the ability to form a specific intent. (R525-531,643)

The evidence code provides that a non-expert witness may testify in the form of inference or opinion when:

> (1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact without testifying in terms of inferences or opinions and his **use** of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and
>
> (2) The opinions and inferences do not require special knowledge, skill, experience, or training.

§ 90.701, Fla. Stat. (1989).

"A lay witness may testify to physical appearance or observable intoxication. Ehrhardt, **Florida** Evidence, § 701.1, n.18 (2d

ed. 1984)." Eberhardt v. State, 550 So.2d at 105. An ordinary person is often capable of observing not only the fact that the accused was intoxicated, but also the degree to which he was intoxicated. Moreover, it is very difficult for a lay witness to describe the degree of intoxication without testifying in the form of an inference or opinion.

In fact, the trial court did not prohibit Mrs. King from testifying about the degree of Appellant's intoxication in the form of an inference or opinion. Instead, the court prohibited her from stating her opinion in terms of the ultimate issue to be decided by the jury. The court ruled that Mrs. King could testify that "he was out of his mind," but he prohibited her from saying, "in her opinion, he could not form a specific intent." (R531) Yet the evidence code expressly allows a witness to state his opinion on the ultimate issue when that opinion is otherwise admissible. § 90.703, Fla. Stat. (1989).

In Rock v. Arkansas, 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37, 48 (1987), the United States Supreme Court declared,

> Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony.

The trial court's evidentiary rulings in this case arbitrarily excluded the opinions of Dr. Merin, Mrs. King, and Mr. Taylor although their opinions were crucial to Appellant's intoxication defense. This Court has stated that "where evidence tends in any way, even indirectly, to establish a reasonable doubt of defen-

dant's guilt, it is error to deny its admission." Rivera v. State, 561 So.2d 536, 539 (Fla. 1990). Accord Story v. State, 16 F.L.W. at D2654. The court's errors in this case prevented the Appellant from establishing the necessary elements of his intoxication defense. It is patently unfair to require the accused to present evidence of his intoxication and his resulting inability to form a specific intent and then to exclude substantial and material portians of the only available evidence of the defense. [2]

In essence, the trial court's evidentiary rulings gutted Appellant's defense. This was not a mere technical violation of the law. Appellant was deprived of the benefit of constitutional rights which are fundamental to our system of justice: the right to call favorable witnesses, the right to be heard, and the right ta a fair trial on the question of his guilt or innocence.

The State cannot show that these errors were harmless beyond a reasonable doubt, see State v. Lee, 531 So.2d 133 (Fla. 1988); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), because Appellant was deprived of the most basic right of all, the right to present his defense. See Hall v. State, 568 So.2d 882, 886 (Fla. 1990)

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[2] It is noteworthy that the defense may have been able to develop more precise, scientific evidence of the degree of Appellant's intoxication if the State's laboratory had not destroyed the only available sample of Appellant's urine before complete tests were conducted. (R1090-1091) Appellant has not pursued the issues raised by the State's destruction of potentially exculpatory evidence on this appeal because trial counsel abandoned those issues without developing a sufficient evidentiary record when he told the court his motion to dismiss the indictment was moot. (R1004,1007) Appellant reserves his right to pursue issues related to the destruction of the evidence and trial counsel's abandonment of those issues, if necessary, in future proceedings for post-conviction relief.

(trial court's evidentiary rulings prevented defendant from presenting his insanity defense to the jury and could not be held harmless). The judgment and sentence must be reversed, and the case must be remanded for a new trial.

ISSUE II

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF APPELLANT'S STATEMENT CONCERNING HIS FEAR OF PUNISHMENT BECAUSE IT WAS NOT RELEVANT TO ANY MATERIAL ISSUE AND THE DANGER OF UNFAIR PREJUDICE OUTWEIGHED ITS PROBATIVE VALUE.

Detectives Stanton and Noblitt transported Appellant to the police station after his arrest. (R486-487,491,499-500) The detectives did not question Appellant about the shooting of Ms. Scantling. Noblitt and Appellant discussed the deaths of their fathers. (R488-489,500-501) Appellant also remarked that "while he was in Raiford, after Spenkelink [sic] had got it, they allowed him to sit in the electric chair. Now, he guessed he'll have to sit in it for real.'' (R489,501) Stanton did not know whether Appellant had even been in Raiford. (R490)

Defense counsel moved to suppress this statement before trial on the ground that the officers failed to give Appellant Miranda warnings. (R1066-1067) Judge Lazarra heard and denied the motion. (R971-975,1010-1027) He reserved ruling on the questions of relevancy and whether the probative value of the statements was outweighed by the danger of unfair prejudice under section 90.403, Florida Statutes (1989), for determination by Judge Graybill at trial. (R975,1020-1021) Judge Graybill initially refused to consider these questions, then reviewed a transcript of the motion to suppress hearing and ruled that the statements were admissible. (R245-249,254-255) The court overruled defense counsel's renewed objection when Detective Stanton testified. (R488-489)

The basic test for the admissibility of evidence is relevancy. Evidence which is relevant to any material issue at trial, other than the bad character or propensity of the defendant to commit crime, is generally admissible, while irrelevant evidence is not. Czubak v. State, 570 So.2d 925, 928 (Fla. 1990); Williams v. State, 110 So.2d 654 (Fla.), cert.denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); 5590.401, 90.402, 90.404, Fla. Stat. (1989).

In Sireci v. State, 399 So.2d 964 (Fla. 1981), cert.denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982), the defendant killed a used car lot owner, then confessed to his girlfriend and his brother-in-law. The trial court admitted testimony by the defendant's cellmate that the defendant said he tried to have his brother-in-law killed to prevent him from testifying, to discredit his girlfriend, and to avoid conviction. This Court ruled that evidence of a suspect's endeavors to evade a threatened prosecution is admissible when it is relevant to show the defendant's consciousness of guilt. 399 So.2d at 968.

This case is different from Sireci because the State's evidence of Appellant's statement to the detectives was not probative of Appellant's consciousness of guilt. See Keller v. State, 586 So.2d 1258, 1261 (Fla. 5th DCA 1991) (testimony concerning attempt to influence witness was too speculative and vague to be probative of consciousness of guilt). The statement showed only that Appellant was apprehensive about the possibility of receiving the death penalty if he were convicted of the murder for which he had just been arrested. An arrest for murder is likely to provoke fear of

punishment in both the guilty and the innocent alike. In fact, it might cause an innocent man to be even more fearful than a guilty one.

In this case, there was no dispute over the fact that Appellant shot and killed Ms. Scantling. The principal issue during the guilt phase of trial was whether Appellant premeditated the murder or was too intoxicated on drugs to be able to form a specific intent. Appellant's statement to the detectives was not probative of premeditation or intoxication. There is no basis in the record to presume that Appellant knew that capital punishment is only available for first-degree premeditated or felony murder nor that intoxication is a defense. His statement showed only his fear of execution and not that he believed himself guilty of first-degree murder.

Even if Appellant's statement was somehow probative of his consciousness of guilt, section 90.403, Florida Statutes (1989), proscribes the admission of relevant evidence when its probative value is outweighed by the danger of unfair prejudice. See Czubak v. State, 570 So.2d at 929 (limited probative value of photographs outweighed by their shocking and inflammatory nature); Hoffert v. State, 559 So.2d 1246, 1249 (Fla. 4th DCA), rev.denied, 570 So.2d 1306 (Fla. 1990) (danger of unfair prejudice outweighed probative value of autopsy photograph). The State's evidence of Appellant's statement was extremely prejudicial because it implied that Appellant had been in prison at Raiford far a prior offense. No such

prior offense was ever proved or shown to be relevant to any material issue at trial. See Czubak v. State, 570 So.2d at 928 (evidence that murder defendant was an escaped convict was not relevant to any material issue); Jackson v, state, 451 So.2d 458, 461 (Fla. 1984) (evidence that defendant painted gun at witness and boasted of being a "thoroughbred killer" was impermissible); Drake v. State, 441 So.2d 1079, 1082 (Fla. 1983) (evidence that defendant was on parole was not relevant to murder charge).

The statement was also prejudicial because if referred to the execution of another man, Spinkellink, for a completely separate and irrelevant offense. See Spinkellink v. State, 313 So.2d 666 (Fla. 1975) (death sentence for murder of hitchhiker in Tallahassee affirmed). In Dorsey v. State, 402 So.2d 1178, 1182 (Fla. 1987), this Court held that evidence of a murder allegedly committed by other persons and not charged or proven against the racketeering defendants was irrelevant, and its admission was reversible error.

The statement was rendered even more prejudicial because it implied that Appellant believed the death penalty would be appropriate punishment for the offense. Again, there is no basis in the record to presume that Appellant knew anything about capital sentencing law and the requisite consideration and weighing of aggravating and mitigating circumstances. The discretion of the jury to recommend and of the trial court to impose sentence in a capital case must be guided and channeled to prevent arbitrary and capricious application of the death penalty. Maynard v. Cartwrisht, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Godfrey v.

Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). The sentencing process should not be contaminated by the unguided and unchanneled consideration of Appellant's fear of punishment.

The erroneous admission of irrelevant collateral crime evidence is presumed to be harmful error because of the danger that the jury will take evidence of bad character or propensity to commit crime as evidence of guilt of the crime charged. Czubak v. State, 570 So.2d at 928; Castro v. State, 547 So.2d 111, 115 (Fla. 1989); Peek v. State, 488 So.2d 52, 56 (Fla. 1986). In this case, the collateral crime evidence in combination with the evidence of Appellant's fear of execution contained in Appellant's statement was harmful not only during the guilt phase of trial as in Czubak and Peek, it may very well have carried over and improperly affected the jury's recammendation of death as in Castro v. State, 547 So.2d at 116.

The improper admission of the evidence of Appellant's irrelevant and highly prejudicial statement cannot be deemed harmless unless the State can show beyond a reasonable doubt that there is no possibility that the evidence affected the verdict. State v. Lee, 531 So.2d 133, 136 (Fla. 1988); State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986). The erroneous admission of evidence of collateral crimes and Appellant's fear of punishment in this case was not harmless because there is a substantial likelihood that it influenced the jury's rejection of Appellant's intoxication defense during the guilt phase of trial and mitigating evidence during the penalty phase of trial (see Issue VI, infra). The conviction and

sentence must be reversed, and the case must be remanded for a new trial.

ISSUE III

THE PROSECUTOR VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW BY IMPROPERLY URGING THE JURORS *TO* CONSIDER MATTERS OUTSIDE THE SCOPE OF THEIR DELIBERATIONS IN THE PENALTY PHASE OF THE TRIAL.

It is well established that counsel has the duty to refrain from inflammatory and abusive argument. Stewart v. State, 51 So.2d 494 (Fla. 1951). Prosecutors in particular have a duty to seek justice in a fair trial:

> Under our system of jurisprudence, prosecuting officers are clothed with quasi judicial powers and it is consonant with the oath they take to conduct a fair and impartial trial. The trial of one charged with crime is the last place to parade prejudicial emotions or exhibit punitive or vindicative exhibitions of temperament.

Id., at 495.

More recently, this Court ruled:

> When comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument.

Garron v. State, 528 So.2d 353, 359 (Fla. 1988). Moreover, the Court declared, "Such violations of the prosecutor's duty to seek justice and not merely 'win' a death recommendation cannot be condoned by this Court." Id.

Unfortunately, the prosecutor in the present case failed to head this Court's admonitions about his duty to seek justice in a fair trial. Instead, he urged the jury to consider the compare the benefits of a life prison sentence with the death of Ms. Scantling:

> Now, Mr. Edmund may get up here and tell you that life imprisonment would be sufficient punishment for Mr. White. He's going to go to jail for the rest of his life. That life imprisonment is a living hell. It's a torture. All right, I'm not saying I would want to spend one day in jail.
>
> Don't get me wrong, but what is life imprisonment? What is life imprisonment? What can one do in jail?
>
> Well, you can laugh. You can cry. You can read a book. You can watch TV. In short, you live to learn of the wonders that the future holds. In short, it is living. People want to live.
>
> If Miss Scantling had had a choice of being in prison for life or being in that photograph with a shotgun hole in her back, what choice would Melinda Scantling have made? The answer is clear. She would have chosen *to* live, but, yau see, she didn't have that choice. You know why? **Because** that man, right **there**, decided for himself that Melinda Scantling should die. And for making that decision, for making that decision, he too deserves to die.

(R882-883)

This Court has condemned the same argument as prosecutorial misconduct in two other **cases** from Hillsborough County, Taylor v. State, 583 So.2d **323**, 329-330 **(Fla. 1991)**; and Jackson v. State, 522 So.2d 802, 808-809 (Fla.), cert.denied, **488** U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 153 (1988).[3] In both cases this Court found the argument to be "improper because it urged consideration of factors outside the scope of the jury's deliberations." 583 **So.2d** at 329, 522 So.2d at 809. Moreover, in Taylor this Court chastised the

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[3] Counsel for Appellant is aware of two other pending appeals from Hillsborough County in which this issue has been raised by the appellants in their initial briefs. Michael Tyrone Crump v. State, Case No. 74,230, and George M. Hodses v. **State**, Case No. 74,671. This Court rejected Hodges' claim for relief in an opinion, not yet final, issued January 23, 1992.

same prosecutor, Assistant State Attorney Michael Benito, for misleading the trial court about the propriety of the remarks after Jackson was decided. 583 So.2d 330. In Taylor this Caurt found the misconduct so egregious that it reversed the death sentence and remanded for a new penalty phase trial before a new jury. Id.

Appellant concedes that defense counsel's failure to object to the prosecutor's improper argument would ordinarily foreclose appellate review. Daughtery v. State, 533 So.2d 287, 289 (Fla.), cert.denied, 488 U.S. 959, 109 S.Ct. 402, 102 L.Ed.2d 390 (1988). However, Florida courts "have long recognized that improper remarks to the jury may in some instances be so prejudicial that neither rebuke nor retraction will destroy their influence, and a new trial should be granted despite the absence af an objection below...." Robinson v. State, 520 So.2d 1, 7 (Fla. 1988); Pait v. State, 112 So.2d 380, 385 (Fla. 1959).

Not only were Mr. Benito's remarks extremely prejudicial within the context of an individual case such as Taylor or the present case, but he had deliberately engaged in a continuing course of misconduct in a series of capital trials. Under these circumstances, the individual defendants' entitlement to relief should not depend upon whether defense counsel in each case recognized the need to object to the improper remarks.

Both the Florida and the United States Constitutions provide for due process of law and equal protection of the law. U.S. Const. amend. XIV; Art. I, §§2 & 9, Fla.Const. Mr. Benito's improper conduct violated Appellant's right to due process of law

just as certainly as it violated Taylor's right to due process. Appellant is equally entitled to the relief granted Taylor.

Moreover, the prosecutor's improper remarks cannot be deemed harmless. As argued under Issue V, infra, the State failed to prove beyond a reasonable doubt that the homicide was cold, calculated, and premeditated. As argued under Issue VII, infra, there was only one valid aggravating factor, conviction for prior violent felonies (R1136), while there were several valid mitigating factors, mental and emotional disturbance, impaired capacity, drug abuse, and impassioned domestic relationship. (R1137) Under these circumstances, there is a substantial likelihood that the prosecutor's improper argument affected the jury's decision to recommend the death penalty (R1128), so the violation of Appellant's right to a fair trial was not harmless. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The death sentence must be reversed, and the case must be remanded for a new penalty proceeding before a new jury. Taylor v. State, 583 So.2d at 329-330.

ISSUE IV

THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BY INSTRUCTING THE JURY UPON AND FINDING THIS OFFENSE TO BE COLD, CALCULATED, AND PREMEDITATED.

The trial court granted the State's request to instruct the jury on the cold, calculated, and premeditated aggravating circumstance provided by section 921.141(5)(i), Florida Statutes (1988 Supp.), over defense counsel's objection that the circumstance had not been proven and did not apply to the facts of this case. (R756-758,873) The court instructed the jury on this circumstance (R895), and found cold, calculated, and premeditated as an aggravating factor supporting the death sentence. (R950-951,1136)

The Eighth and Faurteenth Amendments prohibit the arbitrary and capricious application of a standardless capital punishment statute. Maynard v. Cartwright, 486 U.S. 356, 362, 108 S.Ct. 1853, 100 L.Ed.2d 372, 380 (1988); Furman V. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). To avoid a challenge for vagueness, a statutory aggravating circumstance must satisfy the fundamental constitutional requirement of channeling and limiting the sentencer's discretion in imposing the death penalty. Maynard v. Cartwright, 486 U.S. at 361-362, 100 L.Ed.2d at 380. When the sentencer is the jury, the statutory aggravating circumstance must inform the jury of what it must find to impose the death penalty. Id. When the trial judge is the sentencer, the circumstance must be narrowly defined by the state supreme court and the appellate

court must review the evidence to determine whether it supports the trial judge's finding. Walton v. Arizona, 497 U.S. __, 100 S.Ct. ___, 111 L.Ed.2d 511, 528 (1990).

This Court has avoided Eighth Amendment vagueness challenges to the cold, calculated, and premeditated aggravating circumstance provided by section 921.141(5)(i) by applying and enforcing a limiting construction of the Circumstance. The cold, calculated, and premeditated factor requires proof af heightened premeditation. Reed v. State, 560 So.2d 203, 207 (Fla. 1990); Garron v. State, 528 So.2d 353, 360-361 (Fla. 1988). It also requires proof of a careful plan or prearranged design to kill. Rivera v. State, 545 So.2d 864, 865 (Fla. 1989); Schafer v. State, 537 So.2d 988, 991 (Fla. 1989).

There are procedural safeguards to protect against the overbroad application of aggravating circumstances. The trial court is permitted to instruct the jury on an aggravating circumstance only if it is relevant and supported by the evidence. See Byrd v. State, 481 So.2d 468, 473 (Fla. 1985), cert.denied, 476 U.S. 1153, 106 S.Ct. 2261, 90 L.Ed.2d 705 (1986); Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985). Moreover, the circumstance must be proven beyond a reasonable doubt and cannot be based upon speculation. Hamilton v. State, 547 So.2d 630, 633-634 (Fla. 1989).

The prosecutor's penalty phase closing argument that this offense was cold, calculated, and premeditated (R879-880) was contradicted by his own guilt phase argument that Appellant was

"consumed by Melinda Scantling."' (R723) More importantly, the evidence presented during both phases of the trial plainly established that the offense was a crime of passion resulting from a long-standing domestic dispute between Appellant and Ms. Scantling which erupted into violence because of Appellant's cocaine abuse, mental and emotional disturbance, and impaired capacity to conform his conduct to the law. (R355-358,364-378,386-387,516-552,448-588,631-652,658-659,778-796,811-857) See Farinas v. State, 569 So.2d 425 (Fla. 1990); Thompson v. State, 565 So.2d 1311 (Fla. 1990).

The facts in Farinas were similar to the facts in the present case. The defendant and the victim lived together for two years and had a child. The victim moved out. The defendant followed her when she drove her father to work, then ran her car off the road. He approached the victim and expressed his anger resulting from a report to the police that he had been harassing her. The defendant kidnapped the victim. when she jumped from his car and ran, he shot her in the back, paralyzing her. He unjammed his gun three times, then killed her by firing two shots into the back of her head. This Court found that the State failed to prove beyond a reasonable doubt that the crime was cold, calculated, and premeditated because the facts did not "evidence a heightened premeditation bearing the indicia of a plan or prearranged design." 569 So.2d at 431.

Moreover, this Court found that the death sentence in Farinas was disproportionate because the defendant was under the influence

of extreme mental or emotional disturbance and the offense was the result of a heated, domestic confrontation. Id. Just as Appellant was obsessed by Ms. Scantling's rejection after an eleven year relationship, Farinas was obsessed with the idea of having his victim return to live with him and was intensely jealous because he suspected she had a relationship with another man. Id.

Similarly, this Court found that the State failed to prove the murder in Thompson was cold, calculated, and premeditated and vacated the death sentence. In Thompson, the defendant woke up thirty minutes before he shot an stabbed his girlfriend to death. This Court found that the evidence did not prove the defendant contemplated the killing for thirty minutes. Instead, the evidence indicated that the defendant was highly emotional, so it was equally likely that the defendant killed the victim while he was in a "deranged fit of rage." 565 So.2d at 1318.

In the present case, Appellant was enraged with Ms. Scantling because she terminated their eleven year relationship (R779,865), she obtained a restraining order to keep him away (R355-358,1159-1160), and she had him arrested for burglary following an extremely violent confrontation when he found Robert Curry in her apartment in the early morning hours on Saturday (R364-372,780-787-788,828-833) Appellant's statement to Michael Clethen in the jail that he would kill the "ho" if he made bond (R385-387) was evidence of his passionate obsession and rage rather than proof of cold calculation. While the State's evidence that Appellant obtained his shotgun from the pawnshop at 4:30 p.m. on Monday (R439-445), drove

to Ms. Scantling's ork plac at 5 00 p.m., shot her twice, then drove away (R277-285,320-325,334-339) was consistent with premeditation, the heightened premeditation and cold calculation necessary for the aggravating circumstance was negated by the defense evidence of Appellant's heavy cocaine abuse and mental derangement from the time he got out of jail on Sunday until Monday afternoon just before he drove to the pawn shop. (R524-525,536-540,543,552, 568-573,587-588,631,637,778, 782,788-796,822,832-836,851-857)

Under these circumstances, the trial court erred by instructing the jury upon and finding the cold, calculated, and premeditated aggravating circumstance. The evidence failed to satisfy this Court's limiting construction of the circumstance requiring proof beyond a reasonable doubt of heightened premeditation and a careful plan or prearranged design to kill. The trial court's application af this aggravating circumstance to the facts of this case rendered this Circumstance vague and overbroad in violation of the Eighth and Fourteenth Amendments.

As further argued under Issue VI, infra, the death sentence recommended by the jury and imposed by the court was disproportionate to the circumstances of the offense. The death sentence should be vacated, and the case remanded for a life sentence as in Farinas and Thompson. In the alternative, the death sentence should be reversed, and the case remanded for a new penalty proceeding before a new jury.

ISSUE V

THE TRIAL COURT GAVE UNDUE WEIGHT TO THE JURY'S RECOMMENDATION OF DEATH AND FAILED TO MAKE AN INDEPENDENT JUDGMENT OF WHETHER THE DEATH PENALTY SHOULD BE IMPOSED.

The jury recommended the death penalty. (R900,1128) The trial court directed counsel to prepare sentencing arguments on the question of whether the court was bound by the jury's recommendation unless the court found the jury was unreasonable. The court directed counsel to consider this Court's decision in Irizarry V. State, 496 So.2d 822 (Fla. 1986), which required the court to impose a life sentence as recommended by the jury because of the defendant's "passionate obsession" with his former wife. (903-908) The prosecutor told the court, "You have to find them unreasonable and then override, Judge, but you still have the ability to override a jury's recommendation." (R906) The prosecutor urged the caurt to avoid finding itself bound by the jury's recommendation and warned that this Court would reverse the sentence if such a finding were made. (R906-907)

At the sentencing hearing, the prosecutor argued that Irizarry was wrongly decided because it was dangerous to justify a jury life recommendation on the basis of the defendant's passionate obsession with his former wife. The prosecutor argued that the court should find the jury's death recommendation in this case was reasonable and impose the death penalty. (R930-935)

Defense counsel argued that the rule of Tedder V. State, 322 So.2d 908 (Fla. 1975), which requires the court to follow reason-

able jury recommendations of life, does not apply to death recommendations. He urged the court to sentence Appellant to life on the basis of the mitigating circumstances in this case. [4] (R935-949)

The court sentenced Appellant to death. (R950-954,1132-1138) The court's sentencing order quoted the Tedder rule and expressly applied that rule to the jury's death recommendation: "The court is therefore bound to fallow the jury's recommendation of death in the instant case since there is a reasonable basis for such recommendation and the court is unable to find that no jury, comprised of reasonable persons, could have ever returned such recommendation." (R1137-1138) The court further suggested that this Court should recede from Tedder and hold that "any sentence of death, regardless of the jury's recommendation, is clothed with the presumption af correctness and will not be reversed absent a clear abuse of discretion on the part of the sentencing judge...." (R1138) Finally, the court suggested that this Court should "[r]efrain from substituting its own judgment...." (R1138)

The sentencing court is required to make an individualized sentencing decision based upon its independent and reasoned judgment. Ross v. State, 386 So.2d 1191, 1197 (Fla. 1980). In Ross, as in the present case, the trial court applied the Tedder standard to a jury recommendation of death, found the recommendation to be reasonable, and sentenced the defendant to death. This

[4] Appellant's argument that substantial mitigating circumstances render the death penalty disproportionate in this case is presented under Issue VI, infra.

Court vacated the death sentence and remanded the case for reconsideration of the sentence because "the trial court gave undue weight to the jury's recommendation of death and did not make an independent judgment of whether the death penalty should be imposed." This Court further explained why the trial court erred by applying the Tedder standard to a death recommendation:

> Although this Court in Tedder v. State, [322 So.2d 980 (Fla. 1975)], and Thompson v. State, [328 So.2d 1 (Fla. 1976)], stated that the jury recommendation under our trifurcated death penalty statute should be given great weight and serious consideration, this does not mean that if the jury recommends the death penalty, the trial court must impose the death penalty. The trial court must still exercise its reasoned judgment in deciding whether the death penalty should be imposed.

386 So.2d at 1197.

The trial court's preoccupation with the Tedder and Irizarry decisions and its recommendations that this Court should recede from Tedder, accord a presumption of correctness to death sentences, and refrain from substituting its own judgment plainly demonstrate that the trial court failed to comprehend the proper roles of the jury, sentencing judge, and this Court under Florida's capital sentencing law. The United States Supreme Court explained those roles when it approved the application of the Tedder standard in life recommendation cases:

> Regardless of the jury's recommendation, the trial judge is required to conduct an independent review of the evidence and to make his own findings regarding aggravating and mitigating circumstances. If the judge imposes a sentence of death, he must set forth in writing the findings on which the sentence is based.... The Florida Supreme Court must

ISSUE VI

THE DEATH SENTENCE IMPOSED BY THE TRIAL COURT WAS DISPROPORTIONATE TO THE CIRCUMSTANCES OF THE OFFENSE AND VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Eighth and Fourteenth Amendments require that capital punishment be imposed fairly, and with reasonable consistency, or not at all. Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1, 9 (1982); U.S. Const. amends. VIII and XIV. This Court's independent appellate review of death sentences is crucial to ensure that the death penalty is not imposed arbitrarily or irrationally. Parker v. Dugger, 408 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 812, 826 (1991). This requires an individualized determination of the appropriate sentence on the basis of the character of the defendant and the circumstances of the offense. Id.

This Court has consistently followed a policy of reviewing death sentences to determine whether they awe proportionate to the circumstances of the offense and to the sentences imposed in other capital cases. "A high degree of certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty is administered evenhandedly." Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988). The death penalty must be reserved for only the least mitigated and most aggravated murders. Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert.denied sub nom., Hunter v. Florida, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

This case involves several substantial mitigating circumstances. First, the homicide was the result of a long-standing domestic dispute between Appellant and his girlfriend Melinda Scantling. Dr. Arturo Gonzalez, a forensic and clinical psychiatrist with 40 years of experience (R774-776), testified that Appellant felt betrayed by Ms. Scantling. They had been involved in a relationship for eleven years. Appellant felt he had been especially kind to her. He mortgaged his house and gave her half of the proceeds for her living expenses while he was in jail. He bought her a new car, let her live in his home, and helped her with her son. After Ms. Scantling began working, people told her Appellant was a gangster, so she rejected him. Appellant's obsession with her rejection caused him to use drugs. (R779,786)

Dr. Sidney Merin, a board certified clinical psychologist and neuropsycholagist with 30 years of experience (R588-590), testified that Appellant told him Ms. Scantling had him jailed in Bartow on an extortion charge. When she learned he was out of jail, she called and told him their relationship must end. (R828-829) Appellant drove to her house around 4:00 a.m. on Friday and "cased the place." (R829) Another vehicle ran Appellant's truck off the road, causing him to crash into a telephone pole. He went home for his car, then returned to Ms. Scantling's house. Appellant claimed he knacked on the door, and she let him in. He said he could tell someone was in the house. (R829) A man struck Appellant with a tire iron. Appellant took the tire iron and struck the man. Ms. Scantling picked up the tire iron, hit Appellant with it, and broke

the sliding glass door to make it appear that Appellant broke in. (R830)

In fact, Appellant's version of these events two days before the homicide was highly distorted. On March 1, 1989, Ms. Scantling had obtained a restraining order, signed by Appellant, excluding him from her residence for one year. (R355-359,1159-1160) Robert Curry testified that he was in Ms. Scantling's apartment in the early morning hours on Saturday, July 8, when Appellant broke into the apartment and struck Curry an the arm and head with a crowbar. (R364-368) Curry forced Appellant to drop the crowbar. Ms. Scantling struck Appellant's leg with the crowbar and said, "I'm tired of you messin' with me and Des." (R370) Curry subdued Appellant, and Ms. Scantling called the Sheriff's Department. (R370-372)

Dr. Merin testified that Appellant's version of what happened in Ms. Scantling's apartment was distorted, but Appellant believed it was true. (R830-831) Appellant's distorted version of the facts displayed the heightened suspiciousness characteristic of paranoia. Appellant believed and acted upon such thoughts. (R829) Appellant was obsessed with Ms. Scantling and her rejection of him. (R849) Appellant had always been angry with Ms. Scantling. They had many previous conflicts. Appellant's excessive use of cocaine during the days preceding the homicide prevented him from controlling his anger and allowed him to act upon it. (R833,851-857)

Bruce Edmund testified that he had advised Appellant to drop his relationship with Ms. Scantling. But Appellant responded,

"when you've been with someone for eleven years, it's hard to let go." (R865)

The second mitigating circumstance established by the evidence was Appellant's long-standing history of drug abuse and his particularly extreme cansumption of drugs during the days preceding the homicide. Appellant's sister, Bernadine King, testified that she had sixteen years of experience handling disability claims for the Social Security Administration. She also counseled heroin addicts for the United Methodist Ministries. (R514-515,520) She said Appellant began using marijuana when he was in college before she moved from Tampa in 1973. When she returned in 1981, he had progressed to harder drugs. (R515-516)

In 1989, there was a profound change in Appellant's personality. As described by Mrs. King, by July 4, "We were dealing with an animal.'' (R516,519-521) Mrs. King sought help for Appellant by contacting defense counsel, a judge, a probation and parole counselor, and a mental health clinic. No one could help because Appellant had not done anything violent. (R520-521,549-550)

Appellant's behavior was "very bizarre." He "couldn't stay still, just going and coming." (R519) Normally, he was very articulate. Now, his speech was slurred; he spoke like he had cotton in his mouth. (R521,532,554) Saliva came from his mouth, his nose was running, and his eyes were red and sunken. (R522,532, 554) His hands were shaking and burned from smoking drugs. (R532-533) He lost 25 pounds in a few days. (R522) Normally, Appellant was very meticulous about his clothes and food. Now, his clothes

and fingernails were very dirty. He sat on the kitchen floor eating from a can with his hands. (R522-523)

In the early morning hours of Monday, July 10, 1989, Appellant called Mrs. King and said he needed help. He said, "I need to talk to daddy. Please tell me where daddy is. Where is daddy? I got to get *to* daddy. I need *to* tell him something. I've got to *go* with him." (R524-525) Their father had died in 1984. (R525) In Mrs. King's opinion, Appellant was *so* intoxicated when he made this call that "he was blown out of his mind." (R536)

Appellant had come by her house earlier, around 5:00 p.m. on Sunday. He was dirty, his teeth had not been brushed, his clothes were blood stained and smelled bad. (R539) His speech was slurred, his nose was running, and he was shaking. (R540) In her opinion he was intoxicated. (R540,543)

Mrs. King summarized the effects of Appellant's drug abuse:

> Reggie hasn't always been crazy. He's a very intelligent person. But when a person is taking drugs, they aren't intelligent. And whatever he got ahold of, made him as crazy as anybody I've seen and in sixteen years of going to mental hospitals I've seen a lot of crazy people. (R552)

Richard Fuller testified that every time he had seen Appellant during the past year, Appellant was using drugs. (R558-559) They smoked cocaine and marijuana together. Appellant also taok valiums. (R559)

Based upon Fuller's observations, alcohol and marijuana had about the same effect on Appellant. "He was just a normal laughing type of guy." (R562) When Appellant snorted or smoked cocaine, he

sometimes got so high he could hardly talk. (R563) Appellant became a totally different person when he smaked crack cocaine. He would not bathe or eat. He drove araund like a mad man. Fuller couldn't talk to him. (R563)

Fuller first saw Appellant use crack in 1988. (R563) He continued to see Appellant using crack from time to time. Appellant's actions and attitudes became progressively worse the more he smoked. (R565)

In early July, 1989, Fuller saw Appellant "everywhere crack was." (R565) Appellant was "hitting the stem" every time Fuller saw him. He drove around smoking crack "like he was smoking cigarettes." (R566) Fuller observed that when Appellant smoked crack,

> He would lose his speech. He would drive like a fool. You couldn't talk to him. He was just a total different person. And like, you know, I used to try to talk to him, but he wasn't listening to nobody. His understanding was zero. (R566)

Fuller also observed that Appellant would take three or faur valiums when he smoked crack. Sometimes he took twenty valiums a day. He smoked crack and took valiums constantly. (R566-567) On the street, people say if you take a hit, you can't quit. (R567) Appellant couldn't quit. (R568)

Fuller saw Appellant sometime between 3:30 and 4:30 p.m. (R568-569) Appellant had just purchased a pack of rocks and was "packing a stem, getting high.'" (R569,571-572) When Fuller questioned Appellant about sitting in front of the barber shop with Mr. Coe looking out the window seeing him get high, Appellant answered, "Fuck Mr. Cae and everybody else." (R571) Appellant's

eyes were bulging out. His speech was slurred. (R571) He backed his car up about thirty yards, turned, and drove away "like a bat out of hell." (R572-57)]

In Fuller's opinion, Appellant was high an crack cocaine. Fuller said there is no comparison between alcohol intoxication and crack intoxication. Crack is "a whole new thing" on a different level than alcohol. (R573)

The high from one "hit" of crack normally lasts about five minutes. (R585) But with the amount of crack Appellant had on July 10, Fuller thought he could have stayed high for about five hours. (R587-588)

Elbert Taylor testified that Appellant came to his house around 11:00 a.m. on Sunday, July 9, 1989. He was wearing bloady clothing and said he had just gotten out of jail. (R631-632) Taylor persuaded Appellant to let him take him to his uncle's house and his mother's house. (R632-633) But they stopped along the way, and Appellant left Taylor's presence for awhile. When Appellant returned, he was high. (R633-634) His speech was so slurred Taylor could not understand him, and his mood was altogether different. (R634)

At Appellant's uncle's house, Taylor urged him to take a bath and change clothes. (R634-635) Taylor remained in the living room until he noticed water flowing out into the hall. Ho noticed an odor of crack cocaine near the bathroom. Taylor turned off the water and took Appellant to his mother's house. (R635-636)

Between 1:00 and 2:00 p.m. on Monday, July 10, Taylor returned to take Appellant to his probation officer. (R636-637) He found Appellant sitting in a car smoking a drug pipe. Appellant could barely talk and refused to go to the probation office. (R637)

Taylor said Appellant was normally very clean, well groomed, and well dressed. But when he was high he failed to bathe, change clothes, or comb his hair. (R638) Appellant went an drug binges which lasted three to five days. "He would just go beyond the point of no return." (R639) When Appellant was using crack, he was constantly leaving the house, then returning. He staggered, stammered, and drooled. (R640) When Taylor talked to Appellant about stopping his drug use, Appellant said he could do it on his awn, or that Taylor did not understand. (R640-641) Taylor believed Appellant was addicted because he displayed the same symptoms as the crack and cocaine addicts Taylor counseled. (R642) There is a substantial difference between alcohol intoxication and crack cocaine intoxication; it is like the difference between a bazooka and an atomic bomb. (R642)

Taylor had seen Appellant on "different highs." Sometimes he was almost passed out, sometimes he could carry on a conversation, and sametimes he could barely walk. (R647) Crack could cause Appellant to immediately lose his ability to make decisions. (R650-651) "If you're doing crack, you can get high in a matter of seconds." (R652) Although the high can burn off in about five minutes, Appellant usually remained high a long time. (R651-652)

The parties stipulated that Roach Laboratories analyzed a sample of Appellant's urine taken on July 11, 1989, and found that the sample contained residue of cocaine, Valium, and marijuana. **(R658-659,1103)**

Dr. Gonzalez testified that he examined Appellant in the jail on July 13. Appellant displayed withdrawal symptoms. The drug screen test showed traces of cocaine, marijuana, and Valium. Appellant said in the six days before the crime he consumed five ounces of cocaine, heroin, 40 valiums, and 55 to 60 "reefers." **(R777-778)** On July 14, Appellant was improving, but was still suffering withdrawal symptoms. His condition continued to improve with successive visits. **(R780-781)**

Dr. Ganzalez testified that Appellant's claims of heavy drug consumptian were verified by the tests. **(R782-789)** Appellant was under the influence of heavy drugs "because you don't test positive the way he did test in this test 48 hours or 72 hours later." (R789) When the prosecutor questioned whether Appellant may have lied, the doctor answered, "Yes, to a point, but the test is not a lie; the test is a fact." **(R789)**

Appellant's withdrawal symptoms were consistent with the six-day period of drug use reported by Appellant. **(R792-793)** Evidence that Appellant wrecked his car thirty minutes after the offense was consistent with motor impairment. (R793) Appellant's method of disposing of the shotgun and shells showed he was not thinking clearly. **(R794)** The testimony of witnesses who saw Appellant smoking a crack pipe and acting intoxicated was consistent with

Appellant's stated history of drug use. (R794-795) Dr. Gonzalez concluded that Appellant was under the influence of drugs which caused him to lose control. (R782)

Appellant told Dr. Merin that he consumed $7,500 worth of cocaine during the five days preceding his arrest. (R828) Changes in Appellant's MMPI scores between 1984 and 1989 were consistent with either heavy cocaine abuse or psychosis. In the absence of other evidence of psychotic thinking, Dr. Merin concluded that the changes resulted from substance abuse. (R831-832) Evidence that Appellant was under the influence of cocaine, that his condition deteriorated rapidly in the ten days before July 10, 1989, that he violated the restraining order on July 8, and that he was seen smoking crack and acting intoxicated an the afternoon of July 10 was consistent with the doctor's opinion. (R833-836) The excessive use of cocaine prevented Appellant from controlling his anger towards Ms. Scantling and allowed him to act upon it. (R833,851-857)

Bruce Edmund testified that Appellant stayed at the Edmund family horse farm in Ft. Meade for about 30 days in December, 1988, to dry out from his heavy drug use. (R858-861) Edmund saw Appellant "messed up" on drugs on one occasion when Appellant and his brother returned a car from Tampa. Even after sleeping five hours, Appellant was "out of it." (R863-864) Edmund said, "I've seen a lot of drunks and I've never seen nothing like it.... [L]ike he went back into his own world." (R864)

The third mitigating circumstance was that Appellant was under the influence of extreme mental or emotional disturbance, as provided by section 921.141(6)(b), Florida Statutes (1988 Supp.). Both Dr. Gonzalez and Dr. Merin testified that Appellant was suffering from an extreme mental and emotional disturbance at the time of the homicide. (R782-783,788,796,832-8848-849)

Dr. Merin testified that the MMPI test results in 1989 showed a dramatic change from the 1984 test results. This change indicated gross pathology or severe disorganization af thinking. In 1989, Appellant was clearly psychotic, "absolutely crazy." (R822) His 1989 profile indicated "a rather bizarre and virtually total mind disorganization." (R823) Since the L scale and K scale scores were within normal limits, Appellant was not malingering or trying to "con" the doctor. The high F scale indicated pathological thinking, internal turmoil, and severe impairment of functioning. (R832,1169)

Severe elevation of the first MMPI scale indicated Appellant was having a lot of body symptoms and was experiencing strange internal feelings. (R823,1169) The second scale showed that Appellant's level of depression was severe. (R824,1169) The emotional lability scale was very high. The fourth scale had not changed much from 1984, but still showed impulsivity and emotional immaturity. (R824,1169)

Appellant's score on the paranoia scale increased fram 90 in 1984 to 102 in 1989. This showed an increase in the misinterpretation and craziness of Appellant's thinking, a symptom of cocaine

use. (R825,1169) Appellant's score an the SC scale in 1989 "goes through the roof," indicating "strangeness, bizarreness, disorganization in his thinking, probably close to psychotic thinking."' (R826,1169) Appellant's score of 86 on the manic scale showed he had a high level of energy. (R826,1169)

Three additional scales on the 1989 test shawed that Appellant had heightened levels of anxiety and repression and a very low level of ego strength and sense of personal worth. (R826-827,1169) Appellant's 1989 score on the McAndrews scale was lawer than in 1984, but it still revealed a potential for substance abuse. (R827,1169)

The fourth mitigating circumstance established by the evidence was Appellant's impaired capacity to conform his conduct to the requirements of the law, as provided by section 921.141(6)(f), Florida Statutes (1988 Supp.) Both Dr. Gonzalez and Dr. Merin concluded from their examinations that Appellant's capacity was substantially impaired at the time of the offense. (R788-789,796, 832-833)

This Court has repeatedly found circumstances similar to those in the present case to be substantially mitigating: (1) domestic disputes, (2) drug or alcohol abuse and intoxication at the time of the offense, (3) severe emotional or mental disturbances, and (4) substantially impaired capacity to conform conduct to the requirements of law. &, e.g., McKinney V. State, 579 So.2d 80, 85 (Fla. 1991) (mental deficiency, alcohol and drug abuse); Downs v. State, 574 So.2d 1095, 1099 (Fla. 1991) (mental or emotional disturbance,

impaired capacity, drinking at time of offense, history of drug and alcohol abuse, domestic confrontation between defendant and estranged wife); Penn v. State, 574 So.2d 1079, 1083-1084 (Fla. 1991) (drug abuse, domestic conflict); Nibert v. State, 574 So.2d 1059, 1062-1063 (Fla. 1990) (emotional disturbance, impaired capacity, chronic and extreme alcohol abuse, and drinking at time of offense); Buford v. State, 570 So.2d 923, 925 (Fla. 1990) (drug and alcohol abuse, intoxication at time of offense, impaired capacity, mental or emotional disturbance); Farinas v. State, 569 So.2d 425, 431 (Fla. 1990) (mental or emotional disturbance, heated domestic confrontation); Cheshire v. State, 568 So.2d 908, 911 (Fla. 1990) (lover's quarrel with estranged wife, drinking at time of offense, emotional distress).

Appellant's evidence of these mitigating circumstances was not rebutted by the prosecutor. This Court has ruled that "when a reasonable quantum af competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert v. State, 574 So.2d at 1062. As a matter of law and public policy, this Court has declared, "Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court.'' Cheshire v. State, 568 So.2d at 912.

In contrast to the substantial mitigating circumstances proved by the defense, the State's evidence of aggravating circumstances

was relatively weak. As argued under Issue IV, supra, the State's evidence was legally insufficient to sustain the trial court's finding of cold, calculated, and premeditated. The unrebutted mitigating circumstances established that this offense was the result of a long-standing lover's quarrel, Appellant's history of drug abuse, Appellant's extreme drug abuse during the days preceding the offense, Appellant's mental and emotional disturbance, and his impaired capacity to control his conduct. These circumstances necessarily negate any finding of heightened premeditation, calculated plan, or carefully prearranged design. This was an affense characterized by Appellant's passionate obsession for Ms. Scantling and drug-induced, mindless violence in reaction to her rejection of their relationship.

The trial court's other aggravating circumstance, prior convictions for violent felonies, was weakened by the fact that the prior violent felonies involved the same victim, Ms. Scantling, and her friend Mr. Curry, and were committed only two days before the homicide. (R367-372,773,1170-1171) See Reed v. State, 560 So.2d 203, 207 (Fla.), cert.denied, __U.S.__, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990) (trial court cannot rely upon prior convictions for violent felonies committed against same victim at same time as the murder); Wasko v. State, 505 So.2d 1314, 1318 (Fla. 1987) (same). Moreover, the same four mitigating circumstances applied to the prior felonies. They too were the result of Appellant's passionate obsession with Ms. Scantling, his drug abuse, his mental and

emotional disorder, and his impaired capacity. (R779-780,786-787, 828-831)

In several recent cases involving similar mitigating factors, this Court has ruled that the death penalty was disproportionate to the circumstances of the offense. For example, in McKinney v. State, 579 So.2d at 85, this Caurt found that the mitigating circumstances of no significant history of priar criminal activity, mental deficiency, and a history of alcohol and drug abuse outweighed the sole aggravating factor that the murder was committed during the course of a violent felony.

In Penn v. State, the defendant killed his own mother by beating her with a hammer while she slept. This Court approved the trial judge's finding of heinous, atrocious, or cruel, but reversed a finding of cold, calculated, and premeditated because of the absence of evidence of cold calculation. This Court concluded that the death penalty was disproportionate because of the defendant's heavy drug use and the domestic nature of the offense. 574 So.2d at 1083-1084.

In Nibert v. State, this Court ruled that death was disproportionate where heinous, a rocious, or crue was the only aggravating circumstance, and the case involved substantial mitigating circumstances including emotional disturbance, impaired capacity, and chronic and extreme alcohol abuse. 574 So.2d at 1063.

In Farinas v. State, the defendant kidnapped his estranged girlfriend, shot her in the back when she tried to run, unjammed his gun three times, then fired two fatal shots to the back of her

head. This Court reversed a finding of cold, calculated, and premeditated. The Court also ruled that death was a disproportionate penalty where the defendant suffered from a mental or emotional disturbance, was obsessed with his failed relationship with the victim, and was intensely jealous of a suspected relationship with another man. 569 So.2d at 431.

In Livingston v. State, 565 So.2d 1288, 1292 (Fla. 1988), this Court found that the death penalty was disproportionate because the mitigating factors of childhood abuse, youth, inexperience, immaturity, marginal intellect, and extensive use of cocaine and marijuana outweighed the aggravating factors of prior conviction for violent felony and commission of homicide during an armed robbery.

In Blakely v. State, 561 So.2d 560 (Fla. 1990), the trial caurt follawed the jury's death recommendation upon finding the heinous, atrocious, or cruel and cold, calculated, and premeditated aggravating circumstances. This Court ruled that the death penalty is not proportionately warranted when the murder is the result of a heated domestic confrontation. Id., at 561.

In Fitzpatrick v. State, the trial court followed the jury's recommendation and impased the death penalty. This Court vacated the death sentence and remanded for imposition of a life sentence because substantial mitigating evidence of impaired capacity, emotional disturbance, and low emotional age outweighed the aggravating factors. 527 So.2d at 811-812.

In the present case, Appellant's extensive evidence of substantial mitigating circumstances, including his passionate obses-

sion with Ms. Scantling and his inability to accept her termination of their lengthy domestic relationship, his history of drug abuse and grossly excessive drug abuse in the days preceding the offense, his severe emotional and mental disturbance, and his substantially impaired capacity to control his conduct, outweighed the State's evidence of aggravating circumstances. The death sentence imposed by the trial court is disproportionate both to the circumstances of this offense and in comparison with the numerous cases in which this Court vacated death sentences because of similar mitigating circumstances. The death sentence must be vacated, and Appellant's case must be remanded for imposition of a life sentence.

CONCLUSION

Appellant respectfully requests this Hanorable Court to reverse the judgment and sentence and remand this case to the trial court for the following relief: (1) a new trial (Issues I and 11); (2) resentencing to life (Issue VI); (3) a new penalty phase trial before a new jury (Issues III and IV); or (4) resentencing by the court (Issue V).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert S. Krauss, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 28th day of January, 1992.

Respectfully submitted,

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