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IN THE SUPREME COURT OF FLORIDA

HAROLD GENE LUCAS,

Appellant,

vs.

Case No. 78,118

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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Florida's "Heinous, Atrocious or Cruel" Aggravating
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PRELIMINARY STATEMENT

Page references to the record on appeal in case number 78,118 (the instant case) are designated with the prefix "R". Page references to the record on appeal in case number 70,653 (prior appeal of Appellant's sentence of death) are designated with the prefix "PR".

STATEMENT OF THE CASE

On August 30, 1976 Appellant, Harold Gene Lucas, was indicted by a Lee County grand jury for the premeditated murder of Anthia Jill Piper by shooting her with a firearm, the attempted premeditated murder of Terri L. Rice by shooting her with a firearm, and the attempted premeditated murder of Richard Byrd, Jr. by shooting him with a firearm. (R148,PR813) All three offenses allegedly occurred on August 14, 1976. (R148,PR813)

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

The resentencing resulted in Judge Shands again sentencing Appellant to death. In Lucas v. State, 417 So.2d 250 (Fla. 1982) this Court again vacated the death penalty imposed upon Appellant, because Judge Shands failed to use reasoned judgment in reweighing the aggravating circumstances and mitigating factors.

Upon resentencing, Appellant was sentenced to death once again, this time by the Honorable Thomas S. Reese, as Judge Shands died prior to the resentencing. In Lucas v. State, 490 So.2d 943 (Fla 1986) this Court vacated Appellant's death sentence for the third time. The Court held that both the State and the defense

should have been allowed to present testimony and argument at the resentencing hearing. The Court also invalidated Judge Reese's finding that Appellant's actions created a great risk of death to many persons. Finally, because the original trial judge and Appellant's defense counsel may have erroneously believed that mitigating circumstances were restricted to those enumerated in Florida's capital sentencing statute, this Court remanded far a complete new sentencing proceeding before a newly empaneled jury.

Appellant's new sentencing proceeding took place on March 30 through April 3, 1987, with Judge Reese presiding. (PR1-811) The jury recommended that Appellant receive the death penalty. (PR807, 888) A sentencing hearing was held on May 7, 1987. (PR893-915) After arguments of counsel and a brief statement by Appellant, Judge Reese again sentenced Appellant to death, reading his already-prepared sentencing order into the record. (PR889-892,909-913) In Lucas v. State, 568 So.2d 18 (Fla. 1990) (R154-168) this Court once again vacated Appellant's death sentence, because the trial court's order discussing aggravating and mitigating circumstances lacked clarity, and remanded "for reconsideration and rewriting of the findings of fact." 568 So.2d at 24. (R166) The opinion also stated that Appellant "should inform the court of the specific nonstatutory mitigating circumstances he wants the court to consider, and the court may permit both sides to present argument regarding those circumstances. There is no need to empanel a new jury." 568 So.2d at 24. (R166)

Appellant subsequently filed in Lee County Circuit Court a Motion to Declare Section 921.141(5)(h) Florida Statutes Unconstitutional, a Motion to Present Witnesses to Establish Statutory Mitigating Circumstances and Non-Statutory Mitigating Evidence, and a Motion to Preclude Death as a Possible Punishment, as well as three lists of potential defense witnesses. (R1001-1019, 1033-1034) The motions were heard by Judge Recse on December 11, 1990 (R93-115), and denied. (R1020-1025) At the hearing, counsel for Appellant orally asked the State to produce any mitigating evidence that it knew to exist which had not been presented at prior resentencings. (R109-110) The court refused to require the State to produce such material, except for "the materials required in reciprocal discovery or Brady versus Maryland." (R110)

Appellant thereafter filed a Motion for Presentence Investigation and Copy of Post Sentence Investigation (R1026-1028), which was heard by Judge Reese on February 28, 1991. (R117-123) The court denied the request for a presentsnce investigation, but granted the request for a copy of the post sentence investigation. (R122-123,1029-1030)

Both Appellant and the State filed memoranda directed to the sentence Appellant should receive prior to the sentencing hearing, which was held before Judge Reese on May 14, 1991. (R1-91,171-199) At that hearing the court ruled that Appellant's prison record and the post sentence investigation would be part of the record of this case. (R4-5) After hearing arguments of counsel, as well as a plea from Appellant himself that his life be spared, the court sentenced

Appellant to death, finding two aggravating circumstances (prior conviction of a violent felony due to the contemporaneous attempted murders of Terri Rice and Ricky Byrd, and especially heinous, atrocious and cruel), and discussing a number of mitigating circumstances. (R5-90,965-982)

Appellant filed his notice of appeal to this Court on June 12, 1991. (R986-987)

STATEMENT OF THE FACTS [1]

Appellant, Harold Gene **Lucas,** was born on October 31, 1951. **(R204, PR600-601)** He **was raised** in **the** very lowest of socioeconomic conditions in **a** sharecropper family where his father was an alcoholic who **drank up** all the money and **beat his** wife and children. (R204) Appellant's father not only beat him when he was a child, but cussed him, and told him that he was worthless and would never amount to anything. (R67)

Appellant began smoking marijuana when he **was** 17, and by 1976 **ha** was using all kinds of drugs, including heroin, cocaine, LSD, hashish, THC, and animal tranquilizers. **(PR526,601)** For about two years prior to the instant homicide, Appellant had **been** mixing alcohol and **drugs** fairly regularly, on a daily basis, **and** was "heavy in the drugs and alcohol'' when the killing occurred. **(PR593, 602. See** also **PR515,526,542,617)**

Appellant and Jill **Piper** had dated off and on for **about** two or three years, and at one time had **discussed** getting married. **(PR261-262,480,508,522,592,598,617)** However, in **August** of 1976 their relationship deteriorated. Appellant was a little bit upset that **Piper** had called **the** police on several occasions and had Appellant's car pulled over **and** searched for **drugs,** and he was very

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[1] **As** the instant appeal represents the fifth time that Appellant's case has been before this Court, Appellant will not reiterate all the facts, but will attempt to include only those facts which relate to **his** issues on appeal. For **a** more complete treatment of the facts, please see Appellant's initial brief in case number 70,653, pages **6-24.**

upset that Piper was seeing someone else during the week preceding the homicide. (PR607,611,617)

Witnesses testified to threats that were made by Appellant against Piper in the days before the homicide, as well as on the day of the homicide itself, and there was testimony that Piper had also made threats against Appellant. (PR264-265,267,380-381,387-390,412,490-492,569,575-576)

On August 13, 1976 several people went to Appellant's house to "party," that is, to drink and play cards. (PR564-565,593) They also smoked marijuana and "hash." (PR565,593) That afternoon Appellant made a purchase of a drug that was apparently PCP, and snorted some at around 6:00 or 6:30 p.m. (PR507,513-514,518,565,-572,588-589,594,602) That evening the revelers went out to buy more beer. (PR565,574) By that time they were all "feeling good" and were "high." (PR570,587) When Richard Byrd, Jr. saw Appellant at a park, Appellant seemed to be high and his speech was possibly slurred. (PR446) Byrd felt that Appellant might have been smoking "pot" or doing other drugs. (PR445)

On the way back to Appellant's residence after the beer purchase, the car in which Appellant was a passenger was stopped by Lee County Deputy Sheriff Glen Boyette for a traffic violation at approximately 8:30 p.m. (PR365,367,369,577) There were two six-packs of beer in the car, which Appellant said were his, and two beers were missing from the six-pack holders. (PR372-373) Appellant appeared to Boyette to be coherent. (PR 370) He had no trauble walking, standing, or talking, and his speech was not

slurred, however, Boyette did not perform any field tests on Appellant to see if he was drunk or had been drinking. (PR373) [2]

Some time after the traffic stop, Appellant took a second dose of PCP. (PR596-597)

At approximately 10:30 that night, Appellant became involved in a fight with Eddie Kent at a Hess station. (PR266,397-398,403) Kent detected alcohol on Appellant's breath, and on deposition Kent had indicated that Appellant appeared to be intoxicated or under the influence of drugs at the Hess station. (PR401)

When Appellant's brother, Thomas, saw him around 10:30 or 11:00 that night, Appellant was "carrying on," acting strange and a little bit crazy. (PR527) Appellant seemed as though he was "in his own world," and Thomas considered him ta be "high." (PR527-528)

When Georgina Martin saw Appellant between 11:10 and 11:15 that night, he was "totally out of it." (PR508) His eyes were wide open "like when you look at a little kid that's real scared." (PR508)

Appellant's sister-in-law, Carol Lucas, saw him at about 11:00 or 11:30 that night. (PR542) Ha seemed to be "high." (PR542) His eyes were glassy and he was staggering a little bit. (PR542) He did not look the way he normally looked, and was not acting the way he normally acted; he looked like a different person. (PR542-543)

Terri Rice and Richard Byrd, Jr. agreed to stay the night with Jill Piper on August 13, because she was scared. (PR268-269,414)

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[2] At Appellant's 1987 penalty trial, Boyette could not positively identify Appellant as the man he saw in the car on the day in question, (PR366-367)

They parked the car across the street from the Piper residence so that if Appellant came by, he would not think they were home. (PR270,414-415)

Terri Rice and Richard Byrd, Jr. gave differing accounts of what transpired at the Piper residence on the night of August 13/ early morning of August 14, 1976. According to Rice, she suggested that they park the car in the driveway so that if Appellant came, they could leave. (PR271) The three people went across the street, with Piper carrying a shotgun she had obtained from under the bed in her parents' bedroom, and Byrd carrying a .38 that Piper had obtained from the same location. (PR270-272,285) The girls drove the car across the street, and had gotten out and were walking toward the front of the house, when Rice saw Appellant beside the house. (PR271-272) Appellant aimed a rifle and fixed at Piper, who went down on her knees. (PR272-273) Rice ran inside the house and told Byrd that Piper had been shot. (PR273) Rice went into a bedroom and called the sheriff's department. (PR273) She did not recall hearing any other shot or any yelling or screaming. (PR 274) Byrd joined Rice in the bedroom. (PR274) The two of then were thereafter shot by Appellant, who looked strange, and his eyes were glassy. (PR275-276,286-287)

Ricky Byrd, Jr., on the other hand, testified that after being shot, Jill Piper ran into the house and fell down on the floor. (PR419) Byrd grabbed Rice by the hand and ran into the bedroom. (PR420-421) He could hear a fight going on. (PR422) He ''could hear a man's voice at times cussing,'' and he heard Piper screaming

and begging for her life, saying, "Dear **Gad**, don't kill me," and "Dear God, make **him** leave me alone." (PR422) He also heard "what sounded like blows passed," or "very hard hitting." (PR422) Then Byrd heard more shots and it got quiet. **(PR423)** When Appellant entered the room in which Rice and Byrd were hiding, Appellant's face indicated to Byrd that Appellant "was excited and thrilled with what he **was** doing," although Appellant was **nat** laughing or smiling. (PR431) Appellant was carrying **a** shotgun and **a .22** rifle. **(PR425,448)** Appellant shat Byrd, and then Rice. **(PR426,428)** Appellant **did** not **say** anything. (PR430-431) **He** was very "mechani-cal," **and** did not **trip,** stumble, or fall. **(PR430) Byrd** eventually **made** his way into the front **yard,** where he **collapsed** near Jill Piper's body. **(PR434-435) 3**

The sheriff's deputies who investigated **the** shooting at the Piper residence did not find any blood in the foyer. (PR351) The only spent **.22** caliber cartridge casings they found were outside the **house. (PR348-349)**

The medical examiner who performed an autopsy on Jill Piper found seven gunshot wounds caused by five different bullets. (PR459) The cause of death **was** brain **injury** due to **a** gunshot wound to the **top** of the **head.** (PR459-462) This would have rendered **Piper unconscious** immediately, and death would **have** taken place within minutes. (PR471,462) The other wounds would not necessarily have resulted in Piper's death, but could have stunned her **or** rendered

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[3] **Byrd** acknowledged drinking three **or** four beers on **the** night in question (PR447), while Rice denied using any drugs or alcohol that night. (PR286)

her unconscious. (PR462-463,471,474) None of the wounds was a contact wound; they were probably inflicted from more than a foot away. (PR474-475) In addition to the gunshot wounds, Piper had several recent cuts on her hands that were suggestive of defensive wounds. (PR470-471) Piper had 0.12 percent alcohol in her blood, which indicated intoxication. (PR476-477) Her faculties would have been diminished in terms of skilled tasks, reaction times, etc. (PR476-477)

Appellant's witnesses at hi5 1987 penalty trial testified that he generally had a non-violent character, and had expressed sorrow over the incident involving Jill Piper. (PR506,522,537,538,542) Appellant's sister and brother-in-law trusted Appellant, and trusted him to watch their children. (PR501-502,537) Appellant had calmed down a lot since being in prison. (PR503-504,537-538)

Dr. Daniel Sprehe, a psychiatrist, testified that the drug PCP causes violent impulsive acting out in people, sudden senseless striking out, extreme anger. (PR613,621) It is very often assaciated with senseless violence. (PR621) The history Appellant gave to Sprehe included that Appellant was "'pretty much flipped out" on alcohol and drugs, mainly PCP, when the homicide occurred. (PR617) Sprehe opined that Appellant was unable fully to control his actions at that time. (PR620) He had increased impulsiveness and lessened social awareness. (PR620) Appellant was under extreme mental or emotional disturbance, and his ability to conform his conduct to the requirements of law was substantially impaired. (PR619-621,635) At the time Sprehe examined him, Appellant was

depressed and remorseful because he had lost the person he loved. (PR619)

Appellant himself testified at his 1987 penalty trial, and expressed his belief that the instant tragedy would not have occurred if it had not been for drugs and alcohol. (PR599) He never planned to shoot anyone on August 13, and wished the shooting had never happened. (PR598) Not a day went by that Appellant did not think about Jill Piper and the time they were together. (PR598)

Appellant addressed the court at his May 14, 1991 sentencing hearing, and expressed "extreme remorse for the killing of Jill Piper." (R66) He said that he thought about her constantly, and that "she should be living today and enjoying it.'" (R66) Appellant noted that he had improved his education since being incarcerated, and was not a problem prisoner. (R67) He further stated that corning back to court several time had been "very emotional" for him, and had "devastated" his brothers, sisters, nieces, and nephews over the years, and he knew that it brought up old resentment for the Piper family as well. (R67) He concluded with a plea far the court to sentence him to life. (R67)

In his sentencing memorandum and orally at the May 14 hearing, defense counsel propounded at least 18 specific mitigating circumstances for the court to consider: 1. The killing was committed while Appellant was under the influence of extreme mental or emotional disturbance. (R45-46,186) 2. Appellant acted under extreme duress, (R46,186) 3. Appellant's capacity to conform his conduct to the requirements of law was substantially impaired. (R46,186)

4. The killing was done **far** emotional or passionate reasons rather than from mere cold calculation. (R186) 5. Appellant has displayed good conduct while on death row since 1977, and has experienced positive change and self-improvement while in prison. **(R40-41,186)** 6. Appellant **has** no significant history of prior criminal activity. (R32-33,187) **7.** Appellant feels genuine remorse. (R46,47,50, 187) ***8.*** Appellant cared deeply for Jill Piper. (R187) 9. The structured prison environment has served **as** rehabilitation for Appellant, and he has **the** potential **for** rehabilitation. (R51-52, **56,187)** 10. That Appellant has been sentenced to death four times, and four times **his** death sentence has **been** set aside, has had an extreme emotional impact upon him. (R187) 11. Appellant was physically and psychologically/emotionally abused by **his** father. **(R187)** **12.** Appellant suffered from chronic and extreme alcohol and drug abuse since his prc-teen years. **(R188)** **13.** Appellant **is** a nice person when saber, and was trusted with money and younger children of several witnesses. (R41,50,188) 14. On **the** day of the killing, Appellant was under the influence of PCP, marijuana, and alcohol, with resulting impaired ability to appreciate the criminality of his conduct. (R46,188) 15. Appellant had held gainful employment. (R50,188) 16. Appellant's age of **24** and **the** fact that his emotional age was lower than that, (R59) 17. The intoxication of **the** victim. **(R36,44-45,50)** **18.** That Jill **Piper** had made a prior threat against Appellant. (R45)

Counsel for Appellant also argued that a sentence of death is disproportionate for the instant homicide. (R32,37-39,52-54,62-63, 65,172)

Finally, defense counsel asked the court at the May 14, 1991 hearing not to consider statements made by Terri Rice, Mr. and Mrs. Piper, Mr. D'Allesandro, and Judge Shands in the post-sentence investigation which constituted victim impact statements, but the court made no ruling on this request. (R59)

SUMMARY OF ARGUMENT

I. The lower court should have granted Appellant's request to present additional evidence in mitigation. The court did allow Appellant's prison record and the post-sentence investigation to be mads a part of the record, but arbitrarily refused to permit Appellant to adduce other evidence relevant to such germane matters as his prospects for rehabilitation, possible brain damage, etc. The rules of criminal procedure and constitutional norms pertaining to capital sentencing required the court to entertain Appellant's evidence.

II. The court below erred in determining Appellant's sentence and reducing it to writing before he ever heard the defense presentatian at the May 14, 1991 sentencing hearing. The court should have first conducted the sentencing hearing, and then actually imposed sentence at a later time, after reflection. His failure to follow this procedure was fundamentally unfair and a violation of Appellant's due process rights.

III. Statements of several people contained in the post-sentence investigation were irrelevant to the sentencing process, and their injection thereinto violated Appellant's constitutional rights to due process and not to be subjected to cruel and unusual punishment. Terri Rice, one of the attempted murder victims, made a statement concerning the impact of Appellant's deeds upon her, and offered her characterization of Appellant. The judge who originally sentenced Appellant to death and the prosecutor similarly expressed their views of Appellant as a ''dangerous" person who

should never again be unleashed an the community. And the homicide victim's father expressed his opinion that execution of Appellant was the only appropriate sentence far his daughter's killing. Inclusion of these inflammatory statements in the record calls into question the reliability of the death sentence imposed upon Appellant.

IV. The State failed to prove beyond a reasonable daubt that the homicide of Jill Piper was especially heinous, atrocious or cruel. The testimony of Ricky Byrd, relied upon by the court to support his finding of this factor, was not sufficiently reliable, and did not set the instant crime apart from the norm of capital felonies. The sentencing court also failed to consider Piper's state of intoxication at the time she was killed, and failed to recognize the effect of Appellant's state of drug/alcohol intoxication on his behavior.

V. The especially heinous, atrocious or cruel aggravating circumstance is unconstitutionally vague and, as applied, does not genuinely limit the class of persons eligible for the death penalty. This aggravator has not been interpreted in a rational and consistent manner by the Court, and so sentencing judges are provided with inadequate guidance to enable them to separate the murders which qualify as especially heinous, atrocious or cruel from those which do not.

VI. The court's sentencing order herein contains many inconsistencies and ambiguities and does not clearly establish what the court meant to find in mitigation. It appears that the court did

not give due consideration to all the mitigating evidence presented. Meaningful review by this Court is virtually impossible. Because the order does not show that the sentencing court engaged in the reasoned weighing of aggravating and mitigating circumstances required under Florida's capital sentencing statute, Appellant's sentence of death cannot stand.

VII. The ultimate punishment of death is nat proportionately warranted in this case. One of the two aggravating circumstances found by the trial court should not have been found, and the lone remaining factor is entitled to little weight. Appellant presented substantial mitigation, and the trial court appears to have found several facts to exist which would constitute valid mitigating circumstances. Appellant's case falls within a long line of cases where death sentences for murders committed during domestic disputes or lovers' quarrels have been reduced to life, and a like result must be reached here.

ARGUMENT

ISSUE I

APPELLANT'S CONSTITUTIONAL RIGHTS WERE DENIED BY THE REFUSAL OF THE SENTENCING COURT TO PERMIT APPELLANT TO PRESENT ADDITIONAL EVIDENCE TO ESTABLISH MITIGATING CIRCUMSTANCES.

Prior to Appellant's resentencing proceeding, he filed a Motion to Present Witnesses to Establish Statutory Mitigating Circumstances and Non-Statutory Mitigating Evidence. (R1012-1013) This motion was heard by Judge Reese on December 11, 1990 (R101-109), and denied. (R1020-1021)

The court below did permit some new evidence, namely Appellant's prison record and the post-sentence investigation, to be made part of the record (R4-5), but arbitrarily excluded all other evidence Appellant sought to present in mitigation. This was error.

In every criminal case, the constitution guarantees the right of the accused to have witnesses testify in his favor. Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Florida Rule of Criminal Procedure 3.720(b) requires the court at a sentencing hearing to "[e]ntertain submissions and evidence by the parties which are relevant to the sentence." This provision is mandatory, and if the trial court refuses to allow a defendant to present matters in mitigation, then the case must be remanded for a sentencing hearing and resentencing. H.B.T. and A.J.H. v. State, 495 So.2d 919 (Fla. 4th DCA 1986); Hargis v. State, 451 So.2d 551

(Fla. 5th DCA 1984); Miller v. State, 435 So.2d 258 (Fla. 3d DCA 1983).

The need for the trial court to have all available information before sentencing takes on even greater importance where, as here, the defendant is faced with the ultimate sanction which society can bring to bear. There is a separate criminal procedure rule pertaining to the presentation of evidence in capital sentencing hearings. Florida Rule of Criminal Procedure 3.780 reads as follows:

> RULE 3.780 SENTENCING HEARING FOR CAPITAL CASES
>
> (a) In all proceedings based upon section 921.141, Florida Statutes (1975), the state and defendant will be permitted to present evidence of an aggravating or mitigating nature, consistent with the requirements of the statute. Each side will be permitted to cross-examine the witnesses presented by the other side. The state will present evidence first.
>
> (b) The trial judge shall permit rebuttal testimony.
>
> (c) Both the state and the defendant will be given an equal opportunity for argument, each being allowed one argument. The state will present argument first.

Thus the rule which specifically pertains to capital cases, like its counterpart which pertains to sentencings in general, requires the court to entertain evidence relevant to the sentence the defendant should receive before sentence is imposed. See also § 921.141-(1), Fla.Stat. (1991).

The ssntencer in a capital case may not be precluded from considering, and may not refuse to consider, any relevant evidence which the defense offers as a reason for imposing a sentence less

than death. **Parker v. Dugger**, **498** U.S. ___, **111 S.Ct.** ___, **112 L.Ed.2d 812 (1991);** McCleskey v. Kemp, **481** U.S. 279, **107** S.Ct. 1756, **95 L.Ed.2d 262 (1987);** Hitchcock v. Dugger, 481 **U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987);** Lockett v. **Ohio**, **438 U.S. 586, 98** S.Ct. **2954, 57 L.Ed.2d 973 (1978). This Court has** held that "[T]he only limitation on introducing mitigating evidence is that it be relevant to the case at hand . . . ." King v. State, **514 So.2d 354, 358** (Fla. 1987) (emphasis added). See also O'Callaghan v. State, **542** So.2d 1324 (Fla. **1989)** and Harvard v. State, **486** So.2d **537** (Fla. 1986). **Here** Appellant filed three witness lists naming **12 witnesses** (including Appellant himself) that the defense wished to call in mitigation **(R1019,1033,1034),** and defense counsel apprised **the** court of **at** least some of the areas he wished to explore. For example, he told the court that new information emerged from the post-sentence investigation that Appellant had been having migraine headaches off and on since being in **a** car wreck in **1972,** and this information had not previously been developed. **(R48-49)** This fact raised the possibility that Appellant incurred brain damage in the accident, which certainly would constitute **a** relevant mitigating circumstance. ***See,*** for example, Carter v. State, **560 So.2d 1166** (Fla. **1990);** **State** v. Sireci, ***502*** So.2d 1221 (Fla. 1987); Mason v. State, **489 So.2d 734 (Fla. 1986).** Defense counsel also noted in **his** sentencing memorandum that Evangelist Johnese Lsnnon, Reverend Stanley Daniels, and Reverend **Biggs,** who **were** named in Appellant's Additional Witness List **(R1019),** could have established that the structured environment of prison **had** served **as**

rehabilitation for Appellant, and that he was a changed man. (R187) Certainly, good behavior in prison and potential for rehabilitation are legitimate mitigating circumstances. See, for example, Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Craia v. State, 510 So.2d 857 (Fla. 1987); Valle v. State, 502 So.2d 1225 (Fla. 1987); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Brown v. State, 526 So.2d 903 (Fla. 1988); McCampbell v. State, 421 So.2d 1072 (Fla. 1982). The court did address these factors in his sentencing order (R974-976), but either rejected them altogether as mitigating circumstances, or gave them very little weight. (It is difficult to tell which, as the sentencing order is unclear. Please see Issue VI. in this brief.) Had the court considered Appellant's evidence, he might have viewed these factors in a light more favorable to Appellant. Another circumstance the defense wished to develop through expert testimony was the emotianal and physical effect of four death remands upon Appellant. (R60) This was relevant to the. question of whether a fifth imposition of the death penalty upon Appellant would constitute cruel and unusual punishment. Finally, the court below apparently rejected as a mitigating circumstance that Appellant was physically and psychologically abused in his youth by his alcoholic father, because this was not supported by sufficient evidence. (R84-85, 977-978) Being an abused child has been recognized by this Court as an important mitigating circumstance in many cases. *See,* for example, Nibert; Campbell v. State, 571 So.2d 415 (Fla. 1990); Freeman v. State, 547 So.2d 125 (Fla. 1989). Had Appellant

been permitted to allay the court's skepticism concerning the existence of abuse by calling corroborating witnesses, the caurt might have been persuaded to **sentence** Appellant to life. [4]

This Court's opinion herein did not specifically state whether Appellant would be allowed to present additional evidence on remand. Because the trial court's sentencing order lacked clarity in its discussion of aggravating and mitigating circumstances, this Court vacated Appellant's death sentence and remanded "to the trial court for reconsideration and rewriting of **the** findings of fact." Lucas v. State, *568* So.2d 18, **24** (Fla. 1990). The opinion also **provided** that Appellant "should inform the court of the specific nonstatutory mitigating circumstances he wants the court to con**sider,** and the court may permit **bath** sides to present argument regarding those circumstances." *568* So.2d at 24. In a previous decision in Appellant's case, Lucas v. State, **490** So.2d **943** (Fla. 1986), this Court made a distinction between a remand for **a** new sentencing proceeding and a remand for reweighing. In the former type of proceeding, the parties should be allowed to present additional testimony and argument, while this is not required in a re-

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[4] It should be **noted** that the court below refused Appellant's request to require the State to produce any mitigating evidence that it knew to exist which had not been presented at prior resentancings (except for "the material **required** in reciprocal discavery or Brady versus Maryland") (R109-110), and denied Appellant's motion for a presentence investigation. (R117-123,1026-1030) Additional specific mitigating circumstances might have emerged if the court had agreed to these defense requests. Cf. Mask v. State, 289 So.2d 385 (Fla. 1973) (although trial court had discretion to deny request **for** presentence investigation, he should have at least allowed the defendant to present evidence as to what such an investigation might have disclosed).

weighing. 490 So.2d at 945. The proceeding called for upon the instant remand was more akin to a new sentencing proceeding than a mere reweighing, involving as it did the full participatian and argument of counsel for bath sides, and the requirement that Appellant specifically delineate those nonstatutory mitigating circumstances he wanted the court to consider, and so the court below should have permitted Appellant to introduce his evidence. Indeed, the production of evidence in support thereof might well be considered part of Appellant's responsibility to call the court's attention to the specific mitigating factors the court should consider.

Scull v. State, 533 So.2d 1137 (Fla. 1988) and Scull v. State, 569 So.2d 1251 (Fla. 1990) are instructive on this issue. In Scull I because the trial court's sentencing order was "replete with error," this Court vacated the sentence of death and remanded to the trial court so that it might "conduct proceedings without a jury and render a new sentencing order consistent with this opinion." 533 So.2d at 1144. In Scull II the Court expressed the opinion that on remand the defendant would be entitled to present any new mitigating evidence he wished, and would also be entitled to rely upon any other mitigating evidence in the existing record (and the State would be entitled to do likewise with regard to aggravation). 569 So.2d at 1253. Appellant's cause was remanded

for reasons similar to those in Scull I, and he was entitled to present new mitigating evidence pursuant to Scull II.[5]

In State v. Ferguson, 556 So.2d 462 (Fla. 2d DCA 1990), the court held that the trial court could nat dispense with the presentation of evidence at a penalty phase of a capital trial. The court cogently observed that the trial court's decision on what sentence the defendant should receive

> was not purely a legal decision on the applicability of the death penalty to the crime for which the defendant had been convicted, but rather a factual decision on the propriety of that penalty under the circumstances of this case. The trial court had no authority to make that factual decision before the parties were given an opportunity to present their evidence.

556 So.2d at 463. Here Appellant had not had an opportunity to develop additional evidence in mitigation for the court's consideration since his new jury sentencing proceeding in 1987. The court below should have given Appellant that opportunity prior to resentencing him, and the court's failure to do so deprived Appellant of due process of law and exposed him to cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the Constitutian of the United States, and Article I, Sections 9 and 17 of the Constitution of the State of Florida. Appellant's sentence of death must once again be vacated.

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[5] Appellant cited the later Scull case in his Motion to Present Witnesses to Establish Statutory Mitigating Circumstances and Non-Statutory Mitigating Evidence. (R1012-1013)

ISSUE II

APPELLANT'S CONSTITUTIONAL RIGHTS WERE DENIED BY THE PROCEDURE FOLLOWED BY THE SENTENCING COURT. INSTEAD OF HOLDING A SINGLE HEARING AT WHICH THE COURT MERELY INFORMED APPELLANT OF HIS ALREADY-PREPARED SENTENCING DECISION, THE COURT SHOULD HAVE FIRST RECEIVED EVIDENCE AND ARGUMENT REGARDING THE APPROPRIATE SENTENCE, AND THEN IMPOSED SENTENCE AFTER DUE DELIBERATION.

A single hearing was held below with regard to the sentence Appellant should receive, at which the court heard arguments of counsel and brief remarks from Appellant himself. (R1-92) Near the end of the hearing defense counsel expressed the hope that the court would consider all the mitigating evidence and ease law that the defense had presented, and had not "made up its mind prior to argument" (R66), but these hopes were obviously misplaced, as the court proceeded to read his pre-prepared order sentencing Appellant to death into the record. (R67-90,965-982)

The procedure followed in this case, in which the court had already decided Appellant's sentence and reduced it to writing before he heard what was presented at the May 14, 1991 sentencing hearing, violated Appellant's constitutional rights to due process of law and subjected him to cruel and unusual punishment, in violation of Article I, section 9 and 17 of the Constitution of the State of Florida and the Eighth and Fourteenth Amendments to the Constitution of the United States.

In Grossman v. State, 525 So.2d 833 (Fla. 1988), this Court established a new rule of procedure requiring that all written

orders imposing a death sentence be prepared **prior** to the oral **pronouncement** of **sentence** for filing concurrent with the pronouncement. However, Grossman cannot mean that the written order must, or even may, be prepared before the sentencing court has **heard** any evidence to be presented, arguments of counsel, **and** any statement the defendant wishes to make.

Florida's sentencing guidelines require that a trial court enter contemporaneous written reasons for any departure from the sentence recommended under the guidelines, **Ree v. State, *565* So.2d** 1329 (Fla. 1990), in much the same way our capital sentencing scheme requires contemporaneous written findings to justify **a sentence** of death. In Ree, this Court addressed concerns that if the trial court prepared written departure reasons in advance of the sentencing hearing, **the** reasons would be vulnerable to the attack that they were not based on the evidence presented and violated the defendant's due process rights:

> We agree . . . that the sentencing guidelines and accompanying rules do not permit **a** trial court *to* decide **a** sentence before giving counsel an opportunity to make argument. Fundamental principles of **justice require** that decisions restricting a person's liberty be made only after a neutral magistrate gives due consideration to any argument and evidence that are proper.

565 So.2d 1332. These principles apply in spades where the defendant is facing the termination of his life by the State. In **Ree the** Court noted that "a departure sentence is an extraordinary punishment that requires serious and thoughtful attention by the trial court." ***565*** So.2d at 1332. How much more "extraordinary"

and deserving of "serious and thoughtful attention by the trial court" is a sentence of death! It clearly should never be imposed until the court has had the benefit of all available evidence and argument, and time to deliberate and reflect thereupon.

What **this** Court observed in Scull v. State, **569** So.2d 1251, 1252 (Fla. 1990), which also involved a resentencing to death, is equally applicable to Appellant's cause:

> The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. [Citation omitted.] Due process envisions a law that hears before it **condemns, proceeds upon** inquiry, and renders judgment only after **proper** consideration of issues advanced by adversarial **parties.** [Citation omitted.] In this respect the term "due process" embodies **a** fundamental **con**ception of fairness that derives ultimately from the natural rights of all individuals. **See** art. I, **§ 9,** Fla. Const.

The court below condemned Appellant **to** death before hearing **his** presentation at the May 14 hearing in violation of fundamental **fairness.**

Finally, to allow **a trial** court to determine what **the** sentence will be prior to the sentencing hearing would effectively nullify Florida Rules of Criminal Procedure 3.720 and 3.780, which provide for sentencing hearings in non-capital and capital cases. (Please see Issue I. herein.)

In **Ree** this Court proposed ways that the due process problems discussed therein could be overcome. The trial court could write out his **reasons** for departing from the guidelines at the time sentence was imposed, while still on **the** bench, or could hold a sen-

tencing hearing, fallowed at some later time by the imposition of sentence. The former procedure might prove too cumbersame in the capital sentencing context, where the reasons for imposing a death sentence generally are more lengthy and complex than the reasons for imposing a departure sentencing. But the latter procedure, involving a sentencing hearing and separate later imposition of sentence, can and shauld be followed in capital cases if due process norms are to be maintained.

Appellant is aware that in Palmes v. State, 397 So.2d 648 (Fla. 1981), this Court found nothing wrong with the judge having prepared her order sentencing the defendant to death prior to the sentencing hearing. However, Appellant submits that Palmes, a case now more than 10 years old, was wrongly decided and flies in the face of the principles expressed more recently in Ree and Scull.

Appellant's death sentence must be vacated.

ISSUE III

THE COURT MAY HAVE BEEN IMPROPERLY INFLUENCED BY IRRELEVANT VICTIM IMPACT STATEMENTS IN MAKING HIS DECISION TO SENTENCE APPELLANT TO DEATH.

At the sentencing hearing before Judge Reese on May 14, 1991, counsel far Appellant asked the court not to consider statements by Terri Rice, Mr. and Mrs. Piper (the victim's parents), Mr. D'Alessandro (the state attorney), and Judge Shands in the post-sentence investigation, arguing that these statements constituted victim impact statements which the court could not properly consider under Booth v. Maryland. (R59) The court made no ruling on the request. (R59-91)

The post-sentence investigation, which the court ruled would be made a part of the record herein (R4-5), contains the following quotation from Terri Rice, one of the attempted murder victims (R204):

> I couldn't stand for him to ever be released here on parole. I'm very much afraid of him, and if he were released and allowed to return here I would fear for my life. He sends me letters and I want them stopped. I want nothing to do with him and I would rather I never even heard of him. My doctor and hospital bills came to over $10,650 which I am completely unable to pay.

Jill Piper's father stated in the post-sentence investigation: "I believe he should be executed. No other sentence is appropriate." (R204)

Judge Shands is quoted in the same document as follows (R204):

> I think he would be killed within 48 hours

> if he is released on parole, No man like this should ever be released to the community, as he is dangerous. I don't think he could adjust to supervision. I know the Pipers--they are hot-tempered and might well kill him,

Finally, Joe D'Alessandro, the state attorney, is quoted in the post-sentence investigation as follows (R205):

> If he is now as he was when sentenced, I don't think he could adjust to parole. I'm sure the community will not accept him. They would like to lynch him. They have really been up in arms about his appeal.

In Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), the United States Supreme Court held that the Eighth and Fourteenth Amendments prohibited the introduction of a victim impact statement containing information about the personal characteristics of the victims, the emotional impact of the crimes on the family, and the family members' opinions and characterizations of the crimes and the defendant. The Court ruled that such information was irrelevant to the capital sentencing decision, and its admission creates an unacceptable risk that the death penalty may be imposed in an arbitrary and capricious manner. Id., 482 U.S. at 502-503, 96 L.Ed.2d at 448. And in Scull v. State, 533 So.2d 1137 (Fla. 1988), this Court noted that it was error for the sentencing judge in a capital case to consider victim impact statements in a presentence investigation as an aggravating circumstance. The statements quoted above contained in the post-sentence investigation constituted the type of material which the sentencer is not permitted to consider under Booth and Scull. As one of the surviving victims of the incident at the Piper residence, Rice detailed

not only the emotional and financial impact of Appellant's offense upon her, but suggested that Appellant would **seek to** do her further harm should he ever be paroled. See Teffeteller v. State, **439** So.2d **840** (Fla. 1983) and Grant v. State, 194 So.2d 612 (Fla. 1967) (improper to argue that defendant should be sentenced to death because otherwise he might be released from prison and kill again). The state attorney and the judge similarly offered irrelevant characterizations of Bppellant as a "dangerous" person who would jeopardize the community if paroled. And **Jill** Piper's father **him**self **offered** his opinion on the sentence Appellant should receive--death--for the slaying of his daughter. This is the type of highly inflammatory material condemned in Booth, which had no legitimate part in the sentencing process, and could have **served** only to distract the sentencer from properly channeled consideration of the task at hand.

In Payne v. Tennessee, 501 U.S. ___, 111 S.Ct. **2597, 115** L.Ed.2d 720 **(1991),** the Supreme **Court had** occasion to revisit and partially overrule Booth. However, the Court made it clear that it **was not** disturbing that part of Booth which held that admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment (115 L.Ed.2d at 739, footnote **2**; concurring opinion **of** Justice **O'Connor, 115** L.Ed.2d at **740**; concurring opinion of Justice Scalia, 115 L.Ed.2d at **742,** footnote 1), which is the type **af** material contained in **the** post-sentence investigation. **See** also Hodges v. State, 17 **F.L.W. S74** (Fla. Jan. 23, 1992), in which this

Court noted that admission of the victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence is still Booth error after Payne.

Furthermore, Payne does not require the states to permit consideration of victim impact evidence at capital sentencing proceedings; Payne merely stands for the proposition that the Eighth Amendment erects no bar prohibiting certain kinds of victim impact evidence. Such evidence remains inadmissible under Florida law, because it does not relate to any of the statutory aggravating circumstances enumerated in section 921.141(5), which are exclusive. Grossman v. State, 525 So.2d 833 (Fla. 1988); Miller v. State, 373 So.2d 882 (Fla. 1979); Elledge v. State, 346 So.2d 998 (Fla. 1977). "Victim impact evidence is irrelevant to a capital sentencing decision, and its introduction . . . creates a risk that the decision to impose the death penalty was made in an arbitrary and capricious manner. [Citation omitted.]" Jackson v. Dugger, 547 So.2d 1197, 1199 (Fla. 1989).

In Grossman this Court applied harmless error analysis and determined that the admission of victim impact evidence in that case was not reversible. The same conclusion cannot be reached in the instant case. Here the court found only two aggravating circumstances, one of which was not entitled to much weight (please see Issue VII. in this brief), and one of which should not have been found at all (please see Issue IV. in this brief), and this case does not represent the type of unmitigated, most serious of crimes which cries out for the death penalty. (Please see Issue

VII. in this brief.) The inclusion of irrelevant victim impact statements in the sentencing process could have made a real difference, and Appellant's sentence of death does not pass muster under the Eighth and Fourteenth Amendments to the Constitution of the United States, nor under Article I, Sections 9 and 17 of the Constitution of the State of Florida. His sentence must therefore be vacated.

ISSUE IV

THE COURT BELOW ERRED IN FINDING THAT THE HOMICIDE OF JILL PIPER WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL, AS THE STATE DID NOT PROVE THIS AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT.

As the second of two aggravating circumstances cited in support of Appellant's sentence of death, the court below found that the homicide of Jill Piper was "especially heinous, atrocious and cruel," as follows (R967-970):

> 2. The first degree murder of Jill Piper was especially heinous, atrocious and cruel.
>
> The evidence and testimony presented to the Court conclusively establish beyond every reasonable doubt that the first degree premeditated murder of Jill Piper was especially heinous, atrocious and cruel. The defendant, age 24, had been dating the victim, Jill Piper, then 16 years of age. The evidence establishes that the couple separated and during several days preceding Jill Piper's murder the defendant communicated threats which, based upon the testimony and evidence surrounding the events leading up to the fatal event, were reasonably interpreted by the victim to be death threats. The evidence establishes that the victim was cognizant of these threats and justifiably terrified by threats which involved the use of weapons. The defendant continued to threaten her during the hours preceding the murder. It is apparent from the victim's action in seeking the company of friends, the availability of of [sic] defensive weapons, and the possible concealment of her vehicle, that she was taking steps out of fear and apprehension of a possible attack on the evening she was murdered. From these circumstances the Court concludes that the victim was aware that she was in mortal danger and reacted to the tremendous fear created by the defendant's threats.
>
> The defendant sought the victim out at her residence where he had previously been arrested the preceding week for trespassing after a

warning by law enforcement officers to stay away from Jill Piper. The evidence establishes beyond a reasonable doubt that the defendant purposely and knowingly armed himself in preparation for this crime and stalked Jill Piper at her home and carried out his murderous attack in a manner such that Jill Piper was not able ta reasonably defend herself. The defendant fired several shots from the dark shadows of the night outside of Jill Piper's residence, striking her in the back and severely wounding her. It is further established beyond every reasonable doubt that the victim did not die instantaneously nor painlessly, but that after these initial shots the defendant pursued the victim and proceeded to savagely beat her as she pled for her life with words to the effect, "Oh God, don't kill me, Oh God, leave me alone." The 16 year old girl fought in defense of her life and incurred defensive wounds which were not present prior to this crime. The severely wounded victim, who had every reasonable basis to be in great fear for her life based upon prior threats from the defendant, was naw reduced to pitifully pleading for her life as the 24 year old defendant beat her and inflicted further injuries upon her. The Court finds that the evidence establishes beyond a reasonable doubt that Jill Piper would have been in great physical pain from the gunshot wounds to the back and the savage beating she was receiving, as well as extreme mental anguish with the realization that the defendant was in fact carrying out his threats and that her life was in mortal danger.

With the 16 year old victim having endured these horrible circumstances of being threatened, wounded and beaten, the defendant then fired another series of shots which included the fatal shot. This shot struck the victim in the forehead at such an angle to establish beyond a reasonable doubt the physical inferiority of the victim's position and further establishing that the victim, severely injured and overpowered, was continuing to beg for her life. Although it is established by Dr. Graves' testimony that the victim was rendered unconscious instantaneously by the shot he identified as wound No. 1, it is more importantly apparent beyond a reasonable doubt that this wound was not received until the victim

> had endured prior gunshot wounds and a severe beating with the full realization that the defendant intended to murder her. This was not an instantaneous nor painless death, but **a** savage **and** brutal death which was torturous to the victim upon whom **a** high degree of pain **had** been inflicted by the defendant with an utter indifference to and savage enjoyment of the suffering Jill Piper was undergoing.
>
> The Court finds that it has been established beyond every reasonable doubt that the defendant's crime for which he has been found guilty was atrocious in that it was outrageously wicked and shockingly evil. The Court further finds that it has been established beyond every reasonable doubt that the defendant's actions were intended to and **did,** in fact, inflict a high degree of **pain** upon Jill Piper with such utter indifference to her suffering that its cruelty and atrociaus nature cannot be denied. The Court further finds that this was a most heinous crime in that it was wicked and shockingly evil.
>
> **Not** only do the facts and circumstances surrounding this crime, which have been proven beyond **a** reasonable doubt, **set** it apart as being outrageously wicked and shockingly evil, but also cruel and savage **so** as to place it **apart** from other premeditated first degree murders. The Court finds that it can only by reasonably characterized as especially heinous, atrociaus and cruel. The Court **further** finds that this aggravating circumstance deserves to be given great weight.

The court's finding of the section 921.141(5)(h) aggravating circumstance cannot be sustained, **as** the State did not carry **its** burden of proving this factor beyond a reasonable doubt.

Many of the facts surrounding Jill Piper's death remain unknown. We do knaw that she died from **a** gunshot wound to the top of her head, which would have rendered her immediately unconscious. (PR459,461-462,471) Death would have occurred within minutes. (PR462) Piper had two other wounds which could have stunned her or rendered her unconscious. (PR462,471) In many cases this Court has

found shootings, even when committed execution-style, not to qualify for the heinous, atrocious, or cruel aggravating circumstance. E.g., Santos v. State, 591 So.2d 160 (Fla. 1991); Wright v. State, 586 So.2d 1024 (Fla. 1991); Parker v. State, 458 So.2d 750 (Fla. 1984); Clark v. State, 443 So.2d 973 (Fla. 1983); Maggard v. State, 399 So.2d 973 (Fla. 1981); Armstrons v. State, 399 So.2d 953 (Fla. 1981); Kampff v. State, 371 So.2d 1007 (Fla. 1979) (directing pistol shot straight to head of victim does not tend to establish this aggravatar). (The fact that Piper was shot several times does not render her homicide especially heinous, atrocious or cruel. In Blanco v. State, 452 So.2d 520 (Fla. 1984) this Court rejected this aggravating circumstance, even though the victim had been shot seven times.)

We also know that Piper was intoxicated at the time of her shooting; her blood alcohol level was 0.12 per cent. (PR476-477) This indicates possibly a lessened awareness of what was occurring and less sensitivity to pain than if she had not consumed alcohol; indeed the medical examiner testified that Piper's faculties would have been diminished. (PR476-477) See Herzog v. State, 439 So.2d 1372 (Fla, 1983), in which this Court considered the fact that the victim was under the influence of a drug in finding the heinous, atrocious or cruel aggravating factor inapplicable, and Rhodes v. State, 547 So.2d 1201 (Fla. 1989), in which this Court indicated that where there is an evidentiary question as to the victim's ability to experience pain when she is killed, the question must be

resolved in favor of the defendant, and the aggravator in question cannot be applied.

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

The finding of the court below obviously turns in large part on the reliability of Byrd's testimony, which is highly suspect. Bryd had been drinking prior to the events at the Piper residence, having consumed three or four beers. (PR447)[6] While Bryd testified to having heard "what sounded like blows passed," or *'very hard hitting'* (PR422), the medical examiner said nothing about Piper having any bruises or other injuries on her face or elsewhere that might have corroborated the suggestion that Appellant hit her. (PR453-477) (Piper did have some cuts on her hands, which were "suggestive" of defensive wounds. (PR470-471) Byrd's testimony that a struggle and the final shots occurred inside the house (PR421-422,435,443), was inconsistent with the undisputed physical evidence, such as the fact that Piper's body was found outside (PR295,321-322,337,435), and the fact that all the spent rifle casings were found outside. (PR348-349) Likewise, Byrd's testimony that Piper collapsed inside the house, bleeding (PR419), was incon-

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

sistent with the fact that no blood was found in the foyer. (PR351)

Unlike Ricky Byrd, Terri Rice was not using any drugs or alcohol on the night of August 13, 1976. (PR286) Her version of events included only one series of shots being fired, and Jill Piper collapsing in the yard, which was consistent with the physical evidence, and did not include the hitting or the yelling and screaming from Piper that Byrd claimed to have heard inside the house. (PR274) Rice's testimony was not burdened by the contradictions with other evidence that call into serious question Byrd's account of the episode, and her testimony must be considered the more credible.

In addition, the findings of the lower court contain speculation which is not supported by any testimony. For example, the court seems to say that because of the angle at which the fatal shot was fired, Jill Piper must have been "continuing to beg for her life" at that time. (R969) However, the medical examiner's testimony established that Piper was probably on her back when she received the fatal shot (PR472-473), which would hardly have been a "begging" posture. The court also states that Appellant inflicted pain upon Piper "with an utter indifference to and savage enjoyment of" her suffering (R970), and that he "delighted in [her] agony" (R981), but the record is devoid of support for these conclusions regarding Appellant's state of mind.

Where, as here, the circumstances surrounding the homicide are unknown, there is no factual basis for finding that the killing was especially heinous, atrocious, or cruel. Bundy v. State, 471 So.2d

9 (Fla. 1985). Similarly, where the facts that are known are susceptible to other conclusions than that an aggravating circumstance exists, that circumstance will not be upheld. Peavy v. State, 442 So.2d 200 (Fla. 1983). It is impossible to know with certainty what happened in the moments before Jill Piper was killed, and Appellant is entitled to the benefit of this ambiguity. See McArthur v. State, 351 So.2d 972 (Fla. 1977) and Mavo v. State, 71 So.2d 899 (Fla. 1954). In Hamilton v. State, 547 So.2d 630 (Fla. 1989), which involved the shooting deaths of the appellant's wife and stepson, this Court invalidated the trial court's finding of the especially heinous, atrocious or cruel aggravating factor. Although the lower court provided a detailed description of what may have occurred on the night of the shootings, this Court believed the record to be "lass than conclusive in this regard." 547 So.2d at 633. The Court noted that aggravating circumstances must be proven beyond a reasonable doubt, and cancluded: "The degree of speculation present in this case precludes any resolution of that doubt.'' 547 So.2d at 633-634. Similarly, here there are too many facts which must be left to the imagination in order to uphold the trial court's finding of especially heinous, atrocious and cruel.

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

instant case, Wright involved the killing of the defendant's girlfriend, with whom he had an on-again, off-again relationship. The couple had a history of domestic problems, Wright entered the victim's house at night by knocking down the back door and the kitchen **door** and started shooting and cursing. The victim, struck by the bullets Wright fired, fell outside the house as she tried to flee. She died of bleeding caused by four gunshot wounds, three of which could have been fatal. While reversing on other grounds, this Court specifically found the especially heinous, atrocious or cruel aggravating circumstance not to be supported by the evidence beyond a reasonable doubt. Santos is also particularly relevant, The defendant and Irma had lived together and had **a** child together, Deidre. The couple had a history of domestic problems. Santos went to a place near Irma's parents' house, where Irma was staying. He saw Irma walking with Deidre and Irma's **son** from **a** previous marriage. Santos walked toward them at a fast pace, When Irma saw Santos coming, she screamed and began running with Deidre in her arms. Santos quickly grabbed her, spun her around, and fired three shots, killing Irma and Deidre. This Court invalidated the trial court's finding of especially heinous, atrocious or cruel, noting that this aggravator applies in torturous murders involving extreme and outrageous depravity. The killings here happened too quickly and with no substantial suggestion that Santos intended to inflict a high degree of **pain** upon, or otherwise torture, the victims. The facts of Appellant's case are very similar to these cases, and **a**

like result must be reached if uniformity is to be maintained in the application of Florida's death penalty statute.

Finally, in evaluating this aggravating circumstance, it is necessary to consider Appellant's drug and alcohol consumption, which the lower court failed to do. (The court did acknowledge in his discussion of mitigating circumstances that Appellant had ingested alcohol, marijuana, and other drugs, including PCP, before Jill Piper was killed, and was under the influence of these substances (R77-78,87,972-973,979), but did not recognize the link between drug/alcohol abuse and behavior which may be considered especially heinous, atrocious or cruel.) This Court has frequently recognized the interrelationship between a defendant's mental condition and the commission of acts which might be considered especially heinous, atrocious or cruel if perpetrated by a person of sound mind. E.g., Amazon v. State, 487 So.2d 8 (Fla. 1986); Mann v. State, 420 So.2d 578 (Fla. 1982); Miller v. State, 373 So.2d 882 (Fla. 1979); Huckaby v. State, 343 So.2d 29 (Fla. 1977). The extensive evidence that Appellant was "flipped out" on alcohol and drugs, especially PCP, militates against holding him wholly responsible for acts that otherwise might be considered to qualify for this aggravating Circumstance, particularly in light of Dr. Sprehe's testimony establishing PCP's tendency to cause senseless violence.

For the foregoing reasons, the trial court's finding of the aggravating circumstance set forth in section 921.141(5)(h) of the Florida Statutes must be overturned. This was one of only two

aggravating circumstances found by the court, and was given great weight. Appellant's sentence of death must fall along with this aggravating factor.

ISSUE V

APPELLANT'S DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH **AMENDMENTS** BECAUSE THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE IS VAGUE, IS APPLIED ARBITRARILY **AND** CAPRICIOUSLY, AND DOES NOT GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

The court below found the killing of Sill **Piper** to be especially heinous, atrocious and cruel, and used this as the second of two aggravating factors in support of his imposition of the death penalty upon Appellant. (R71-76,976-970)

In Proffitt v. **Florida**, **428** U.S. **242**, **96 S.Ct. 2960**, **49** L.Ed. **2d** 913 (1976), the United States Supreme Court upheld Florida's death penalty statute against an Eighth Amendment challenge, indicating that the required consideration of specific aggravating and mitigating circumstances prior to authorization of imposition of the death penalty affords sufficient protection against arbitrariness and capriciousness:

> This conclusion rested, of course, on the fundamental requirement that each statutory aggravating circumstance must satisfy **a** canstitutional standard derived from the principles of Furman itself. For **a system "could** have standards ***so*** vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a **pattern** of arbitrary **and** capricious sentencing like that found unconstitutional in Furman could occur." **428** U.S. at 195 n. **46**, **49** L.Ed.2d 859, 96 S.Ct. **2909.** To **avoid** this constitutional flaw, an aggravating circumstance must genuinely limit the class of persons eligible for the death penalty **and** must reasonably justify the imposition of a more

severe sentence on the defendant compared to others found guilty af murder.

Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235, 249-250 (1983) (footnote omitted). As it has been applied, however, Florida's especially heinous, atrocious or cruel aggravating factor has not passed constitutional muster under the above-stated principles, as it has not genuinely limited the class of persons eligible for the ultimate penalty. This fact is evidenced by the inconsistent manner in which this Court has applied the aggravator in question, resulting in a lack of guidance to judges who arc called upon to consider its application in specific factual settings. The standard of review has vacillated. Far instance, in Hitchcock v. State, 578 So.2d 685 (Fla. 1990), this Court stated that application of the HAC statutory aggravating factor "pertains more to the victim's perception of the circumstances than to the perpetrator's,'' 578 So.2d at 692, whereas in Mills v. State, 476 So.2d 172, 178 (Fla. 1985), the analysis concerned the perpetrator's intent: "The intent and method employed by the wrong-doers is what needs to be examined."

Deaths by stabbing provide but one of many specific examples which could be cited of the Court's failure to apply the section 921.141(5)(h) aggravating circumstance in a rational and consistent manner. In cases such as Nibert v. State, 574 So.2d 1059 (Fla. 1990), Mason v. State, 438 So.2d 374 (Fla. 1983), and Morgan v. State, 415 So.2d 6 (Fla. 1982), the Court has approved findings of especially heinous, atrocious, or cruel where the deaths resulted from stabbings. In Wilson v. State, 436 So.2d 908 (Fla. 1983),

however, a killing that resulted from a single stab wound to the chest was held not to be especially heinous, atrocious or cruel. In Demps v. State, 395 So.2d 501 (Fla. 1981) the victim was held down on his prison bed and knifed. Even though he was apparently stabbed more than once (the opinion refers to "stab wounds" (plural) 395 So.2d at 503), and lingered long enough to be taken to three hospitals before he expired, this Court nevertheless found the killing not to be "so 'conscienceless or pitiless' and thus nat 'apart from the norm of capital felonies' as to render it 'especially heinous, atrocious, or cruel' [citations omitted]." 395 So.2d at *506.* See also opinion of Justice McDonald concurring in part and concurring in the result in Peavy v. State, 442 So.2d 200 (Fla. 1983) simple stabbing death without mare not especially cruel, atrocious, and heinous). [For other examples of how various aggravating circumstances have been applied inconsistently, please see MELLO, Florida's "Heinous, Atrocious or Cruel" Asswavating Circumstance: Narrowing the Class of Death-Elisible Cases Without Making It Smaller, XIII Stetson L. Rev. 523 (1983-84).] The result of the illogical manner in which the section 921.141(5)(h) aggravator has been applied is that sentencing courts have no legitimate guidelines for ascertaining whether it applies. Any killing may qualify, and so the class of death-eligible cases had not been truly limited.

In Maynard v. Cartwrisht, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), the United States Supreme Court held that the Oklahoma aggravating circumstance "especially heinous, atrocious,

or cruel" was unconstitutionally vague under the Eighth Amendment, United States Constitution because this language gave the sentencing **jury** no guidance as to which **first** degree murders met these criteria. Consequently, the sentencer's discretion **was** not channeled to avoid **the** risk of arbitrary imposition of the death penalty. ***See*** also Godfrey v. Georgia, **446** U.S. **420, 100 S.Ct. 1759, 64** L.Ed.2d **398** (1980) (aggravating circumstance of "outrageously or wantonly vile, horrible, and inhuman" *too* subjective),

In Smalley v. State, **546 So.2d** 720, **722** (Fla. **1989),** this Court rejected a claim pursuant to Maynard that Florida's especially heinous, atrocious or cruel aggravating factor is unconstitutionally vague under the Eighth and Fourteenth Amendments, because application of **that** factor by Florida juries and **trial** judges is later reviewed on appeal:

> It was because of [the State v. Dixon] narrowing construction **that** the Supreme Court of the United States upheld the aggravating circumstance of heinous, atrocious or cruel against a specific Eighth Amendment vagueness challenge in Proffitt v. F**larida, 428 U.S. 242 (1976).** Indeed, this Court has continued to limit the finding of heinous, atrocious or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. (citations omitted). That Proffitt continues to be good law today is evident from Maynard v. Cartwrisht, wherein the majority distinguished Florida's sentencing scheme from those of **Georgia and** Oklahoma. **See** Maynard v. Cartwright. 108 S.Ct. at **1859.**

Even more recently, however, the United States Supreme Court decided Shell **v.** Mississippi, **498** U.S. __, 111 S.Ct. 313, 112 **L.Ed.2d** 1 (1990) and reaffirmed the holding in Maynard. The concurring opinion in Shell explains why the limiting constructions

being utilized by the various states are not up to constitutional standards:

> The basis for this conclusion [that the limiting construction used by the Mississippi Supreme Court was deficient] is not difficult to discern. Obviously, a limiting instruction can be used to give content to a statutory factor that "is itself too vague to provide any guidance to the sentencer" only if the limiting instruction itself "provide[s] some guidance to the sentencer."' Walton v. Arizona, 497 US __, __, 111 L Ed 2d 511, 110 S Ct 3047 (1990). The trial court's definitions of "heinous" and "atrocious" in this case (and in Maynard) clearly fail this test; like "heinous" and "atrocious" themselves, the phrases "extremely wicked or shockingly evil" and "outrageously wicked and vile" could be used by "'[a] person of ordinary sensibility [to] fairly characterize almost every murder.'" Maynard v. Cartwright, supra, at 363, 100 L Ed 2d 372, 108 S Ct 1853 (quating Godfrey v. Georgia, 446 US 420, 428-429, 64 L Ed 2d 398, 100 S Ct 1759 (1980) (plurality opinion) (emphasis added).

112 L.Ed.2d at 5. Significantly, the terms of the "limiting construction" condemned by the United States Supreme Court in Shell as being too vague are the ones used by this Court to review the HAC statutory aggravating factor. State v. Dixon, 283 So.2d 1 (Fla. 1973).

It is respectfully submitted that the limiting construction used by this Court as to this statutory aggravating factor is too vague and indefinite to comport with constitutional requirements. The definitions of the terms of the HAC statutory aggravating factor do not provide any guidance to the jury when the fact is first used to make a sentencing recommendation, to the sentencer when the factor is next used when the sentence is imposed, or to

this Court when the factor is reviewed and the "limiting" construction is belatedly applied. The inconsistent rulings by this Court applying or rejecting the HAC factor under the same or substantially similar factual scenarios shows that the factor remains prone to arbitrary and capricious application. These infirmities render the HAC circumstance violative of the Eighth and Fourteenth Amendments pursuant to Maynard v. Cartwright, Godfrey v. Georgia, and Shell v. Mississippi. Appellant's sentence of death imposed in reliance on this unconstitutional factor must be vacated.

ISSUE VI

THE LOWER COURT'S SENTENCING FINDINGS DO NOT SHOW THAT HE GAVE PROPER CONSIDERATION TO ALL MITIGATING EVIDENCE IN THE RECORD, AND ARE NOT SUFFICIENTLY CLEAR TO SUPPORT THE SENTENCE OF DEATH IMPOSED UPON APPELLANT.

The judge at the circuit court level performs an integral role in Florida's capital sentencing scheme. In any case in which he imposes a sentence of death, the judge must provide specific written findings of fact addressing the circumstances in aggravation and mitigation. § 921.141(3), Fla. Stat. (1991). And he must also find that there are sufficient aggravating circumstances to support a sentence of death, and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. § 921.-141(3), Fla. Stat. (1991).

The court's findings must be sufficient to provide the appellant the opportunity for meaningful review of his sentence by this Court. See Cave v. State, 445 So.2d 341 (Fla. 1984); Thompson v. State, 328 So.2d 1 (Fla. 1976). In fact, "[t]he trial judge's findings in regard to the sentence of death should be of unmistakable clarity'' so that this Court "can properly review them and not speculate as ta what he found . . . ." Mann v. State, 420 So.2d 578, 581 (Fla. 1982).

In Lucas v. State, 568 So.2d 18 (Fla. 1990), this Court vacated Appellant's death sentence because the court's findings in support thereof were not sufficiently clear. Unfortunately, the findings prepared by the same judge upon remand, while longer and mare

detailed, once again fail the clarity test, and do not show that the court properly considered all mitigating circumstances.

There are at least two inconsistencies in the court's findings. At the May 14, 1991 sentencing hearing, **the** court found as **the** first aggravating circumstance that Appellant was previously convicted of a felony involving the use or threat of violence (the attempted murders of Terri Rice and Ricky **Byrd),** and concluded that this aggravating circumstance must "be given little weight." (R71) However, in **his** written sentencing order, the court stated that this factor must "be **given** great weight" (R967, emphasis supplied).

Another inconsistency appears **with** regard to the cold, calculated **and** premeditated aggravating circumstance [which this Court found to be inapplicable in Lucas v. State, ***568*** So.2d 18 (Fla. 1990)]. In his discussion of mitigating circumstances at the sentencing hearing, the court said (R80):

> You have asserted a mitigating circumstance that the killing was done from an emotional or passionate reason rather than from mere cold calculation.
>
> The Court after consideration of the evidence finds that there are **facts** which tend to establish this particular mitigating factor but **as** the facts established are incapable of mitigating your punishment because the Court has found the aggravating factor of cold calculated and premeditated murder without any pretense of moral or legal justification.

However, later during the hearing the court **said,** "Even **though** the aggravating factor of cold, calculated and premeditated **was presented** and argued to that jury, it is found by **this** Court to be no longer pertinent to this case." (R90) In his written sentencing

order, the court stated that it had <u>not</u> found cold, calculated and premeditated. (R974,982)

Even mare confusing than the court's discussion of aggravating circumstances is his treatment of mitigating circumstances.

The sentencing court has a duty to articulate the mitigating circumstances he considered "so as to provide this Court with the opportunity of giving a meaningful review of the sentence of death." Magill v. State, 386 So.2d 1188, 1191 (Fla. 1980).

In Campbell v. State, 571 So.2d 415 (Fla. 1990), and Nibert v. State, 574 So.2d 1059 (Fla. 1990), this Court established guidelines ta promote uniformity in the addressing of mitigating evidence by sentencing judges. See also Lamb v. State, 532 So.2d 1051 (Fla. 1988) and Rogers v. State, 511 So.2d 526 (Fla. 1987). The judge "'must find as a mitigating circumstance each propased factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence." Campbell, 571 So.2d at 419. "[W]hen a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert, 574 So.2d at 1062. Once a mitigating circumstance is found, it cannot be dismissed as having no weight. Campbell. See also Santos v. State, 591 So.2d 160 (Fla. 1991). While the trial court may reject the defendant's claim that a mitigating circumstance has been proved, the record must contain "competent substantial evidence to support the trial court's rejection of these mitigating circumstances." Nibert at 1062 [quoting Kight v. State, 512 So.2d 922,

933 (Fla. 1987)]. This Court has previously held that it is not **bound** to accept a trial court's findings concerning mitigation if the findings are based on a misconstruction of undisputed facts or a misapprehension of law. Pardo v. State, 563 So.2d 77 (Fla. 1990).

The first problem with the court's discussion of mitigation is that he failed to address at least three of Appellant's proposed mitigating circumstances, except in passing. Appellant's age of **24** at the time of the offense, and the fact that his emotional age was lower than that were argued by defense counsel in mitigation. **(R59)** **Age** is a statutory mitigating factor, section 921.141(6)(g), and arrested emotional development may also constitute valid mitigation. Amazon v. State, **487** So.2d ***8*** (Fla. 1986). Yet the court did not refer to these matters at all in **his** written sentencing order **(R965-982),** and mentioned Appellant's age only briefly **in his** oral remarks at the sentencing hearing, without explicitly saying whether he found Appellant's age mitigating, or, if not, why not. **(R68)** Appellant also **urged** the victim's intoxication as mitigation [see Rhodes v. State, **547 So.2d** 1201 (Fla. **1989)** and **Herzog v. State**, **439** So.2d 1372 (Fla. 1983)], as well as the fact that she had made a prior threat against Appellant. **(R36,44-45,50)** Again, the court mentioned only the threat briefly in his oral remarks at sentencing, and did not state any conclusions as to **these** proposed factors. (R68)

The court's findings are replete with instances in which the court initially appeared to find a mitigating circumstance, but

then appeared to reject it, or vice versa, or failed to find mitigation that he should have found. **For** example, the court's first finding with regard to mitigating circumstances reads a5 follows (R971-972):

> 1. The defendant urges that the killing of **Jill** Piper was committed while he was under the influence of extreme, mental and emotional disturbance. This fact is supported by the psychiatric testimony presented on behalf of the defendant by Dr. Daniel Sprehe, a forensic psychiatrist. Dr. Sprehe's testimony was based in large part upon **a** mental status examination of the defendant and the multiple drug and alcohol intoxication which included the ingestion of substantial amounts of PCP on the date of the murder. The Court finds that other than the conclusion of Dr. Sprehe, that there is no credible evidence which reasonably establishes this mitigating circumstance in that the action of the defendant on the days preceding the murder and on the evening of August 13, 1976 tend to undermine and discredit the ultimate opinions of the psychiatric expert. There is no credible evidence that the defendant suffered from any psychosis, mental illness or other personality disorder that would support **his** being under the influence of "extreme mental and emotional disturbance." The only evidence presented would indicate that, although the defendant appeared agitated to some of the people he encountered that day, the primary basis for the conclusion is the defendant's voluntary ingestion of alcohol, marijuana, and other drugs including PCP which may have diminished his inhibitions, but did not destroy his cognitive function. Therefore the Court finds that very little weight may be accorded this circumstance.

The court initially seems to reject this statutory mitigating **cir-** cumstance [section 921.141(6)(b)] because it is based solely **upon** **Dr.** Sprehe's conclusions regarding the effects of drugs and alcohol on Appellant, but then concludes that this factor is entitled to very little weight, which indicates that the court found it to

exist. To the extent that the court may have rejected this mitigator because it was based on Appellant's voluntary ingestion **af** drugs and alcohol prior to the homicide, this was incorrect. In Nibert this Court observed that evidence such that the defendant had **a** history of alcohol abuse, was **a** nice person when sober but a completely different person when drunk, and had been drinking heavily on the day of the murder "is relevant and supportive of the mitigating circumstances of extreme mental or emotional disturbance and substantial impairment of a defendant's capacity to control his behavior. [Citations omitted.]" **574** So.2d at 1063.

The court's next finding reads as follows **(R972):**

> **2.** The defendant argues that he acted under extreme duress in committing this crime.
>
> The Court finds that based upon consideration of all the evidence that there has been no credible evidence submitted to support this mitigating factor. The psychiatrist, Dr. Sprehe, made a conclusory statement that the defendant acted under duress. **There** is a complete lack of credible evidence of overbearing or **other** factor indicating that the defendant was acting under extreme duress. Therefore no meaningful weight may be accorded this circumstance.

Again, the court initially appears to reject this statutory mitigating circumstance [section 921.141(6)(e)], finding **"a** complete lack of credible evidence" to support it, but then states that "no meaningful weight may be accorded to this circumstance," thus suggesting that he found it to exist.

The court's third finding reads **as** follows **(R972-974):**

> 3. The defendant urges that his capacity to conform the volitional aspects of his con-

duct to the requirements of law was substantially impaired.

The Court finds that the defendant had voluntarily ingested alcohol and other drugs such as PCP which may have reduced his inhibitions and increased his impulsiveness. This fact has been substantiated and supported by the testimony of Dr. Sprehe and others who observed the defendant's demeanor an the day of the murder. The Court finds however that there is ample evidence in the record that the defendant's intoxication and ingestion of drugs was not a substantial impairment negating his capacity to appreciate the criminality of his conduct, nor his ability to conform to the requirements of law, but had the effect of reducing his inhibitions and increasing his impulsiveness. The evidence in this case clearly establishes that the defendant in the days preceding this incident, and in the hours before its actual commission, evidenced a clear pattern of purposeful behavior sufficient to indicate his capacity to appreciate the criminality of his conduct and his ability to conform to the requirements of law. He was able to carry on his usual activities. The defendant had a full appreciation of the nature of his acts and their intended results. He voiced his intentions and motives for the acts that he would later carry out. He armed himself and concealed himself so that he could approach his victim while avoiding initial detection. He then proceeded to attack his victim, submit her to a savage and painful beating, and notwithstanding her pleas for mercy, carry through with his plan and piteously take her life. The defendant then proceeded on his deadly course and sought out the two possible witnesses and attempted to kill them. The defendant then escaped the area for the purpose of avoiding responsibility for his crime. The Court finds that the manner in which the defendant carried out his plan, including the attempted elimination of witnesses and escape to avoid responsibility, rather than establishing a lack of capacity to conform his conduct to the requirements of law because of the alleged impairment, actually and convincingly demonstrates the type of purposeful activity which completely undermines the evidence tending to establish this mitigating factor. Therefore, based upon the

> consideration of all the evidence the Caurt must find that this mitigating factor, although supported by same evidence, is nat sufficient to counter balance either of the aggravating factors which have been established.

The court initially appears to reject this statutory mitigating circumstance [section 921.141(6)(f)], because Appellant's "purposeful activity . . . completely undermine[d] the evidence tending to establish this mitigating factor," but then inconsistently finds it to be "supported by some evidence," but insufficient to outweigh the aggravating circumstances.

If the court meant to reject the statutory mental mitigating circumstances, then this was error. Dr. Sprehe offered compelling testimony regarding the harmful effects of PCP that was unrebutted by expert testimony, or any other "competent substantial evidence." Nibert, 574 So.2d at 1062. Rejection of these factors, if that is what occurred, was predicated on nothing more than an unwarranted judicial foray into amateur psychiatry. In Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986), the court held that capital sentencing standards under the Eighth and Fourteenth Amendments, United States Constitution, preclude a state court from failing to find the existence af mental mitigating factors in the face of compelling evidence that they are present. The uncontroverted opinion at bar as to the existence of the mental mitigating factors required the court to find them to exist.

The court's fourth finding reads as follows (R974):

> 4. The defendant urges a mitigating circumstance that "the killing was done for emo-

> tional or passionate reasons rather than from mere cold calculation.
>
> The Court, based upon consideration af the evidence presented, finds that there are facts which would tend to support this particular mitigating factor, but that the facts as established are incapable of mitigating the defendant's punishment because the Court has not found the aggravating factor of cold calculated and premeditated murder without any pretense or [sic] moral or legal justification,

This finding ignores the many cases in which this Court has held that the passions aroused by a domestic relationship between defendant and victim may constitute a valid mitigating circumstance. (Please see discussion of proportionality in Issue VII. in this brief.) These cases have not required a finding of CCP in order far this mitigator to apply, and so the court below applied an incorrect legal standard in rejecting it.

The court's fifth finding regarding mitigation reads (R974-976):

> 5. The defendant argues as a mitigating circumstance in Paragraph 5 that he has displayed good conduct while on death row since 1977, and that he has experienced change and self-improvement while in prison. Pursuant to the directive and guidance of the Florida Supreme Court in Campbell v. State, 571 So2d 415 (Fla 1990) [sic], the Court considers this mitigating circumstance in conjunction with No. 7 that the defendant has shown genuine remorse and No. 8 that he cared deeply for Jill Piper. In addition, in Paragraph No. 9, the defendant asserts that the structured environment of prison has served as rehabilitation for the defendant as evidenced by the testimony that he appeared to be a changed man with good potential for rehabilitation. The Court, in accordance with the Campbell decision, considers these four alleged mitigating circumstances as one single area of mitigation. The Court has considered the testimony

> and evidence presented at the re-sentencing in 1987, as well as the record in this case and finds that there is support in **the** evidence far this mitigating factor. Having considered the testimony and the demeanor of the defendant while testifying, the Court finds that the defendant's expressed caring for Jill Piper defies logic and reason and is completely contradicted by the overwhelming evidence of his actions. The Court further, having considered the testimony **and** evidence finds that the remorse expressed by the defendant is more **far** his legal circumstances than for the underlying offense. The facts of the defendant's **goad** prison record are amply supported by the evidence, and considering the length of time that he has been under sentence of death in the structured environment of the Florida State prison, it is not startling nor particularly significant that the defendant has changed many of his attitudes **and** opinions. The evidence fails to establish that these changes are due to anything other than the maturation process during the passage of time. The Court finds that there is insufficient credible evidence to reasonably establish the defendant's "good potential for rehabilitation" and therefore finds that this is not a factor which can reasonably be given great weight by the Court, Setting aside the self-serving nature of the expressions of remorse and caring for **the** victim and considering every aspect which has been established; that is, the defendant's good prison record, the Court can give this factor very little weight when compared to the aggravating factors which have been established beyond every reasonable doubt. These established facts are incapable of mitigting [sic] th [sic] defendant's punishment and definitely do not extenuate or reduce his moral culpability.

This finding is most confusing. The court combines several **proposed** mitigating factors (good conduct in prison, potential for rehabilitation, genuine remorse, caring deeply for victim) into one, and states that "there is support in the evidence for this mitigating factor." He then goes on to state, however, that Appel-

lant's "expressed caring far Jill Piper defies logic and reason and is completely contradicted by the overwhelming evidence of his actions," thus seeming to negate his earlier finding. The court finds ample support in the record to show that Appellant has **a** good prison record and has changed many of his opinions and attitudes, but then dismisses this factor because "[t]he evidence fails to establish that these changes are due to anything other than the maturation process during the passage of time." Good conduct in **prison** is a recognized mitigating circumstance. See, for example, Skipper v. South Carolina, **476** U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Crais v. State, 510 So.2d **857** (Fla. 1987); Valle v. State, 502 So.2d 1225 (Fla. 1987). The fact that Appellant's excellent record an death row may stem from "the maturation process" is of no moment, and the court's apparent rejection of this mitigator **was** completely arbitrary.

The court finds "insufficient credible evidence to reasonably establish the defendant's 'good potential for rehabilitation' and therefore finds that this is not a factor which can reasonably be given great weight by the Court.'' In **this** one sentence the court seems to say that the evidence **does** not support this mitigator, and to find that it does exist, **but** is not entitled to great weight.

In the next sentence the court states that "this factor,'' which presumably means the combination of circumstances under discussion is entitled to "very little weight," which indicates that it is entitled to some weight. But in the final sentence pertaining to this factor, the court states: "These established facts **are**

incapable of mitigting [sic] th [sic] defendant's punishment **and** definitely do not extenuate or reduce his moral culpability," which suggests outright rejection of the matters under discussion as constituting any **degree** of mitigation at all.

The court's next finding reads (R976-977):

> 6. At the previous sentencing proceeding the Court found that the defendant **has** no significant history of prior criminal activity. This factor has been found by the Court to exist as a mitigating factor and to have been supported by the evidence at prior sentencing proceedings. The Court again finds that the defendant has no significant history of prior criminal activity. The evidence establishes that the defendant's criminal **record** consisted of minor offenses and the week preceding the murder, there was evidence of a trespass after warning. However, **the** Court finds that this factor is insufficient to mitigate the defendant's punishment and fails to counterbalance the aggravating factors which have been proven beyond every reasonable doubt. [Emphasis supplied.]

The court here clearly finds that Appellant has no significant criminal history, but ***goes*** an to (apparently) reject this **as** a mitigating factor. However, the Florida Legislature has determined that the defendant's lack of a significant history of prior criminal activity shall be a statutory mitigating circumstance which the sentencer is required to consider, section 921.141(6)(a), Florida Statutes, and **the** court below was not free arbitrarily to discount this factor.

Appellant will move on **to the** number **11.** finding of the trial court, which reads (R977-978):

> 11. The defendant urges as **a** mitigating factor and circumstance that he "was physically **and** psychologically abused by his alcohalic

> father in his youth." The Court finds that such reference in a post-sentence investigation report was vague and lacked sufficient specificity to establish that the defendant himself was physically and psychologically abused in this regard and that these factors, even if established, had any bearing upon the offenses which the defendant committed. Therefore, the Court finds that there is insufficient support for this factor in the evidence and that even if established to some degree is incapable of mitigating the defendant's punishment.

The court appears uncertain as to whether this mitigator is supported by the evidence or not. Perhaps if Appellant had been permitted to introduce additional evidence at the sentencing hearing, as discussed in Issue I. in this brief, he could have established this circumstance more to the court's satisfaction. Also, the court's written finding fails to take account of Appellant's own remarks at the May 14, 1991 hearing, in which Appellant detailed the fact that he was beaten by his father, who also cussed him, and told him that he was worthless and would never amount to anything. (R67) Had the court waited until after the hearing to sentence Appellant, as he should have (please see Issue II. in this brief), he could have prepared a comprehensive order which took Appellant's comments into account.

The court's apparent rejection of abuse as a mitigating circumstance because it was not specifically shown to have "had any bearing upon the offenses which the defendant committed," is similar to the error committed by the trial court in Nibert, in which the court found physical and psychological abuse to be possible mitigation, but dismissed it because Nibert was 27 years old at the

time of the offense, and had not lived with his abusive mother since he was 18. This Court rejected the lower court's analysis and implicitly recognized that the scars of child abuse linger long after the abuse ends. The Court also noted the "well-settled law" that a defendant's history of child abuse is a valid mitigating circumstance. **574** So.2d at 1062. ***See*** also Campbell v. State, 571 So.2d 415 (Fla. 1990) and **Freeman v. State**, **547** So.2d 125 (Fla. 1989). The trial court's conclusion that even if Appellant's history of abuse had been established to some **degree** it was "incapable of mitigating the defendant's punishment" was wholly arbitrary, and not in conformity with precedent emanating **from** this Court.

The trial court's next finding reads as fallows (R978):

> 12. The defendant argues as a mitigating circumstance that he suffered from "chronic and extreme alcohol **and drug** abuse since his prc-teen years." Based upon the testimony and evidence presented, the Caurt finds that the defendant's abuse of alcohol and drugs establishes a mitigating circumstance relating to the defendant's character. However, the testimony also establishes that the defendant voluntarily ingested these substances at various times **and was** able to lawfully function within society whenever he chose. **The** defendant was able to choose his time and place to engage in the abuse of **drugs** so that, contrary to the defendant's assertion, the defendant was not dominated by **his** substance abuse but, as previously found, **the** defendant experienced a reduction of **his** inhibitions and increase of impulsiveness during these periods. Other than as previously found, this factor is not capable of mitigating the defendant's punishment. While it is a reflection on his lifestyle and character, the Court finds that it is [sic] does not extenuate nor reduce the degree of moral culpability.

The court appears to find as a matter of fact that Appellant did indeed have a long history of chronic and extreme alcohol and drug abuse, but then to find that this history does not constitute a mitigating circumstance. However, in cases such as Nibert, Wright v. State, 586 So.2d 1024 (Fla. 1991), Carter v. State, 560 So.2d 1166 (Fla. 1990), Pentecost v. State, 545 So.2d 861 (Fla. 1989), and others, this Court has recognized a history of substance abuse as the type of evidence which may support a life sentence. To the extent that the court may have failed to consider this factor in the context of nonstatutory mitigation because he had already considered it in the context of the statutory mitigating circumstances of extreme mental or emotional disturbance and substantial impairment of capacity to conform conduct to requirements of law, the court failed to follow the dictates of Cheshire v. State, 568 So.2d 908 (Fla. 1990).

The trial court's next finding reads (R978-979):

> 13. The defendant urges as a mitigating circumstance that "he was a nice person when sober and was trusted with the money and younger children of several witnesses." The Court finds that the testimony and evidence tending to establish this mitigating factor was provided by relatives and friends of the defendant. The Court further finds that this evidence does not distinguish the defendant in any way from the average person and certainly does not reasonably establish any exemplary character. There is abundant evidence that the defendant conducted himself sufficiently within the minimum requirements of society to hold gainful employment and function in society. The Court finds that the testimony and evidence presented fails to establish that the defendant conducted himself in such a manner in the days and hours preceding the murder and therefore these facts cannot be accorded suf-

> ficient weight to mitigate the defendant's punishment.

In Nibert this Court found the fact that the defendant "was a nice person when sober but a completely different person when drunk'' to constitute legitimate mitigating evidence. 574 So.2d at 1063.

The court's statement that the evidence failed to show that Appellant conducted himself "within the minimum requirements of society . . . in the days and hours preceding the murder"' is inapposite to this proposed mitigator. All the testimony tended to establish that the instant violent behavior was totally out of character for Appellant, and was induced by heavy drug and alcohol use.

The final finding which Appellant wishes to address reads (R979-980):

> 14. The defendant next asserts as a mitigating circumstance that "on the day of the killing, he was under the influence of PCP, marijuana and alcohol with the resulting impaired ability to appreciate the criminality of his conduct."
>
> The Court finds that this mitigating factor is in essence identical to and part of the statutory mitigating factor previously asserted by the defendant. As stated above, the Court finds that while the defendant was under the influence of alcohol and drugs, including PCP, that there is insufficient evidence to establish that these fact impaired his ability to appreciate the criminality of his conduct but rather that they tended to increase his impulsiveness and decrease his inhibitions with the result that he set about his nefarious scheme and carried it through in a purposeful manner. Therefore, the Court rejects this mitigating factor as it may stand alone as being unsupported by the evidence. As a part of the previous mitigating factor, the Court has considered and weighed this factor

and found it to be insufficient to counter-
balance the aggravating factors.

In cases such as Ross v. State, 474 So.2d 1170 (Fla. 1985), Fead v.State, 512 So.2d 176 (Fla. 1987), Nibert, Amazon, and Norris v. State, 429 So.2d 688 (Fla. 1983), this Court has recognized drug/alcohol use prior to the offense to be a valid mitigating factor. The court below apparently found as a factual matter that Appellant was under the influence of alcohol and drugs, including PCP, at the time af the homicide, but inexplicably failed to accord this fact any, or at least sufficient, weight in mitigation,

As Appellant has already indicated, there was ample, essentially unrebutted evidence of Appellant's extensive use of drugs and alcohol in the hours preceding the homicide, and the effect this had on Appellant. On August 13, 1976, he was drinking beer, smoking marijuana and "hash," and using PCP. (PR507,513-514,518, 564-565,572,588-589,593-594,596-597,602) That evening he was "high." (PR445-446,570,587) Later that night he appeared to be intoxicated or under the influence of drugs. (PR401) Witnesses described him as "carrying on," acting strange and a little bit crazy, "in his own world," and "totally out of it." (PR508,527-528) His eyes were glassy, and he was staggering a little bit. (PR286-287,542) He did not look the way he normally looked, nor act the way he normally acted; he looked like a different person. (PR542-543) Dr. Sprehe testified to the power of PCP to induce violent behavior. (PR613,621) Nowhere in his sentencing order did the trial court give this testimony the consideration it warranted,

In sum, then, the findings of the lower court arc full of inconsistencies and ambiguities, and instances where the court failed to **give** proper **consideration to** all the evidence in mitigation.

In **Lucas v. State**, 417 So.2d **250** (Fla. 1982) this Court observed that Florida's capital sentencing statute requires the trial court to "exercise **a** reasoned judgment in weighing the appropriate aggravating and mitigating circumstances in imposing the death sentence." 417 So.2d at 251. In **order** to "satisfactorily perform" its review function, this Court '"must be able to discern from the record that the **trial** judge fulfilled that responsibility." 417 So.2d at 251. From the muddled **sentencing order** entered herein, this Court cannot have any confidence that the court below properly fulfilled his statutory duty.

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

Where, **as** here, the sentencing court fails to make the findings **required** by section 921.141(3) of the Florida Statutes that

will support a sentence of death, or enters findings that are totally deficient, a life sentence must be imposed. § 921.141(3), Fla. Stat. (1991); Bouie v. State, 559 So.2d 1113 (Fla. 1990); Van Royal v. State, 497 So.2d 625 (Fla. 1986).

The death sentence imposed upon Appellant contravenes the bans on cruel and unusual punishments found in Article I, Section 17 of the Constitution of the State of Florida and the Eighth Amendment to the Constitution of the United States. The manner in which the sentence was imposed also did not conform with the requirements of due process of law as guaranteed by Article I, Section 9 of the Constitution of the State of Florida and the Fourteenth Amendment to the Constitution of the United States. The sentence cannot be allowed to stand.

ISSUE VII

THE TRIAL COURT ERRED IN SENTENCING HAROLD GENE LUCAS TO DEATH BECAUSE SUCH A SENTENCE IS DISPROPORTIONATE TO THE CRIME HE COMMITTED.

The death penalty, unique in its finality and total rejection of the possibility of rehabilitation, was intended by the legislature to be applied "to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So.2d 1, 7 (Fla. 1973); Holsworth v. State, 522 So.2d 348 (Fla. 1988); Fitzpatrick v. State, 527 So.2d 807, 811 (Fla. 1988). Appellant's case does not fit within this category.

The court below apparently found only two aggravating circumstances. (R965-982) One of these, especially heinous, atrocious and cruel, should not have been found, as discussed in Issues III. and IV. herein. The other, prior conviction of a violent felony, was not entitled to much weight. It was predicated upon the attempted murders of Terri Rice and Ricky Byrd, which occurred at the same time as the instant homicide, and so revealed nothing concerning Appellant's propensity or lack of propensity for violence. See opinion of Justice Kogan, joined by Justice Barkett, concurring in part and dissenting in part in Santos v. State, 591 So.2d 160 (Fla. 1991). More to the point is the rest of Appellant's life history, which demonstrated that Appellant had shown no propensity toward violent conduct, and that the instant episode was a complete aberration.

Although the **trial** court's findings are virtually incapable of being deciphered, as discussed in Issue VI. herein, it **docs appear** certain that **the** court found as a factual matter at least four aspects of this case that should be viewed **as** substantially mitigating. The court found that Appellant had no significant history of prior criminal activity (R976-977), which is **a** mitigating circumstance under section **921.141(6)(a)** of the Florida Statutes. The court found that Appellant had displayed good conduct while in prison. **(R974-976)** See, for example, Skipper **v.** South Carolina, **476 U.S.** 1, **106** S.Ct. 1669, 90 L.Ed.2d 1 (1986); Craig v. State, 510 **So.2d 857** (Fla. 1987); Valle v. State, ***502*** So.2d 1225 (Fla. 1987). **The** court found that Appellant had **a** history of chronic drug **and** alcohol abuse. **(R978)** See, **for** example, Nibert v. State, **574 So.2d** 1059 (Fla.1990); Wright v. State, ***586* So.2d 1024 (Fla.** 1991); **Carter** v. State, **560 So.2d 1166** (Fla. 1990); Pentecost v. State, **545** So.2d 861 (Fla. 1989). **And** the court found that **Appellant** was under **the** influence of alcohol and drugs, including PCP, at the time of the homicide. (R971-972,979-980) See, for example, **Ross v.** State, **474 So.2d 1170** (Fla. **1985); Fead** v. State, 512 So.2d 176 (Fla. 1987); Nibert; Amazon v. State, **487** So.2d ***8*** (Fla. 1986); **Norris v. State, 429 So.2d 688 (Fla. 1983).**

In the presence of the substantial mitigating evidence **existing** in the **record,** and the relative lack of valid aggravation, the death penalty is unwarranted **for** Appellant as a matter of law. See Penn v. State, 574 So.2d 1079 (Fla. 1991); Nibert ["substantial mitigation may make the **death** penalty inappropriate even when the

aggravating circumstance of heinous, atrocious, or cruel has been proved. (Citations omitted.)"] 574 So.2d at 1059.

Furthermore, Appellant's case falls within that line of cases in which this Court has reversed death sentences where killings have occurred in the course of domestic disputes or lovers' quarrels. Jill Piper and Appellant had dated off and on for two or three years, and had even talked of marriage. (PR261-262,480,508, 522,592,598) Appellant had stayed overnight at the Piper house many times. (PR599) But problems began when Piper began dating someone else in the week before her death, a fact that made Appellant very upset (PR611), and ultimately led to the homicide.

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

In Kampff v. State, 371 So.2d 1007 (Fla. 1979), another case in which the jury recommended death, the defendant shot his wife five times in the retail store and bakery where she worked. They had been divorced for three years, and Kampff had brooded over the divorce during that time. He had constantly harassed and begged his former wife to remarry him. Just before the shooting, Kampff suspected that the victim was becoming romantically involved with someone else. Kampff had an extreme, chronic problem with alcoholism. This Court reversed Kampff's death sentence and remanded for

imposition of a **life** sentence. Appellant here had a longstanding problem with both drugs and alcohol. **(PR515,526,542, 593,602,617)** His crime is na more deserving of a death sentence than Kampff's.

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

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

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

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

In **Ross** the **jury** recommended death for the defendant's killing of his wife. **Her** death resulted from multiple blows to the head with a blunt instrument. Her face was extensively bruised, scratched and lacerated. The bruises occurred while she was still alive, and were probably inflicted with **a** fist or foot. There was evidence she had tried to fight off her attacker, as she had injuries on her hands and arms. The trial court found the murder to be heinous, atrociaus **and** cruel and found no mitigating circumstances. In vacating the death sentence, this Court noted that the trial court should have considered in mitigation, among other things, "that the killing **was** the result of an angry domestic dispute." **474** So.2d at 1174. The killing of Jill Piper was accomplished with much less trauma to the victim than the killing in **Ross.**

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

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

be proportionately correct," citing Kampff, Irizarry, and Ross. 531 So.2d at 1261.

Fead presented facts quite similar to those of the instant case. Fead was very jealous of his girlfriend, felt she was leaving him, and became angered when she danced with other men at a bar earlier in the evening. He and his girlfriend argued, and he shot her to death. Like Appellant, Fead had been drinking all day. (Appellant had also been consuming drugs.) Like Appellant, Fead presented expert testimony that his capacity to control his actions and impulses would have been diminished by use of intoxicants. Both Appellant and Fead expressed remorse over their girlfriends' deaths. Both Fead and Appellant had left school to help support their families. Both were easy-going men who where trusted.

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

Wright also involved a factual scenario similar to that involved herein. Wright had lived at the victim's house off and on and fathered children by her. There was a long history of domestic disputes between them. Late at night Wright entered the victim's house by knocking down the back door and the kitchen door and started shooting and cursing. The victim, struck by the bullets, fell outside the house as she tried to flee and died of bleeding caused by four gunshot wounds, three of which could have been fatal. There was evidence that Wright had been drinking earlier in the evening and become intoxicated; he was described as looking

"wild," his eyes were "real red," and his speech was slurred. 586 So.2d at 1026. (Compare with the testimony in the instant case concerning how Appellant appeared shortly before the homicide.) In ascertaining that the jury's recommendation of life for Wright was reasonable, this Court stated:

> This Court has repeatedly recognized that inflamed passions and intense emotions of an ongoing domestic dispute such as the one in this case are mitigating in nature and may render the death sentence disproportional punishment.

586 So.2d at 1031.

Wilson v. State, 493 So.2d 1019 (Fla. 1986) is instructive because the trial court properly found the same two aggravating circumstances the court found here (especially heinous, atrocious and cruel and prior conviction of a violent felony). The jury recommended death, but this Court found the death sentence not to be "proportionately warranted'' where it resulted from a "heated, domestic confrontation." 493 So.2d at 1023. See also Douglas v. State, 575 So.2d 165 (Fla. 1991) (prior domestic relationship may be considered a nonstatutory mitigating circumstance); Garron v. State, 528 So.2d 353 (Fla. 1988); Blair v. State, 406 So.2d 1103 (Fla. 1981).

The death penalty is not warranted for this Appellant and this crime, and it cannot stand without violating the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9 and 17 of the Constitution of the State of Florida. Appellant's death sentence must be replaced by one of life imprisonment.

CONCLUSION

Appellant's sentence of death was imposed in violation of the state and federal constitutions. He must be resentenced to life in prison. In the alternative, Appellant must be granted a new sentencing hearing before the court that conforms with all standards of due process of law, at which Appellant will have full opportunity to present any and all evidence he wishes in mitigation of his sentence.

CERTIFICATE OF SERVICE

I certify that a capy has been mailed to Robert Krauss, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 27th day of March, 1992.

Respectfully submitted,

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