IN THE SUPREME COURT OF FLORIDA

RONALD JORGENSON,

Appellant,

vs. CASE NO. 86,916

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

G U I L T :

Oyd Crosby saw a car parked on the road the morning of December 2, 1993; the driver's window **was** down and someone **was** slumped over in the passenger seat. There were shoe tracks by the driver's side and a cigarette butt nearby. (TR 1197-1207) Willie Milam called 911 after meeting Crosby; everyone stayed away to preserve evidence. (TR 1215) Robert Stone was stopped by another driver who found the car and avoided the shoe marks; he was not wearing tennis shoes. (TR 1223) Ruth Hall saw **a** car on the curve of Dean Still Road while going home at about 11:45 p.m. (TR 1228-31) Greg White saw a car parked on the side of the road at about one in the morning. (TR 1244-46) EMS supervisor Steven Powell responded to the early morning call at about 7:00 a.m. and found the woman lying in the passenger seat with no pulse; rigor mortis was present. (TR 1247-52) Deputy Sheriff Burless arrived at 7:35 a.m. and roped off the area (TR 1255) and crime scene technician Cynthia Holland videotaped the crime scene, observed the victim with multiple gunshot wounds to the head and collected cigarette butts from Detective Cosper. (TR 1268-1305)

Rocky Finley lived in a trailer with ex-girlfriend Melissa Maynard and testified (after the jury was given a Williams-rule instruction -- TR 1351) that he was a business partner with

Jorgenson in buying and selling and fixing trailers and dealing methamphetamines. (TR 1357) He, the defendant, victim Ruzga, Ms. Kilduff and Melissa Maynard all used methamphetamines which he and appellant sold. He saw appellant on the night the victim was killed to buy amphetamines from him and next saw him after midnight coming out of Finley's trailer with Laurie Kilduff. (TR 1358-61) Jorgenson was carrying a gun two or three days prior to the Ruzga homicide. (TR 1362) That evening Kilduff, who was going to Wal-Mart with Maynard, said she was going to meet appellant and left before eleven. He heard Jorgenson's vehicle which had a loud muffler crank up shortly before or after Kilduff left. Finley previously had heard Jorgenson say about Tammy Ruzga, 'I'm going to kill that bitch" weeks earlier. The day after the murder -- when Finley had seen television reports of the found car and a woman killed -- appellant asked him to give him a car ride to Plant City and the topic of appellant's murdered girlfriend did not come up. (TR 1363-68) Later appellant phoned him from jail to ask him to get the car he had killed Tammy in and admitted that blood went everywhere when he shot her repeatedly. (TR 1370-72) Jorgenson threatened to take him down if Finley testified against him; appellant wanted him to tell police he had been at the Finley house since 10:30 p.m. and Finley refused. (TR 1373-74)

Melissa Maynard went shopping with Laurie Kilduff on December

1, and after their return at about 11:00 p.m. Kilduff used the phone and left in her car fifteen minutes later. She also heard appellant's car start up. (TR 1481, 1483) Later appellant came to her trailer with Laurie; it looked like he had ketchup on his shirt and he was fidgety. (TR 1484) She knew Jorgenson and Finley sold and used methamphetamines (indeed Finley was using it that night -- TR 1482) and she knew that Tammy Ruzga used and delivered methamphetamines. (TR 1483-84) Jorgenson asked her that if anyone inquired about his whereabouts that evening to tell them he had been in a business meeting with her and Finley; she too was aware that he carried a gun. (TR 1484-85) Appellant previously expressed the desire that Tammy disappear and asked her to help zap her with a stun gun. (TR 1486-87) After appellant's arrest he phoned her collect and when she mentioned a news article that the victim was shot once he corrected her by saying she was shot three times in the head. (TR 1490) She also testified that after police had searched appellant's trailer he made a remark regretting that he had not gotten rid of the shoes. (TR 1536-37)

Laurie Kilduff Turney became involved when she learned appellant dealt drugs; both she and her ex-husband Patrick were into methamphetamines. (TR 1542) She testified that during an 8:00 p.m. phone call appellant asked her to call him again at 11:00. (TR 1546) She did so and appellant asked her to follow him

out to Dean Still Road at 33 and 1-4. She stated that she did not know the reason until she got there. (TR 1552-53) Laurie Kilduff testified that she did not know before she drove to meet appellant on the night of the killing the actual purpose of the meeting; she understood that they were having a meeting with the Latin Kings, another group involved in the methamphetamine business. (TR 1553-54) She further testified that appellant had explained to victim Tammy Ruzga the reason they were out there on the road was that they had a meeting with the Latin Kings. (TR 1566) They met at I-4 and 33 and appellant told Laurie to meet him at Dean Still Road. Tammy was a passenger in Jorgenson's car. After stopping for gas and coffee, Laurie drove out there and appellant pulled up behind her. She saw that appellant had a gun by his side and mentioned that he could not get Tammy in the driver's seat. (TR 1560-64) She responded, "what difference does it make?" She did not leave because she was on drugs, thought appellant was her friend and figured he would catch her sooner or later if she ran. Appellant returned to his car and shot the victim three times, then removed a baby car seat and three pairs of jeans from the car (which was supposed to be given to Rocky and Missy). Jorgenson smoked regularly and he smoked at the scene of the murder; he wiped his prints from his car door and steering wheel and instructed her to drive by a lake where he got out, walked toward the lake, and

returned in two or three minutes. (TR 1565-75) They returned to Finley's trailer and smoked methamphetamines. The next morning he phoned police to report his car and girlfriend missing. (TR 1582) Initially she lied to police and attempted to follow Jorgenson's instruction that Tammy had stolen the car, appellant tried to get across the idea that it looked like Tammy killed herself or someone else did it. (TR 1584-98) Finally, she told the police the truth about everything. She was given immunity to tell the truth. (TR 1599-1600) Appellant subsequently wrote her a letter, Exhibit 100, reminding her that, "without you they don't have a case". (TR 1607) Onredirect she testified appellant had told her a week or so prior to the killing that Tammy was a liar and a thief, that he could not stand it any longer, all she did was cry and whine and all she wanted to do was kill herself any way. (TR 1704)

Officer Hibbs spoke to appellant after he reported his car and girlfriend missing. Jorgenson only wanted the police to know she had a history of drug use and that he was missing some property which she might trade to obtain drugs. Appellant did not wish to report a missing person or file a stolen vehicle report. (TR 1757-58)

Detective Cosper observed tire and shoe impressions at the murder scene, saw similar shoeprints at defendant's residence and retrieved cigarette butts appellant smoked at the police station.

(TR 1768-70)

Associate medical examiner Dr. Melamud described the multiple gunshot wounds to the head of Tammy Jo Ruzga. (TR 1782-1802) There was a large amount of amphetamine level in the blood which is not uncommon in chronic drug abusers. (TR 1805) He thought that the victim was a habitual drug user. (TR 1829-32)

Rebecca Holloway testified that she gave the victim jeans and a baby car seat to give to Tammy's friends, at about 9:35 p.m. (TR 1834-38)

Forensic serologist Theodore Yeshion explained that on the DQ-Alpha segment of DNA found on chromosome 6 appellant had a type 1.1, 1.2, the same as cigarette butts found at the scene of the crime and at the shore of Lake Hunter. (TR 1867-1892)

Scot Cary, an expert in shoe and tire track impressions, testified as to his examination of the tires and also opined that appellant's left shoe made a track at the scene and that two right shoe tracks were probably made by his right shoe. (TR 1941-78)

Jail inmate Michael Hughes had met appellant years earlier when the latter was a bouncer at Benny's Bar in Lakeland. (TR 1991) While in jail Jorgenson admitted to him that he killed Tammy by shooting her three times in the head and that he made the decision to kill her between 7:00 and 8:00 p.m. the night before she was found. (TR 2008) Appellant explained there was a problem

of getting the victim to sit up long enough to be shot because after he had gotten her juiced up on crystal methamphetamine she kept falling over. He could get a clear shot when he propped her up. (TR 2008, 2012) Jorgenson had tired of his relationship with Tammy and she was blackmailing him -- that if he cut her off financially or from drugs, she would turn him in and make life hell for him. (TR 2012) Appellant explained that he would get rid of somebody who messed with his dope business. (TR 2013):

"No one fucks with his dope business"

(TR 2014)

Jorgenson also admitted reporting the victim and his car missing to the authorities and was unhappy with Laurie's assistance -- offering Hughes $50,000 to get rid of her. (TR 2015) He regretted using drugs that night because it messed up his thinking and he would have done things differently (act alone, make better plans to dispose of the body beforehand, gotten rid of the shoes). (TR 2015-2016)

Jail inmate Richard Costentino similarly testified that appellant admitted shooting the victim three times. (TR 2069-70)

Detective Deanna Goddard Warren described the shoe prints, tire tracks and cigarette butts at the murder scene, and obtaining appellant's shoes from him. (TR 2097-2103) In his interview appellant denied killing Tammy and said someone was trying to frame

him. (TR 2103-04) He also claimed that he had not owned a gun in the last twenty-five or thirty years. (TR 2109) The witness noted discrepancies given in the versions by Kilduff and appellant. (TR 2113-14) Kilduff was granted immunity in return for her truthful report and she admitted being at the scene when Jorgenson killed Tammy. (TR 2122-23) Warren believed on hearing Laurie Kilduff's statement that she was an accessory after the fact. (TR 2136) She testified about talking to inmates Hughes and Costentino without making any promises or threats to either. (TR 2143)

The jury returned a guilty verdict. (TR 2522-24)

PENALTY PHASE:

At penalty phase the state introduced the testimony of fingerprint examiner Mary Beth Dalton who identified Jorgenson's prints on the Colorado judgment and sentence for murder, Exhibit 62. (TR 2562-67) The defense introduced as exhibits the autopsy report on victim Philip Morgan in that case and a stipulated statement of facts. (TR 2568, TR 2570)

Additionally, the defense called Jorgenson's mother who testified that appellant was fifty-four years old (TR 2575), that on one occasion at age eight appellant ran away from home for an eight day period, that no man was in the house from 1949 to 1954, that she had married four or five times, that appellant was very

bright in school but it was difficult to keep him there because he was bored in school, that he was shy but won a fight and went to prison for 6½ years after shooting Philip Morgan. (TR 2576-2594) The only person in the house to mistreat appellant was Mr. Bill Young, for a six-month period. She didn't have any contact with appellant since 1991. (TR 260940)

Gary Jorgenson, appellant's younger brother, testified that he was aware Philip Morgan was physically abusive to his sister. The witness was not living there at the time of the shooting of Morgan. Appellant encouraged him and told him drugs were not the answer to his problems and last had contact with him in December 1991. (TR 2612-20)

Melissa Maynard testified that appellant let Tammy use more and more drugs, that he also used them, that when appellant mentioned zapping the victim with a stun gun Laurie Kilduff volunteered to do it and that after the murder Laurie told her she had stated to Jorgenson on the road to go ahead and do it. The witness saw bruises on the victim's face after appellant mentioned he'd had a fight with Tammy. (TR 2628-39) Inis Brightman thought Jorgenson was a good parent to his nine-year-old daughter, did not see any drug use but lost contact with appellant five or six years ago. (TR 2641-49) Her daughter, Terry Hill, knew appellant in 1986 and he was a good parent, not abusive to anyone. (TR 2653-57)

Linda Parker Reeves knew appellant years earlier when he was assistant manager and bouncer of a bar. When she saw him after they drifted apart he seemed paranoid and looked like he was on methamphetamines. (TR 2661-69) She did not notice him drifting off into the drug world until a benefit in January of 1992. (TR 2673)

Debbie Lee Harris, daughter of Inis Brightman, began dating Jorgenson in 1984 and he did not use drugs for the two years she was with him. Appellant treated her and her daughter well but she was not ready for another marriage. (TR 2679-2683) She last saw Jorgenson in December of 1989. (TR 2689)

Brenda Abbott, part-time singer in a band and deli worker, has known appellant for ten years. (TR 2769) In the period before 1992 he was a good man but his personal habits and emotional behavior changed. He was more apprehensive with people and acted more aggressively in escorting people out of the bar he worked at as a bouncer. His fuse got shorter. (TR 2773-78) She saw the same characteristics including acting nervous as others who used methamphetamines. (TR 2779) His reputation for honesty changed, too. The witness did not know -- until a couple of weeks earlier -- that he had previously been convicted of murder and went to prison for it. (TR 2783-84) Jorgenson began to drink more and stopped talking about his daughter. (TR 2785)

The defense called Dr. Henry L. Dee, a clinical psychologist (TR 2789-2844) and a psychiatrist, Dr. Thomas McClane, who had not met appellant but described methamphetamine use. (TR 2845-2879)[1] The jury recommended a sentence of death by a vote of eleven to one. (TR 2952-2955)

The trial court concurred and sentenced Jorgenson to death, finding one aggravator, the 1966 murder conviction in Colorado of Philip Morgan. The trial court considered and rejected asserted statutory mental mitigation explaining that the opinion testimony of both mental health experts should be rejected because the facts of the case do not establish that the Ruzga murder occurred because of the influence of methamphetamines and the facts of the case demonstrated that he wanted the victim dead weeks earlier, was able to lure her to the murder site, arrange for another to be present to drive him away, attempt to establish an alibi with friends, dispose of the murder weapon and remain calm enough to cover his tracks by reporting the victim missing the following morning, The trial court found as non-statutory mitigation that Jorgenson was under the influence of methamphetamines at the time of the offense and the disparate treatment accorded Laurie Kilduff Turney, to which he gave minimal weight. (R 528-536)

This appeal follows.

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[1]See Issue III, supra.

SUMMARY OF THE ARGUMENT

I. The trial court did not err reversibly in denying appellant's pre-trial motion to suppress evidence and statements. The trial court's ruling arrives at the appellate court with a presumption of correctness and the defense offered no evidence to contradict the state. witnesses' testimony that appellant acted freely, knowingly and voluntarily.

II. The trial court properly allowed testimony to be elicited that appellant was engaged in drug use and dealing as it was relevant to explain his motive and intent to kill the victim, as well as explaining the conduct of other parties. It was not unduly prejudicial nor did it become a feature of the trial.

III. The trial court adequately explained in its sentencing order its treatment of proffered mitigation after considering all. Appellant' s disagreement with the weight is not cause for reversal.

IV, The trial court did not abuse its discretion in weighing the aggravating factor found; a prior homicide can be a significant weighty factor warranting the death penalty. See Ferrell v. State, 680 So.2d 390 (Fla. 1996).

V. The trial court did not and the jury did not consider appellant's drug dealing as a non-statutory aggravator.

VI. The trial court did not err in denying requested jury instructions as that claim has been consistently rejected by prior

decisions of this Court. See Jones v. State, 612 So.2d 1370 (Fla. 1992). The trial court did give consideration to appellant's complaint about disparate treatment and correctly determined that Jorgenson was more culpable than Kilduff.

VII. The sentence of death is not disproportionate to appellant -- Tammy Ruzga's executioner -- since he has previously killed -- Phillip Morgan in Colorado -- and with his superior intelligence and non-abusive upbringing there is little to say in mitigation.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED REVERSIBLY IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE AND STATEMENTS.

Appellant filed a pretrial motion to suppress evidence including shoes, saliva, clothing, ammunition, blood samples and statements. (R 194-197) After hearing testimony (R 207-249) the trial court denied the motion, stating:

> 'I'm denying the motion to suppress on the totality of the circumstances as this Court has heard them today. Both of the defendant's consents were freely, voluntarily and knowingly given."
>
> (R 256)

At the hearing Detective Thomas Cosper testified that he became involved in the investigation into the death of Tammy Ruzga on December 2, 1993 and went to appellant's residence. (R 208) Appellant was very much coherent and Detective Warren (formerly Goddard) was present and talked to appellant. (R 210) They were there for about twenty minutes and Jorgenson rode with Cosper to the substation; appellant had no trouble understanding conversations or navigating. (R 211) He went there voluntarily and had no trouble understanding the officer's request to come to a police station. (R 212) They waited about an hour or so for Warren to arrive and Jorgenson went in and out of the building,

smoking cigarettes. (R 213) Appellant was not in custody nor was there an arrest warrant for him and Jorgenson understood that he was free to **leave** if he wanted. Afterwards, Cosper took him home. Appellant had no difficulty understanding what the officer **was** talking about -- that his girlfriend was found dead -- and even indicated that he understood the area of DNA. He agreed to and did furnish his shoes to them. (R 215-216) Jorgenson signed a consent form for the shoes and residence. (R 217) Cosper stayed in the residence with appellant while the search was conducted. Appellant did not object or act in any bizarre fashion. (R 218-219) Cosper did not allow appellant to ingest intoxicants of any kind. (R 219)

Sheriff's officer Deanna Warren similarly testified that she went to appellant's residence at about four in the afternoon, that appellant understood she was a police officer (R 224), that she explained that they were investigating the stolen car he had reported which they had found and he did not report any confusion. She told him where the car was found. (R 225) She asked if he would be willing to talk at the substation. (R 226) There was nothing about his demeanor which would have made either officer prevent him from driving an automobile. (R 212, 226) He appeared to be in control of his faculties and understood what he was doing. (R 226) Warren spent two or three hours with appellant at the station. (R 227) At some point she told him Tammy Jo Ruzga was

dead and Jorgenson understood that his girlfriend was dead; she recalled appellant mentioning he had the feeling she had been shot, but the officers had not mentioned a shooting. (R 228) Jorgenson did not intake any intoxicants. (R 229) Appellant seemed to understand the issue of DNA; he denied involvement in the death. (R 229) The officers asked if they could have his shoes; appellant understood and gave them the shoes he was wearing and signed a consent form. (R 230) He also signed a consent to search of his residence. (R 231) He agreed to their searching his house and gave them the keys. (R 233) Appellant fixed himself some food during the search. (R 234) In a taped statement appellant maintained that he was somewhere else and someone was trying to frame him. (R 235)

Appellant did not testify at the suppression hearing.

Appellant's contention that the lower court erred in denying the motion to suppress evidence is meritless. A trial court's ruling on a motion to suppress is presumptively correct. Medina v. State, 466 So.2d 1046 (Fla. 1985); Dennis Javier Escobar v. State, So.2d , 22 Florida Law Weekly S412 (Case No. 77,735, July 10, 1997); Douglas Martin Escohar v. State, ___ So.2d ___, 22 Florida Law Weekly S414 (Case No. 77,736, July 10, 1997). Even when evidence adequately supports two conflicting theories, the appellate court's duty is to review the record in the light most

favorable to the prevailing theory. Johnson v. State, 660 So.2d 637 (Fla. 1995); Escobar, *supra*. In the instant case appellant did not testify contradicting the testimony of officers Cosper and Warren that appellant understood what was happening; was in control of his faculties and freely, voluntarily, willingly and knowingly agreed to provide the evidence now challenged. To the extent that appellant is arguing that there was improper 'deception" by failing to immediately inform him of his girlfriend's death and that he was a suspect, police misrepresentation alone does not render a confession involuntary. Douglas Escobar, *supra*. And Jorgenson did not confess. The fact that 'everybody" was a possible perpetrator (R 245) and appellant was not told this does not render nugatory his voluntary, consensual behavior.

ISSUE II

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLEGEDLY PERMITTING THE STATE TO INTRODUCE EVIDENCE OF COLLATERAL CRIMES AND BAD ACTS WHICH APPELLANT MAINTAINS WAS **IRRELEVANT, PREJUDICIAL AND BECAME** A **FEATURE OF THE TRIAL.**

Prior to trial the prosecutor filed a Notice of Intent to Prove Other Crimes, Wrongs or Acts, i.e., that the defendant and victim while living together both were involved in the sale and use of methamphetamines. (R 302) Shortly before trial, appellant filed a motion to exclude evidence of other wrongs contending that the notice was insufficient and that the evidence was not relevant and was outweighed by the danger of unfair prejudice. (R 361-362) Prior to jury selection, the prosecutor represented that he did not anticipate going into the drug business in his case in chief but that Jorgenson, the victim, Finley, Maynard and Kilduff were so involved and was the only reason these folks even came together. The prosecutor indicated that he was not going to address it in opening statement, that there would be drug questions on voir dire but that the court should be aware of problems because it is a dangerous thing to try and whitewash something that much. (TR 23) Defense counsel added that he and the prosecutor had felt earlier that a pretrial evidentiary hearing was unnecessary and agreed with the prosecutor that it would "be impossible for the trial and facts to come out" without drugs coming out. The defense further explained that many of the witnesses to testify "were high on drugs

during the time they witnessed the events that they're describing and it would be necessary that this will be developed". (TR 24-25) The court then granted the defense motion. (TR 26, R 363)

At the conclusion of the first day of jury selection the prosecutor asked the trial court to revisit the Motion in limine. (TR 329) He contended that upon listening to defense voir dire questions about the drug business and visualizing the defense scenario where the state's witnesses would be portrayed as druggies and the whole relationship between the parties was not explained he thought he would have to get into the drug business. The prosecutor represented that witnesses Finley, Maynard and Kilduff could show the victim regularly delivered drugs for appellant -- they both had recently been arrested for'drug possession before the murder, that appellant had made threats to get rid of her and that the victim's drug use had worsened in recent months. A motive for the homicide would be the protection of his drug business. (TR 330) The state further argued that the jury would not get a fair picture if they thought all the state witnesses were drug users and Jorgenson had no motives. The evidence was relevant to show the state's theory of the case. (TR 333) The state claimed that Finley, Maynard and Kilduff could testify that Finley and Jorgenson were in the business of delivering and selling methamphetamines and that victim Ruzga was regularly used as a delivery person and the inference of eliminating a problem with his business was

appropriate even if no witness had a direct quote from Jorgenson specifying this motive to them. (TR 334-336) The defense agreed that there was evidence Jorgenson had made statements about wanting to be rid of Tammy, that he was upset with her for various things including she had stolen from him and she had been using a lot of methamphetamine, but that the defense did not see a connection to the murder. (TR 337) The court interjected that it seemed relevant to motive. (TR 339) Upon questioning by the court, the defense affirmed that the victim was a runner for Jorgenson, that she used his drugs, and that he made a statement that he wanted to get rid of her to people that knew about his drug business. (TR 343) The defense attempted to characterize it as a romantic relationship, a domestic quarrel regarding the use of the drug. (TR 344) The prosecutor further noted -- in response to a defense comment as to the danger of unfair prejudice -- that possession of methamphetamine is just as much a crime as sale, which the defense acknowledged that use evidence was admissible. (TR 348) The defense acknowledged that this evidence was not a surprise. (TR 350) The defense agreed that it would be relevant to show that appellant and the victim used and possessed methamphetamines 'because it's all surrounding the scenario of events". (TR 354)

The court announced it would allow the evidence because of its relevance to motive and would read the appropriate instruction to

the jury. (TR 356, R 364)[2]

The prosecutor adduced testimony from Rocky Finley that he and Jorgenson had been business partners, buying, selling and fixing trailers and dealing methamphetamines (TR 1357); that he, Jorgenson, victim Ruzga, Laurie Kilduff, and Melissa (Missy) Maynard all used methamphetamines (TR 1358); that he bought methamphetamines from defendant the night of the murder (TR 1359); and that previously he had heard appellant say about Ms. Ruzga "I'm going to kill that bitch". (TR 1366) After the murder, appellant called him from the jail and admitted shooting the victim three times. (TR 1370) Appellant wanted Finley to tell police he had been at Finley's house since 10:30 p.m. and told Finley that if he testified against him, he would take him down with him. (TR 1373-1374)

Melissa Maynard testified that Rocky Finley was doing methamphetamines that night, an activity he had been involved in over the course of time she knew him. (TR 1482) She was aware Jorgenson and Finley shared and co-participated in selling

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[2]The trial court instructed the jury prior to Rocky Finley's testimony that evidence of other crimes allegedly committed by the defendant regarding involvement in drugs should be considered for the limited purpose of proving motive, opportunity, intent, preparation, planning, knowledge on the part of the defendant and that he was not on trial for a crime not included in the indictment. The jurors acknowledged understanding this instruction and would follow it. (TR 1351-1354) Defense counsel informed the court it would not be necessary to repeat the instruction prior to Melissa Maynard's testimony. (TR 1471) The trial court repeated the instruction in its final instructions to the jury. (TR 2514)

methamphetamines and knew that Tammy Ruzga assisted in using and delivering it. (TR 1484) Appellant previously had stated that he wished Tammy would disappear and asked her to help zap the victim with a stun gun. (TR 1486-1487)

Laurie Kilduff testified that six months before Ruzga's murder she found out appellant dealt drugs and she got involved in it. (TR 1541) Ex-husband Patrick Kilduff introduced her to appellant's drug dealings and methamphetamines. (TR 1542) The witness was aware that appellant, Finley and Ruzga used methamphetamines; she got it from appellant and Finley and ex-husband Patrick. (TR 1547) At the spot where the murder took place she saw that appellant had a gun. This exchange followed:

> "Q. Why didn't you drive away when you thought that based on these past conversations, he might just be going to kill somebody?
>
> A. Because I was on the drugs, and at the time I thought he was my friend and I figured if I ran also, he would sooner or later catch me."
>
> (TR 1565)

Afterwards Kilduff and appellant smoked methamphetamines. (TR 1578) While in jail appellant wrote her a letter, Exhibit 100, in which he stated that without her the state didn't have a case. (TR 1607) Before the killing Jorgenson had said in her presence, about a week and a half earlier, that Tammy was a liar and a thief, that he could not stand it anymore and that all she did was whine and cry and all she wanted to do was kill herself anyway. (TR 1704)

Dr. Melamud while testifying that the cause of death was multiple gun shot wounds to the head (TR 1802) also testified that the victim had a large amount of methamphetamine level in the blood which was not uncommon in chronic drug abusers. (TR 1805)

Jail inmate Michael Hughes stated that appellant told him he made the decision this **was** going to be the night he would get rid of Tammy between 7 and 8 p.m. the night before she was found and that he got her juiced up on crank (crystal methamphetamine) . (TR 2008) Hughes also testified:

> "Q. Did he tell you why he did this?
> A. Apparently at the time, he had some kind of relation -- relative business in the drug trade. And my understanding is that this girl Tammy was his girlfriend of some type for some period of time. The relationship got sour in one way and the accusation, in essence, was made that he got tired of her and, you know, it was like, you know, I want you to leave, I'm seeing someone else.
> And in her blackmail side of the whole conversation was, if you -- if you cut me off, if you cut me off financially, you cut me off as far as me getting drugs, I'm going to turn you in, I'm going to make life hell for you. And my understanding, that was her demeanor and she was a very blackmail-type person."
> Q. Did he make the comment at that point to you that you included in your letter, about what he would do with somebody that messed with his dope business?
> A. He would get rid of them.
> Q. If you could look at the fourth paragraph of the second page of that document, on the fourth line, did you include a quote there, and does that refresh your recollection of exactly what Mr. Jorgenson said to you about his dope business?
> A. The fourth paragraph?
> Q. Yes.

A. On the second page?
Q. On the second page.
No, the page before. Fourth paragraph, third line -- fourth line.
A. Yes. The quote, yes.
Q. Go ahead. Tell them what he said.
A. No one fucks with his dope business."

(TR 2012-2014)

Appellant contends that the state failed to establish a nexus between appellant's drug dealing and Ms, Ruzga's death. Appellee disagrees. The victim Tammy Jo Ruzga was shot three times in the head and discovered in the passenger seat of appellant's vehicle; nothing suggested a robbery or sexual assault. Appellant had expressed a desire prior to the killing to get rid of Ruzga (to Finley, Maynard and Kilduff) and after the killing informed Michael Hughes of his problems with Ruzga and her willingness to make life hell for him and his explanation that "no one fucks" with his dope business. (TR 2014)

It is important to note that the prosecution was not urging the jury to conclude merely that since appellant was involved in drug dealing that such a character flaw ipso facto should result in a guilty verdict since drug dealers resort to such violence. Rather, the state's theory was that this victim constituted a financial drain and problem to his drug business that needed to be removed. The fact of drug dealing was specific as to his personal motive, not an editorial on society's drug problem in general.

Jorgenson alludes to the prosecutor's representation prior to

completion of jury selection that he had no one to bridge the gap between drug dealing and the murder but apparently the context of that statement **was** referring to the pre-homicide witnesses of Finley, Maynard **and Kilduff.** Note **the prosecutor's** comment at TR 352 that 'I'm not going to have any witness that comes in and says he said he was going to kill her because she pissed him off, either." (emphasis suppled) Obviously the prosecutor understood the discussion to be about specific declarations of motive by appellant to witnesses prior to the murder. But irrespective of whether appellant's former friends were able to specify a particular threat or admitted motive articulated by Jorgenson, the admission to Hughes did so. It matters not whether the prosecutor correctly counted beforehand the witnesses whose testimony supported his theory.

WILLIAMS RULE:[3]

In the seminal decision of Williams v. State, 110 So.2d 654, 658 (Fla. 1959), this Court opined:

> "Our initial premise is the general canon of evidence that any fact relevant to prove a fact in issue is admissible into evidence unless its admissibility is precluded by some specific rule of exclusion. Viewing the problem at hand from this perspective, we begin by thinking in terms of a rule of *admissibility* as contrasted to a rule of *exclusion.*"

Williams and the subsequently codified F.S. 90.404(2)(a) (pertaining to similar fact evidence) both recognized that evidence of other crimes, wrongs or acts is admissible "when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or

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[3] This Court attempted to clarify matters in Griffin v. State, 639 So.2d 966 (Fla. 1994). There the Court repeated that generally the test for the admissibility of evidence is relevance, i.e., evidence tending to prove or disprove a material fact. The Court further explained that F.S. 90.404(2)(a) -- often called the "Williams rule" because it tracked the language in Williams v. State, 110 So.2d 654, 662 (Fla. 1959) -- has led to some confusion because practitioners have attempted to characterize all prior crimes or bad acts as Williams rule evidence. Such a characterization, said the Court, is erroneous. The Williams rule, on its face, is limited to similar fact evidence. Thus, evidence of uncharged crimes inseparable from or inextricably intertwined with the crime charged is not Williams rule evidence but is admissible as relevant evidence under 90.402. Id. at 968.

Whether one adopts the Griffin description or simply the earlier articulation in Williams v. State, *supra,* the result is the same here since the prosecutor's eliciting information of Jorgenson's drug dealing was relevant to appellant's motive-intent as well as explaining the conduct of other witnesses and was not offered solely to demonstrate appellant's bad conduct.

absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity" (emphasis supplied). Evidence of other crimes is not limited to other crimes with similar facts; similar fact crimes are merely a special application of the general rule that all relevant evidence is admissible unless specifically excluded by a rule of evidence. Bryan v. State, 533 So.2d 744, 746 (Fla. 1988). In short, evidence of 'dissimilar" crimes can be admissible when relevant. As explained in Sexton v. State, So.2d , 22 Florida Law Weekly S469 (1997) :

> "Thus, section 90.404 is a special limitation governing the admissibility of similar fact evidence. But if evidence of a defendant's collateral bad acts bears no logical resemblance to the crime for which' the defendant is being tried, then, section 90.404(2) **(a)** does not apply and the general rule in section 90.402 controls. A trial court has broad discretion in determining the relevance of evidence and such a determination will not be disturbed. absent an abuse of discretion. ***Heath*** v. State, 648 So. 2d 660, 664 (Fla. 1994).
>
> (text at 470)

In the instant case the state was not introducing evidence of Jorgenson's selling and delivering drugs solely to show his bad character or propensity; rather, such evidence helps explain his motive (to eliminate user and friend Tammy who was a drain and threat to his business); additionally, it helps explain the relationship of the various parties (Ruzga, Jorgenson, Finley,

Kilduff and Maynard) and why accomplice Laurie Kilduff was present at the scene of the crime and did not immediately flee the scene (as well as appellant's ability to lure the victim to her death). See Ferrell v. State, 686 So.2d 1324 (Fla. 1996) (evidence of robbery of victim days earlier explained defendant's motivation in seeking to prevent retaliation by victim); Strausser v. State, 682 So.2d 539 (Fla. 1996)(evidence of charge of interfering with child custody victim filed against defendant was inextricably intertwined with murder in that it may have contributed to defendant's anger towards victim); Williamson v. State, 681 So.2d 688 (Fla. 1996) (evidence of another crime was integral to state's theory of why its key witness acted as he did); Foster v. State, 679 So.2d 747 (Fla. 1996) (collateral crimes evidence admissible to present complete picture of criminal episode and to show defendant's motive and intent); Pittman v. State, 646 So.2d 167 (Fla. 1994) (evidence of threats defendant made against his former wife and her family relevant to material fact in issue); Caruso v. State, 645 So.2d 389 (Fla. 1994) (testimony about defendant's drug activities admissible to show relevant context in which criminal acts occurred, defendant's state of mind and motive); Hoefert v. State, 617 So.2d 1046 (Fla. 1993) (similar fact testimony of other choking victims relevant to issue of motive); Grossman v. State, 525 So.2d 833 (Fla. 1988)(evidence of threats to kill housemate admissible as threat was relevant to housemate's motivation in notifying police

after defendant admitted killing). Williams v. State, 622 So.2d 456 (Fla. 1993)(evidence of attempted murder in Jacksonville four months prior to Pensacola murders being tried relevant to show defendant's modus operandi in operation of his drug business and was not a focus of the trial).

Appellant deems it significant that the prosecutor did not find it necessary to argue motive in closing to the jury (and perhaps present yet another assertion of error on the appeal). As this Court has repeatedly declared the test of admission of other crime or bad acts evidence is not necessity but relevancy. Ruffin v. State, 397 So.2d 277 (Fla. 1977); Heiney v. State, 447 So.2d 210 (Fla. 1984); Muehleman v. State, 503 So.2d 310 (Fla. 1987); Craig v. State, 510 So.2d 857 (Fla. 1987); Bryan v. State, 533 So.2d 744 (Fla. 1988).

The prosecutor certainly cannot be faulted for arguing to the jury the presence of (1) direct eyewitness testimony of Laurie Kilduff, (2) the circumstantial evidence of appellant's shoe prints, tire prints, DNA on the cigarette found at the scene, and the timing of appellant's leaving and return, (3) Jorgenson's multiple admissions, and the almost two dozen coincidents that would have to be operative to acquit. (TR 2387-2421)

Appellant cites Garcia v. State, 622 So.2d 1325 (Fla. 1993), for the proposition that the state may not subvert the truth-seeking function by obtaining a conviction based on deliberate

obfuscation of relevant facts. Garcia involved a Brady[4] violation and prosecutorial impropriety found in the state's closing argument that Joe Perez was a non-existent person when it knew it to be a common alias for a co-defendant. In contrast, here, the state did not falsely argue the facts or present false evidence regarding the truth that Jorgenson used and sold methamphetamines -- since virtually all who knew him so testified -- and appellant's intent can be discerned not only by his actions but by his admissions before and after the crime.[5]

Appellant's additional contention that the state's eliciting the fact that Jorgenson (and state witness Finley) dealt drugs constituted an impermissible "feature" of the trial as in Long v. State, 610 So.2d 1276 (Fla. 1992) is similarly unpersuasive. In Long, *supra*, in a trial for the murder of Virginia Johnson the prosecutor introduced evidence of four other murders including graphic evidence pertaining to each victim and physical evidence (hair, fiber, tire tracks) from each of those crimes. This Court agreed with the defense argument that the evidence should not have been admitted:

> "[3][4] The record reflects that these other crimes did become the central feature of

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[4]Brady v. Maryland, 373 U.S. 83 (1963).

[5]If appellant sought to be a beneficiary of the decision in Coolen v. State, ___ So.2d ___ 22 Florida Law Weekly S292 (Fla. 1997), wherein the Court found' the slaying resulted from an unprovoked attack without apparent reason, perhaps he should have remained more quiet with those in whom he confided.

> this trial. Approximately four hours of testimony was presented concerning the murder in issue in this case while more than three days of testimony was presented concerning these other offenses. Under the unique circumstances of this case, including the plea agreement, we find that the four other murders could not be presented at this trial."
>
> (text at 1280-1281)

The Long case presents the classic example of impermissible Williams-rule "feature" evidence: the jury was deluged with graphic, damaging evidence of four other murders consuming six times the volumes devoted to that related to the offense ostensibly being tried -- a situation likely to both confuse the jury and to create an unacceptable degree of unfair prejudice to the accused.[6]

As to Jorgenson's claim that any reference to the fact that he dealt in drugs was prejudicial, as this Court frequently reminds -- all evidence that points to a defendant's commission of a crime is prejudicial. Ashley v. State, 265 So.2d 685, 694 (Fla. 1972); Amoros v. State, 531 So.2d 1256, 1260 (Fla. 1988). Minimizing if not totally eliminating the fear of undue prejudice is the fact that one of the state's primary witnesses, Rocky Finley, was also a drug dealer, a partner of Jorgenson in selling methamphetamine. Under the view advanced by appellant -- that the jury would be

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[6]Any contention that the volume of testimony that Jorgenson was a drug dealer was excessive must fail. See Wilson v. Stat-e, 330 So.2d 457 (Fla. 1976)(approving introduction of six hundred pages of transcript pointing to separate crimes by the defendant); Burr v. State, 466 So.2d 1051 (Fla, 1985); Townsend v. State, 420 So.2d 615 (Fla. 1982).

influenced by the mere mention of drug selling -- the jury should equally be disposed to reject any testimony by Finley, and for that matter by drug users Melissa Maynard and Laurie Kilduff. The fact remains that unlike the situation in Long, *supra*, there was no improper use of evidence of another crime (evidence that Jorgenson dealt drugs was elicited not merely to show his bad character but to establish why he killed and the context and behavior of other actors), there was no improper reference to a number of uncharged offenses which might confuse or mislead the jury and in short there was no danger that the jury would convict on any basis other than the overwhelming direct and circumstantial evidence and self-incriminating admissions of defendant. While appellant repeats that he does not regard Laurie Kilduff as credible because she had a criminal record and used drugs (furnished by appellant), was a probation violator granted immunity, the jury heard all of that including Jorgenson's admissions to cellmates that he was not happy with her performance and offered $50,000 if she were killed. (TR 2016, 2066-2067) That appellant used methamphetamines the night of the murder, certainly afterwards at any rate, does not detract from the planning, luring the victim to a secluded area, killing her and preparing for Kilduff's presence at the scene to furnish a get-away car.[7]

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[7]Appellant cites in his brief at page 41 the decision of the Court in Ciccarelli v. State, 531 So.2d 129 (Fla. 1988). Appellee has no objection to the appellate court reading the trial record if that

In summary the state did provide a nexus between Jorgenson's drug dealing and the execution of Tammy Jo Ruzga, to wit: his admission to cellmate Hughes that Ruzga would turn him in and make life hell for him if he cut her off financially and from drugs and that 'no one fucks with his dope business". (TR 2012-2014) It is not fatal that the state did not argue motive in closing argument since the state's overwhelming case was supported by direct eyewitness evidence, scientific-supported circumstantial evidence and appellant's admissions to Finley, Maynard, Costentino and Hughes. The now challenged evidence did not become a "feature" of the trial and appellant suffered no undue prejudice -- only the normal prejudice associated with the proper admission of evidence to convict. Ashley, ***supra;*** Amoros, *supra*. See **also** Walker v. State, ___ So.2d , 22 Florida Law Weekly s537 (Fla. 1997)(upholding admission of abortion evidence to establish motive and intent to kill the two victims and rejecting defense contention that prejudice outweighed probative value).

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is what Jorgenson is urging.

ISSUE III

WHETHER THE TRIAL COURT ERRED REVERSIBLY IN FAILING TO FIND AM WEIGH MITIGATING CIRCUMSTANCES.

A. **Statutory Mitigating Circumstances:**

The trial court explained in its sentencing order the reasons for rejecting proffered statutory mental mitigation (R 530-533):

> 'In its sentencing memorandum, the defendant requested the Court to consider the following statutory mitigation circumstances:
>
> 1. The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.
>
> Dr. Henry Dee, a clinical psychologist and Dr. Thomas McClane, a psychiatrist, testified for the defense.
>
> Dr. Dee testified the defendant was given a battery of psychological tests and he talked to the defendant on two separate occasions. The doctor testified the defendant denied having any involvement in the murder of Tammy Jo Ruzga and the tests the defendant took were normal. (Dee, pg. 6,7,40,46 and 52).* The defendant was also reluctant to admit anything was wrong with him. The doctor also did not make any findings that the defendant did not know right from wrong. (Dee, pg. 37 and 52).
>
> The doctor testified the defendant has an over-all I.Q. of 140 and is in the top 99.6 percentile of the population. (Dee, pg. 19). The doctor's testing of the defendant revealed the defendant's memory is impaired but that

*Information inside parenthesis refers to trial testimony for the named witness.

this finding, because of the defendant's high I.Q., would not be noticeable to the average person. (Dee, pg. 25).

The doctor stated that, in general, people under the influence of methamphetamine have impulsive behavior and do not evaluate their impulses, before acting. He also felt the defendant was under the influence of extreme mental or emotional disturbance. (Dee, pg. 38).

Dr. Thomas McClane never examined the defendant, but testified as to the effects methamphetamine has on individuals in general. He stated it causes paranoia, sleep deprivation, misjudgment, exaggerated reactions to negative experiences and aggressive reactions. (McClane, pg. 74-75). The doctor also testified that the defendant's actions were not inconsistent with someone who wanted to kill his girlfriend. (McClane, pg. 90) .

The doctor, in a long hypothetical given by the defense, felt that more than likely an individual would be under the influence of extreme mental or emotional disturbance. (McClane, pg. 88).

In Florida a distinction exists between factual evidence and opinion testimony. As a general rule, uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable, or contradictory. Opinion testimony, on the other hand, is not subject to the same rule. Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking. Walls v. State, 641 So.2d 381, at 390 (Fla. 1994).

The Court rejects the opinion testimony of both doctors that the defendant was under the influence of extreme mental or emotional

disturbance at the time of the murder. The facts of this case do not establish to this Court this defendant committed the murder of Tammy Jo Ruzga because he was under the influence of methamphetamine, i.e., the defendant's use of methamphetamine did not in any way cause him to kill the victim. At most, the facts of this case establish to this Court the defendant *got caught* because methamphetamine caused the defendant to make mistakes that resulted in his arrest, i.e., leaving his shoe prints and a cigarette butt at the scene.

In support of its conclusions regarding the effect of defendant's mental state on this offense, the Court has looked to the following facts as proven at trial:

The defendant, a few weeks prior to the murder, told people he wanted Tammy Jo Ruzga killed. At the time, the individuals he told this to, Rocky Finley and Melissa Maynard, felt he was kidding. A few days prior to the murder the defendant started carrying a gun. The defendant, on the night of the murder, spoke to Laurie Kilduff Turney at 8:00 p.m. and told her to call him again at 11:OO p.m. (Turney, pg. 12). The defendant, in the 11:00 p.m. telephone conversation, told Laurie to meet him at I-4 and Highway 33. (Turney, pg. *19)* . After Laurie arrived at the rendezvous the defendant then told her to drive to a remote area on Dean Still Road, which she did, after stopping for gas. The defendant then got out of his car and approached Laurie's car and told her he could not get the victim into the driver's seat. (Turney, pg. 31). The defendant then took the 38 revolver he had at his side and went back to the driver's window of his car, spoke to the victim, and fired three shots into the victim's head at close range. He then took a baby's carrier out of the back seat and three pairs of blue jeans. (Turney, pg. 34). He wiped the car's door and steering wheel and then gave the jeans and baby carrier to Laurie to give to her friends, Melissa Maynard and Rocky Finley. (Turney,

pg. 34-37).

The defendant then had Laurie drive him to two separate locations to possibly get rid of the gun at the second location by throwing it into Lake Hunter. The gun was never recovered. (Turney, pg. 75).

The defendant and Laurie then went back to Rocky Finley's trailer, where the defendant tried to establish an alibi by telling Melissa Maynard, "If anyone asks, I have been here from 11:30 p.m.". The defendant, along with Laurie, smoked some more methamphetamine, yet around 6:30 a.m. he had the presence of mind to call the Sheriff's Department to report his car and girlfriend missing in order, 'to make it look good". (Turney, pg. 49). From the first telephone call at 8:00 p.m. until the last telephone call at 6:30 a.m., there was a time period of ten and a half hours.

These facts contradict the testimony of the doctors and do not prove to this Court the defendant was under an **extreme** mental or emotional disturbance. These facts prove to this Court the defendant wanted the victim killed and that he planned to kill her; he took her to a remote area, under a ruse, telling her they were going to meet the 'Latin Kings"; he left his car there, and tried to establish an alibi. This Court calls particular attention to the fact that the defendant was level-headed and calm enough to call the Sheriff's Office at 6:30 a.m. and continue the charade by reporting both his car and girlfriend as missing, even after smoking more methamphetamine. Nothing the defendant did was impulsive, or the product of paranoid thinking. Methamphetamine did not cause the killing, it only caused him to be caught. As Dr. Dee stated, the defendant was stupid to leave his shoe prints and cigarette butt at the scene. (Dee, pg. 60). This statutory mitigating factor does not exist. Alternatively the defense has offered this mitigator as a non-statutory mitigator without the statutory qualifying adjective or adverb.

The Court for the above reasons does not find this to exist even as a non-statutory mitigator.

2. The capacity of the defendant to conform his conduct to the requirements of the law was substantially impaired.

The Court feels it is important to distinguish this statutory mitigator from the one previously discussed. The Court will consider the testimony and findings of the two doctors as it did in #1 above and readopts them here.

The first statutory mitigator dealt with the influence of extreme mental or emotional disturbance. This second statutory mitigator deals with whether the defendant was substantially impaired in his ability to appreciate what he was doing, i.e., his knowledge. "921.141(6)(b), is interpreted as less than insanity but more than the emotions of an average man, however inflamed... 921.141(6)(f), refers to mental disturbance that interferes with but does not obviate the defendant's knowledge of right or wrong", Duncan v. State, 619 So.2d, 279 at 283 (Fla. 1993). The Court is ever mindful that this is not a test of insanity of whether the defendant knew right from wrong, but whether the disturbance interfered with the defendant's knowledge of right or wrong. Dr. Dee testified there was nothing in the defendant's testing to show he did not know what he was doing, nor did he make any findings that the defendant did not know right from wrong. (Dee, pg. 37 and 52).

As previously discussed above the defendant's actions do no [sic] show an inflamed man nor do they show an interference with the defendant's ability to conform his conduct to the requirements of the law. The defendant planned the murder, carried it out and attempted an alibi. This mitigating factor does not exist. Alternatively the defense has offered this mitigator as a non-

> statutory mitigator without the statutory qualifying adjective or adverb. The Court for the above reasons does not find this to exist even as a non-statutory mitigator.

On a proffer Dr. Dee testified that in his discussion with Jorgenson he did not indicate that he was involved in the crime, the whole tone of his manner was that he was not. (TR 2790) In front of the jury, Dee testified that appellant informed him that his "drug of choice was crank, which is a type of methamphetamine". (TR 2801) Appellant's performance on the personality testing was "basically unremarkable", sort of "highly defensive normal", the kind of testing that "every psychologist hates to get, because there's just not much to say about the person. Everything is pretty much within normal limits. It's not interesting reading." (TR 2802) He found no pathology or emotional disturbance at the time of testing. (TR 2803) Appellant is unusually intelligent with a full scale I.Q. of 140, brighter than about 99.6% of the population. (TR 2806) Since his memory quotient was less, the witness opined that it resulted from chronic methamphetamine abuse. (TR 2807) Because his level of intelligence is so high, the brain damage suggested by memory loss would be very difficult to detect. (TR 2809) Dr. Dee was not able to measure any hypothalamus or frontal lobe damage. (TR 2813) Methamphetamine abuse leads to social withdrawal and isolation. (TR 2818) He opined that Jorgenson's judgment was impaired, reaching the level of extreme emotional disturbance and his capacity to conform his conduct to

the requirements of law was substantially impaired. (TR 2821-22)

On cross-examination Dr. Dee admitted that appellant knows exactly what he is doing, more than 99.6 percent of the population, enough to continue denying a crime that he committed, that Jorgenson denied to him committing the crime. (TR 2823) The witness conceded that his diagnosis was a process of excluding other causes and there was no way (short of autopsy) to be sure of the cause of the different scores on the I.Q. (TR 2823-24) He acknowledged looking into the areas of competence to proceed, mental state at the time of the offense and all he ended up with was the mitigation discussed. (TR 2825-26) Dr. Dee relied on appellant to provide information about his background. (TR 2826) Jorgenson did not blame his prior murder on methamphetamines -- that had nothing to do with drugs. (TR 2827) Appellant did not mention that in the prior Colorado killing that Jorgenson shot the victim four times before the victim got to him. (TR 2828) Dr. Dee acknowledged that the measurement characteristics of the I.Q. testing really do not exist after you reach the 99 percentile. Appellant denied committing the crime. (TR 2829) Dr. Dee agreed that appellant displayed intelligence in asking others to tell police he had been with them. (TR 2830) The witness agreed that appellant's behavior did not sound "terribly impulsive" in talking about killing the victim weeks earlier or in asking Kilduff to meet him at a specific location before the killing. (TR 2831-32) It

did not sound impulsive that appellant expressed the thought to Kilduff that he could not move the victim to the driver's seat to make it look like a suicide. (TR 2832) It also seemed like organized thought reporting to police that he was at the home of friends with whom he tried to establish an alibi. (TR 2832-33) Amphetamine users are hypervigilant as contrasted with users of alcohol or antidepressants who tend to be in a fog. Jorgenson was not an addictive personality that caused him to take drugs. (TR 2834) Jorgenson had chronic abuse not addiction. (TR 2834) The witness had nothing in his testing suggesting appellant did not know he was killing the victim. (TR 2834)

Dr. Thomas McClane -- who had never met appellant Jorgenson (TR 2849) -- described the stimulative aspects of methamphetamine, opined that chronic users tend to increase the dosage and the hyperalertness of the effect. People tend to become more paranoid. (TR 2857-60) Even ingesting more than the usual dosage a person could engage in purposive activity including deciding to commit a crime, arranging to meet with an accomplice and driving to a pre-arranged spot and asking others to furnish an alibi. (TR 2866-67) On cross-examination the witness admitted there was nothing in the defense-propounded hypothetical inconsistent with a person using small amounts of methamphetamines deciding to kill his girlfriend. (TR 2873) All users do not increase their use. (TR 2874) Methamphetamine use does not make everybody violent. Normal people

without using drugs also kill and ask others to provide an alibi. (TR 2877) The witness explained that the long-term use was only important in the sense of build up of tolerance and his answer in the defense hypothetical depended on intoxication at the time of the offense. (TR 2879)

Jorgenson argues that the lower court erred by considering but refusing to weigh mitigation; the trial court may not, in his view, "substitute its own pseudo-scientific analysis for that of qualified experts". (Brief, p. 51) The trial court did not refuse to find and give weight to appropriate mitigation; the sentencing order in fact did find and accord minimum weight to appellant's use of methamphetamines and its influence on him at the time of the murder -- a non-statutory mitigator ("... did not in any way cause the defendant to commit the murder, it is the reason why he got caught... the reason why this highly intelligent man left his footprints and a cigarette butt at the scene." -- R 534).[8]

with respect to the rejection of Dr. McClane -- who had not seen or examined Jorgenson -- this expert agreed that the ingestion of even a greater than usual dosage of methamphetamines could still allow one to engage in purposive activity (such as deciding to commit a crime, arranging to meet with an accomplice, luring the victim and driving to a pre-arranged site, and asking others to

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*The state, too, is appreciative of the fact that Jorgenson's intelligence was not so great as to avoid prompt detection and apprehension.

furnish an alibi). All users do not increase their use and the defense-propounded hypothetical was consistent with a small amount user deciding to kill his girlfriend. (TR 2866-74) In light of the facts of the case, the trial court could permissibly reject both extreme mental or emotional disturbance and impaired capacity to conform conduct to the requirements of law as mitigators -- either statutory or non-statutory. See Walls v. State, 641 So.2d 381 (Fla. 1994); Wuornos v. State, 676 So.2d 972 (Fla. 1996).

Similarly with respect to Dr. Dee who reported appellant's testing as "highly defensive normal" (TR 2802), who found no pathology or emotional disturbance at the time of testing (TR 2803), who acknowledged that appellant knows what he is doing "more than 99.6 % of the population" -- enough to continue denying a crime that he committed (TR 2803) -- that witness acknowledged he relied on appellant's self-report of his background (TR 2826) and Jorgenson's conduct both in the weeks before and after the homicide did not sound "terribly impulsive". (TR 2832-33) Jorgenson did not have an addictive personality that caused him to take drugs. (TR 2834)

Appellant does not seem to disagree with the trial court's assessment regarding the non-causative aspect of appellant's drug use with the Ruzga homicide -- and even the defense expert acknowledged that the prior murder of Philip Morgan had nothing to do with methamphetamine use. (TR 2827) Appellant characterizes

the trial court's treatment as requiring a mitigator to reduce one to an automaton when impairments can merely reduce a defendant's culpability. But as the trial court explained:

> 'As previously discussed above the defendant's actions do no [sic] show an inflamed man nor do they show an interference with the defendant's ability to conform his conduct to the requirements of the law. The defendant planned the murder, carried it out and attempted an alibi."
>
> (emphasis supplied) (R 533)

Thus, the court was not misapprehending that the defendant must be reduced to an automaton; the court simply explained that there was no interference with the ability to conform conduct to the requirements of law. The trial court correctly -- not erroneously -- concluded that the coincidental, voluntary use of drugs (or alcohol) does not give a defendant immunity from the death penalty when committing a premeditated murder, especially one who has reached a level of maturity of fifty-plus years (rather than an immature youth) with a superior **level of intelligence.**

As to complaint that trial court failed to give sufficient weight to mitigating factors that were found, see Atkins v. Singletary, 965 F.2d 952, 962 (11th Cir. 1992); Gunsby v. State, 574 So.2d 1085, 1090 (Fla. 1991) (resolution of factual conflicts is solely the responsibility and duty of the trial judge and as an appellate court we have no authority to reweigh that evidence); Pettit v. State, 591 So.2d 618, 621 (Fla. 1992) (decision as to

whether mitigation has been established lies with the trial court); Ponticelli v. State, 593 So.2d 483 (Fla 1991), vacated on other grounds, 113 S.Ct. 32 (1992), affirmed. on rem&, 618 So.2d 154 (Fla. 1993)(rejecting defense argument that court failed to consider unrebutted mitigating evidence; trial court found doctor's testimony speculation and there was competent, substantial evidence to support rejection of the mitigating evidence); Sireci v. State, 587 So.2d 450 (Fla. 1991)(decision as to whether a particular mitigating circumstance is established lies with the trial judge; reversal is not warranted simply because an appellant draws a different conclusion; since it is the trial court's duty to resolve conflicts in the evidence, that determination should be final if supported by competent, substantial evidence); Hall v. State, 614 So.2d 473 (Fla. 1993) (record supports trial judge's conclusion that mitigators either were not established or entitled to little weight).

B. Non-Statutory Mitigating Circumstances:

The trial court found two non-statutory mitigators -- homicide was committed while under the influence of methamphetamine which it gave minimal weight and disparate treatment afforded Laurie Kilduff Turney which it also ascribed minimal weight. (R 534-535) With respect to the proffered mitigator of domestic relationship, the court determined:

> '2. The homicide was in part a product of emotions and/or disagreements stemming from

> a romantic, domestic relationship that existed between the defendant and the victim.
>
> This was not proved. The facts as the Court has previously outlined on #1. above do not support this. The defendant did not kill his girlfriend in the heat of passion or after stalking her, but planned it and carried it out. He killed her because she was using too much of his drugs and he felt she was becoming a liability and would expose his drug business. (Turney, pg. 167) (Hughes, pg. 241-242). This non-statutory mitigator has not been proved and the Court gives it no weight."

(R 534)

Curiously, appellant makes no reference in this section to Spencer v. State, 691 So.2d 1062 (Fla. 1997), although he makes a passing reference to it later at page 96 of his brief but then too does not address this Court's pertinent analysis:

> "[8] Finally, Spencer argues that the death sentence is not proportionate in his case and cites a number of cases involving domestic disputes where this Court found that the death penalty was not warranted. See, e.g., Santos v. State, 629 So.2d 830 (Fla.1994) (finding death sentence not warranted for defendant who killed his daughter and her mother after a long history of domestic problems). However, this Court has never approved a "domestic dispute" exception to imposition of the death penalty. See id. (finding death sentence disproportionate because four mitigating circumstances of extreme emotional disturbance, substantial inability to conform conduct to requirements of law, no prior history of criminal conduct, and abusive childhood outweighed single aggravating circumstance of prior violent felonies based upon crimes that occurred during the murders). In some murders that result from domestic

> disputes, we have determined that CCP was erroneously found because the heated passions involved were antithetical to "cold" deliberation. Santos *v. State,* 591 So.2d 160, 162 (Fla.1991); *Douglas v. State, 575* So.2d 165, 167 (Fla.1991). However, we have only reversed the death penalty if the striking of the CCP aggravator results in the death sentence being disproportionate."
>
> (text at 1065)

See also Walker v. State, ___ So.2d ___, 22 Florida Law Weekly S537 (Fla. 1997), fn 12:

> "Walker's related assertions that the trial court erroneously failed to consider in mitigation that these murders arose out of domestic dispute is without merit. This Court had never treated "domestic dispute" cases as categorically different than other death cases and the fact that a case is "domestic" in nature is not, in and of itself, mitigating. In any event, this case is distinguishable from other domestic disputes in that, unlike the typical domestic case, the evidence here does not suggest that the murders were the result of a sudden, emotionally charged fit of rage or anger."

Here, appellant acknowledges there is "no CCP aggravator in appellant's case". (Brief, p. 58) This Court's reasoning is directly on point and yet Jorgenson makes no effort to address it or argue that it should not be controlling in the instant case. The cases relied on by appellant at pages 58 and 59 do not compel the granting of relief *sub judice.* The instant case is not a jury override (like Douglas v State, 575 So.2d 165), this is not a case where no aggravators remain (like Richardson v. State, 604 So.2d 1107, or Kampff v. state, 371 So.2d 1007, or Amoros v. State, 531

So.2d 1256) or where the trial judge deems valid aggravators remaining to be insufficient to merit the death penalty (like Maulden v. State, 617 So.2d 298). This is not a case where the trial court's finding of the presence of the CCP aggravator is improper (as in White v. State, 616 So.2d 21, or Santos v. State, 591 So.2d 160) or where a number of improper factors were used in aggravation (as in Blair v. State, 406 So.2d 1103) or a heated domestic dispute unaccompanied by a conviction of a prior similar violent offense (as in Blakely v. State, 561 So.2d 560 or Klokoc v. State, 589 So.2d 219 or Wright v. State, 688 So.2d 298).

Factually the instant case is similar to Riechmann v. State, 581 So.2d 133 (Fla. 1991), where the defendant murdered his "life companion" of thirteen years to recover insurance proceeds when she decided to quit prostitution, reducing her income to the defendant. Unlike the "domestic" cases urged by Jorgenson where the defendants' judgments have been clouded to some extent by being distraught over losing the victim (or some related family matter), here appellant's purpose was to lose or eliminate the victim no longer necessary or appropriate to his lifestyle. See *also pope* v. State, 679 So.2d 710 (Fla. 1996) (rejecting a disproportionality challenge on the basis of "domestic killing" since circumstances showed that it was something more than a lovers' quarrel); Orme v. State, 677 So.2d 258 (Fla. 1996)(rejecting defense argument that killing was an emotional reaction to an ended relationship with the

victim).

C. **Other Non-Statutory Mitigating Circumstances**:

Finally, appellant complains that the trial court did not address the following non-statutory mitigators: (1) appellant suffered an unstable and emotionally impoverished childhood with no father and a series of short-term stepfathers; (2) that as a child he started school young and whose immaturity caused him to be socially maladjusted in school and to be picked on; (3) that he dropped out of high school, later earning a G.E.D.; (4) that his childhood was in a single parent home impoverished economically [like (1), *supra*] ; (5) that he led a law-abiding and productive life for twenty years [in between homicides]; (6) that he **was** a loving father to his daughter Tracy until using drugs in 1991; (7) that he was involved with his mother and family in supportive ways until he lost contact with them in 1991; (8) that he was a helpful friend to Linda Reeves, Inis Brightmon, Debbie Harris and Brenda Abbott; (9) that at age 54 he would not be eligible for parole until age 79; (10) that the statutory aggravators did not apply to the facts of the killing of Tammy Ruzga; and (11) that appellant is exceptionally intelligent and anti-social aspects can be ameliorated in a structured environment.

Appellee notes that while Jorgenson now suggests these warm and fuzzy qualities should have been addressed by the trial court, almost none were advanced even **as** a footnote thought in appellant's

thoughtful seventeen page memorandum in support of a life sentence. (R 414-430) Even in closing argument to the jury at penalty phase defense counsel conceded that 'we don't argue" that the problems in his childhood were extreme ("We're not saying that" - TR 2921) and admitted that the lack of a father figure and financial strains 'by themselves are not terribly weighty". (TR 2922) Even in the lengthy post-jury recommendation sentencing argument to the judge on September 8, 1995 (R 431-498) the defense chose not to mention the weak aspects of Jorgenson's childhood and family background. Appellant may not urge as reversible error the failure of the trial court to find non-statutory mitigation which the appellant did not argue below. See Lucas v. State, 568 So.2d 18, 24 (Fla. 1990); Hodges v. State, 595 So.2d 929, 934 (Fla. 1992), vacated on other grounds, Hodges v. Florida, ___ U.S. ___, 121 L.Ed.2d 6 (1992), affirmed on remand, Hodges v. State, 619 So.2d 272 (Fla. 1993) (we will not fault the trial court for not guessing which mitigators Hodges would argue on appeal) .[9]

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[9]The instant case is distinguishable from Farr v. State, 621 So.2d 1368 (Fla. 1993), where the trial court refused or failed to consider a psychiatric report and PSI including information about the defendant's suicide attempts, murder of his mother, sexual abuse as a child, psychological disorders and drug abuse, apparently because he did not present a case in mitigation and had expressed a desire to die. Similarly in Robinson v. State, 684 So.2d 175 (Fla. 1996), the trial court erroneously believed that he must ignore proffered mitigation at the defense request and psychiatric and clinical evaluations disclosed mitigation (lengthy and substantial history of drug abuse and mental health problems) which received little or no discussion in the sentencing order. In contrast, the trial court at length dealt with proffered mental

This Court has recognized that the trial court's failure to consider or articulate minor, weak mitigation in a particular case does not ineluctably result in reversal. For example, in Thomas v. State, ___ So.2d ___, 22 Florida Law Weekly S149 (1997), the trial court failed to mention in the sentencing order that the defendant was a good worker for Publix who showed up every day and did not cause trouble, that he was a "delightful young man" who is 'very loving" and good with the children of a witness. Another witness who met the defendant in prison had "seen a lot of good in him". This Court found the omission harmless ("In counterpart to the relatively minor mitigation, the evidence in aggravation . . . is massive" including the murder of his own mother to keep her from talking to police). See *also* Wickham v. State, 593 So.2d 191, 194 (Fla. 1992) (evidence regarding Wickham's abusive childhood, his alcoholism, his extensive history of hospitalization for mental disorders including schizophrenia should have been found and weighed by the trial court -- but was harmless and could not reasonably have resulted in a lesser sentence). If the failure to consider and find serious mental disorders in Wickham can be deemed harmless, the trial court's failure to mention the factors urged here should be deemed frivolous.

Turning to the items suggested by appellant, despite

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health mitigation and any omissions concerned trivial items such as dropping out of high school with a 140 IQ and his 20 year hiatus between murders.

Jorgenson's attempt to double up on the childhood with surrogate fathers factor (1 and 4, *supra*), the fact remains that he was mistreated by only one substitute father -- and that briefly for a six-month period. Militating against that alleged mitigator is the fact that appellant's brother was similarly situated and did not choose to become a two-time murderer. This could hardly have been a significant influence in his life since -- as appellant reminds us -- the two murder victims Morgan and Ruzga were separated by over twenty years of non-homicidal behavior. That appellant dropped out of high school is not mitigating in the sense that the defendant had a learning disability or was retarded and therefore disadvantaged from the general population; he quit high school out of boredom and it apparently was not sufficiently challenging for his 140 IQ.[10] Appellant chose not to use productively his high intelligence or to follow his own advice to his brother and instead selected using methamphetamines and to eliminate a methamphetamine-user friend who could jeopardize his activity (as he told Hughes 'no one fucks with my drug business") and that he was nice to others who did not represent a threat matters not.

There is no reversible error.

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[10]That as a child he was picked on but subsequently won a fight describes roughly the entire population of the planet.

ISSUE IV

WHETHER THE LOWER'COURT ERRED AND ABUSED ITS DISCRETION BY ALLEGEDLY FAILING TO PROPERLY WEIGH THE ONE AGGRAVATING CIRCUMSTANCE.

The trial court's sentencing order recites as to aggravation:

> 'The defendant **has previously been** convicted of a felony involving the use of threat or violence to some person.
>
> Mary Beth Dalton, **a** fingerprint examiner, testified the defendant's fingerprints matched those on his conviction for the 1966 second degree murder.
>
> Both the state and the defense stipulated to the following facts:
>
> FACTS OF THE 1966 HOMICIDE
>
> Ronald Jorgenson's sister called him on the night of August 25, 1966, and told him her common **law** husband, Phillip Morgan, had automobile license plates which belonged to her. She said she had found Morgan at a bar, and asked Jorgenson to help her get the plates back from him. Jorgenson and a friend drove out to the bar. Jorgenson entered and asked Morgan to return the plates. Morgan refused. Jorgenson left the bar **and** went into the parking lot towards his car. At this time Morgan and Jorgenson's sister **came** on to the porch of the bar. Morgan began to hit the sister. Jorgenson reached into the car, took out his pistol, and fired a warning shot over their heads with the hope of frightening Morgan. Morgan jumped off the porch and ran toward Jorgenson.
>
> Jorgenson testified that Morgan shouted that Jorgenson would **have** to kill him or be killed. Thereupon, Jorgenson shot three times and wounded Morgan. According to Jorgenson, Morgan was still able to reach Jorgenson and fight him for the gun, so Jorgenson fired a fourth and fatal shot to the head. Witnesses

> for the People testified that Morgan did not get close enough to Jorgenson to touch him, and that Jorgenson fired until Morgan dropped."

(R 528-529)

Appellant notes that he provided penalty phase testimony that the victim in the earlier homicide had a history of being abusive physically to Jorgenson's sister, that this victim Phillip Morgan drank heavily and was known as a bar fighter, that appellant's sister was six months pregnant when Jorgenson killed Morgan and that prior to protecting his drug business by murdering Tammy Ruzga twenty years later, appellant led a law abiding life. (It is indeed surprising that the jury recommended death by an eleven to one vote!)

To the extent that appellant may be making an argument that certain victims are subject to righteous dispatch at Jorgenson's whim (alleged spouse abuser Morgan twenty years ago and the more current methamphetamine consumer Tammy Ruzga), suffice it to say that this Court has rejected similar arguments in Thomas v. State, 618 So.2d 155 (Fla. 1993), and Bolender v. State, 422 So.2d 833, 857 (Fla. 1982)(jury life recommendation not sustained on basis victims were armed cocaine dealers).

To the extent that appellant's complaint is that the trial court failed to explain to his satisfaction why a prior homicide should be deemed so weighty, appellee relies on Ferrell v. State, 680 So.2d 390, 391-392 (Fla. 1996), wherein this Court observed:

"[2] Ferrell next argues that his death sentence is disproportionate when compared to other cases involving a single aggravating circumstance. We disagree. Although we have reversed the death penalty in single-aggravator cases where substantial mitigation was present, we have affirmed the penalty despite mitigation in other cases where the lone aggravator was especially weighty. *Compare Songer v. State*, 544 So.2d 1010 (Fla.1989) (death sentence reversed where single aggravating factor of "under sentence of imprisonment" was weighed against three statutory and seven nonstatutory mitigators) with *Duncan v. State*, 619 So.2d 279 (Fla.), *cert. denied*, 510 U.S. 969, 114 S.Ct. 453, 126 L.Ed.2d 385 (1993) (death sentence affirmed where single aggravating factor of prior second-degree murder of fellow inmate was weighed against numerous mitigators).

In the present case, although the court found a number of mitigating circumstances established, it assigned little weight to each. The lone aggravating circumstance, on the other hand, is weighty. The prior violent felony Ferrell was convicted of committing was a second-degree murder bearing many of the earmarks of the present crime, as reported in the presentence investigation:

> Circumstances: The female (victim) was slumped in the right front seat of a vehicle. According to witnesses, the suspect later identified as the defendant, was upset with the victim and pulled his vehicle alongside the vehicle in which the victim was riding, The defendant allegedly got out of his vehicle carrying a .22 caliber rifle, placed the rifle to his shoulder and stated, "Bitch, I'm tired of your fucking me." The defendant then pointed the gun approximately one foot from her head and fired several shots at her head, for a total of eight. Upon the defendant's arrest, he told the police he would take them to the house and give them the gun he used and also stated that he had

> shot the victim and was glad he did and hoped she died.
>
> [3] We find Ferrell's death sentence proportionate to other capital cases. See, *e.g., Duncan.* We find Ferrell's sentence commensurate to the crime in light, of the similar nature of the prior violent offense. *Cf. King v. State,* 436 So.2d 50 (Fla.1983), *cert. denied, 466* U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 163 (1984) (death sentence affirmed for shooting live-in girlfriend where prior conviction was for axe-slaying of common-law wife) ."

See also King v. State, 436 So.2d 50 (Fla. 1983); Duncan v. State, 619 So.2d 279 (Fla. 1993); Lemon v. State, 456 So.2d 885 (Fla. 1984); Harvard v. State, 414 So.2d 1032 (Fla. 1982).

While appellant may wish to describe homicide number one as quasi-self-defense, the prosecution prefers the characterization as a first degree murder followed by appellate reversal because of scientific testing error followed by Jorgenson's plea to second degree murder. See prosecutor's argument at post-jury sentencing hearing on September 8, 1995. (R 451-454)[11] With an intelligence higher than 98% of the population, appellant has learned to shoot his antagonists in the head. Appellant is not entitled to a rejection of the jury's clear proclamation of the appropriate sanction on the mere argument that he had only killed twice in twenty years.

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[11] *See also* recitation to jury at TR 2570 regarding the earlier homicide that *Witnesses for the People testified that Morgan did not get close enough to Jorgenson to actually touch him and that Jorgenson fired until Morgan dropped."

Appellant cites Chaky v. State, 651 So.2d 1169 (Fla. 1995), in which this Court explained that the prior felony conviction:

> " . . . . occurred in South Vietnam in 1971 during the war and involved a hand grenade incident in which Chaky was guarding a witness and meant to throw the grenade close enough to scare a soldier who was threatening the witness, but not close enough to injure the soldier. No one was injured and Chaky pleaded guilty to the charge to receive a reduced sentence."

(emphasis supplied) (text at 1171)

Appellee submits that no serious debate can be made that the Chaky prior conviction wherein "No one was injured" is comparable to the Jorgenson-Morgan homicide; if there is, appellee will assert that Phillip Morgan was injured. Nor is appellant aided by Songer v. State, 544 So.2d 1010 (Fla. 1989), where the single aggravator present there was the non-violent walking away from a work-release job.

The single aggravator in the instant case is weighty and this Court should affirm as in Ferrell, *supra*. See *also* Burns v. State, So.2d ___, 22 Florida Law Weekly S419 (1997).

ISSUE V

WHETHER THE TRIAL COURT ERRED BY WEIGHING OR PERMITTING JURY TO WEIGH NON-STATUTORY AGGRAVATOR THAT APPELLANT WAS A DRUG DEALER.

The trial judge's sentencing order does not reflect the use of any aggravating factor other than the statutory-enumerated prior felony conviction involving the use of threat or violence to some person, i.e., the 1966 murder of Phillip Morgan. (R 528-529) The prosecutor only argued to the jury the presence of this one statutory aggravator (TR 2892):

> "Mr. Jorgenson deserves to die for one reason under the law. And quite uniquely, it does not arise out of the circumstances of the death of Tammy Ruzga. It arises out of the fact that Mr. Jorgenson killed somebody before."

It was the defense -- not the state -- who reminded jurors in penalty phase closing argument that they might be tempted and to avoid that temptation to think "damn, I don't like people who deal in drugs, and I think we ought to put him to death because he's a drug dealer." (TR 2935)

Appellant's complaint appears to be that the prosecutor's eliciting testimony at guilt phase concerning appellant's drug dealing and selling through his partner and user Rocky Finley and others such as Laurie Kilduff and Melissa Maynard impermissibly influenced the jury into recommending a sentence of death for two-

time murderer Jorgenson.[12]

It is quite correct that testimony was adduced in the guilt phase (for which the state does not apologize) that many of the dramatis personae were methamphetamine users and that Jorgenson and Finley also delivered the drugs to themselves and others.[13] Appellee understands that it would be more antiseptic but is not always possible to confine its eye and ear witnesses to bishops and Nobel prize laureates since killers do not **always** associate with the latter groups.

Appellant relies on Castro v. State, 547 So.2d 111 (Fla. 1989), where this Court concluded that a new sentencing proceeding was required because of the erroneous admission at guilt phase of

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[12]It is oddly convenient that appellant warmly **embraces** the concept of introducing and relying on defense testimony about appellant's connection to the drug world and abuse of methamphetamines when proffered at penalty phase for **a** reduced sentence through witnesses Maynard, Reeves, Abbott, Dr. Dee and Dr. McClane, but otherwise remains shocked about it.

[13]The excerpt quoted on p. 72 at the end of Rocky Finley's statement is incomplete. The total excerpt at trial reads at TR 1359:

> "Q. Let's back up for a moment into that day when it was still daylight outside. Did you see Mr. Jorgenson during the day that day?
>
> A. Yes.
>
> Q. What was the purpose of your having contact with him during the day?
>
> A. I think it was -- I believe it was to do something with methamphetamine. I believe I was getting something from him. Yeah, I believe I **was** buying."

testimony of witness McKnight that Castro had tied him up and threatened to stab him several days prior to killing the victim Scott. The testimony lacked relevance to any material fact in issue (state incorrectly argued it was relevant to McKnight's state of mind which **was** not an issue) and the only discernible purpose was to show bad character and propensity for violent behavior, which prejudicially contrasted with the mitigating evidence of childhood incest. Similarly, in Lawrence v. Stat-c, 614 So.2d 1092 (Fla. 1993), the Court deemed prejudicial for the penalty phase erroneous testimony from inmate Sutton concerning Lawrence's admission that he had jiggled old women out of their money and had threatened to kill a woman Linda, a potential witness on a 1987 burglary charge (a crime unrelated to the 1986 murder case being tried).

Unlike Castro and Lawrence, the evidence at guilt phase sub *judice* regarding Jorgenson's methamphetamine use and delivery was not erroneously admitted into evidence. It was proper to show the relationship of the parties (Finley and Jorgenson supplied drugs to each other and to Laurie Kilduff, Tammy Jo Ruzga and Melissa Maynard), to help explain the source of victim Ruzga's near-fatal amount of drugs in her system at the time of death, to help explain in part why accessory Kilduff did not immediately flee the murder site at the point she anticipated the killing would take place, the ability of the witnesses to recall and recount the events at the

time in question and to explain the testimony of Hughes and Costentino concerning appellant's motive for the killing in his damaging statements against interest. See Consalvo v. State, ___ So.2d ___, 22 Florida Law Weekly S494, fn 10 (Fla. 1997) (where evidence of another crime which is admitted but not erroneously, the rule of Straight v. State, 397 So.2d 903 (Fla. 1981) that admission of irrelevant collateral crimes is presumed harmful is not applicable).

Furthermore, there is no unduly prejudicial impact at the penalty phase since appellant sought to cloak himself in the alleged mitigating category of extreme mental or emotional disturbance and alleged inability to conform his conduct to the requirements of law because of methamphetamine abuse -- which a thoughtful juror might wonder as to the reason for its availability -- and the state in penalty phase closing argument emphasized not the facts and circumstances of the instant case but rather focused on his repeater-murderer status from the Colorado homicide years earlier.

Appellant's claim is meritless and must be rejected.

ISSUE VI

WHETHER THE LOWER COURT ERRED IN DENYING THE APPELLANT'S REQUESTED JURY INSTRUCTION ALLEGEDLY BASED ON HARMON V. STATE, 527 So.2d 182 (FLA. 1988) CONCERNING THE NONSTATUTORY MITIGATOR DISPARITY OF TREATMENT OF AN ACCOMPLICE AND/OR WHETHER THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ITS WEIGHING OF THAT MITIGATOR AT SENTENCING.

Appellant requested special jury instruction number seven (which the trial court denied) providing:

> 'The **degree** of participation and relative culpability of an accomplice or joint perpetrator, together with any disparity of the treatment received by such accomplice **as** compared with that of the defendant here being sentenced, are factors you may take into consideration in making your penalty recommendation."

(R 377)

The defense counsel below argued that this instruction should **be** given (TR 2744-49) and the prosecutor responded that the cases relied on were jury override cases in which the appellate court had performed the analysis required by Tedder, 322 So.2d 908 (Fla 1975), that it was a danger for the jury to engage in proportionality analysis, a function of this court's review, and the jury adequately could take into account "any other circumstance of the offense" as a mitigator. (TR 2750-51)

A. The **Failure** to Give the **Requested Instruction**:

Appellant concedes that he was allowed to and did argue the disparity in treatment in his penalty phase closing argument

(Brief, p. 76) and he similarly identifies decisions of this Court rejecting similar requests for specific instruction on non-statutory mitigation. See, e.g., Jones v. State, 612 So.2d 1370 (Fla. 1992); Robinson v. State, 574 So.2d 108 (Fla. 1991); Finney v. State, 660 So.2d 674 (Fla. 1995). The contention that the jury could not or would not understand alleged disparate treatment without the requested instruction is meritless. The trial court properly rejected, and this Court should likewise reject appellant's invitation that the jury now also be given the responsibility of engaging in proportionality analysis.[14]

B. Trial Court's Treatment of Disparity Mitigator:

Appellant's reliance on cases such as Harmon, 527 So.2d 182 (Fla. 1988); Brookings v. State, 495 So.2d 135 (Fla. 1986); Fuente v. State, 549 So.2d 652 (Fla. 1989); and Spivey v.

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[14]While it may be argued that the role of the jury has been promoted from recommender of a sentence to co-sentencer in recent years -- see Espinosa v. Florida, 505 U.S. ___, 120 L.Ed.2d 854 (1992); Lambrix v. Singletary, 520 U.S. ___, 137 L.Ed.2d 771 (1997) -- it is not difficult to imagine the resulting mischief by adding to the jury's burden the responsibility of proportionality weighing. Proportionality analysis is the responsibility of this Court which as appellate reviewer statewide has a perspective unlike that of any jury in a local community. To expand the jury's role would lead to prosecutors and defense lawyers introducing wholesale not only the opinions of this Court (with the separate concurring and dissenting views of individual Justices) but perhaps also the trial transcripts of those other cases. Since proportionality analysis can only realistically be done at the appellate level, and since as this Court well knows individual Justices of the Court can sometimes disagree on the proper resolution of a given case, and since proportionality review is not mandated by the Constitution, see Pulley v. Harris, 465 U.S. 37, 79 L.Ed.2d 29 (1984), the trial court correctly denied the requested relief.

State, 529 So.2d 1088 (Fla. 1988) is misplaced. All of these are jury override cases, calling for the application of the unique jurisprudence of Tedder v. State, 322 So.2d 908 (Fla 1975) and its progeny. In the instant case the jury recommended a sentence of death by a vote of eleven to one. (R 413) As stated in footnote 5 of Burns v. State, ___ So.2d ___, 22 Florida Law Weekly S419 (1997) :

> "[5]The remainder of the cases on which Burns relies are jury override cases. Jury override cases involve a wholly different legal principle and are thus distinguishable from the instant case. See Watts v. State, 593 So. 2d 198, 205 (Fla.), cert. denied, 505 U.S. 1210 (1992); Hudson v. State, 538 So. 2d 829, 831-32 (Fla.), cert. denied, 493 U.S. 875 (1989); Williams v. State, 437 So. 2d 133, 137 (Fla. 1983), cert. denied, 466 U.S. 909 (1984) ."

Merging the jury override jurisprudence which calls for the Court's consideration of whether there is a reasonable basis for the jury's recommendation of life imprisonment (since the jury acts as conscience of the community) with cases involving near-unanimous death recommendations would be irrational and might imperil the death penalty statute as applied.

Spivey, *supra*, additionally is distinguishable in that there the defendant did not have an intent to kill and his culpability was predicated only on a felony murder theory and he was not the primary motivator. Similarly in Brookings, *supra*, the woman who hired the defendant to kill pled to the lessor offense of second

degree murder and an active participant who purchased the murder weapon and devised the plan for the ambush and drove over the body after the killing received total immunity; the jury could reasonably decide that disparate treatment for equably culpable actors merited a life recommendation. In contrast, Jorgenson was the killer in this case, he planned it and carried it out; that Laurie Kilduff may have lesser culpability as an accessory does not require vacation of the judgment of the jury (the conscience of the community) that the appellant should receive a sentence of death. The instant case is more comparable to Mordenti v. State, 630 So.2d 1080 (Fla. 1980)(although Gail Mordenti was involved in this case by acting as contact person between Royston and Mordenti, it was Mordenti who actually carried out the contract murder). *See also* Downs v. State, 572 So.2d 895 (Fla. 1990); Eutzy v. State, 458 So.2d 775 (Fla. 1984); Heath, 648 So.2d 660 (Fla. 1995); Hannon v. State, 638 So.2d 39 (Fla. 1994); Coleman v. State, 610 So.2d 1283 (Fla. 1992); R. Ferrell v. State, 686 So.2d 1324 (Fla. 1996)(death penalty proportionate even for non-shooting defendant since he played integral part in planning and carrying out murder and used his friendship to lure victim to his death, whereas co-defendant Johnson merely provided get-away vehicle after the crime was committed); Sliney v. State, ___ So.2d , 22 Florida Law Weekly S476 (Fla. 1997) (death penalty not disproportionate where trial court did' not find any statutory mental mitigation, and

defendant more culpable than co-defendant who received life sentence); R. Johnson v. State, ___ So.2d ___, 22 Florida Law Weekly S256 (Fla. 1997) (proportionality argument rejected because defendant was triggerman, leader of the attack and recruited co-defendants to participate); Henyard v. State, 689 So.2d 239 (Fla. 1996) (co-defendants less severe sentence irrelevant to proportionality review because death never valid punishment option for fourteen-year-old); Larzelere v. State, 676 So.2d 394 (Fla. 1996)(co-defendant's acquittal was irrelevant to proportionality analysis because exonerated as a matter of law). Cole v. State, So.2d ___, 22 Florida Law Weekly S587 (Fla. Case No. 87,337, September 18, 1997)[15]

Moreover, the trial court did give consideration to this factor:

> '3. Any disparity of the treatment received by an accomplice or joint perpetrator, as compared with that of the defendant here to be sentenced.
>
> The accomplice, Laurie Kilduff Turney, who was given immunity, was not the major player. The evidence shows she drove ahead of the defendant to the murder scene, realized he

[15]The instant case is also unlike Hazen v. State, So.2d ___, 22 Florida Law Weekly S546 (Fla. 1997) where this Court found that the defendant was a follower and not as culpable as prime instigator Buffkin (who entered a plea bargain and avoided the death penalty) or triggerman Johnny Kormondy. In the instant case, Jorgenson lured the victim to the site of her execution and was the triggerman -- he was an adult in his mid-fifties who had killed before (unlike the emotionally dependent follower youth Hazen).

was going to kill the victim and drove the defendant away from the scene and provided an alibi by lying to the police. However speculative her involvement was, it was minor compared to the defendant/s. Under the facts of this case, at best she was an accessory after the fact and not a principal. The defendant, a man with an I.Q. of 140 in the top 99.6 percentile of the population, was the trigger man. He was also older than Turney and was clearly the leader, The defendant had also been previously convicted of second degree murder while Turney's record consisted only of a drug charge. Hall v. State, 614 So. 2d 473 at 479 (Fla. 1993). This non-statutory mitigator has been proved by a preponderance of the evidence and the Court gives it minimal weight. Hoffman v. State, 474 So. 2d 1178 at 1182 (Fla. 1985).

The Court has very carefully considered and weighed the aggravating circumstance and finds only two non-statutory mitigating circumstances, i.e., the defendant's methamphetamine use and Laurie Kilduff Turney's involvement, which was minimal compared to the defendant's. The Court is ever mindful that human life is at stake in the balance. The Court finds that the lone aggravator of a prior murder deserves great weight and far outweighs the two non-statutory mitigators. The Court further notes there is nothing in the record to show that the jurors did not follow all instructions the Court gave them. The Court feels the jury's recommendation of eleven to one for death is appropriate in this case."

(R 534-535)

Appellant mocks the trial court's finding with a gratuitous observation ('what else could it say?", Brief, p. 79) and asserts that the lower court's action was unreasonable, arbitrary and a clear abuse of discretion. Appellant even informs us that the

trial court's treatment of the issue in his order 'seems a mere pretext to sentence Appellant to death". (Brief, p. 80)

In Jorgenson's attempt to prosecute Laurie Kilduff -- he agrees that she was less culpable, was not the shooter -- he contends that she is a principal in the first degree. The bases for his conclusion include: (1) Laurie Kilduff and Tammy Ruzga did not get along, citing Melissa Maynard's testimony regarding appellant's proposal to zap Tammy with **a** stun gun and Laurie's testimony that the victim **was** jealous of her; (2) appellant's disbelief in Laurie Kilduff's testimony regarding the meeting with appellant on Dean Still Road; (3) alleged variances between the testimony of Kilduff and Rocky Finley; (4) Laurie Kilduff provided an alibi to police initially; and (5) admissions made by Jorgenson to jail inmate Michael Hughes.

As to (1), ***supxa,*** Melissa Maynard's testimony was that about a month before the killing appellant mentioned that he wished Tammy Ruzga would disappear and asked Melissa, Marie (Rocky Finley's sister) and Laurie if they would go with him and paralyze the victim with a stun gun and that none of them did so, or even accompany Tammy to Walgreens. (TR 1486-1487) Laurie Kilduff did testify she and Tammy were acquaintances and that the latter was jealous of her. (TR 1544) Melissa Maynard had been a friend of the victim for ten and one-half years and during the last couple of months "were friends, but not good friends". (TR 1473, 1476) That

victim Ruzga was not as close a friend to Laurie and Melissa is not a sufficient fact to render either a principal in the instant crime.[16]

As to (2), *supra*, appellant expresses disbelief at Kilduff's testimony regarding the meeting with appellant on the road. Suffice it to say that appellant could challenge it via cross-examination and that Jorgenson does not find it credible is not surprising given his current status, but that is immaterial. See testimony of Michael Hughes and Richard Costentino regarding appellant's offer of $50,000 to kill Kilduff. (TR 2015, 2066-67)

Appellant points to Laurie Kilduff's testimony that she responded "What difference does it make?" when appellant said he couldn't get the victim in the driver's seat. Kilduff testified she did not understand why it would make a difference -- since Jorgenson did not explain it to her -- and she did not flee because she was on drugs and thought if she ran sooner or later he would catch her. (TR 1565)

Kilduff maintained that the first time she believed appellant was about to kill the victim was when he approached Kilduff's car and she saw the gun in his hand. She did nothing to assist in causing the death. Kilduff did not load the gun, procure the gun, lure the victim to the site of being killed, or administer drugs to

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[16]According to Kilduff, Tammy was jealous of other women around appellant, not only Kilduff, (TR 1623)

her. (TR 1702-03) According to Melissa Maynard, Kilduff called her from the jail after arrest and pretty much told her that she was present on Dean Still Road when appellant shot Tammy. (TR 2640)

As to (3), variances between the testimony of Kilduff and Rocky Finley, there is no discrepancy in the cited passages. The fact that Finley testified Laurie said she had to hurry to meet appellant does not demonstrate that she was aware of the purpose beforehand.

As to (4), Laurie's initially assisting in the alibi to police was fully explored on direct and cross-examination.

As to (5), appellant's statement to jail inmate Hughes attempting to implicate Kilduff, as this Court well knows while a hearsay declaration implicating one's self is admissible, hearsay declarations attempting to implicate another or shift responsibility is less trustworthy and not admissible. As stated in Williamson v. United States, 512 U.S. 594, 129 L.Ed.2d 476 (1994) :

> "Rule 804(b)(3) is founded on the common-sense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. This notion simply does not extend to the broader definition of "statement." The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that

> seems particularly persuasive because of its self-inculpatory nature."
>
> (129 L.Ed.2d at 483)

See *also* Franqui v. State, ___ So.2d , 22 Florida Law Weekly S373 (Case No. 83,116, June 26, 1997); Franqui v. State, ___ So.2d ___, 22 Florida Law Weekly S391 (Case No. 84,701, July 3, 1997); Escobar v. State, So.2d ___, 22 Florida Law Weekly S412 (Case No. 77,735, July 10, 1997); Escobar v. State, ___ So.2d ___I 22 Florida Law Weekly S414 (Case No. 77,736, July 10, 1997).

Appellant's subsequent effort to implicate Kilduff, especially after she provided damaging information to the authorities -- and his attempts to have her murdered -- do not render his remarks attempting to shift blame to her reliable.

The trial court in its sentencing order found that Laurie Kilduff Turney who was given immunity was 'not the major player" and however speculative her involvement was 'it was minor compared to the defendant's". (R 534) The trial court concluded that under the facts of the case "at best she was an accessory after the fact and not a principal" and that Jorgenson with an IQ of 140 was the triggerman, older than Turney and 'clearly the leader" with a more serious past criminal record. To the extent that appellant now disagrees and contends that Melissa Maynard's penalty phase testimony more accurately paints Turney as a principal, suffice it to say that the trial court could reject that brief conclusory testimony. And even if this Court were to conclude that Turney was

more than an accessory after the fact, nevertheless her involvement was still minor in comparison to Jorgenson who provided drugs to the victim, lured her to the murder site and executed her with a fusillade of gunshots to the head.

ISSUE VII

WHETHER THE SENTENCE OF DEATH IS DISPROPORTIONATE BECAUSE THE ONLY AGGRAVATING CIRCUMSTANCE IS ALLEGEDLY OUTWEIGHED BY MITIGATING CIRCUMSTANCES.

"Appellant is a good man, except that sometimes he kills people."

Fead v. State, **512** So.2d **176,** 180 (Fla. 1987) (J. Grimes, concurring in part and dissenting in part)

This court has frequently approved the trial court's imposition of a sentence of death where a single aggravator has been found. *See* Ferrell v. St-at-p, **680** So.2d 390 (Fla. 1996); Duncan, 619 So.2d 279 (Fla. 1993); Cardona v. State, 641 So.2d 361 (Fla. 1994); Arango v. State, **411** So.2d 172 (Fla. 1982); Armstrong v. State, 399 So.2d 953 (Fla. 1981); LeDuc v. State, 365 So.2d 149 (Fla. 1978); Douglas v. State, **328** So.2d 18 (Fla. 1976); Gardner v. State, 313 So.2d 675 (Fla. 1975); Burns v. State, ___ So.2d , 22 Florida Law Weekly S419 (1997) (avoid arrest, victim engaged in performance of official duties, and disruption of lawful exercise of government function or enforcement of laws which trial judge merged because based on a single aspect of the offense -- the victim was a law enforcement officer).

Conducting his own weighing process, Jorgenson concludes that the prior violent felony -- a second degree murder conviction in Colorado must be given 'diminished" consideration because it was an imperfect self-defense, by its remoteness in time and its domestic

aspects. The stipulated statement of the facts of the 1966 homicide recited:

> "The facts of the 1966 homicide: Ronald Jorgenson's sister called him on the night of August 25th, 1966, and told him her common-law husband, Phillip Morgan, had automobile license plates which belonged to her. She said that she had found Morgan at a bar, and asked Jorgenson to help her get the plates back from him.
>
> Jorgenson and a friend drove out to the bar. Jorgenson entered and asked Morgan to return the plates. Morgan refused. Jorgenson left the bar and went into the parking lot towards his car.
>
> At this time, Morgan and Jorgenson's sister came onto the porch of the bar. Morgan began to hit the sister. Jorgenson reached into the car, took out his pistol, and fired a warning shot over their heads, with the hope of frightening Morgan. Morgan jumped off the porch and ran towards Jorgenson.
>
> Jorgenson testified that Morgan shouted Jorgenson would have to kill him or be killed. Thereupon, Jorgenson shot three times and wounded Morgan. According to Jorgenson, Morgan was still able to reach Jorgenson and fight him for the gun, Jorgenson fired a fourth and fatal shot to the head.
>
> Witnesses for the people testified that Morgan did not get close enough to Jorgenson to actually touch him and that Jorgenson fired until Morgan dropped.

(TR 2570)

In Ferrell, *supra*, this Court reasoned:

> "[2] Ferrell next argues that his death sentence is disproportionate when compared to other cases involving a single aggravating circumstance. We disagree. Although we have reversed the death penalty in single-aggravator cases where substantial mitigation was present, we have affirmed the penalty despite mitigation in other cases where the

lone aggravator was especially weighty. *Compare Songer v. State,* 544 So.2d 1010 (Fla.1989) (death sentence reversed where single aggravating factor 'of "under sentence of imprisonment" was weighed against three statutory and seven nonstatutory mitigators) *with Duncan v. State,* 619 So.2d 279 (Fla.), *cert. denied, 510* U.S. 969, 114 S.Ct. 453, 126 L.Ed.2d 385 (1993) (death sentence affirmed where single aggravating factor of prior second-degree murder of fellow inmate was weighed against numerous mitigators).

In the present case, although the court found a number of mitigating circumstances established, it assigned little weight to each. The lone aggravating circumstance, on the other hand, is weighty. The prior violent felony Ferrell was convicted of committing was a second-degree murder bearing many of the earmarks of the present crime, as reported in the presentence investigation:

> Circumstances: The female (victim) was slumped in the right front seat of a vehicle. According to witnesses, the suspect later identified as the defendant, was upset with the victim and pulled his vehicle alongside the vehicle in which the victim was riding. The defendant allegedly got out of his vehicle carrying a .22 caliber rifle, placed the rifle to his shoulder and stated, "Bitch, I'm tired of your fucking me." The defendant then pointed the gun approximately one foot from her head and fired several shots at her head, for a total of eight. Upon the defendant's arrest, he told the police he would take them to the house and give them the gun he used and also stated that he had shot the victim and was glad he did and hoped she died.

[3] We find Ferrell's death sentence proportionate to other capital cases. See, *e.g., Duncan.* We find Ferrell's sentence commensurate to the crime in light of the

> similar nature of the prior violent offense. *Cf. King v. State,* 436 So.2d 50 (Fla.1983), *cert. denied, 466* U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 163 (1984) (death sentence affirmed for shooting live-in girlfriend where prior conviction was for axe-slaying of common-law wife). (FN3)
>
> FN3. *See also Lemon v. State, 456* So.2d 885 (Fla.1984), cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985) (death sentence affirmed for stabbing/strangulation of girlfriend where prior conviction was for assault with intent to commit first-degree murder for stabbing female victim); *Harvard v.* State, 414 So.2d 1032 (Fla.1982), *cert. denied, 459* U.S. 1128, 103 S.Ct. 764, 74 L.Ed.2d 979 (1983) (death sentence affirmed for shooting second ex-wife where prior conviction was for aggravated assault arising from shooting attack on first ex-wife and her sister) ."

(text at 391-392)

The trial court could, and indeed properly did, give great weight to this significant aggravator of a prior unnecessary homicide.

Appellant essentially complains about his disagreement with trial court's judgment about his proffered mitigation. See Bell v. State, ___ So.2d ___, 22 Florida Law Weekly S485 (Fla. 1997) (no abuse of discretion in treatment of mitigation); James V. State, So.2d , 22 Florida Law Weekly S223 (Fla. 1997) (decision as to whether a mitigating circumstance is established is within trial court's discretion; reversal is not warranted simply because defendant draws different conclusion); (X I - ' - So.2d ___, 22 Florida Law Weekly S183 (Fla. 1997) (no abuse of discretion in rejecting statutory mitigator considering evidence cited in the

order and adduced at trial); Lawrence v. State, 691 So.2d 1068 (Fla. 1997)(trial court properly rejected cocaine use as a statutory mitigator and as a non-statutory mitigator properly found it was not entitled to substantial weight); Mungin v. State, 689 So.2d 1026 (Fla. 1997)(no abuse of discretion in trial court's dismissing as irrelevant proffered testimony of witnesses who knew defendant in high school); Kilgore v. State, 688 So.2d 895 (Fla. 1997)(trial court acted within his discretion in ruling mental health factors entitled to little weight); Consalvo v. State, ___ So.2d ___, 21 Florida Law Weekly S423 (Fla. 1997) (trial court acted within discretion in finding mitigating factor but according little weight); Williamson v. State, 681 So.2d 688 (Fla. 1996)(proper for judge to give limited weight to dysfunctional upbringing mitigator when similarly situated siblings became productive members. of society); Spencer v. State, 691 So.2d 1062 (Fla. 1997) (two statutory mental mitigators not given great weight because of defendant's ability to function in his job and capacity to plan and carry out murder); Foster v. State, 679 So.2d 747 (Fla. 1996) (weight to ascribe to mitigator is within discretion of trial court); Sims v. State, 681 So.2d 1112 (Fla. 1996) (trial court's order adequately provided appellate court for meaningful review); Bonifay v. State, 680 So.2d 413 (Fla. 1996).

Appellant contends that it would be a "close case" balancing this aggravator against the two found non-statutory mitigators to

which the trial court gave minimal weight (R 534-535), but that in light of his arguments advanced in Issues III, IV, V and VI, the sentence'is improper. Appellee disagrees and rather than repeat the arguments advanced in those issues will simply reincorporate them here. Appellant seeks to compare his situation with those presented in Nibert v. State, 574 So.2d 1059 (Fla. 1990); Songer v. State, 544 So.2d 1010 (Fla. 1989); White v. State, 616 So.2d 21 (Fla. 1993). Unlike Jorgenson, Nibert was not a prior murderer and he had a long history of receiving abuse as a child (here, only person in the house to mistreat the defendant was Bill Young for a six month period - TR 2609). Songer had a single non-violent aggravator - walking away from work release -- not a prior murder and he had much in the way of mitigation including the presence of the two statutory mental mitigators. Similarly, White had not previously killed, the jury had erroneously been instructed on CCP and the two statutory mental mitigators were present.

Appellant next proceeds to rely on a number of jury override cases: Cochran v. State, 547 So.2d 928 (Fla. 1989); Amazon v. State, 487 So.2d 8 (Fla. 1986); Fead v. State, 512 So.2d 176, 180 (Fla. 1987), but as this Court has explained in Burns v. State, ___ So.2d , 22 Florida Law Weekly S419 (1997), the number of aggravators and mitigators is not diepositive of a disproportionality issue and in footnote 5:

> "The remainder of the cases on which Burns relies are jury override cases. Jury override

> cases involve a wholly different legal principle and are thus distinguishable from the instant case. *See Watts v. State, 539 So.* 2d 198, 205 (Fla.), *cert. denied 505* U.S. 1210 *(1992); Hudson v. State, 538 So.* 2d 829, 831-832 (Fla.), *cert. denied, 493* U.S. 875 (1989); *Williams v. State, 437 So.* 2d 133, 137 (Fla. 1983), *cert. denied, 466* U.S. 909 (1984)."

The Burns court also explained why death was an appropriate sanction there where other factually-similar cases involving the slaying of a law enforcement officer had been deemed disproportionate [Songer, *supra*, Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988)] -- the gravity of the single merged aggravator was entitled to great weight. The court added:

> "Nor does the instant case involve any statutory mental mitigators. The consideration given statutory mental mitigators, depending on the evidence presented to support them, may be substantial. Not only was the instant case devoid of the statutory mental mitigators, but the statutory mitigators that were found were afforded only minimal weight."

(22 Florida Law Weekly at 420)

Appellee submits that there can be no greater aggravating circumstance than a prior murder (Jorgenson's claim of the crime of self-defense notwithstanding), and the trial court's order explained the basis for rejection of asserted statutory mental mitigators:

> 'The Court rejects the opinion testimony of both doctors that the defendant was under the influence of extreme mental **or** emotional disturbance at the time of the murder. The facts of this case do not establish to this

Court this defendant committed the murder of Tammy Jo Ruzga because he was under the influence of methamphetamine, i.e., the defendant's use of methamphetamine did not in any way **cause** him to kill the victim. At most, the facts of this case establish to this Court the defendant *got* **caught because** methamphetamine caused the defendant to make mistakes that resulted in his arrest, i.e., leaving his shoe prints and a cigarette butt at the scene.

In support of its conclusions regarding the effect of defendant's mental state on this offense, the Court has looked to the following facts as proven at trial:

The defendant, a few weeks prior to the murder, told people he wanted Tammy Jo Ruzga killed. At the time, the individuals he told this to, Rocky Finley and Melissa Maynard, felt he was kidding. A few days prior to the murder the defendant started carrying a gun. The defendant, on the night of the murder, spoke to Laurie Kilduff Turney at 9:00 p.m. and told her to call him again at 11:00 p.m. (Turney, pg. 12). The defendant, in the 11:00 p.m. telephone conversation, told Laurie to meet him at I-4 and Highway 33. (Turney, pg. 19). After Laurie arrived at the rendezvous the defendant then told her to drive to a remote area on Dean Still Road, which she did, after stopping for gas. The defendant then got out of his car and approached Laurie's car and told her he could not get the victim into the driver's seat. (Turney, pg. 31). The defendant then took the 38 revolver he had at his side and went back to the driver's window of his car, spoke to the victim, and fired three shots into the victim's head at close range. He then took a baby's carrier out of the back seat and three pairs of blue jeans. (Turney, pg. 34). He wiped the car's door and steering wheel and then gave the jeans and baby carrier to Laurie to give to her friends, Melissa Maynard and Rocky Finley. (Turney, pg. 34-37).

The defendant then had Laurie drive him to two separate locations to possibly get rid of the gun at the second location by throwing

it into Lake Hunter. The gun was never recovered. (Turney, pg. 75).

The defendant and Laurie then went back to Rocky Finley's trailer, where the defendant tried to establish an alibi by telling Melissa Maynard, "If anyone asks, I have been here from 11:30 p.m.". The defendant, along with Laurie, smoked some more methamphetamine, yet around 6:30 a.m. he had the presence of mind to call the Sheriff's Department to report his car and girlfriend missing in order, "to make it look good". (Turney, pg. 49). From the first telephone call at 8:00 p.m. until the last telephone call at 6:30 a.m., there was a time period of ten and a half hours.

These facts contradict the testimony of the doctors and do not prove to this Court the defendant was under extreme mental or emotional disturbance. These facts prove to this Court the defendant wanted the victim killed and that he planned to kill her; he took her to a remote area, under a ruse, telling her they were going to meet the "Latin Kings"; he left his car there, and tried to establish an alibi. This Court calls particular attention to the fact that the defendant was level-headed and calm enough to call the Sheriff's Office at 6:30 a.m. and continue the charade by reporting both his car and girlfriend as missing, even after smoking more methamphetamine. Nothing the defendant did was impulsive, or the product of paranoid thinking. Methamphetamine did not cause the killing, it only caused him to be caught. As Dr. Dee stated, the defendant was stupid to leave his shoe prints and cigarette butt at the scene. (Dee, pg. 60). This statutory mitigating factor does not exist. Alternatively the defense has offered this mitigator as a non-statutory mitigator without the statutory qualifying adjective or adverb. The Court for the above reasons does not find this to exist even as a non-statutory mitigator.

2. The capacity of the defendant to conform his conduct to the requirements of the law was substantially impaired.

The Court feels it is important to

> distinguish this statutory mitigator from the one previously discussed. The Court will consider the testimony and findings of the two doctors as it did in #1 **above and** readopts them here.
>
> The first statutory mitigator dealt with the influence of extreme mental or emotional disturbance. This second statutory mitigator deals with whether the defendant was substantially impaired in his ability to appreciate what he was doing, i.e., his knowledge. "921.141(6)(b), is interpreted as less than insanity but more than the emotions of an average man, however inflamed... 921.141(6)(f), refers to mental disturbance that interferes with but does not obviate the defendant's knowledge of right or wrong", Duncan v. State, 619 So.2d, 279 at 283 (Fla. 1993). The Court is ever mindful that this is not a test of insanity of whether the defendant knew right from wrong, but whether the disturbance interfered with the defendant's knowledge of right or wrong. Dr. Dee testified there was nothing in the defendant's testing to show he did not know what he **was** doing, **nor** did he make any findings that the defendant did not know right from wrong. (Dee, pg. 37 and 52).
>
> As previously discussed above the defendant's actions do no [sic] show an inflamed man nor do they show an interference with the defendant's ability to conform his conduct to the requirements of the **law.** The defendant planned the murder, carried it out and attempted an alibi. This mitigating factor does not exist. Alternatively the defense has offered this mitigator as a non-statutory mitigator without the statutory qualifying adjective or adverb. The Court for the above **reasons** does not find this to exist even **as a** non-statutory mitigator.

(R 531-533)

Thus, any attempt by Jorgenson to obtain relief by placing himself within the orb of decisions mandating **a** reduced sentence because of

trial court findings of significant statutory mental mitigation is unavailing; such cases are inapposite to the present situation.[17]

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[17] *See* e.g., Kramer v. State, 619 So.2d 274 (Fla. 1993), involving the statutory mental mitigators and a killing which the Court described as a "spontaneous fight . . . between a disturbed alcoholic and a man who was legally drunk". Id. at 278. Jorgenson makes no effort to argue -- and the state would hope this Court would not conclude -- that his luring the victim to a secluded area to pump three bullets into her head as she reclined helplessly qualifies as a spontaneous fight among drunks. Clark v. State, 609 So.2d 513 (Fla. 1992), involved a weak aggravator (pecuniary gain in desiring the victim's job), this Court's rejection of the trial court's finding of three other aggravators, and mitigation included emotional and sexual abuse as a child, Penn v. State, 574 So.2d 1079 (Fla. 1991), involved a trial court's erroneous finding of an aggravator (CCP), a statutory mitigator of no significant criminal activity (he apparently had not murdered years earlier) and a statutory mental mitigator of under the influence of extreme mental or emotional disturbance. Livingston v. State, 565 So.2d 1288 (Fla. 1990), involved a trial court's erroneous finding of an aggravator, this seventeen-year-old had no prior homicidal history and endured a childhood history marked by severe beatings and neglect by his mother. This Court explained that his youth, inexperience and immaturity "significantly mitigate the offense" and there was evidence that after the beatings his intellectual functioning could best be described as marginal -- a sharp contrast with appellant Jorgenson's 140 IQ (TR 2806), age of fifty-four (TR 2575), who left school because he was bored (TR 2585), and had no significant history of childhood abuse. With the removal of three erroneous aggravators in Rembert v. State, 445 So.2d 337 (Fla. 1984), the Court found the homicide committed during a felony aggravator disproportionate in this non-premeditated killing (the victim was actually alive when Rembert left). Lloyd v. State, 524 So.2d 396 (Fla. 1988), involved appellate reduction of three found aggravators to one (HAC and CCP were invalid) and the single remainder -- homicide during a robbery -- was not sufficient in a proportionality analysis to overcome the mitigating factor of no significant history (Lloyd apparently had not killed before). Thompson v. State, 647 So.2d 824 (Fla. 1994), similarly had one remaining aggravator (during the course of a robbery) and the mitigation there included no violent propensities prior to the killing. The same is true of McKinney v. State, 579 So.2d 80 (Fla. 1991), who unlike Jorgenson had mental deficiencies. Sinclair v. State, 657 So.2d 1138 (Fla. 1995), involved a single aggravator (the merged robbery-pecuniary gain) and mitigators found to have

Next Appellant contends that he is entitled to a finding of disproportionality because victim Tammy Jo Ruzga may be coincidently his girlfriend and thus qualifies for the extended "domestic dispute". This Court's articulation in Spencer v. State, 691 So.2d 1062, 1065 (Fla. 1997), disposes of that contention:

> "[8] Finally, Spencer argues that the death sentence is not proportionate in his case and cites a number of cases involving domestic disputes where this Court found that the death penalty was not warranted. See, e.g., Santos v. State, 629 So.2d 838 (Fla. 1994) (finding death sentence not warranted for defendant who killed his daughter and her mother after a long history of domestic problems). However, this Court has never approved a "domestic dispute" exception to imposition of the death penalty. See id. (finding death sentence disproportionate because four mitigating circumstances of extreme emotional disturbance, substantial inability to conform conduct to requirements of law, no prior history of criminal conduct, and abuse childhood outweighed single aggravating circumstance of prior violent felonies based upon crimes that occurred during the murders). In some murders that result from domestic disputes, we have determined that CCP was erroneously found because the heated passions involved were antithetical to "cold" deliberation, Santos v. State, 591 So.2d 160, 162 (Fla.1991); Douglas v. State, 575 So.2d 165, 167 (Fla. 1991). However, we have only reversed the death penalty if the striking of the CCP

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some weight by the trial court were defendant's cooperation with the police (unlike Jorgenson's denial of involvement), dull normal intelligence (unlike Jorgenson's 140 IQ) and this Court's conclusion that emotional disturbances inflicting the defendant had substantial weight.

aggravator results in the death sentence being disproportionate.

(emphasis supplied)

See also Walker v. State, ___ So.2d ___, 22 Florida Law Weekly S537 (Fla. 1997), fn 12:

> "Walker's related assertions that the trial court erroneously failed to consider in mitigation that these murders arose out of domestic dispute is without merit. This Court had never treated "domestic dispute" cases as categorically different than other death cases and the fact that a case is "domestic" in nature is not, in and of itself, mitigating. In any event, this case is distinguishable from other domestic disputes in that, unlike the typical domestic case, the evidence here does not suggest that the murders were the result of a sudden, emotionally charged fit of rage or anger."

Of course, it is not necessary to strike the CCP aggravator because the prosecutor never urged its applicability and the trial court never found it sub *judice*. Thus, all the cases cited by appellant in this subsection -- Klokoc v. State, 589 So.2d 219 (Fla. 1991); Douglas v. State, 575 So.2d 165 (Fla. 1991); Blakely v. State, 561 So.2d 560 (Fla. 1990); Amoros v. State, 531 So.2d 1256 (Fla. 1988);[18] Garron v. State, 528 So.2d 353 (Fla. 1988); Irizarry v. State, 496 So.2d 822 (Fla. 1986);[19] Wilson v. State, 493 So.2d 1019 (Fla. 1986); White v. State, 616 So.2d 21 (Fla. 1993) -- involved

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[18]Quite apart from proportionality analysis, the sentence of death could not stand in Amoros since with both found aggravators removed there remained no basis for imposition of the death penalty.

[19]Irizarry was also a jury override.

challenged CCP findings in which this court agreed were inappropriate because of the emotional factors operative and with the CCP factor eliminated, the sentences were disproportionate. All these cases are inapposite here as CCP is not a factor to be removed from the calculus.

Appellant also compares his case to that in Darcus Wright v. State, 688 So.2d 298 (Fla. 1996), but there this Court observed:

> 'The present record is devoid of evidence of prior violent offenses or other aggravation committed by Wright unrelated to the ongoing struggle between him and Allison,"

(Id. at 301)

Mitigation included the defendant's turning himself in and admitting the crime, a statutory mitigating factor of under the influence of extreme mental or emotional disturbance and organic brain damage and poor reasoning skills.

Next appellant argues that the single aggravator is offset by significant mental mitigation, referring to the testimony of Dr. Dee, Dr. McClane and Argument Issue III. Appellee too relies on Issue III, *supra*, and the trial court's explanation of the rejection of the testimony of psychologist Dr. Dee and psychiatrist Dr. Thomas McClane (who did not examine Mr. Jorgenson). (R 530-533) To summarize, the facts of the case do not support the view that appellant was under the influence of extreme mental or emotional disturbance at the time of the murder -- the use of methamphetamine did not in any way cause appellant to kill Ruzga,

only that he got caught because drug use caused him to make mistakes resulting in his arrest (leaving shoe prints and cigarette butt at scene). Moreover weeks earlier appellant expressed the desirability of her death, started carrying a gun a few days prior to the homicide and spoke to Laurie twice on the night of the murder arranging for the rendezvous where appellant shot the victim three times; he disposed of the gun which **was** never recovered and then attempted to establish his alibi with Rocky Finley and Melissa Maynard and he had the presence of mind to call the police to report his missing **car** and girlfriend 'to make it look good". Since the facts of the case contradicted the opinions of the experts the trial court properly rejected the latter. See Walls v. State, 641 So.2d 381 (Fla. 1994); Wuornos v. State, 676 So.2d 972 (Fla. 1996).

Appellant can take no solace from Spencer v. State, 691 So.2d 1062 (Fla. 1997), in his proportionality argument since this Court approved the death penalty there. The Court found the'ultimate sanction proportionate (even with a finding of two statutory mental mitigators) because 'Both defendant's [Spencer and Lemon] killed women with whom they had a relationship and both had a previous conviction for a similar violent offense". Id. at 1065.

Appellant contends that the non-statutory mitigator of methamphetamine use, which the trial court found and gave minimal weight (R 534), should have been given more weight to render the

sentence of death disproportionate. This Court has repeatedly acknowledged that the trial court is the arbiter to attach weight to proffered mitigation. See **cases** cited, *supra*, pp. 75-76.

Appellant also claims that the sentence is disproportionate because, although finding the influence of drugs at the time of the killing, the trial court gave it minimal weight. Appellee reiterates that the weight to be accorded **any** mitigator is for the trial court to determine.[20]

Lastly, appellant alludes to his prior argument that disproportionate treatment accorded Laurie Kilduff renders his sentence disproportionate, Appellee relies on its prior argument in Issue VI and reiterates that Jorgenson planned the killing, lured the victim to the murder site, was the triggerman using **a gun** he had and for proportionality purposes Kilduff's participation **was** minimal.

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[20]Unlike Besaraba v. State, 656 So.2d 441 (Fla. 1995), Jorgenson does not have vast mitigation including **a** deprived **and** unstable childhood and no significant history of prior criminal activity. Caruso v. State, 645 So.2d 389 (Fla. 1994), like so many **cases** relied on by appellant, was **a** jury override and thus inapposite.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Byron P. Hileman, Esq., Post Office Drawer'9479, Winter Haven, Florida 33883-9479, this 13TH day of October, 1997.

COUNSEL FOR APPELLEE