IN THE SUPREME COURT OF FLORIDA

RONALD JORGENSON,

Appellant,

vs.

Case No. 86,916

(Court-Appointed)

STATE OF FLORIDA,

Appellee.
_____/

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal is a direct appeal from the Judgment and Sentence of death imposed by the Circuit Court of the Tenth Judicial Circuit on September 29, 1995, the Hon. Daniel True Andrews, Circuit Judge presiding.

The Record will be recited as follows. The Record [Papers and Pleadings] including the documents, motions, orders, preliminary hearings, and sentencing hearings and documents, which appear in Record volumes I. through IV. are continuously paginated from page 1 through page 548. In Appellant's Brief these will be referenced by the letter R. and the page number, e.g. [R. 1-2].

The part of the Record representing the trial transcripts which appear in Record volumes IV. through XXI. are continuously paginated with the court reporter page numbers from 1 through 2960. In Appellant's Brief these will be referenced by the letter T. and the page number, e.g. [T. 1230-34].

STATEMENT OF THE CASE

In the late afternoon of December 3, 1993, Appellant Ronald Jorgenson was arrested and charged with first degree murder. An Indictment was filed on December 9, 1993. [R. 1-2].

The Public Defender conflicted off because it represented State witness Laurie Kilduff. [R. 4-5]. The Court appointed conflict counsel, Lawrence D. Shearer, on January 4, 1994. The Court appointed a second counsel, Byron Hileman, on or about September 21, 1994. [R. 19-23; 36-55].

Extensive discovery followed and various experts and investigators were appointed to assist the Appellant. A Pretrial Motion to Suppress Evidence was heard and denied on February 24, 1995. [R. 194-97; 203-57]. Numerous other pretrial motions and standard death penalty motions were also filed and heard.

A Motion to Suppress Evidence was filed by Appellant to exclude several items of evidence seized without warrant, including the shoes worn by Appellant to the Sheriff's substation on December 2nd and taken from him there, certain items taken from a search of his house that evening, saliva samples taken from him for DNA tests, and statements made by him that day. [R. 194-97]. A hearing on that Motion was held on February 24, 1995. [R. 203-57]. The trial court denied the Motion to Suppress.

On that same date the trial court heard argument, considered, and denied Appellant's Motion Objecting To Standard Jury Instruction on Premeditated Murder; and for a Corrective Instruction, [R. 178-85; 260-65]. It also heard argument on and denied Appellant's Motion Objecting to Standard Jury Instruction on Reasonable Doubt. [R. 170-77; 265-73]. Also heard and granted were Appellant's Motion for the State to Reveal Impeaching Information as to its Witnesses including Laurie Kilduff, a Motion to Require the State to Disclose Mitigating Evidence, and a standard "Brady" motion. [R. 159-62; 163-66; 167-69; 270-85].

The trial court also heard on February 24, 1995, and granted Appellant's Motion to Prohibit Presentence Investigation Report. [R. 156-58; 285-90].

The court heard argument on that same date on Appellant's Motion to Declare Fla. Stat. Section 92 1.14 1 Unconstitutional for Failure to Provide the Jury with Adequate Guidance in finding Sentencing Circumstances and to Prohibit the Death Penalty, and his Motion to Declare 92 1.14 1 Unconstitutional because it Precludes the Consideration of Mitigation by Imposing Improper Burden of Proof, and Appellant's Motion to Declare Section 92 1.141 Unconstitutional for Lack of Appellate Review. All three motions were denied. [R. 104-05; 117-42; 154-55; 143-53; 287-92]. Last the court heard and denied Appellant's Motion to Declare Fla. Stat. Section 92 1.141 Unconstitutional for Permitting a Bare Majority of Jurors to Recommend a Death Sentence. [R. 106-08; 97-98].

A second Motion to Suppress relating to statements made by Appellant in jail to a State "snitch witness", Walter Fudge, was heard on June 29, 1995, and granted in part. [R. 321-24; 338-43; 352]. Fudge was not called at trial.

Jury trial of Appellant began August 7, 1995. The State had filed a timely Notice of Intent to Prove Other Crimes, Wrongs, or Acts on February 5, 1995. In that notice the State related its intent to show that both victim and defendant were involved in the sale and use of methamphetamine. It asserted the information was relevant to show motive, and to explain the relationship between the victim and the defendant in this case. [R. 302].

The Appellant filed a Motion to Exclude Evidence of Other Wrongs on July 28, 1995. [R. 360-62]. Hearing was held on the defense motion on August 7, 1995, before jury selection began. [T. 23-26]. At hearing the Assistant State Attorney announced he had no intent to go into the drug dealing business in his case-in-chief and would not address it in opening statement. [T. 23].

The court then granted the defense motion to exclude drug dealer/sales evidence from trial. [R. 363; T. 26].

In the midst of voir dire, the State asked the court to reconsider its ruling on the defense Motion to Exclude Evidence of Other Wrongs previously granted [T. 329]. Extensive argument and discussion was had. The State now declared its intent to use evidence of Appellant's drug dealing to show motive. [T. 332-37]. The defense restated its objection that the notice of the State was vague [T. 333-34], and that evidence that the Appellant was a drug dealer as distinguished from the excessive use of drugs by Appellant and the victim was not relevant. The defense pointed out that the State's declaration that such evidence was relevant to motive was pure speculation and that the State had no evidence to support an assertion that the killing had anything to do with selling drugs. The defense further asserted that the risk of extreme unfair prejudice was very great because selling drugs or being a "drug dealer" is viewed much more seriously by jurors than simple drug use or possession. The State admitted it had no evidence to support its motive theory, i.e. to connect the drug dealing to the homicide, but said, nonetheless, it was an inference the jury could draw. [T. 3 5 1]. Assistant State Attorney Aguero made this point in a colloquy with defense counsel Shearer and Hileman and the trial court. [T.348-55]. [See Argument Issue V. Below].

The defense pointed out not only the risk of prejudice at guilt phase but that the risk was doubled because of the tendency of this evidence to contaminate and influence any penalty phase determination by the jury should one occur. [T. 336-355]. The trial court erroneously reversed itself and permitted the State to introduce evidence concerning Appellant's drug dealing as relevant to motive. [T. 356; R. 364].

The jury returned a verdict of guilty on the charge of first degree murder on August 18, 1995. [R. 368; T. 2522-24]. Penalty phase trial ensued and the jury returned a recommendation of the death penalty by a vote of 1 l-l on August 22, 1995. [R. 413; T. 2952-55].

Appellant proffered a **Memorandum in Support of Life Sentence** on September 8, **1995.** [R. 414-30]. A **sentencing hearing** was held before the court on September 8, 1995. [R. 43 1-99]. The court held a final **sentencing hearing** and sentenced Appellant to death on September **29, 1995.** [R. 500-2 1]. The **court** filed its **written sentencing order** on the same date. [R. 522-36].

In its **sentencing order** the trial court, while reciting the Colorado Supreme Court statement of the facts of the Appellant's prior homicide verbatim, did so without any discussion or apparent assessment of the weight of those facts. Nowhere in its order does the court mention the stipulated autopsy report showing that victim Morgan was extremely intoxicated at the time of the homicide. Neither does the trial court mention in the order other undisputed facts which mitigate the weight of the aggravator from testimony of family members in penalty phase as set forth below in the Statement of Facts. Although the court does say it has considered the Colorado Supreme Court statement of facts and the fact that the homicide was almost thirty years ago, no discussion, assessment, nor explanation of any weighing by the trial court is found.

Apparently, the court did not discount the weight of the single aggravator at all as far as can be ascertained from its order. There is in the sentencing order only a **conclusory** statement that the single aggravator deserves great weight. **[R.528-29]**.

See Argument Issue IV.

The trial court in its sentencing order refuted into non- existence the extensive penalty phase evidence of the statutory and non-statutory mental mitigators, i.e. brain damage from

Appellant's chronic methamphetamine abuse, including paranoia, loss of contact with reality, blunted moral judgment, impulsivity and, added to that, the acute loss of judgment and impulse control due to more heavy than normal methamphetamine intoxication on the night of the murder. All of these facts were in evidence and were unrefuted by the State at penalty phase and formed the basis for testimony of two defense experts at penalty phase, both of whom found that both statutory mental mitigators applied. [See Statement of Facts and Argument on Issue III.].

The trial court dismissed that evidence by reciting selected facts showing Appellant's premeditation and his attempts to elude apprehension. The court concluded that those facts totally nullify the statutory mental mitigators supported by the uncontroverted testimony of two qualified experts in penalty phase. The court also found no non-statutory mental mitigation for the same reasons. Finally, while the court did find the non-statutory mitigator that Appellant was under the influence of drugs at the time of the murder, it also apparently reduced the weight of the non-statutory mitigator of drug intoxication to "minimal", also based upon the premeditation evidence. [See Statement of Facts and Argument on Issue III below].

The facts on which mental mitigation were grounded were in large part on testimony by State witnesses on the Appellant's use of greater than normal amounts of methamphetamine on the night of the murder, and the unchallenged testimony of friends and family in penalty phase to changes in Appellant's behavior after his drug addiction began in late 199 1. [See Statement of Facts]. None of these supporting facts nor any substantive testimony of the experts is directly addressed in the Order. Instead, we have only this which the court recites:

> "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 the 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. (Emphasis in original)

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 8:00p.m. and told her to call him again at 11:00p.m. (Tumey, pg. 12). The defendant in the 11 :OOp.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. (Tumey, pg.3 1). The defendant then took the 38 revolver he had at his side and went back to the driver's window of the 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. (Tumey, 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. (Tumey, pg. 34-37).

The defendant then has 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. (Tumey,pg. 75).

The defendant and Laurie then went back to Rocky Finley's trailer, where defendant tried to establish an

> alibi by telling Melissa Maynard, "If anyone asks, I have been here from 11:30p.m." The defendant along with Laurie, smoked some more methamphetamine, yet around 6:30a.m. he had the presence of mind to call the Sheriffs Department to report his car and girlfriend missing in order, " to make it look good." (Turney, pg. 49). From the first telephone call at 8:00p.m. until the last telephone call at 6:30a.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; took her to a remote area, under a ruse, telling her they were going to meet the "Latin Rings"; 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 Sheriffs Office at 6:30a.m. and continue the charade by reporting both his car and girlfriend missing even after smoking more methamphetamine. Nothing this 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. [R. 53 1-32].

The court in considering the **second statutory mental mitigator,** i.e. that the defendant's capacity to appreciate that what he was doing was wrong and to conform his conduct to the requirements of the law was substantially impaired, used identical reasoning to find it did not exist, with the added caveat that Dr. Dee could not make any findings that Appellant did not know right from wrong. Again the court found this circumstance did not exist even in non-statutory form. [R. 533]. The trial court never directly addressed Dr. Dee's clear testimony that

Appellant suffered measurable brain damage on neuro-psychological evaluation and his opinion that such damage did indeed form a nexus with the murder as to both statutory mental mitigators.[R. 530-33].

The trial court did find that the non-statutory mitigator, i.e. that Appellant committed the murder while under the influence of drugs, did exist, but gave it minimal weight for the very same reasons used to refute the mental mitigators.

The trial court's order addressed the proffered non-statutory mitigator that the murder arose in part from the emotions generated in a romantic domestic relationship and concluded it was not to be found proven nor weighed.[R. 5343. See also discussion in Argument Issue III.

The court did find a non-statutory mitigator in the disparate treatment given co-perpetrator Laurie Kilduff, but gave it minimal weight.[R.534-35]. See also discussion in Argument Issue VI.

This direct appeal followed.

STATEMENT OF THE FACTS

In the early morning hours of December 2, 1993, Appellant **Ronald Jorgenson** called the Polk County Sheriffs Department to report that his live-in girlfriend, **Tammy Jo Ruzga (33)** was missing. He related that she had left the previous evening in his red Mustang and had not returned. Since **Tammy** was a drug user with a serious addiction he was fearful that she had gone into a high drug area to obtain drugs and perhaps met with harm.

Shortly after 6:30 A.M. **Deputy James Hibbs** responded to Jorgenson's call and went to the latter's home at 1418 Southern Avenue in Lakeland. Jorgenson told Deputy Hibbs that he and his girlfriend lived together at that address. He related that they had argued the night before and that she had driven off in his car and had not returned. Jorgenson said he did not want the car reported stolen, he was worried about **Tammy's** safety because she had never stayed out so long by herself Jorgenson gave Hibbs a description of his car, its tag number, and **Tammy's** driver's license. [T. 2096; 1753-65] Appellant Jorgenson also telephoned neighbor Rocky Finley and other friends that morning, told them about **Tammy** Ruzga's failure to return, asking if they had information. [T. 1368-69; 1582-84].

At about 6:45 A.M. on the morning of December 2, 1993, **Oyd Crosby,** a truck driver traveling on unpaved Dean Still Road in a remote rural area north of **Lakeland** saw a red Ford Mustang sitting on the side of the road. He observed what appeared to be a bullet hole in a window of the car and stopped to investigate. He saw footprints around the car and a young woman slumped in the car apparently very bloody. Crosby went to seek a phone. Nearby Crosby encountered **Willie B. Milam Jr.** and Milam offered to call police. Crosby returned to the car to

wait for authorities. After the calling 911, Milam returned to the car to wait with Crosby. [T. 1196-1225].

Paramedic **Steven Powell** of Polk Emergency Services arrived at the scene at 7:32 A.M. Powell examined the young woman slumped over in the front passenger seat of the Mustang. She was dead and already in rigor mortis. [T. 1247-53]. **Jerome J. Burless**, Polk County Deputy Sheriff, arrived on scene minutes after Powell. He and other officers secured the crime scene. [T. 1254-61].

Deputy Hibbs, who had resumed patrol duties, heard a radio transmission sending another unit to Dean Still Road on a call relating to the same car Jorgenson had described to him earlier. He responded to the scene and passed on that information. [T. 1759-60],

Shortly after her discovery the victim was identified as **Tammy Jo Ruzga** by **Detectives Warren** and **Cosper** with the aid of information and a photo supplied by Hibbs from Jorgenson.

Detectives learned that on the night she was killed Ms. Ruzga had driven the red Mustang over to the home of **Rebecca Holloway.** While there she picked up an infant carseat and some jeans belonging to Rocky Finley. The carseat was one that Holloway was offering to give to Tammy Ruzga's neighbors, Rocky Finley and Missy Maynard, for their new baby expected shortly. Tammy arrived at Holloway's about 9:00-9:15 P.M. and left before 10:00 P.M. [T. 1834-38].

Later detectives found several other witnesses to the crime scene. **Ruth Hall** returning home from work late on the night of December 1, 1993, saw the red Mustang parked on Dean Still Road about 11:55 P.M.-12:OO A.M. [T. 1232-38]. Mrs. Hall's son, **Raymond C. Hall,** traveled to work down Dean Still Road at about 11:30 P.M. on the same evening and saw no car there on the road at that time. [T. 1238-42]. Another witness, **Greg White,** saw the car on Dean

Still Road between 1:45 A.M. and 2:00 A.M. December 2, 1993. [T. 1242-47].

Cynthia Holland, crime scene technician for the Polk County Sheriffs Department, took photos of shoe prints from around the Mustang and photographed and made casts of tire impressions from a second car's tracks just ahead of the Mustang. She recovered a Camel Light cigarette butt from the area near the bumper of the Mustang, and one from its ashtray. Holland also took autopsy photos and collected physical evidence from the body. Holland collected a projectile from the car and three fragments of projectiles from the victim's head taken at autopsy. That evening Holland took into evidence a pair of shoes from Appellant Ronald Jorgenson, samples of his saliva, and tested his hands for gunshot residue. No murder weapon was ever found. [T. 1264-13 11; 13 11-46].

Medical Examiner, **Dr. Alexander Melamud,** found that the victim, Tammy Ruzga, had been shot three times in the head. The shots were fired in rapid succession at close range with a medium caliber gun. Two bullets entered the right side of her head and one the left. [T. 1778-1803]. Melamud said that toxicology reports indicated that at the time of her death Ms. Ruzga had potentially lethal levels of methamphetamine in her blood and urine and some cannabis, but drugs were not the cause of death. Such levels could be tolerated by someone habitually using the drug. [T. 1807-15]. Melamud determined that any of the gunshot wounds would have been fatal and that unconsciousness would have been instantaneous, with death following very quickly thereafter. [T. 1800-02; 18 12- 15]

The Appellant was forced to call Dr. Melamud as a defense witness due to the Court's restriction of its' cross-examination of him as to time of death. [T. 1825-29]. Melamud told defense counsel in deposition that the murder could not have occurred more than twelve hours before the autopsy, i.e. not before 1:00 A.M. December 2nd, because the body was generally

palpably warm at autopsy. This was germane because State witnesses Finley and Maynard saw Kilduff and Jorgenson back at Finley's home just after midnight. [T. 1483-84;1825-29; 2273-76; 2276-23 10; 1360-62].

On the afternoon of December 2nd **Detectives Warren and Cosper** went to Appellant's home to talk to him. Detectives observed shoeprints at Jorgenson's house which appeared to them similar to those found around the car at the murder scene. [T. 2100-01; 1767-68]. Appellant was asked to come to the Sheriffs substation for an interview. He did so and voluntarily waived his rights per Miranda and was questioned for several hours. He was asked to give detectives the pair of shoes he was wearing [State's Exhibits 109 and 1 10]. Detectives stated he voluntarily complied. They also collected discarded Camel Light cigarette butts Jorgenson had smoked while at the substation. [T. 2102-2105; 1769-72].

The officers confronted Jorgenson in this first interview with the shoeprints and cigarette butt evidence. He denied involvement. He told them **Tammy** had left in his car the previous night and not returned. He also said he was at a business partner's house for a meeting on the night of the murder during the pertinent times with people named **Ricky,** Rocky, Missy and Laurie. Jorgenson stated that after leaving Finley's home he and Laurie Kilduff stayed at his home the rest of the night. Jorgenson also denied owning a gun. (T.2105-2110).

The undisputed evidence developed by the detectives in the investigation showed that at the time of her death **Ms. Ruzga** had been living with her boyfriend, Appellant **Ronald Jorgenson,** for about eight months in their trailer home in North Lakeland. The evidence showed that in the months immediately preceding her death Ms. Ruzga's methamphetamine addiction had gotten very severe causing her to lie and steal from her boyfriend, the Appellant, and from friends to get additional money for drugs. This problem caused friction between Ms. Ruzga, her

boyfriend, and other friends. [see below].

Jorgenson was cooperative with police during their investigation. He spoke with them after waiving Miranda rights, gave them his shoes, submitted to a gunshot residue test, and even signed a consent to search his home while at the substation. Thereafter the detectives took him home and conducted a search. While detectives were there **Laurie Kilduff [Turney]** called Jorgenson and he, at the detectives request, asked her to come to the house to talk to them. She drove her blue Ford **Fairlane** station wagon to Jorgenson's home which detectives examined to compare to the tire tracks of a second car at the crime scene. Kilduff told the same story about her whereabouts the previous night as had Jorgenson , except she stated they had gone out for a drive. (T. 2099-2112; 2196-2223; 2232-2240; 2245-2252).

The next day, December **3rd,** detectives asked Jorgenson and Kilduff to come to the substation for a second interview. They complied. **Kilduff drove** her car and detectives photographed it, examined its tires, and took dirt samples from it. Laurie Kilduff reiterated the previously stated alibi for herself and Jorgenson for the night of December 1-2. After several hours, detectives confronted Kilduff with a VOP warrant, arrested her, and searched her purse finding methamphetamine and drug paraphernalia. Detectives then confronted Kilduff with some of the evidence they had in the murder implicating Jorgenson and herself and warned her she could be charged as a principal with 1st degree murder and face life imprisonment with a 25 year minimum mandatory. Her children being taken by HRS was mentioned. Detectives told Kilduff this was her last chance to help herself They also then offered her complete immunity. [T. 2092-2145; **2145-2195]**.

Assistant State Attorney Aguero came down and made the offer of complete transactional immunity [provided only that she was not the shooter]. **Kilduff** accepted. Kilduff then admitted

to: being on Dean Still Road on the night of December 1 st; to having been a witness to the murder of Tammy Ruzga; she named Appellant Jorgenson as the murderer; and admitted to having driven Jorgenson away from the scene in her car. (T. 2117-2195). Jorgenson was arrested and charged with the murder.

Rocky Finley, a next door neighbor and alleged business partner of Appellant Jorgenson, testified at trial over defense objection and after a limiting instruction read to the jury by the court, that he was on drug probation and that he was a business partner of Jorgenson in selling the drug methamphetamine. [T. 135 1-59]. Thereafter, Appellant's jury was repeatedly exposed in guilt phase to the prejudicial allegations from several witnesses that Appellant was a drug dealer. Appellant maintained a standing objection to that testimony. Finley and Appellant also had a trailer refurbishing business.

Finley also testified he saw Jorgenson with Laurie Kilduff on the night of the shooting shortly after midnight leaving Finley's trailer and returning to his own. [T. 1360-62; 14 14-22]. Finley said he had seen Jorgenson carrying around a gun for several days before the shooting. He also admitted owning firearms himself, and said that Jorgenson often took guns in trade for drugs and then resold them. [T. 1362-63; 1375-79]. He also heard Ron Jorgenson make comments in a joking manner about killing Tammy a couple of weeks before the shooting. [T. 1362; 1365-66; 1398-14053.

Finley stated that earlier on the night of the shooting his girlfriend Missy Maynard and Laurie Kilduff went shopping at Walmart in Kilduff s car. Finley also knew or learned that Tammy Ruzga was over at Rebecca Holloway's house and called there to ask Tammy to bring Missy the carseat and jeans. [T. 1414-15; 1435-36]. Before the women left to shop, Finley heard Laurie Kilduff tell Missy that she had to hurry back because she had to meet Ron [Jorgenson]

somewhere on I-4 and 33. Kilduff stated she "could not be late". When the women returned from Walmart at about 10:45 P.M. Laurie Kilduff stated several times "I've got to hurry." Kilduff then left in her car. [T. 1363-64; 1411-20]. Finley heard Ron Jorgenson's car crank up in the same time period during which Kilduff left, but does not know who was in it.[T. 1365; 1413-15].

Finley also testified that Ron Jorgenson called him collect from the jail after his arrest on December 3rd and admitted he shot Tammy Ruzga stating that he shot her once while he was in the car and twice from outside the car. [T. 1369-73; 1424-29; 2239-2243]. However, Finley could not recall whether he told Detective Warren about this confession in his statement to her the next day, December 4th. [Indeed, Warren testified it was not told to her by Finley until five days later]. [T. 1424-28; 2239-42]. Finley also stated that Jorgenson called him before he was to give a deposition in the case and told him to provide Jorgenson an alibi for the night of the murder or he would: "burn you too." [T.1373-74;1436].

Finley, under intense cross-examination, admitted Jorgenson had been upset with Tammy Ruzga because her drug use was out of control and she was lying to him and stealing from him and his friends, [T. 1398-1405]. Finley also admitted Jorgenson owed him money and that they had business disputes. [T. 1382-98]. Finley denied, however, having animus against Jorgenson sufficient to motivate him to try to frame the latter for Tammy's murder. [T. 1378-1398; 1404-1408; 1432-40].

Melissa (Missy) Maynard, Finley's live-in girlfriend and Laurie Kilduff s close friend, stated that she had gone shopping with Kilduff at Walmart at about 10:00 P.M. the night of the murder, except she (unlike Finley) said that they went in her car rather than Laurie's. Before they left Laurie and Rocky smoked "crank." [T. 1493]. She also said Laurie left in her own car after their return at about 11:00 P.M. She also heard Jorgenson's car being cranked up after their

return from Walmart, but she did not know by whom.. [T. 1477-82; 1493-98].

Maynard stated that later Jorgenson and Kilduff came back to her house sometime after midnight. Both Jorgenson and Laurie appeared "high" on methamphetamine. Jorgenson acted very fidgety at that time and had "ketchup" on his shirt. [T. 1483-84; 1498-1501]. The State elicited from Missy over the standing objection of the defense that Jorgenson and Rocky Finley were in business together selling methamphetamine, and that Tammy Ruzga sometimes delivered for them. [T.1484; 1491, 1513-19]. When he came to her house that night, Jorgenson asked Missy to say if asked that he was with she and Rocky in a business meeting that night. [T. 1485].

Missy Maynard said that she had seen Jorgenson with a .32 revolver within a week of the murder, and that Jorgenson told her he wished Tammy Ruzga would disappear. On another occasion Jorgenson asked several people including herself to "zap" Laurie with her stun gun and leave her at Walgreens. [T. 1485-87; 1501-03]. Missy also stated she talked to Jorgenson on the phone a couple days after his arrest. In that conversation Maynard said to Jorgenson: "the newspaper said she [Tammy] was shot once in the head." Jorgenson replied: "No....She was shot three times in the head." [T. 1489-90]. Missy stated she had gotten the carseat and jeans from Laurie at some time after the night of the murder.[T.1491].

Missy Maynard confirmed that victim, Tammy Ruzga, had frustrated Jorgenson recently by her excessive use of meth, and her habits of stealing and lying. She also stated Laurie Kilduff did not get along with Tammy and they quarreled. [T. 1503-1511]. Missy also confirmed some problems between Finley and Jorgenson over their businesses and money. Missy kept the books for the trailer refurbishing business, but not for the drug sales. [T. 15 14-15 16].

Testifying later as a defense witness, Melissa Maynard described a couple of disputes between Rocky Finley and Jorgenson, one of them two weeks before Tammy's death, which

changed their relationship to one of distrust. [T. 2320-24].

Laurie Jo Kilduff (Turney) was the State's key witness. Kilduff stated she had known Jorgenson for several years. She stated that in recent months she found out he dealt drugs and she got involved in it (as a user). Kilduff met Finley and Missy Maynard through Jorgenson. [T. 1539-44]. Kilduff got to know Jorgenson's girlfriend, decedent Tammy Ruzga, through him. She stated Tammy was jealous of her and did not like her. [T. 1544-45]. Laurie Kilduff also stated Jorgenson told her a week before the murder that Tammy Ruzga was a liar and a thief, and that all she did was cry and whine and all she wanted to do was kill herself [T. 1704].

Laurie told about shopping with Missy the night of the murder. She stated she called Jorgenson from Missy's before she left at about 8:00 P.M.(not 10:00P.M. as Missy testified). He asked her to be back by 11:00 P.M. but did not say why. [T. 1546-5 1]. (Finley stated she told Missy before they went shopping about having to go to I-4 and 33) [T. 1363-65;1411-20]..

Kilduff stated she called Jorgenson from Missy's upon their return at 11:00 P.M. and he told her he needed her to follow him (in her own car) out to Dean Still Road. They were to meet at Highway 33 and 1-4. Kilduff drove out there and met Jorgenson, who was in his red Mustang with Tammy Ruzga in the passenger seat, at about 11:40 P.M. She stated Jorgenson got out and told her he wanted to go out to Dean Still Road. Kilduff stated she did not know why she was to do this. She stopped to get some gas and coffee at a Fina Station and then Kilduff in her car led Jorgenson in his car out to Dean Still Road. [T. 1551- 60; 1615-46; 1677-81].

Once out on remote Dean Still Road , Kilduff picked a lonely spot with no houses around and stopped. Jorgenson pulled in behind her. She turned her lights off. [T. 1561; 1563]. Jorgenson sat talking with Tammy in his car and then came up to Laurie's car. He had a .38 pistol. Jorgenson stated he could not get Tammy in the driver's seat to which Kilduff replied

"what difference does it make?' [Just a couple of days after the murder Kilduff told Maynard in a call from the jail that her response to Jorgenson's frustrated statement was: "What difference does it make? Just go ahead and do it?"] [T. 2628-42]. Kilduff admitted that she knew at that time Jorgenson intended to kill Tammy. [T. 1564-65]. Jorgenson told Kilduff he had told Tammy a cover story about meeting the Latin Kings. Jorgenson, after consulting with Kilduff, then returned to the car and shot Tammy three times.[T. 1566-67].

Then, Kilduff said, Jorgenson started taking stuff (baby carrier and three pair of jeans) out of the Mustang and transferring it to Kilduff s Fairlane. Kilduff said Jorgenson smoked at the scene. Jorgenson wiped his prints off his car. Kilduff then drove herself and Jorgenson from the murder site, went by Lake Wire and Lake Hunter, and thence back to Rocky and Missy's house by about 12:30P.M. [T. 1563-77; 1682-86].

Kilduff confirmed Jorgenson was under the influence of meth that evening. [T. 1578-79]. Kilduff also heard Jorgenson call the police about 6:30 A.M. to report Tammy missing. He also called several of Tammy's friends about her being missing. [T. 1582-84].

Ms. Kilduff admitted in trial that in her initial interview with police she had denied any involvement in the murder, and said she and Jorgenson were at Finley's, and that she told them Tammy took the car that night and did not come back. She stated that at the second interview she was confronted by police with a VOP warrant and arrested. She was told of the evidence of Jorgenson's guilt and her own involvement, and was threatened with a murder charge and a life sentence with 25 year minimum mandatory, Kilduff also admitted police found drugs and paraphernalia in her purse at her arrest, but she was not charged with those crimes after accepting immunity in the murder case. Shortly thereafter she was offered total immunity on the murder and changed her story implicating Jorgenson. [T. 1595-1612; 1647-77; 1691-99; 1741-53; See also

2111-34; 2162-95].

Ms. Kilduff testified she consulted no attorney about immunity nor did she get a Public Defender to assist her in her VOP case [in fact she had the P.D. twice on her VOPs] in which she was reinstated to probation.[T. 1736-37]. This last testimony was patently false, but was not raised by the defense on cross.

A former cellmate of Jorgenson, **Michael Hughes,** claimed that Jorgenson told him the details of the crime. Hughes is a sixteen times convicted felon and twice convicted for misdemeanor crimes of dishonesty. [T. 2027-33]. He stated Jorgenson said that he and Laurie Kilduff together planned the murder weeks beforehand and decided to do it December 1st on the spur-of-the-moment. [T. 1997-99; 2047]. Hughes said Jorgenson told him they got Tammy all "cranked up" that night and then he called Laurie Kilduff and said: "let's do it." Jorgenson, according to Hughes, stated that he fired the shots from outside the rider's side window, and that he had a problem propping Tammy up so he could get a good head shot.

Hughes stated that Jorgenson said the relationship had gone sour, and that he was tired of her and was seeing someone else. [T. 2008-14]. Hughes stated that Jorgenson told him that he [Jorgenson] was messed up badly on drugs when the crime occurred and that was why he made the error of leaving shoeprints around the car. Jorgenson stated "He should have gotten rid of the shoes." [T. 20 15-16]. Hughes also said Jorgenson offered him $50,000 to get rid of witness Laurie Kilduff before she could testify at trial. [T. 2014-15].

A second former cellmate, **Richard Costentino,** also testified at trial. He is a seven times convicted felon and was twice convicted of misdemeanors involving dishonesty. [T. 2061; 2080]. Costentino stated Jorgenson offered him $50,000 to kill someone who was snitching on him and also to kill Laurie Kilduff. [T. 2066-2067; 2078-80]. Costentino also stated Jorgenson threatened

to kill him when he learned Costentino would be a State witness. [T. 2087-92].

The defense presented impeachment witnesses, **Joseph Costentino** and **Richard Costentino Sr.,** the grandfather and father respectively of State "snitch" witness, **Richard Patrick Costentino.** They each said the State's witness had a reputation for being untruthful. The father called his son "an habitual liar." [T. 23 13-15]. Another defense witness, **Douglas Kerwin,** stated he was Richard Patrick Costentino's employer and that Costentino had a reputation among co-workers of being "less than honest."[T. 23 16-2320]. The final defense impeachment witness was **Michael Murphy,** a prisoner in the Polk County Jail awaiting trial on 1st degree murder charges, but not a convicted felon. Richard Patrick Costentino was in Murphy's jail pod. Murphy had an altercation with Costentino because he found the latter going through his [Murphy's] discovery file in his cell. Later Costentino betrayed some knowledge of Murphy's case though Murphy never spoke to him about it. Murphy stated Costentino also talked to other prisoners frequently about their own cases. Murphy thought Costentino had been put there to investigate them. [T. 2367-83].

The State presented at trial expert witness **Theodore E. Yeshion,** Forensic Serologist for F.D.L.E., who performed DNA DQ-Alpha tests on Camel light cigarette butts found at the murder scene and at Lake Hunter [State's Exhibits 26 and 16 or 105 and 108 respectively]. He found no discernible test result from the Lake Hunter exhibit. Yeshion did establish a match to Appellant's known 1 . 1, 1.2 DQ-Alpha profile with the saliva typed from the murder scene exhibit. So that test sample result was consistent with Jorgenson's DQ-Alpha profile. [T. 1849-1929]. No evidence of demographics/probability was taken.

The State offered a second expert witness **Joel Scot Cary,** a laboratory analyst with F.D.L.E. Crime Lab, to testify on shoeprint and tire track evidence. Cary also compared shoeprint

casts [Exhibits 92,931, to shoes taken from Appellant [Exhibits 109, 1 10] and casts he made from the actual shoes [Exhibits 96,971 and a number of photographs and acetate overlays, All these shoeprint exhibits were admitted over defense's renewed objection pursuant to its prior motion to suppress. [T. 1960-62].

Cary concluded the right rear tire of Kilduff's car was of the same type and wear pattern as one of the tracks and that it probably made one of the tire impressions at the crime scene. He also found the tire tracks showed four different makes/models of tires. Kilduff's car had four different of tires on it. As to the shoeprints at the crime scene, he opined that two right shoe tracks and one left shoe track were probably made by the Appellant's shoes, but that one left shoe track was definitely made by Appellant's left shoe. [T. 1970-1975].

The Trial at "Penalty Phase":

The State and defense stipulated to the admission into evidence of a Judgment and Sentence of Ronald Jorgenson in August, 1967, in Colorado for the crime of second degree murder and a statement of facts in that case excerpted from the pertinent opinion of the Colorado Supreme Court. They also agreed to the admission of portions of an autopsy report of the victim of that Colorado homicide, Mr. Phillip Morgan. [T. 2547-5 1].

The State in its penalty phase opening statement stated that it was asserting only one aggravating circumstance, the prior conviction of Appellant Jorgenson of second degree murder in Colorado in 1967. The defense in its opening statement stated it would show evidence mitigating the weight that should be attributed to the one aggravating circumstance because the 1966 Colorado murder was a domestic situation in which Phillip Morgan, the common-law husband of Jorgenson's sister, Betty, was beating her in a drunken rage and then attacked Jorgenson who shot him in an imperfect self-defense situation. The defense also promised to offer

evidence of several types of mitigating circumstances both statutory and nonstatutory. [T.2555-62].

The State offered a **certified Judgment and Sentence** from Colorado [Exhibit 62] and had fingerprint expert **Mary Beth Dalton confirm** that the prints on it matched those of Ronald Jorgenson. [T. 2562-67]. The defense then offered two documents [Exhibits 1 and 2] consisting of a ***one page autopsy report*** showing that at the time of his death **Phillip** Morgan had a blood alcohol level of .285, and a ***brief statement of the facts*** drawn **from** the Colorado Supreme Court opinion describing the shooting of Mr. Morgan by Ronald Jorgenson in 1966. [T. 2568-71]. That document read as follows:

> "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." [T. 2570-71].

The Appellant offered testimony of a number of penalty phase witnesses. First, was the Appellant's mother, **Sylvia Jorgenson,** age 76. Mrs. Jorgenson testified the Appellant's sister **Betty** was born of a first marriage which ended when her husband, **Mr. Jorgenson,** drowned. Ronald was the son of **Lawrence Brown** and the brief second marriage with him was annulled. Ronald's father never lived in the household during the boy's childhood and the boy never saw him until adulthood. Mrs. Jorgenson, as a single mother, had to work to support her children throughout Jorgenson's childhood. She never received child support. She joined the service and they moved a lot, and did not have the home life they should have had. During one financial crisis in 1949, she lost her family home and the family lived in a one-room apartment. [T. 2571-75; 2580-84].

Mrs. Jorgenson remarried a third time in 1949, when Ronald Jorgenson was eight years old. That husband, **Mr. Bill Young,** drank and beat Mrs. Jorgenson. He also beat the Appellant severely leaving marks from a belt buckle. Appellant ran away from home as a result of the beatings for eight days on one occasion. The marriage to Young broke up within a year. [T. 2575-77]

Mrs. Jorgenson's fourth husband, **Mr. John Greschke,** married her in 1951, but the marriage lasted only a year because he was a habitual liar. [T. 2579-80].

There was a **fifth** husband, **Mr. Robert Island,** and that marriage produced Appellant's younger brother **Garry** in 1955. The marriage was annulled after about a year because Mrs. Jorgenson learned Island had lied and was already married with kids. [T. 2577-79].

Mrs. Jorgenson stated she could never earn enough to give the children spending money

and that Appellant worked part-time jobs from the time he was ten years old. She stated she started Appellant in first grade at age five because she could not afford babysitters. He was bright in school, but because he was younger than his classmates he had social problems and was "picked on" a lot. Ronald Jorgenson later became bored with school and began skipping school a lot. He dropped out of high school, but later got his GED and one year of college. [T. 2584-88].

Mrs. Jorgenson testified she knew Phillip Morgan well. He lived with her daughter Betty off and on for three years and they had a son. Morgan and Betty lived with Mrs. Jorgenson for long periods. Morgan abandoned Betty at one point and then came back. He was a heavy drinker and had a reputation as a fighter at the bars. Morgan physically abused Betty and both she and her son, Ronald Jorgenson, knew about that. Betty was six months pregnant with a second child at the time of Morgan's death. On the day of the shooting of Morgan, Ronald Jorgenson was called to the bar by Betty to help her. [T. 2588-2594].

Mrs. Jorgenson stated that after serving his term in prison for the killing of Morgan, Appellant lived a pretty normal life. He worked, got married, had a daughter, Tracy, in 1977. Appellant moved to Florida but stayed in touch with his Mom by phone, letters, and through her visits to Florida. After a divorce Appellant's daughter Tracy lived with him from the mid-1980's until his arrest in this case in 1993. Mrs. Jorgenson said that Appellant's behavior changed in late 1991, when she lost all contact with him. She said Appellant had never used drugs in his earlier life and was not a drinker either. Indeed, he tried to help his wife with her drug/alcohol problem in earlier times. He also had no problems with the law that she knows of from the time he got out of prison in 1973, until his arrest in 1993. [T. 2594-2602].

Appellant's younger brother, Garry **Jorgenson,** testified that his brother Ron was a sort of surrogate father to him since there was no man in the house in his childhood. He also witnessed

the aftermath of Phillip Morgan's frequent physical abuse of his sister Betty because the couple lived at his house, and that his brother Ron knew about it as well. Gerry testified Appellant helped him by counseling him to not use drugs and helping him during a domestic crisis involving the breakup of his marriage. Garry also stated he was in regular touch with his brother, the Appellant, from the 1970's until late 1991, at which time he too lost contact with him. Garry also stated that Ronald Jorgenson had no problems with the law from 1973 until he lost contact with him in late i991. [T. 2611-27].

The defense called witness **Melissa Maynard** in penalty phase. She stated that Jorgenson and Tammy Ruzga had a romantic relationship for many months and seemed happy together. The relationship changed for the worse as both used more and more drugs and Tammy particularly began extremely heavy use.

Melissa stated both Ronald Jorgenson and Laurie Kilduff both seemed very high on methamphetamine when she saw them at 12:30 P.M. on the night Tammy was killed. She knew that Jorgenson bought two eight-balls of meth that same day, yet Ronald Jorgenson called Rocky Finley the next morning to get more drugs because he was out of them. Melissa said Jorgenson did not sell the drugs to anyone to her knowledge that night.[T.263 1-33].

Ms. Maynard testified that on the night Jorgenson made the comment that she should take Tammy to Walgreen's and zap her with the stun gun and leave her there, Laurie Kilduff volunteered to actually zap Tammy. Melissa stated that on the morning after Tammy's death she and Rocky went to Jorgenson's trailer, knocked on the door and no one answered. She could hear Laurie Kilduff and Jorgenson in the bedroom laughing and "having a good time." [T.2636]. Melissa also talked later to Laurie Kilduff, who called her from the jail just after her arrest for violation of probation December 3rd. Laurie Kilduff told Melissa that on the night of the killing

Jorgenson was using more methamphetamine than he normally did.[T. 2636]. Laurie also told her that out on Dean Still Road that night Ronald Jorgenson came up to her car and said: "she won't get into the driver's seat, now what?" To this Laurie said she replied: "what difference does it make, just go ahead and do it." [T. 2637].

The defense presented five more brief lay witnesses: Inis Brightman, Terry Hill, Linda Parker Reeves, Debbie Lee Harris, and Brenda Abbott. **Mrs. Inis Brightman,** a 76 year old widow, knew Jorgenson because he lived with her daughter Debbie and lived with her thereafter for a time with his daughter Tracy. She stated Jorgenson was a good father to Tracy and was very helpful to Ms. Brightman in making repairs. She maintained a friendly relationship with Jorgenson and his daughter until they lost contact five or six years ago. [T.2642-52].

Terry Hill is a daughter of Inis Brightman. She lived with her mother when Jorgenson was dating her sister Debbie and when he lived there with his daughter Tracy at her mother's house. She observed him to be a good and thoughtful father and stated he was always good to her mom and sister. She lost contact with Jorgenson in January, 1992, just after he and others had put on a benefit for a singer who needed surgery. [T. 2652-60].

Linda Parker Reeves testified she has known Jorgenson since 1990. She stated she knew Jorgenson in his job as an assistant manager of the Apple Lounge. He was always restrained in handling problems with patrons there. He also was a good friend who helped her injured father manage a mobile home park by doing the heavy physical work for him without pay. Jorgenson also drove her to and from repeated doctors appointments when she had eye surgery and could not drive.

Later, Jorgenson changed. He stopped socializing with Reeves. He seemed nervous, looked like he had not slept, and neglected personal hygiene. She and Jorgenson organized a

benefit for a country singer, Brenda Abbott, who needed surgery. Reeves noted that Jorgenson was very nervous, moody and "paranoid" at that benefit in January, 1992. She did not see him after that because she concluded he had gotten into the use of methamphetamine. Reeves did not hang out with drug people.[T. 2660-77].

The fourth defense lay witness of this group was **Debbie Lee Harris,** daughter of Inis Brightman and former girlfriend of Appellant. They dated and lived together for more than a year. Jorgenson did not use drugs and treated her well. Jorgenson rescued her one time from a situation in which an ex-boyfriend on drugs broke into her house and started to beat her and choke her. Jorgenson pulled the guy off her and threw him out. Harris also stated that Jorgenson was skilled at sewing clothing and sewed herself and her daughter matching cowgirl outfits. [T. 2677-89].

Brenda Abbott testified stated she was a singer and needed throat surgery. Jorgenson helped raise money for her operation. Abbott said Jorgenson was a good and kind man. She knew him as a co-worker in clubs and as a friend. Abbott also noted a change in Jorgenson. He became nervous and started hanging out with different people, and neglecting personal hygiene. He also neglected his job and his boss, Bruce Mandish, noticed it. Mandish told Brenda he believed Jorgenson might be taking money from the till and that he might be on drugs. Eventually Mandish had to let Jorgenson go. Abbott said she had known people on methamphetamine, and Jorgenson showed the characteristics she had observed in others on the drug. She then lost touch with Jorgenson in mid 1992. [T. 2267-86].

The defense and called expert witness **Dr. Henry Dee,** a Ph.D. clinical psychologist. There was initially a proffer of testimony concerning whether the defendant discussed the crime with the psychologist or remained silent on that subject. The Court ruled, over defense objection, that the State could inquire into what it alleged were Jorgenson's denials of involvement in the

crime to the psychologist.[T. 2787-92].

Dr. Dee testified he was a clinical psychologist and neuropsychologist and a forensic psychologist, He was accepted as an expert in those areas. He stated he was asked by the defense to do a comprehensive psychological and neuro- psychological evaluation of the Appellant, Ronald Jorgenson. He had four appointments with Jorgenson and did about twelve hours of testing plus clinical interviews. Dee stated Jorgenson admitted heavy prolonged use of the drug methamphetamine since the early 1990's. Jorgenson's personality tests including the MMPI and 16PF showed no significant pathology.

As to the extensive neuropsychological tests, Dee stated that Jorgenson had a full-scale IQ of 140. Further, Jorgenson had a verbal IQ of 125, but a performance IQ of 146. These differences are very significant, he stated. In addition, Jorgenson's Denman score was 113, far below his general intellectual functioning. His verbal memory quotient of 107 and nonverbal memory quotient of 117 also showed statistically significant deficits which are diagnostic of brain damage. Dee stated these differentials showed impairment of brain function, especially in memory impairment, which Dee believed to a reasonable degree of medical certainty were caused by chronic abuse of methamphetamines.

Dee also testified that chronic methamphetamine abuse tends to damage the hypothalamus relating to emotional expression and the frontal areas of the brain relating to regulating moral behavior and self-regulation morally. This damage cannot be proven except at autopsy, but is discoverable by inference through behavioral change when other clinical evidence of brain damage is present as in this case. People with damage in these areas of the brain have problems with impulse control. Dee stated that persons on heavy amounts of amphetamines develop persecutory delusions and may act out violently in a "fugue state" and be amnesic as to the event. [T. 2812-

19].

Dr. Dee in addressing signs that Jorgenson had brain damage affecting the hypothalamus stated there would be a change in his moral behavior, a change in his ability to adequately assess risks and regulate the intensity of his emotional reactions, especially under stress. He stated these people are morally insane .,. . they just do things that before the injury they wouldn't have thought of doing. They can plan out alternate strategies of behavior, but can't tell you which one they ought to select because they don't know how they're going to feel after its done.[T. 2812-19].

Dr. Dee stated that in view of all the facts it was his opinion to a reasonable degree of medical certainty that Jorgenson on the night of the murder was suffering from an extreme mental or emotional disturbance. Dee also stated it was his opinion that on the night of the murder, Jorgenson's capacity to conform his own conduct to the requirements of the law was substantially impaired. *[T. 2820-22].*

On cross-examination Dr. Dee stated he did not know whether Jorgenson was insane or not on the night of the murder due to insufficient information. [T. 2822]. He also said Jorgenson seemed to regret having lost Tammy.[T. 2829]. Dr. Dee also stated that the fact that Jorgenson was capable of purposive planning and behavior on the night of the murder was consistent with both the methamphetamine abuse by Jorgenson reported both chronically and on that night in question and the brain damage found in Jorgenson by Dee's testing. [T. 2830-3 1; 2841-44].

The Defendant's last witness in penalty phase was **Dr. Thomas McClane.** Dr. McClane, a board certified psychiatrist, was declared an expert by the Court in the fields of psychiatry, forensic psychiatry, and pharmacology. [T. 2849]. McClane did not examine the Appellant, but testified as an expert on the effects of the drug methamphetamine and opined based upon hypotheticals as to the statutory mental mitigating circumstances.

Dr. McClane stated that use of methamphetamines, especially heavy chronic use, caused deficits in impulse control and also made aggressive or violent action more probable. When questioned about whether a person so affected could premeditate a plan to kill and take purposeful action to carry out such a premeditated plan, he stated that they could. The loss of impulse control, the paranoia, and the heightened aggressiveness would make it more likely they would actually carry out the plan. Someone else not similarly affected would be more likely to consider the consequences and defer action or abandon such a plan.

Dr. McClane also stated that the difference between methamphetamine and many other illegal drugs is that tolerance for it is gained, as with other drugs, and with increased use almost everyone reaches a toxic level at which extreme paranoia and loss of ability to interpret reality occurs. [T. 2845-80]

Dr. McClane stated that in his opinion, to a reasonable degree of medical certainty, a person in Jorgenson's position on the night of the murder, given the facts hypothetically posed by counsel taken from the evidence, would have been suffering from an extreme mental or emotional disturbance. Dr. McClane also opined that such a person's capacity to conform his conduct to the requirements of the law would have been substantially impaired. [T. 2868-73]. Under cross-examination by the State, Dr. McClane explained that purposive and premeditated behavior on the night of the murder by Appellant was not inconsistent with the impulsivity he described nor with the presence of the statutory mental mitigating factors.

SUMMARY OF ARGUMENT

Appellant has presented two arguments dealing with the guilt phase of his trial (Issues I and II). First, He asserts that the trial court erred and abused its discretion by denying his Motion to Suppress Evidence and Statements based on the fact that officers induced him to come to give the statement under false pretenses and induced him to waive his Miranda rights and to consent to searches of his person and home when he was heavily intoxicated on drugs. Appellant claims these waivers were involuntary.

Second, Appellant also asserts that the court committed reversible error by permitting the State over his objection to introduce irrelevant evidence of bad acts, namely that Appellant was a drug dealer. Further, that over Appellant's standing objection, the court permitted cumulative evidence to that same effect such that it became a feature or sideshow of the trial. Appellant argues he was seriously prejudiced thereby in both guilt and penalty phase.

All other claims by Appellant (Issues III-VII) deal with the penalty phase of the trial and the imposition of the death sentence. Appellant states that the trial court erred in that it did not qualitatively weigh the single aggravator found since it did not discount its weight due to the mitigating facts and circumstances of that 30 year old crime that constituted that aggravator.

Appellant argues that the trial court erred and abused its discretion by not finding and not weighing either statutory or non-statutory mental mitigation despite overwhelming and uncontroverted evidence of such mitigation. Also Appellant argues that the trial court erred by not finding and weighing domestic mitigation which was established without contradiction in the record. The Appellant also complains the court erred in failing to consider, find, and weigh eleven other lesser non-statutory mitigators proven in the trial.

Appellant asserts that the trial court abused its discretion in not fairly and impartially

weighing the non-statutory mitigators it did find established (under the influence of drugs at the time of the crime; and disparity of treatment of an accomplice given total immunity). Thereby imposing the death sentence which was disproportionate to the facts of this case.

Appellant has asserted that the trial court erred in that it considered and/or permitted the jury to consider inadmissible and prejudicial evidence of bad acts by Appellant, i.e. that he was a drug dealer, which contaminated the reliability of the jury recommendation at penalty phase and the sentence of the court.

Appellant argues that the trial court erred in imposing the death penalty based upon any one or all the penalty phase errors above. Further, the court erred, considering that there was only one attenuated aggravator in the face of substantial mitigation, by imposed the death penalty in Appellant's case when that death penalty is clearly disproportionate to circumstances of the Appellant's crime in this case and as it compares to the sentences imposed other similar capital cases and thus violates the Eighth Amendment.

On the basis of the errors set forth in Issues I and II the Appellant is seeking to have this Court set aside his conviction and remand for a new trial. In regard to the errors constituting Issues III, IV, V, VI, and VII, Appellant is seeking to have this Court vacate the sentence of death and remand for the imposition of a sentence of life imprisonment or in the alternative for a new penalty phase proceeding before a new jury

ARGUMENT

ISSUE I.

WHETHER THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY DENYING THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE AND STATEMENTS?

Appellant filed a Motion to Suppress Evidence on January 30, 1995 which related to, inter alia, a pair of shoes, statements made by Appellant to police on December 2, 1993, and items collected from Appellant's home including clothing, ammunition, blood samples. [R. 194-97]. These searches were warrantless and were alleged to be in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the Constitution of Florida. The statements were alleged to have been taken in violation of Appellant's right to silence under Amendments Five and Fourteen of the United States Constitution and Article I, Section 9 of the Constitution of Florida.

Evidentiary hearing was held on this Motion to Suppress on February 24, 1995. [R.200-256]. The State alleged the searches (of Jorgenson personally and his home) were made pursuant to valid consent by Appellant. The defense alleged that Appellant's consent was vitiated by the fact he was under the influence of drugs at the time it was given.

The State presented two witnesses, Detectives Cospar and Warren. Detective Cospar testified Appellant came voluntarily to the Sheriffs substation for the interview on December 2nd and was not under arrest. He stated Jorgenson appeared to understand him and did not appear to be under the influence of drugs. The interview and search of the home lasted a total of eight hours. [R. 207-22]. Detective Warren testified that she told Appellant of the death of his girlfriend, asked for his shoes, and talked to him about DNA evidence. She denied that Jorgenson

appeared under the influence of drugs or alcohol at the interview, but was impeached by her own deposition testimony that at initial contact with Appellant he did appear to be on drugs. Warren admitted she had said that and had characterized Jorgenson as glassy-eyed with slow speech and appeared very tired. [T. 238-47].

The Appellant argued that the voluntariness of the consent to search and any waiver prior to the statements was impaired due to Appellant being under the influence of drugs at the times they were given. ***Reddish v. State,*** **167 So.2d 858 (Fla. 1964)** and ***State v. Melendez,*** **219 So.2d** 587 **(Fla. 4th DCA 1981).** The defense also argued that the officers deceived Appellant to get his consent by withholding the information of **Tammy's** death, and by making him believe through deception that he was coming to the station to discuss the recovery of his car when they had already focused the investigation on Appellant as a suspect in the homicide. [R. 249-56].

Appellant asserts that the totality of the facts herein show, that due to his drug addiction and heavy drug intoxication on December 2, 1995, that his mind was not so clear and unhampered that he was able to understand the nature and consequences of the waiver of his constitutional right to silence and his right to be protected from unreasonable searches and seizures and to privacy. Therefore, his waiver of those rights was not freely, voluntarily, and intelligently made. The trial court erred in finding that the State proved by a preponderance of the evidence that the waiver and consent of Appellant was voluntary. ***Blackburn v. Alabama,*** **361 U.S. 199, 80 S. Ct. 274, 4 L.Ed. 2d 242 (1960);** ***Brewer v. State,*** **386 So.2d 232 (Fla. 1980);** ***DeConingh v. State, 433*** **So.2d 501, 502-03 (Fla.** 1983); ***Harrison v. State, 562*** **So.2d** 827, **827-28 (Fla. 2d DCA 1990).** Appellant asks this Court to reverse the trial court's denial of his Motion to Suppress and order a new trial.

ARGUMENT

ISSUE II.

WHETHER THE TRIAL COURT ERRED BY PERMITTING THE STATE TO INTRODUCE EVIDENCE OF COLLATERAL CRJMES AND BAD ACTS BECAUSE THAT EVIDENCE WAS IRRELEVANT, EXTREMELY PREJUDICIAL, AND BECAME A FEATURE AND FOCUS OF THE TRIAL?

Appellant herein argues that the trial court erred in permitting "William's Rule" or "other bad acts" evidence into the trial, over strenuous defense objection, in the form of testimony from multiple witnesses that Appellant was a "drug dealer" as distinguished from being just a drug user.

When asking the trial court to reconsider its Order granting Appellant's Motion to Exclude this evidence that Appellant was a drug dealer, the State argued it was relevant because it was probative of Appellant's motive for the murder, i.e. his girlfriend had become a threat to his drug business.[T. 23-26; 329-55].

Evidence of collateral crimes or bad acts is inherently prejudicial because it creates the risk that a conviction will be based on the defendant's bad character or propensity to commit crimes, rather than on proof that he committed the crimes charged. Straight v. *State,* 397 So.2d 903 (1981); *Peek v. State, 488* So.2d 52, 56 (Fla. 1986). To minimize this risk, the evidence must meet a strict standard of relevance. *Hewing v. State,* 513 So.2d 122,124 (Fla. 1987). In order to preserve the defendant's Fifth and Fourteenth Amendment rights to due process and a fair trial, the evidence must be relevant to a material issue of fact.

Even if the evidence is relevant, it must be excluded if its prejudicial effect substantially outweighs its probative value or if it plays so disproportionate a role in the trial that it becomes a feature rather than an incident of the trial. *Long v. State,* 610 So.2d 1276, 1280-81 (Fla. 1992); *State v. Lee,* 531 So.2d 133, 137-38 (Fla. 1988).

The record at Appellant's trial discloses that the State never fulfilled its promise to establish a nexus between Ms. Ruzga's death and Appellant's drug dealing. It simply was not relevant. Yet the trial court permitted that evidence, cumulatively and in quantity, even though the State admitted in the reconsideration proceeding that it could not provide a bridge for the jury between the two elements .[T.348, 351]. The Assistant State Attorney said:

> "I mean, we're agreeing with what the state can show. I'm agreeing there's no witness that will come in and bridge the gap (between drug dealing and the murder) that the jury needs to bridge. They're going to have to draw that conclusion for themselves." [T. 35 1].

The State, indeed, did not elicit at trial any substantial credible evidence to prove that nexus or show that motive. Further, indicative, but not determinative, of the State's failure to connect the drug dealing evidence to the homicide is the fact that the State did not argue any such nexus or motive in any of its closing arguments. Yet the trial court permitted the evidence despite the State's admission of an inadequate factual predicate to show relevance, i.e some connection with the charged crime..

The probative value of evidence of other crimes or bad acts must be more than mere speculation, If such evidence is introduced to establish motive, there must be more than a theory that the other wrongful conduct might have been the motive behind the crime at issue.

Specific events of drug dealing may be connected to a homicide sufficiently to justify admissibility at a murder trial. But mere evidence of a general pattern of drug dealing is not admissible. ***State v. Perez, 672*** **So.2d 884 (Fla. 3d DCA 1996);** ***Craig v. State, 585*** **So.2d 278, 280 (Fla. 1991);** ***Reaves v. State, 639*** **So.2d 1 (Fla. 1994).**

The evidence in Appellant's case is easily distinguishable from cases where evidence of

drug dealing has been held probative of motive in a murder prosecution. In those cases the relevancy was established by linking the drug dealing directly with the homicide. See, e.g. ***Jameson v. Wainwright,* 719 F.2d 1125 (C.A. 11 (Fla.) 1983); *Tumulty v. State, 489* So.2d 150, 153 (Fla. 4th DCA 1986); *Maugeri v. State, 460* So.2d 975 (Fla. 3d DCA 1984); *Sims v. State,* 681 So.2d 1112, 1115 (Fla. 1996); Caruso *v. State, 645* So.2d 389,394 (Fla. 1994).** In Appellant's case no evidence of any such nexus or connection was ever produced. There was a link to drug use, but not to drug dealing.

As recited above, evidence of other wrongs or bad acts is admissible under **Fla. Stat. Section 90.404(2) (1993)** if probative of a material issue of fact even though it is always prejudicial to a defendant . But even if relevant such evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or the needless presentation of cumulative evidence. **Fla. Stat. Section** 90.403 (1993); ***Bryan v. State,*** 533 So.2d 744,746 **(Fla. 1988).** All of these dangers in **Section** 90.403 were presented here. Cumulatively this evidence was so pervasive in the trial that Ronald Jorgenson's character became a feature or substantial "sideshow" of the trial. ***Reyes v. State,*** *253* So.2d *907* (Fla. 1st DCA 1971); *Annie Bush v. State,* 1997 WL 131574 (Fla. 1st DCA 1997); *Long v. State,* 610 So.2d 1276 (Fla. 1992).

The prosecution introduced through several witnesses that Appellant was a drug dealer. Specifics were introduced regarding the drug dealing and use by Appellant. This evidence served no purpose other than to prejudice the jury against Appellant by portraying him as being a trafficker in illegal drugs. In the absence of any legitimate probative value sufficient to outweigh the substantial and unfair prejudice created, the trial court erred in admitting this evidence over Appellant's timely objection.

Wrongful admission of collateral crimes or bad acts evidence is presumptively harmful error, ***Czubak v. State, 570*** **So.2d 925,928 (Fla. 1990); Castro v.** ***State, 547*** **So.2d 111, 116 (Fla. 1989).** The trial court must determine whether that presumption is overcome beyond a reasonable doubt by considering several factors. This Court has stated it looks at several factors in making its determination in such a case: (1) to what extent is the objectionable testimony relevant?; (2) the necessity of the testimony; (3) the quality of the testimony. ***Smith v. State, 344*** **So.2d 915 (Fla. 1st DCA 1977), disapproved in part,** ***Ruffin v. State, 397 So.*** 2d 277 **(Fla. 1977) [disapproval only as to point that relevancy, not necessity, is the proper test of admissibility].**

In one recent case this Court stated: "....while the State is free to argue to the jury any theory of the crime that is reasonably supported by the evidence, it may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts." ***Garcia v. State,*** 622 **So.2d 1325, 1331 (Fla. 1993).** That case differed factually from this one in that it was based in part on specious State arguments used at trial contrary to facts known to the State which were not disclosed to the defense. Appellant would argue analogously that presenting evidence, as was done here, under the guise of relevancy to motive when the State knows and admits it has no substantial evidence to support that theory and knows that the only effect of it will be to show bad character or propensity, is indistinguishable legally or ethically from ***Garcia.*** It similarly subverts the search for truth and obfuscates the relevant facts by knowingly seeking to have the jury consider irrelevant facts tending demonstrate only defendant's bad character and propensity to commit crimes.

In summary, the relevancy of Appellant's "drug dealing" was simply nonexistent. The State proffered a theory of motive completely unsupported by any substantial credible evidence

creating a nexus with the crime charged. The court erred by reversing its earlier order excluding that evidence.

The prejudice here is self-evident in the inherently inflammatory nature of evidence of drug dealing or trafficking. Many cases have held that introduction of collateral drug dealing evidence against the defendant, without a clear nexus with the crime being prosecuted, is harmful error requiring a *new* trial. ***Abbott v. State,*** **622 So.2d 601, 602-03 (Fla. 2d DCA 1993)** [officer's spontaneous statement that defendant was known to be a "larger scale drug dealer" held inadmissible and reversible error despite instruction to the jury]; ***Selver v. State,*** **568 So.2d 1331, 1332-33 (Fla. 4th DCA 1990)** [testimony that witness had engaged in several prior drug deals with defendant, when homicide unconnected with those deals, held inadmissible and required new trial]; ***Freeman v. State,*** **630 So.2d 1225, 1226-27 (Fla. 4th DCA 1994)** [victim/girlfriend in attempted 1st degree murder case stated defendant gave her a gold bracelet which he said he got from someone who owed him money for drugs, held conviction reversed despite court instruction to disregard]; ***Hawks v. State,*** **616 So.2d 1106, 1107-08 (Fla. 5th DCA 1993)**[testimony offered in drug sale case that defendant possessed crack cocaine on another occasion offered to show motive was held fatally prejudicial]. All these situations were held to be harmful error under **DiGuilio** review.

In Appellant's case the jury was exposed over and over again to evidence about Appellant's drug dealing from different witnesses Finley, Kilduff, Maynard, Hughes]. It heard a William's Rule limiting instruction one time. The subject became a major focus of the trial in both the guilt and penalty phases which was thereby rendered fundamentally unfair. The trial court's error here violated the 5th and 14th Amendments to the Constitution and equivalent portions of the Constitution of the State of Florida by denying Appellant a fair trial Also, the

jury's death penalty recommendation may have resulted in part from consideration by the jury and ultimately the court of drug dealing as an impermissible aggravating circumstance. That will be argued elsewhere. [Issue V.].

The trial court compounded its error in admitting the irrelevant and prejudicial drug dealing testimony by allowing it to be augmented cumulatively so that it became a feature or "sideshow" of Appellant's trial. Appellant made timely objection to the admission of this evidence and maintained a standing objection thereafter.

This error is presumptively harmful. The nature of this evidence and the cumulative amounts of it should make it self-evident that it cannot be shown that this evidence did not affect the verdict beyond a reasonable doubt. ***Ciccarelli v. State,*** **531 So.2d 129,132 (Fla. 1988).**

In addition to the generalized prejudicial effect tending to encourage a guilty verdict due to the portrayal of Appellant's bad character as a drug dealer, there was specific prejudice. The State's sole eyewitness, important especially as to the element of premeditation, Laurie Kilduff, had questionable credibility. She not only was a convicted felon who used drugs, and had been on probation which she violated, but she was testifying on the basis of the greatest possible incentive to inculpate Appellant, her own total transactional immunity for the murder in which she was clearly involved. The bad acts evidence against Appellant may have served to neutralize or offset Kilduff's lack of credibility on such crucial issues as premeditation and may even have militated against a possible second degree murder verdict. There was evidence from State witnesses of Appellant's heavy meth use on the night in question which may have formed a basis for a jury conclusion that he did not premeditate were it not diluted by the damning drug dealer testimony. Appellant's conviction should be vacated and remanded for a new trial.

ARGUMENT

ISSUE III.

THE TRIAL COURT ERRED, VIOLATED THE EIGHTH AMENDMENT, AND ABUSED ITS DISCRETION BY FAILING TO FIND PROVEN AND TO WEIGH APPELLANT'S EVIDENCE OF SEVERAL MITIGATING CIRCUMSTANCES AND IN SO DOING THEREBY IMPOSED A SENTENCE OF DEATH WHICH IS DISPROPORTIONATE TO THE CIRCUMSTANCES OF THE OFFENSE.

The Eighth and Fourteenth Amendments prohibit in State capital proceedings the sentencer from being precluded or prohibited from considering any relevant mitigating circumstances, and prohibit the sentencer from refusing to consider any relevant mitigating evidence reasonably established at trial. ***Eddings v. Oklahoma,*** **455 U. S. 104, 114-115; 102 S. Ct.** 869; 71 **L. Ed. 2d 1 (1982).** Such mitigating evidence must be considered and given effect if relevant to the Defendant's character or record, or to the circumstances of the offense because the punishment should be directly related to the personal blameworthiness of the Defendant. ***Penry v. Lynaugh,*** 492 **U.S.** 302; 109 S. **Ct.** 2934; 109 **L. Ed. 2d** 256,284 (1989). Further, the Eighth Amendment requires that the death penalty be imposed fairly and with reasonable consistency, or not at *all.* ***Eddings v. Oklahoma,*** **supra, 455 U. S. at 112.**

This *Court* in ***Campbell v. State,*** 571 **So.2d 415** (Fla. 1990) and ***Rogers v. State,*** **511 So.2d 526 (Fla. 1987), cert. denied 484 U. S. 1020; 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988),** set forth a three-step procedure for trial courts to use in evaluating mitigating circumstances aimed at insuring greater consistency in capital cases. [See ***also Ferrell v. State, 653*** **So.2d 367, 371 (Fla. 1995).**] First, the court must evaluate in its written order each mitigating circumstance proposed by the Defendant and determine whether it is supported by the evidence and whether it is truly mitigating in nature (if nonstatutory). Second, the court must find as a mitigating

circumstance each such factor reasonably established by the evidence and mitigating in nature. Third, the court must weigh the aggravating circumstances against the mitigating circumstances, expressly considering each established mitigating circumstance.

A. Statutory Mitigating Circumstances:

The court below considered two statutory mitigating circumstances proposed by the defense: (1) that the Appellant at the time of the murder was under the influence of an extreme mental or emotional disturbance [Sec. **921.141(6)(b) Fla. Stat. (1993]** and (2) that at the time of the crime the Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. [Sec. **921.141(6)(f) Fla. Stat. (1993)**]. The trial court found that neither existed as statutory or non-statutory mitigation. [R. 530-33; See also Statement of the Case].

Perhaps no other mitigating circumstances carry more weight than expert mental health evidence. Evidence of serious mental or emotional disturbance or mental disorder has been recognized in Florida law to have such importance through the statutory creation of two such categories of those mitigators. This Court has repeatedly given great weight to these statutory mental mitigators where applicable. It has recognized that the statutory mental mitigators can outweigh a host of aggravating circumstances, ***Ferry*** v. ***State, 507*** **So.2d 1373 (Fla. 1987);** ***Smalley v. State,*** 546 **So.2d** 720 **(Fla. 1989).** Even in cases where the jury recommends death, this Court has reversed the death penalty where this kind of mitigation exists. ***Santos v. State,*** **591 So.2d 160 (Fla. 1991);** ***Nibert v. State,*** **574 So.2d 1059 (Fla. 1990).**

In support of these mitigators the defense called two expert witnesses in penalty phase. First was **Dr. Henry Dee,** a board-certified clinical psychologist and neuro-psychologist. Dr. Dee met with Appellant four times for clinical interviews and to administer more than twelve hours of

psychological and neuro-psychological tests to Appellant.

Dr. Dee found definite brain damage in Appellant which he attributed to heavy chronic use of methamphetamine. The brain damage was demonstrable by the differential between Appellant's high IQ. and his much lower performance on memory and other performance tests. Dr. Dee stated that the differential between Appellant's verbal I.Q. and performance I.Q. was statistically significant and reliable to the extent that it could occur by chance (without brain damage) only 1 in 10,000 times. [T. 2803-2810]. Further, Dr. Dee opined that, while not directly provable except by autopsy, typically chronic methamphetamine abuse damages the hypothalamus and frontal areas of the brain which govern impulse control, emotional expression, and moral behavior. [T. 2811-20] He stated that the best indicator of such damage is a change in behavior evidencing the loss of normal self-regulative ability emotionally and morally, including impulsivity in decision-making. Dr. Dee emphasized that these characteristics can frequently lead to paranoia and violence and even an explosion in rage in a fugue state for which the actor can be amnesiac. [T. 2814-16]

The other evidence in the case clearly showed significant change in Appellant's behavior and lifestyle contemporaneous with his immersion into heavy methamphetamine abuse from late 1991 forward. The Appellant not only committed this crime, after nearly twenty years of a normal law-abiding life history from 1973, but also started dealing in drugs, cut off all contact with his former friends and family, and his personal habits including personal hygiene changed dramatically.

Dr. Dee stated his unequivocal opinion that on the night of the murder Appellant was suffering from an extreme mental and emotional disturbance and that Appellant's capacity to conform his conduct to the requirements of the law was substantially impaired. [T. 2820-22]. Dee

stated that Appellant's ability to engage in purposive planning and carrying out of the murder on the night of the crime and the events leading up to it was consistent with, not contradictory to, his diagnosis and findings. [T. 2830-31; 2841-44]. The State attempted to impeach Dr. Dee on this point unsuccessfully.

> Q. Now, when you're talking about impaired judgment, Dr. Dee It just seems to me that flies in the face of impaired judgment. If you go to somebody and say, listen, if the cops show up, tell them I've been here all evening immediately after the homicide, that's pretty intelligent isn't it?
>
> A. Oh, yeah. Well, he is an intelligent guy. I said that what's impaired is this, you know, instantaneous self-regulation. After you've done something, you can certainly say, my God, I have really done something bad and wrong here, and I'm going to try to cover it up. Those are not inconsistant with each other.
>
> Q. With regard to how much methamphetamine Mr. Jorgenson may have used that night, Mr. Hileman said that one witness said he used more than he usually used that night. What conclusions do you draw when you look at this fact that he goes immediately afterwards and says cover it up as far as his....your opinion on how much he might have used that night?
>
> A. It doesn't affect my opinion on how much he might have used. I mean, there's nothing in there that's contradictory with having used high doses of methamphetamine. The stuff hangs around under twelve hours. It's not like it just can't go away like that. It still, as a matter of fact, that may be another index of impulsivity. He runs over to somebody's house and says, oh I did this, cover it up, which is kind of a stupid thing to do because he knows if questioned, the person can testify to that. [T. 2830-31].

Dr. Dee also stated that Appellant could be amnesiac as to the actual killing. [T. 2835-36]. He also stated that the brain damage of Appellant, once off drugs, could be treated or ameliorated to some extent. [T. 2836-38].

The Appellant also presented **Dr. Thomas McClane,** a board-certified psychiatrist with expertise as a clinical psychiatrist, forensic psychiatrist, and in pharmacology. Dr. McClane did not examine Appellant but discussed in great detail the effects of both acute and chronic use of methamphetamine. McClane emphasized that heavy use causes paranoia and loss of touch with reality in almost everyone. He said aggressiveness and violence are also heightened by such use.

Dr. McClane affirmed Dr. Dee's testimony that methamphetamine is particularly prone to lead to extreme mental and emotional disturbance because as tolerance to the drug increases and dosage increases, almost 100% of users will get to a point where they take a high enough dosage to become psychotic with paranoid delusions and may act with violence under the influence of those mental aberrations. [T. 2852-66]. Dr. McClane confirmed that use of one eighth to one-fourth of an ounce of meth per day as was attributed to Appellant by State witness Maynard was a high dosage. [T. 2866].

Dr. McClane responded to lengthy hypotheticals proffered by the defense based on the facts of this case, including the testimony of State witnesses to Appellant's acute meth intoxication on the night in question and his use of more than his own normal amounts during that time, and stated a firm opinion to a reasonable degree of medical certainty that Appellant on the night of the murder was under an extreme mental and emotional disturbance and that his capacity to conform his conduct to the requirements of the law was substantially impaired, [T. 2868-73]. McClane also stated that the Appellant's purposive planning and carrying out of the crime were consistent with his opinions and findings. [T. 2866-67].

> Q. All right, Doctor. I want to turn to the last area I need to ask you about. Specifically, I want to ask you a hypothethical question relating to this particular criminal offense in this case, okay?

I want you to assume for purposes of the question that you have a 54 year old male Caucasian, who is a large person, over six feet tall, weighing around three hundred pounds. I want you to assume that that same person has been a user of methamphetamine for approximately two to three years on a regular basis, and that during that period of time, his usage has increased to the point that his daily usage has reached approximately an eighth to a Quarter of an ounce per day.

Assume further that white male fifty-four year old man is involved in a romantic relationship with a woman, oh, sixteen to twenty years younger than himself, with whom he is living. Assume further that in the course of that relationship, certain stressors have appeared that have caused problems in the relationship. Specifically, that the young Woman is also a heavy user of methamphetamine, and as a result of her heavy use, she has begun to evidence behavior, which includes stealing from the man she's living with, sneaking jewelry down and pawning it to buy extra drugs or things of that type, so that she is in a position of not being honest with him. He learns of it, and, of course, grows very angry.

Assume further that they have arguments and fights on these issues. Assume further that this man at some point begins to get so angry at this woman he is living with, that he makes remarks to friends which could be interpreted as threats against her life. They could also be interpreted just as hostility toward her.

And assume further that this person on a particular day uses somewhat more , and we don't have a quantity in mind here, somewhat more than his normal amount of Methamphetamine. That in some fashion, again the details not being clear--- he makes some kind of plan with another person who is an accomplice in the matter to meet with him later that night for some unspecified purpose.

Assume further that this individual, this white male, has acquired in the days before these events a firearm. Assume further that on this particular night, the same night -- or day in which he has used more than the normal amount of methamphetamine, the accomplice in and the

subject of this hypothesis meet with the paramour, the Wife, the girlfriend, of the subject, out in a remote area, that the accomplice is directed by the subject, the white male, to drive out to a very, very remote area and stop the car.

That happens. The white male takes a gun, fires three shots, killing his girlfriend. He then undertakes to wipe the car. The car he's driving, by the way, is his car. Wipes the car for fingerprints, but at the same time carelessly leaves footprints and cigarette butts at the scene.

Assume further that he gets in the car with his accomplice. They drive to an area where the accomplice believes he may or may not have attempted to dispose of the weapon. that he drives back to his home, goes over to the house of friends, and asks them to give him an alibi. He doesn't put it that way. He says basically, just say I was here from a certain time forward. Then sometime later calls the police and reports that his girlfriend is out in the car and has not returned. When the police investigate the case, he tells them that he is not involved in her disappearance. He is subsequently charged with her murder.

Having those facts in mind-- do you need me to-- I know it's a very extensive hypothetical, but have you got those facts in mind, Dr. McClane?

A. I think so.

Q. Assuming those facts, I want to ask you if you have an opinion as to whether a person in that position and under those facts as set forth, on the night of the killing would have been suffering from an extreme mental or emotional disturbance?

A. Yes.

Q. Okay. And what is that answer-- your answer to that based upon, doctor?

A. I'm particularly emphasizing the long use of amphetamines and the increased amphetamines of the day in question that you-- your hypothetical question, and the stress-- stressors from outside, from the person that you

said was--

Q. Girlfriend, I believe live-in girlfriend.

A. ---was stealing and there was stress going on in the relationship.

Q. Yes, sir.

A. I think it's-- of course, these things cannot be predicted with 100 percent accuracy, but I think it's more likely than not, that the person would be suffering from amphetamine intoxication with the effects that I summarized before, and I would consider that an extreme emotional disorder.

Q. Okay. Doctor, assuming the same effects and evidence--thank goodness I don't have to repeat them--I want to ask you this question: Whether you can reach an opinion or have reached an opinion based upon the hypothetical, the same hypothetical we just stated just moments ago, as to whether that person on the night that the shooting occurred would have had the capacity to conform his conduct to the requirements of the law, substantially impaired?

A. Yes, given that-- and again, emphasizing those aspects of your question that I did, namely increasing doses for many years-- a year or two--

Q. Right?

A. -- and then a substantial increase over a twenty-four hour period, one of the faculties that's-- that's usually substantially impaired is the ability to sensor (sic) and control one's impulses Almost everybody has felt like killing somebody at some point, but they don't feel like that very long and they quickly say I had better not do this, this is morally wrong or illegal or other things, and they don't act on it.

Persons intoxicated with amphetamines, we think because of the-- partly because of the paranoid thinking, the distortion of things going on around them, are much more impulsive. Mainly, if they have an impulse, they're much

> more likely to act on it. Persons, even when they plan to harm someone else, often back out at the last minute. That would be less likely, although not totally unlikely, it would be less likely with someone who is substantially intoxicated with amphetamines. [T. 2868-74].

Dr. McClane under cross-examination admitted that this story was also consistent with a person using smaller amounts of amphetamines and deciding to just kill his girlfriend. However, he also told the prosecutor that Appellant's premeditation and methodical carrying out of a plan to kill was not inconsistent with the kind of impulsivity he spoke about and attributed to Appellant at the time of the murder. [T. 2874-79].

The State offered no rebuttal to these experts and their opinions stand uncontroverted on the record! There was also considerable factual evidence to support these findings in the recent changes in Appellant's life style, associates, personal habits, and behavior presented in both the guilt and penalty phases. Much of this evidence came from State witnesses. Additionally, several penalty phase witnesses, family and non-family, testified to the dramatic changes in Appellant's conduct from late 1991 until the date of the crime. [See Statement of Facts].

The trial court in its sentencing order simply dismissed these findings on the two statutory mitigators as not established. This was based on its conclusion that Defendant undertook purposive behavior to plan and carry out the crime and to seek to avoid detection [evidence of premeditation]. The trial court recited evidence of such premeditation and attempts to avoid detection by Appellant and concluded ipso facto that the mental mitigators did not exist.[See Statement of the Case and Statement of Facts].

The unrehutted, unequivocal testimony of both experts, however, was that such behavior is not inconsistent with their clear findings of Appellant's extreme mental disturbance and substantial impairment. The court did consider the evidence, but arbitrarily

refused to weigh it. The reasons the trial court gave for dismissing the evidence could have been properly used to discount its weight, but not to ignore it completely. A court may not give mitigating evidence no weight by merely not considering it. ***Eddings v. Oklahoma,*** **supra at 114-115;** ***Skipper v. South Carolina,*** 476 **U.S. 1 (1986).** The trial court may not substitute its own pseudo-scientific analysis for that of qualified experts unless its opinion is grounded on alternative expert opinion, or, at the very least, not unless it bases its analysis on demonstrable scientific principles generally accepted in the fields of expertise in question. Any other rule would result in "voodoo" psychology and effectively destroy psychology and psychiatry as a major contributing force in death penalty decision-making in Florida.

The trial court in its sentencing order herein stated that the uncontested evidence presented by Dr. Dee and Dr. **McClane** that Jorgenson was under the influence of extreme mental or emotional disturbance and was substantially impaired in conforming his conduct to the requirements of law was unreliable. [R. 530-3 1].**The** court rejected it in **toto,** even as non-statutory mitigation, The court based its finding it says on the facts it recited. [See Statement of the Case]. At one point the trial court states it rejects the doctors' testimony because:

> "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 the case establish to this court the defendant ***got caught*** (emphasis in original) 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." [R. 53 1].

In this remarkable passage the court's implies that methamphetamine intoxication and the brain damage resultant from its chronic use, together with all the behavioral and mental consequences the two doctors attributed to it ,as well as its acute effects on Appellant on the

night of the murder means absolutely nothing as mitigation ***unless it causes the defendant to*** commit ***the crime.*** The trial court would appear to believe that no degree of mental mitigation can form a sufficient nexus with a crime short of **McNaughton** to be mitigating in nature if there is evidence of clear premeditation

The trial court finds that the mental mitigators (statutory or nonstatutory) do not exist in Appellant's case in spite of the fact that: a.) the Appellant's experts testified to the existence of the two statutory mental mitigators and were unrefuted at trial; and b.) that these findings were based on and supported by facts concerning Appellant's drug usage long term (including brain damage) and extreme use on the night in question which were elicited almost entirely from the State's own witnesses and thus is also totally uncontroverted on the record.

Respectfully Appellant urges this Court that such a view is not the law. If the trial court's view is correct, then no defendant's crime could be mitigated by mental factors unless such mental factors compelled him to kill like some automaton. And that would be a prima facie case of legal insanity because one acting under the impetus and total control of a mental disease or defect without essential free will or rational cognition sufficient to distinguish right from wrong can not be held criminally responsible at all. The Florida statutory mental mitigators implicate impaired or diminished capacity, not total loss of capacity. This is so because such impairments reduce a defendant's culpability. The trial court seems to evince a belief that only impairment which "causes" the commission of the crime so that it is by implication totally beyond the actor's control (i.e. legal insanity) can mitigate culpability. Indeed, the trial court in its sentencing order refers twice to the fact that Dr. Dee stated he had insufficient information to state whether Appellant knew right from wrong at the time of the offense. [R. 530, **533]**. That does not eliminate the statutory mental mitigating circumstances. ***Mines v. State, 390*** **So.2d 332,337 (Fla.**

1980); *Ferguson* v. *State,* 417 So.2d 631 (Fla. 1982); *Knowles* v. *State,* 632 So.2d 62 (Fla. 1993); *Campbell v. State,* supra at 418-19.

Note should also be taken that the trial court used this "premeditation analysis," not in the weighing process of the mental mitigators which would have been proper (See *Dustin Ray Spencer* v. *State,* 21 Fla. L. Weekly S366 (Fla. 1996), but to totally negate their existence. In other words the court seems to say that such purposive planning and behavior by the Appellant as it recites definitively legally nullifies the uncontroverted testimony of two experts as to the existence (not weight) of the statutory and non-statutory mental mitigators. This is equivalent to an unconstitutional refusal to consider mitigation. An impressive quantum of uncontroverted and credible evidence was presented to establish the existence of these statutory mental mitigators. The trial court erred and abused its' discretion by failing to find and weigh this mitigation.

This trial court was required to find mental mitigation established at some level in this case when uncontroverted and established by a reasonable quantum of competent uncontroverted, credible evidence as it was here. *Nibert v. State,* 574 So.2d 1059,1062 (Fla. 1990). This trial court's reasoning would result in a finding in every case of premeditated murder that there can be no mental mitigation, regardless of evidence.

The trial court erred and abused its discretion in refusing to find the statutory mental mitigators to be established. The evidence of these statutory mitigating circumstances was unrefuted, a substantial quantum of credible proof manifestly had been presented supported by the other facts in the case. The court was accordingly without authority refuse to weigh the mental mitigation because the record contains no competent, substantial, credible evidence to support that rejection. *Kight v. State,* 512 So.2d 922,933 (Fla. 1987) Cert. denied, 485 U. S. 929; 108 S. Ct. 1100; 99 L. Ed. 2d 262 (1988); *Nibert* v. *State,* supra at 1061-62; *Knowles v. State,*

632 **So.2d 62, 67** (Fla. 1993); ***Cook v. State, 542*** **So.2d** 964,971 (Fla. 1989).

The trial court may reject expert opinion unsupported by or clearly contrary to the factual evidence or otherwise not worthy of credibility. But unequivocal and uncontroverted expert opinion, as appears here, when supported by an undeniable preponderance of the substantial, uncontroverted, and credible evidence of facts consistent with the expert opinion (Appellant's chronic drug use and abuse, drug intoxication on night of offense, and changes in behavior since 1991), cannot be ignored. ***Walls v. State,*** 641 **So.2d 381, 390-91** (Fla. 1994). [In ***Walls*** it should be noted that the experts' opinions were clearly "equivocal" on the statutory mitigators while those here were not. And, in ***Walls***, the trial court, while rejecting the statutory mental mitigators, did find the lesser non-statutory mental mitigators, while the trial court here did not.] The trial court here erred in not so finding and weighing this evidence. ***Spencer v. State, 645*** **So.2d** 377, 385 (Fla. 1994).

This Court has upheld the trial court's refusal to find the statutory mental mitigators, when unlike here, conflicting expert testimony is in the record, or the facts on record are clearly in conflict with the expert's opinions, or when it is shown affirmatively that there is no factual nexus between the mental condition and the crime. ***[e.g. Sireci v. State, 587*** **So.2d** 450,453 (F'la. 1991); ***Jones v. State, 652*** **So.2d** 346,350 (Fla. 1995); ***Williamson v. State,*** 681 **So.2d** 688,697 (Fla. 1996); ***Wuornos*** v. ***State,*** 644 **So.2d** 1000, 1110 (Fla. **1994].** None of these pertain here.

Note should be taken that Appellant's case was not one wherein the direct evidence of heavy drug abuse contemporaneous with the crime (part of the basis for the mental mitigators here) was shown only by the Defendant's own self-serving testimony. [See for example ***Preston v. State, 607*** **So.2d** 404,411 (Fla. 1992); ***Ponticelli*** v. ***State,*** 493 **So.2d** 483 (Fla. **1992)]**.Appellant did not testify. The evidence of his chronic heavy use of meth, and use of even more than usual

on the night in question was proven by the State's own witnesses [Maynard, Kilduff, Hughes].

In addition, the court below did not even address the undisputed findings by Dr. Dee of Appellant's brain damage. Yet such brain damage is clearly mitigating. ***Robinson v. State, 684*** **So.2d 175,180 (Fla. 1996);** ***DeAngelo v. State,*** **616 So.2d 440,443 (Fla. 1993);** ***Heiney v. Dugger,*** *558* **So.2d 398,400 (Fla. 1993)** *Hall* v. *State,* **541 So.2d 1125 (Fla. 1989).** Nor did the trial court address Dr. Dee's testimony that brain damage such as Appellant's could be treated and ameliorated.[T. 2836]. ***Carter v. State, 560 So.2d 1166, 1167 (Fla 1990).***

It is clear that this Court has found that brain damage may be a significant mitigator in many cases. Indeed, this Court's decisions indicate that mental mitigation must be given significant weight. [See e.g. ***Larkins v. State, 655*** **So.2d 95 (Fla. 1995).]** The weight given it varies with the circumstances, but it clearly has weight. Further, this Court has found an abuse of discretion when that condition is proven and no substantial credible evidence supporting rejection of it appears. ***DeAngelo v. State,*** **616 So.2d** *440,443* **(Fla. 1993);** ***Spencer v. State, 645*** **So.2d 377, 384-85 (Fla. 1994);** ***Robinson v. State, 684*** **So.2d 175, 178-80 (Fla. 1996),** ***Nibert v. State,*** **supra at 1061-63.**

Further, by refusing to find even the less extreme or substantial non-statutory mental mitigators here when the uncontroverted evidence clearly established them, the trial court refused to consider the less extreme versions of the statutory mental mitigators as mitigating at all. That is clearly contrary to the law as established by this Court and the United States Supreme Court. This Court has repeatedly held that proffered mitigation in the record shown to be of a mitigating nature and reasonably established by a preponderance of the evidence must be given at least some weight. See ***Campbell v. State,*** **supra at 419;** ***Ferrell v. State,*** **supra at 371;** ***Dailey v. State,*** **594 So.2d 254,259 (Fla. 1991).**

This Court has also held that the purpose of the sentencing order is to assure that the court has duly considered and weighed such mitigation, ***Campbell v. State,*** **supra at 419. A** refusal by the sentencer to consider mitigating evidence reasonably established by excluding it from consideration and/or refusing to weigh it would render the sentencing process unconstitutional. ***Cheshire v. State, 568*** **So.2d** ***908*** **(Fla. 1990);** ***Santos v. State,*** **591 So.2d 160 at 163-64 (Fla. 1991);** ***Parker v. Dugger, 111 S. Ct. 731,112 L.Ed. 2d 812, 824-27 (1991).***

This Court has reversed trial courts which arbitrarily rejected unrebutted expert testimony on the mental mitigators if the Record was without competent substantial evidence to support such rejection and when a reasonable quantum of uncontroverted evidence established the mitigation. ***Spencer v. State,*** **645** ***So.2d*** **supra at 385;** ***Maxwell*** **v.** ***State,*** **603 So.2d 490 (Fla. 1992);** ***Santos v. State,*** **591 So.2d 160 (Fla. 1991) ;** ***Santos v. State, 629*** **So.2d 838 (Fla. 1994).**

B. Non-Statutory Mitigating Circumstances:

The trial court found two non-statutory mitigators: (1) that the Defendant was under the influence of a mind-affecting drug at the time of the crime, namely methamphetamine to which it gave minimal weight; (2) the disparity of treatment received by an accomplice [Laurie Kilduff's total immunity] which it likewise gave minimal weight. Appellant takes issue with the weighing of both those mitigators, but that will not be addressed here.

The court rejected as unproven **a third non-statutory mitigator**, i.e. that the murder arose at least in part from the strong emotions and disagreements created in a romantic domestic relationship between Appellant and the victim. That was error and an abuse of discretion. In so doing the trial court expanded its premeditation analysis utilized to negate mental mitigation to this proffered domestic mitigation.

It was undisputed from State witnesses: that the Appellant and the victim had lived together for some months as boyfriend and girlfriend; that they had been a happy couple for a time; that in the months just before the murder the victim Tammy Ruzga had developed a very serious mcthamphetamine addiction and so had the Appellant; that Tammy's out-of-control drug habit caused her to lie and to steal from her boyfriend and others; that Tammy was jealous of and did not like Laurie Kilduff whom she clearly viewed as a rival for Appellant's affection; that Appellant, despite his own drug problem, had grown tired of and very angry about Tammy's lying and stealing and being drugged out all the time; that Appellant told several people, joking or not, in the weeks leading up to the murder that he wanted out of the relationship and wanted Tammy to disappear;

That over the past two years Appellant, due to his own heavy chronic use of methamphetamine and the resulting brain damage, had suffered attenuation of his ability to regulate his own emotions and impulses, to observe normal law-abiding moral values which he had followed for the previous 20 years of his life, or to cope with life stresses. Appellant, due to his excessive regular drug use before the murder had clearly developed an overt tendency toward isolation from family and friends, anxiety, impulsive decisions, paranoia, distrust, and great anger or rage [manifested at least verbally]. That Appellant had changed. He ceased to be a dependable employee earning an honest living; a law-abiding citizen; and a decent, loving custodial parent and caring friend and supportive member of a family. [See Statement of Facts].

This Court has long recognized that a prior domestic relationship between defendant and victim is a non-statutory mitigator in many situations. That is because such relationships, given the frailty of human nature and emotions, have dynamics which often generate intense superheated passions including extreme rage and violence. ***Douglas v.*** *State, 575* **So.2d 165, 167 (Fla. 1991).**

These factors make even a murderer who premeditates less blameworthy in such emotionally charged domestic situations when emotional controls fail. Such murders are unlike murders committed with cold deliberation and cool reflection unclouded by extreme emotion, drugs, or mental defect. The law takes into account that domestic murders, while premeditated, may also be fueled by the white heat of explosive emotions.

In murders where planning and clear premeditation are present this Court has found significant mitigation where domestic passions play a important role. ***Douglas v. State,*** **supra;** ***Kampff v. State,*** 371 **So.2d 1007 (Fla. 1979);** ***Richardson v. State,*** 604 **So.2d 1107 (Fla. 1992);** ***Blair v. State,*** 406 **So.2d 1103 (Fla. 1981);** ***white v. State,*** **616 So.2d 21 (Fla. 1993);** ***Blakely v. State,*** 561 **So.2d 560 (Fla. 1990).**

For example in ***Maulden v. State,*** 617 **So.2d 298,299,301-02 (Fla. 1993),** the defendant clearly planned and made preparations to carry out his crime. **Maulden**: decided he was going to kill his ex-wife and her boyfriend; called and warned boyfriend's father the day before; drove to the ex-wife's apartment and ascertained the boyfriend's car was there; **left** and went to dig up a gun he had buried; went back to the apartment; entered the apartment through a bathroom window; shot his ex-wife and her boyfriend to death; scraped the signs off the company truck; and drove the stolen truck to Las Vegas and hid out in a motel. It is true this Court in ***Maulden*** used the domestic mitigation to negate the aggravator [cold, calculated, and premeditated] and it weighed heavily against the remaining two other aggravators [prior violent felony and committed during course of a burglary] since death was reversed. ***See*** also ***Santos v. State,*** 591 **So.2d** 160 **(Fla. 1991);** ***Klokoc v. State,*** 589 **So.2d** 219 **(Fla.** 1991) ; ***Amoros*** v. ***State,*** 531 **So.2d 1256 (Fla. 1988);** ***Darcus Wright v. State, 688*** **So.2d** 298 ***(Fla.*** **1996).**

There no C.C.P. aggravator in Appellant's case. But that does not diminish the fact that

the murder occurred in the context of escalating anger over perceived betrayal, jealousy, and domestic conflict, the impact of which was magnified by drug abuse of both Appellant and the victim. Whatever warmth, good will, and rationality may have beent in their relationship previously was eroded by conflict and the acute and chronic effects of drug abuse. Both experts at penalty phase found such domestic stressors a factor in the mental mitigation they observed. *[1] The rage and emotions of domestic strife may diminish culpability because it involuntarily befogs the judgment and lets slip the emotional controls of susceptible persons. This Court has stated: "that mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent that it is believable and uncontroverted." ***Robinson v. State,*** **supra at 177;** ***Maxwell*** **v. State, supra at 491.** This mitigator was present here and proven in the record.

The trial court, in so far as can be discerned, based its rejection of this domestic non-statutory mitigator on the bare unproven suggestion of a non-domestic motive for the murder. [R. 534]. Michael Hughes' testimony referenced by the court includes the following:

> "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." [T. 20 13].

Laurie Rilduff herself said Tammy Ruzga was jealous of her. The State clearly and utterly failed in its bid offered pretrial to prove a non-domestic motive for Ms. Ruzga's murder. Even if it had, that would not completely negate the domestic aspects of this case which are clearly present.

Appellant urges this Court that domestic non-statutory mitigator is supported by the evidence and is entitled to some weight. The trial court's rejection of it is an abuse of discretion.

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[1] For example **in** ***Spencer*** **v.** ***State,*** **supra at** 384, the Court stated the mental mitigation evidence [which the trial court had not even found] negated the "cold" element of C . C .P.

C. **Other Non-Statutory Mitigating Circumstances Not Addressed**:

The trial court simply failed to address at all in its sentencing order or to weigh in its deliberations several non-statutory mitigators clearly set forth in the penalty phase record. They include: **(1)** that Appellant suffered an unstable and emotionally impoverished childhood with no father and a series of short-term unsuitable stepfathers, including one who severely physically abused him and his mother; (2) that his childhood was spent as a latchkey kid who was forced to start school too young because his mother could not afford child care and whose immaturity caused him to be socially maladjusted in school and to be picked on; (3) that he dropped out of high school although later getting a G.E.D.; (4) and that his childhood was a single parent home impoverished economically because there was no child support and considerable financial hardship including the loss of his mother's home; (5) the almost twenty years of law-abiding and productive life of the Appellant between 1973 and 1993.; (6) that he was observed to be a good and loving father and sole responsible residential custodian to his daughter Tracy for many years, at least until he began to use illegal drugs in late 1991; (7) that he was involved with his mother and family in loving, supportive ways until he lost contact with them in late 1991; (8) that he was a good, kind, and helpful fiiend to Linda Reeves, Inis Brightman, Debbie Harris, and Brenda Abbott; (9) That Appellant was 54 years old at sentencing and would not be eligible for parole until he reached age 79. **(10)** That none of the statutory aggravating circumstances of Sec. **921.141(5) Fla. Stat. (1993)** apply to the facts of this killing itself; **(11)** That Appellant is exceptionally intelligent (I.Q. 140), and that the anti-social aspects of his brain damage can be ameliorated with cessation of drug abuse in a structured environment and with treatment. Rehabilitation and a positive contribution by Appellant even in prison is therefore highly probable. [See Statement of Facts and Statement of the Case].

These non-statutory mitigators were not controverted by the State. There was substantial credible evidence in the record to establish them as proven by a clear preponderance of the evidence. They are all mitigating in some degree and they certainly have some weight. The trial court failed in its duty to consider these circumstances found in the record and to weigh them appropriately. If established it may not give them no weight. None of them is so much as mentioned in the sentencing order. ***Campbell v. State,*** **supra at 419;** ***Rogers v. State,*** **supra;** ***Farr v. State,*** **621 So.2d 1368, 1369 (Fla. 1993);** ***Eddings v. Oklahoma,*** **supra 455 U. S. 115-16;** ***Lockett v. Ohio, 438*** **U. S. 586, 604-05; 98 S. Ct. 2958, 2964-65; 57 L. Ed. 2d 973 (1978).**

As an example, considerable evidence of Appellant's disadvantaged family background and/or traumatic childhood (no father nor substituted positive male role model; physical abuse, poverty, etc) was presented. This material, while not overpowering in weight, is nonetheless mitigating. ***Nibert v. State,*** **supra at 1061-62;** ***Stevens v. State, 552*** **So.2d 1082, 1086 (Fla. 1989);** ***Brown v. State, 526 So.*** **2d 903, 907-08 (Fla. 1988)** ***Herring v. State, 446*** **So.2d 1046 (Fla. 1984).** This evidence was uncontroverted at trial, but was neither found nor weighed at all by the trial court here. Also, Appellant's capacity (prior to drugs) to be a loving, supportive family member and good and kind friend was amply established in trial at penalty phase. These matters are clearly mitigating. ***Harmon v. State, 527*** **So.2d 182, 189 (Fla. 1988);** ***Songer v. State,*** **544 So.2d 1010, 1012 (Fla. 1989);** ***Parker v. State,*** **641 So.2d 369 (Fla. 1994).** Once again these factors were neither found nor weighed by the trial court. [See Statement of Facts].

In conclusion, the trial court erroneously failed to find proven and weigh both statutory mental mitigators or their equivalent nonstatutory mitigators despite clear undisputed evidence. It erroneously failed to find established and weigh the nonstatutory mitigator that the murder grew out of an emotionally charged domestic/romantic relationship. The trial court erroneously failed to

find proven and weigh a number of lesser non-statutory mitigators set forth in the Record and undisputed.

These errors alone are sufficient to have this death penalty set aside. However, when taken together with the trial court's gross overweighing of the one statutory aggravator [See Issue IV.], and its' gross underweighing of the non-statutory mitigator of the disparity between the treatment of Appellant and his accomplice Laurie Kilduff [See Issue VI], and the contamination of the penalty phase trial jury (and the court via the jury's recommendation) by the consideration of the non-statutory aggravator of Appellant's drug dealing [See Issues II., V.], this sentence of death becomes absolutely indefensible and so disproportionate to the crime that this case should be remanded with directions that the trial court enter a sentence of life imprisonment.

ARGUMENT

ISSUE IV.

THE TRTAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO PROPERLY WEIGH THE ONE AGGRAVATING CIRCUMSTANCE IN THAT IT FAILED TO QUALITATIVELY DISCOUNT ITS WEIGHT AS REQUIRED BY THE NATURE AND FACTUAL CIRCUMSTANCES OF THAT PRIOR VIOLENT FELONY.

The sole aggravating circumstance proffered by the State and found by the trial court was that Appellant Jorgenson had committed a prior violent felony by his conviction of second degree murder for a 1966 homicide. The trial court accorded this single aggravating circumstance " great weight" and concluded it "far outweighs" the mitigation found

The fact of the prior felony was stipulated by the defense. However, the Appellant introduced at trial the facts behind the prior conviction in the form of a statement of facts contained in a written decision of the Colorado Supreme Court. [T. 2570-71]. Appellant also introduced an autopsy report on decedent Morgan from that case which showed his blood alcohol level at the time of his death to be at .285. [T. 2569]. [See Statement of the Case.].

Other penalty phase testimony from family members which went unrebutted by the State amplified this factual history and included the following facts: (a) That Phillip Morgan had a history of being physically abusive to Jorgenson's sister and that Jorgenson knew it. [T. 2588-94; 2614-15]; (b) That Morgan drank heavily and was known as a bar fighter [T.2591-92]; (c) That at the time of the killing Jorgenson's sister whom Morgan was hitting was six months pregnant with Morgan's child [T. 2592-93]; (d) That after getting out of prison in 1973, Jorgenson lived a law-abiding life for twenty years until his arrest for drugs and this crime in 1993 [T. 2594-2602;

2622].

This Court has stated that the trial court in a death case may not merely count or arbitrarily weigh aggravators nor mitigators. It must make a explicit, careful, reasoned, qualitative assessment of these factors in its weighing process. Both aggravators and mitigators are subject to a qualitative evaluation if such weighing is to be a meaningful. If that process is not illuminated by being stated in a sentencing order with reasonable clarity so that at least reliable inferences as to the court's reasoning process can be drawn, then meaningful review, including proportionality review, becomes problematic. ***State*** **v.** ***Dixon,*** **283 So.2d 1, 10 (Fla. 1973) cert. denied, 416 U. S. 943 (1974);** ***Porter*** **v.** ***State,*** **564 So.2d 1060, 1064 (Fla. 1990);** ***Herring v. State, 446*** **So.2d 1049, 1057 (Fla.) cert. denied 469 U. S.** ***989;*** **105** ***S.*** **Ct. 396;** ***83*** **L. Ed. 2d 330 (1984);** ***Ferrell v. State, 653*** **So.2d 367, 370-71 (Fla. 1995).**

The trial court's reasoning in its sentencing order in weighing the sole aggravator herein is scant and conclusory. In light of all the facts concerning the prior conviction, it is impossible to determine why the trial court gave the aggravator great weight aside from the obvious fact that it was a homicide.[See Statement of the Case]. It would almost seem that the trial court followed a mechanical rule, i.e. if the prior violent felony is a homicide, any kind of homicide and regardless of facts, it gets the great weight. Such an approach would be constitutional error for failure to consider mitigation.

The undisputed fact of victim Morgan's extreme intoxication is not mentioned in the trial court's order. The statement of facts of the Colorado Supreme Court is recited verbatim, but no weighing of it is evident in the order. Neither can the trial court's rationale for not discounting its weight be ascertained. That defeats the purposes set forth in ***Campbell v. State,*** **supra et al** and suggests arbitrariness.

The prior homicide was clearly significantly factually mitigated: by its having arisen out of an imperfect self-defense situation wherein Jorgenson shot the man (Morgan) who was beating his six months' pregnant sister and who then attacked him in a drunken rage; by being almost thirty years ago; by the fact that Jorgenson, after release from prison in 1973, lived a crime-free normal life as a father and family member and employee for nearly twenty years prior to the crime committed herein.

Add to the facts above that there was not one single aggravator in the Appellant's case actually arising from the facts of the present case itself. This Court has stressed that the death penalty is reserved for the least mitigated and most aggravated of murders. ***State v. Dixon,*** **supra.** The trial court's decision here to ignore or not weigh these facts, to not discount the weight of the single aggravator, and to give it "great weight" without cause or reasonable explanation is an abuse of discretion.

It is true that this Court has upheld death penalties in cases with a single aggravator. However, those were cases involving very little in mitigation. In determining the weight of a single aggravator this Court has recognized that not only must all the established mitigation be properly and fairly weighed, but the facts and circumstances surrounding the single aggravator should be scrutinized in the weighing process since the sentencing court must arrive at a qualitative weight. This Court has stated that the underlying facts of a prior violent felony used in aggravation may be presented to a penalty phase jury so that those facts may be considered in the weighing process for either the purpose of enhancing or diminishing the aggravator's weight. ***Finney v. State, 660*** **So.2d 674, 682-84 (Fla. 1995).**

That same principle applies when, as here, there are facts mitigating or diminishing the aggravator's weight, just as it would if the facts made the aggravator more weighty. See for

example ***Ferrell*** v. ***State,*** 680 **So.2d** 390,391"92 **(Fla.** 1996) where the only aggravator was defendant's prior violent felony, a homicide. There the defendant's other homicide this Court noted "was a second degree murder, bearing many of the earmarks of the present crime," made the aggravator more weighty. In Appellant's case the reverse is true in that the prior homicide was very different, and much closer to a imperfect self-defense situation. See ***also Chaky v. State,*** 651 **So.2d 1169, 1173 (Fla. 1995)** wherein the sole aggravator, a prior violent felony, occurred under unusual circumstances in a wartime setting. This Court held the aggravator discounted in weight due to its circumstances.

This Court recognized and discussed the principle of the qualitative weighing of aggravators in ***Slawson v. State,*** 619 **So.2d 255, 258-60 (Fla. 1993).** In ***Slawson*** the trial court gave "great weight" to the defendant's single aggravator (defendant committed three other homicides, two of them of helpless children) and found these facts enhanced the weight of the aggravator so that it outweighed the two statutory mental mitigators and several significant non-statutory mitigators not because of the convictions themselves, but because of the nature of the facts of those homicides.

In ***Songer v. State,*** **544 So.2d 1010, at 1011 (Fla. 1989)** the same principle was demonstrated in reverse wherein this Court said that the single aggravator of the defendant's committing the murder after an escape from prison was diminished by fact that he did not break out of prison but merely walked away from a work-release job. The case of Appellant, like ***Songer,*** is aggravated by a single circumstance, and the weight of that aggravator is similarly diminished by its' underlying facts. Some of the mitigation is also similar.

Errors in weighing by the trial ***court*** may be harmless, ***e.g. Peterka v. State, 640*** **So.2d** 59 **at 71 (Fla. 1994).** However, where, as here, there is only one attenuated aggravator, the failure

of the trial court to qualitatively weigh the circumstances of that single aggravator cannot be harmless beyond a reasonable doubt. Even if each of the mitigators herein were to be held to be of only little or moderate weight, in order to have a fair and just qualitative weighing of the lone aggravator against the several applicable mitigators, the aggravator itself would have to be properly evaluated first in light of the totality of its' own factual circumstances. That was not done here. Accordingly, this death sentence, being unreliable as indicated, should be vacated and the case remanded for a new sentencing proceeding.

ISSUE V.

THE COURT ERRED AND VIOLATED THE EIGHTH AMENDMENT BY WEIGHING OR BY PERMITTING THE PENALTY PHASE JURY TO WEIGH THE NON-STATUTORY AGGRAVATOR THAT APPELLANT WAS A DRUG DEALER

The law clearly prohibits either co-sentencer (Judge or Jury) in a capital sentencing in a "weighing state" from being permitted to weigh invalid aggravating circumstances. ***Espinosa v. Florida,*** 505 U. S. 1079, 1082, 112 S. Ct. 2926, 2929, 120 L. Ed. 2d 854 (1992). The exposure of the penalty phase jury herein to the often repeated allegations during guilt phase of Appellant being a "drug dealer" so contaminated that jury that it almost certainly weighed those facts as a non-statutory and impermissible aggravating circumstance. The court's error in admitting the cumulative and irrelevant evidence of Appellant's drug dealing in guilt phase was violative of the Eighth Amendment because it contaminated the penalty phase jury and ultimately the court's sentence of death. [See Argument Issue II above]

The jury made an 1 l-l death recommendation to which the trial court was bound to give great weight. The jury had been exposed to repetitive irrelevant testimony in guilt phase that Appellant was a drug dealer. That testimony could not have been admitted at penalty phase since Appellant had never been convicted of that crime and had not asserted a crime free background as mitigation. Thereby the penalty phase jury was improperly permitted to weigh that evidence as a nonstatutory aggravating circumstance. Consequently, the trial court also necessarily weighed that non-statutory aggravating circumstance in sentencing Appellant to death since the court was required to and presumably did give the jury recommendation great weight. The reliability of this death sentence is thereby greatly diminished.

Even assuming arguendo that the trial court made no error in admitting the drug dealer testimony, or that the prejudice of that testimony was insufficient to substantially outweigh its marginal relevance in guilt phase, or that it was harmless error in guilt phase for whatever reason, that evidence nonetheless **impermissibly** prejudiced and contaminated penalty phase of Appellant's trial.

The error of the improper admission of evidence of irrelevant crimes or bad acts by Appellant here clearly affected the penalty phase jury's recommendation. Clear undisputed mitigating evidence of the presence of both statutory mental mitigators, domestic mitigation, disparity of treatment of an accomplice, and other non-statutory mitigation were either devalued or ignored by the sentencing jury and the sentencing court [R. 413; 414-30; 43 1-99; 500-520; 522-36; See Issue III. Above], In the face of only a single weakened aggravator [See Argument Issue IV], one can only suggest that the Jury and trial court may have failed to give Appellant a proper assessment and weighing of mitigation because of negative bias engendered by his status as a drug dealer. As this Court stated in a similar case, Castro **v. *State,*** 547 **So.2d 111, 115, 116 (Fla. 1989):**

> "Substantially different issues arise during penalty phase of a capital trial that require analysis qualitatively different from that applicable to the guilt phase, What is harmless as to one is not necessarily harmless as to the other, particularly in light of the fact that a Williams rule error is presumed to infect the entire proceeding with unfair prejudice..
> ....*....................
> the case for mitigation---that Castro was an alcoholic, addict, and victim--is very different from the image presented by M&night's irrelevant and improper testimony [testimony that defendant days before the unrelated murder tied up **McKnight** and threatened to stab him] that Castro had an inherent criminal propensity and bad character. **In sum, the Williams rule error improperly tended to negate the case for mitigation presented by Castro and thus may have influenced the jury in its penalty-phase deliberations.** (emphasis supplied)"

The same can be said here for Appellant Jorgenson and the effect of the improperly admitted "drug dealer" evidence in his trial. In Castro the death penalty was vacated and the case remanded for new penalty phase before a new jury.

In another case this Court found that the admission of evidence of the murder by the defendant of his former stepson was error despite the fact that it was related to the almost contemporaneous murder of the boy's mother which was being tried, because it was only marginally relevant to the crime being tried and was very inflammatory. This Court remanded for a new trial. ***Heny v.*** State, 574 **So.2d** 73 **(Fla. 1991).** Appellant would argue that his drug dealing, while not so inflammatory as the evidence in ***Henry,*** was even more clearly irrelevant.

In ***Lawrence*** v. ***State,*** 614 **So.2d** 1092 **(Fla. 1993),** this Court found testimony of a number of witnesses to collateral crimes or bad acts by defendant to be harmless as to guilt phase because for most of that testimony no contemporaneous objection was made at trial and the error was thereby not preserved for appeal. This Court also found that three invalid aggravators which had erroneously been presented to the jury via instructions and had then been found proven erroneously by the trial court. However, there were also three valid aggravators which remained. The Court said:

> As discussed earlier, the State relied heavily on similar fact evidence of other crimes, and we held that, in those instances that had been preserved for appeal, any error regarding the introduction of that evidence was harmless as to Lawrence's conviction. We are not convinced, however, that any error would be equally harmless in regards to his death sentence. [at 1096-97].

Appellant would urge that the decision in ***Lawrence,*** as in Castro, although not framed in those terms, really relates to the exceptional prejudice that collateral crimes evidence brings to penalty phase which is in essence nothing less than consideration of an invalid aggravating

circumstance.

At trial the State in its' opening stated the point and in its case-in-chief over and over again elicited evidence that Appellant was a drug dealer as opposed to simply being a drug user [T. 1162-63; 1347;1351-54; 1357-59; 1439; 1471; 1484; 1514; 1541-42]. As an example the State in its direct of witness Rocky Finley elicited the following:

Q. How many times have you been convicted of a felony?

A. Twice.

Q. Tell the jury what that was about.

A. The first time was a sale to an undercover a thousand feet of a school, methamphetamine. An associate of mine had sold some to him, and because I supplied the place for him to sell it, then I was also charged with the sale. I actually didn't do the selling, but she did.

And then the second charge was having a gun by a convicted felon and use of methamphetamine.

.....

.....

Q. In the four to eight weeks before Ms. Ruzga was killed, What was your relationship with Ronald Jorgenson?

A. We got along good. We was in--- we was kind of like business partners, I guess as such. He was buying and selling trailers and fixing them up and selling them, and I was giving him money for that, and we was also dealing a little bit in methamphetamine at the time.

.....

.....

Q. Tell the jury what your involvement was in any Methamphetamine selling or buying.

A. Well, they come to my house if they wanted methamphetamine, and if I didn't have it, then I would run across the road to Ron, pick it up, come back, get the money, take the money back to Ron; or go over and get it, come back, and get the money, take the money back, depending on how

big a hurry they was in.

Q. Did you also use methamphetamine at that time?

A. Yes, sir, I did.

Q. How about Mr. Jorgenson?

A. Yes, he did.

Q. How about Ms. Ruzga?

A. Yes, she did.

Q. Ms. Kilduff?

A. Yes, she did.

Q. How about Missy?

A. Yes.

.....

.....

Q. Let's back up for a moment into that day when it was still daylight outside. Did you see Mr. Jorgenson during that 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. [T. 1355-59].

At another point in the trial the State Attorney elicited the following from Melissa Maynard on direct:

Q. Were you aware prior to December the 2nd, 1993-- or December the lst, 1993, that Mr. Jorgenson and your boyfriend, Rocky Finley, shared and coparticipated in selling methamphetamines?

A. Yes, I did.

Q. Were you familiar with whether Ms. Ruzga ever parti-

pated in assisting them in that business?

A. I never knew her to sell, but I knew her to use.

Q. Did you ever know her to deliver any?

A. Yes. [T. 1484].

The State continued a similar line of questioning with witnesses Laurie Kilduff, Missy Maynard, and Michael Hughes. The evidence presented by the State also included all kinds of testimony about drug selling and use by everyone from the Appellant to his friends to the decedent to Laurie Kilduff and Laurie's ex-husband, Patrick Kilduff , who was not involved in this case at all. The use and selling of methamphetamine was pervasive in this trial. The State Attorney, while not arguing that motive for the killing in closing, did argue that all the participants were "druggies", "dumb dopers", and a "bunch of dopers" and "methamphetamine freaks," and mentioned Appellant's drug dealing numerous times. [T. 2406; 2421; 2389; 2405; 2414; 2488; 2492; 2495; 2496; 2500; 2901].

Further the State, while referencing the absence of certain other motives [T. 2392; 2415; 2421], never argued in any of its closings the proposition that got this evidence admitted in the first place: i.e. that Appellant's motive for the murder was that he was a drug dealer and his girlfriend Tammy endangered his drug business. [See Argument Issue II.].

In addition, the State enhanced that prejudicial image of Appellant's character by also admitting evidence of alleged threats by Jorgenson to kill not only the decedent, but various other witnesses after the fact or to have them killed by hirelings (jail snitches) [T 1373-74; 1436; 20 14- 15; 2066-67; 2078-80; 2087-89; 2240-45; 24 19].

The "drug dealing testimony" herein clearly does not meet the test of relevancy. There was simply no evidence that Appellant's drug dealing as distinguished from his and Tammy's excessive

drug use had anything to do with this homicide. Appellant urges this Court that the State's actions here contaminated the penalty phase jury's recommendation, and the trial court's sentence. In its sentencing order the trial court stated:

> "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." [R. 534].

Thus, apparently the trial court, as well as the jury, was improperly influenced by the irrelevant evidence of drug-dealing and the suggested motive which was not proven nor supported by any substantial evidence at all. That is consideration of nonstatutory aggravating circumstances.

Due to the error herein in weighing an invalid aggravator this Court must either remand Appellant's case for resentencing or reweigh without the invalid aggravator unless the error is harmless beyond a reasonable doubt. ***Sochor*** *v. Florida, 504* **U. S. 527; 112 S. Ct. 2114; 119 L. Ed. 2d 326 (1992).** Appellant's death sentence should be vacated and the case remanded for a new penalty phase proceeding.

ARGUMENT

ISSUE VI.

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTION BASED ON *HARMON V. STATE*, 527 SO.2d 182 (Fla. 1988) CONCERNING THE NON-STATUTORY 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?

This issue encompasses two related but independent errors of the trial court. First, the Appellant requested a special jury instruction (number seven) found in the Record on Appeal at [R. 377]. The requested instruction is as follows:

> 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.

The trial court denied the requested instruction. [R. 3773. [See also argument before the court on this requested instruction at T. 2744-55]. Appellant states that was error because it prevented the jury from receiving necessary guidance as to the law from the court to make it clear that the mitigating circumstance of disparity of treatment could be weighed in its deliberations in penalty phase.

The second and more important point of Issue VI. is the thesis that the trial court erred and abused its discretion in not assessing and weighing the disparity mitigator in a fair, impartial, and objective manner in that it gave it almost no weight. That consequently the trial court's weighing of this mitigator is not supported by any substantial credible evidence and is therefore

unreasonable and an abuse of discretion.

As to the first point, Appellant was allowed to and did argue the disparity in penalty phase closing. However, because the facts of this case involved an extreme disparity between the treatment accorded Appellant (State's Request for death penalty) and Appellant's accomplice, Laurie Kilduff (granted absolute immunity by the State), this issue of disparity was an extraordinarily important one for this penalty phase. That being the case, the only way the jury's penalty phase recommendation could be reliable was for the jury to receive a clear instruction by the court that the law permitted them to consider disparity of treatment as mitigating.

The Appellant recognizes that this Court has rejected similar requests for specific instruction on non-statutory mitigation many times. ***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).** However, he renews the plea to this court to vary from that rule on the facts of his case where there is a vitally important and weighty non-statutory mitigator (extreme disparity) which does not suggest itself to the common sense of jurors based on the standard instruction.

In this case, with facts of such an enormous disparity, the standard instruction on non-statutory mitigation fails to reasonably inform jurors of the law. The phraseology of the standard instruction , "any aspect of the defendant's character or record or any of the circumstances of the offense," does not necessarily logically comprehend nor suggest the disparity issue.

The facts of Appellant's case, with one attenuated aggravator, make disparity critically important. This Court has reversed death penalties on the strength of such disparity alone, even in the face of three or four aggravating circumstances. (See below). The lay penalty phase jury needs to know that the law permits them to consider such disparity. Yet Appellant's jury, having just convicted defense counsels' client of murder after hearing defense counsel argue for acquittal,

was expected to accept from those same defense counsel argument that they may consider the disparity as mitigation without hearing it from the court. Those defense counsel, who have argued for innocence, may have used up their credibility with the jury by simply doing their job. To expect a lay jury to make the leap from the very general standard non-statutory mitigation instruction to encompass disparity on the word of defense counsel alone is asking too much. It creates a playing field that is a sinkhole at one end, not level. That such an important a matter in determining a just sentence should be left to chance makes no sense.

On the facts of Appellant's case, the decision by the trial court here to reject the special jury instruction was an abuse of discretion.

Moving to **the issue of the weight given this mitigator by the trial** court, the basic fact is that the accomplice in this case, Laurie Jo Kilduff (Turney), received complete transactional immunity in the murder case. In addition, she got restored to probation in her drug case prior to this trial. Appellant received the ultimate penalty of death. This Court has recognized such disparity of treatment as a significant non-statutory mitigating circumstance. ***Slater v. State,*** **316 So.2d 539** ***(Fla.*** **1976);** ***Curtis v. State,*** **685 So.2d 1234, 1237-38 (Fla. 1996).**

Even when the accomplice's culpability is substantially less, e.g. where the defendant is the shooter and the accomplice is not, this Court has indicated that if the disparity is very great, that alone may merit reversal of the death penalty. ***Harmon v. State,*** **527 So.2d 182 (Fla. 1988);** ***Brookings v. State,*** **495 So.2d 135 (Fla. 1986);** ***Fuente v. State,*** **549 So.2d 652 (Fla. 1989);** ***Spivey v. State,*** **529 So.2d 1088, 1095 (Fla. 1988).**

In ***Harmon*** v. ***State,*** **supra,** this Court in a jury override situation reversed the death penalty of Harmon under ***Tedderprinciples,*** not because of any heavy mitigation, but because the jury could have recommended life based on the disparity of treatment of Harmon compared to

that of co-defendant Bennett. Co-defendant Bennett was permitted to plead to second degree murder for a maximum penalty of seventeen years in prison while Harmon got death. Harmon was indisputably the shooter. Further the trial court found four aggravating factors against Harmon: (1) prior violent felony (2) murder for pecuniary gain (3) murder committed to avoid lawful arrest. (4) cold, calculated and premeditated (later reversed by this Court). Appellant's case is not an override case, however, this Court emphasized that the jury decision to recommend life for Harmon, presumably on disparity grounds, was reasonable. If it is reasonable for a jury to do so, it is also reasonable for the trial court, or this Court to do so.

In ***Brookings v. State,*** **supra,** another life override case, Brookings was not only the shooter, he was characterized by this Court as a "violent criminal who would murder another human being for money. The trial court found four valid aggravating circumstances. This Court characterized the State's need for the testimony of co-defendants Lowery and Murray as "essential to insure a conviction of Appellant." In Appellant's case, it should be noted parenthetically in comparison, the State had a powerful circumstantial case against Jorgenson and did not need the testimony of Kilduff in order to convict this Appellant. The State had the shoeprints, tire tracks, the DNA from the cigarette at the scene, the lack of an alibi, the prior threats, the admissions on the phone to Finley and in jail to Hughes, all these made a very strong case without Kilduff. In ***Brookings,*** co-defendant Lower-y who actively aided and abetted in the crime received received total immunity. Co-defendant Murray, who hired Appellant to kill victim Sadler, was allowed to plead to second degree murder for a term of years. This Court reversed the death penalty of Brookings.

In ***Fuente v. State,*** **supra,** yet another jury override case, there was a contract killing by Appellant. His two codefendants, Salerno and Barabara Alfonso, were given total immunity in

return for their cooperation. Three aggravating factors were properly found by the trial court. This Court reversed the death penalty of Fuente.

The Appellant's case is, of course, not a jury override case. However, if this Court finds a life recommendation "reasonable" in light of the disparity issue alone (not other mitigation) in the cases cited above in which far greater aggravating circumstances existed than in Appellant's case, then it would seem totally unreasonable for the trial court in Appellant's case, with one discounted aggravator not even arising from the facts of this case itself, to hold disparity in Appellant's case worthy of only minimal weight? Appellant asserts the trial court's weighing of this mitigator in his case is unreasonable, arbitrary, and is a clear abuse of discretion..

The trial court's logic in assessing the facts in its sentencing order and its conclusion that the disparity mitigator weighs almost nothing, will illustrate why Appellant asserts that the trial court acted arbitrarily and capriciously in so doing. First, the trial court says the mitigator is established (what else could it say?). Then the trial court defined the disparity mitigator almost out of existence reducing it to minimal weight. The trial court's sentencing order speaks for itself In weighing the disparity of treatment mitigator the trial court stated:

> "The accomplice, Laurie Kilduff Turney, who was given immunity, was not the major player. The evidence shows she drove ahead of defendant to the murder scene, realized he 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 Tumey and was clearly the leader. The defendant also had been previously convicted of second degree murder while Tumey'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)." [R. 535].

Appellant simply states that the trial court has not examined all the facts fairly and impartially. Indeed, its' recitation seems a mere pretext to sentence Appellant to death. While Laurie Kilduff was less culpable in the sense she was not the shooter, she was equally culpable in the legal sense that she is a principal in the first degree. There was abundant testimony that Laurie Kilduff and Tammy Ruzga did not get along. Missy Maynard testified that when Appellant asked someone to take Tammy to Walgreens, zap her unconscious, and leave her there, Laurie Kilduff volunteered. Kilduff was clearly a rival of Tammy's for Appellant's affections and was perceived by Tammy as such. Laurie herself testified Tammy was jealous of her. [T. 1544-45; See also Statement of Facts].

Laurie Kilduff at trial did admit to meeting Appellant at I-4 and Highway 33 for what she says was some unknown purpose. Her story is that Appellant told her to go out to Dean Still Road without explanation and that she led while Appellant followed her. She admitted that she, not Appellant, picked the place to stop on a lonely stretch away from any houses, pulled over, and turned off her headlights. How did she know where to go and that a quiet lonely place was appropriate7 Then after a time Appellant came up to her car and he tells Kilduff he can't get Tammy into the driver's seat. She saw Appellant's pistol in his hand and admits that she realized, at that point at least, that he is going to kill Tammy. How did she know that? How did she know he wasn't going to kill her ? How did know he wasn't getting ready to ambush the Latin Rings or whomever7 The story is not credible.

When Jorgenson says to Kilduff: "I can't get her into the driver's seat, what now?" By her own testimony at trial Kilduff says she replied to Jorgenson: What difference does it make?" [T. 1551-77; 1615-46; 1677-86]. But according to State witness, Melissa Maynard, testifying in

Appellant's penalty phase, Laurie called her from jail the day after her arrest (two days after the event) and told Melissa that her reply to Jorgenson was: "What difference does it make? Just go ahead and do it." [T. 2628-42]. That is clearly aiding and abetting by encouraging the shooter to go through with his crime. Further, here is this high I.Q. older fellow, who is clearly the leader according to the court, coming up in a panic to Kilduff to seek from her advice, counsel, and encouragement about what to do to complete the crime. And she provides it.

Further, there are contradictions between Kilduff s other testimony and that of Rocky Finley. Kilduff stated she was called by Jorgenson at 8:00P.M and was told nothing except to call him back at 11:00P.M. Then at 11 :OOP.M., after returning from shopping, she called Jorgenson and he told her to meet him at I-4 and Highway 33, but did not say why. [T. 1546-5 1]. Finley testified that at 8:00P.M., before going shopping with Melissa Maynard, Laurie said she had to meet Ron (Jorgenson) at 1-4 and Highway 33 at 11 :OOP.M. and that she could not be late. Rocky Finley also says that when Laurie returned she said she had to hurry to meet Jorgenson. [T. 1363-65; 1411-20].

Last, Laurie Kilduff not only gave Appellant an alibi to police, but she hung tough with it through two interrogations over two days until they arrested her on a VOP warrant, and threatened her with a first degree murder charge as a principal.

State witness Michael Hughes stated that Jorgenson told him in jail that he and Laurie Kilduff had been planning the murder for a couple of weeks, but decided to do it that night on the spur of the moment. Jorgenson also said he called Laurie up that night and said: "let's do it." Presumably she knew what he meant. [T. 1997-99; 2047].

Appellant understands that the trial court is entitled to find the facts, judge the credibility of witnesses, and resolve conflicts in testimony, absent a clear abuse of discretion. However, the

assertion by the trial court that Laurie Kilduff was "at best an accessory after the fact not a principal" is a conclusion of law that is not supported by the facts even when viewed from the vantage point most favorable to the State. It is simply not reasonable. Out of her own mouth Kilduff admitted she had knowledge of Appellant's intent to kill Tammy prior to the shooting and she nonetheless encouraged and continued to aid and abet the shooter. The facts and the law were simply misconstrued by the trial court to rninimize mitigation. The concept of being a principal is explained in **Florida Standard Jury Instructions in Criminal Cases 3.01:**

> If the defendant helped another person or persons [commit][attempt to Commit] a crime, the defendant is a principal and must be treated as if [he][she] had done all the things the other person or persons did if
> 1. The defendant had a conscious intent that the criminal act be done and
> 2. The defendant did some act or said some word which was intended to and which did incite, cause, encourage, assist, or advise the other person or persons to actually [commit] [attempt to commit] the crime.

Appellant asserts that any impartial reading of Laurie Kilduff s testimony alone, without more, satisfies the requirements of the principal instruction. In Kilduff s own sanitized version of events she admits one critical fact: she knew Jorgenson planned to kill Tammy at least at that moment he came up to her car his revolver in his hand in her sight and said "I can't get her into the driver's seat. What now?" No crime has yet occurred. Kilduff then said: " what difference does it make?", or maybe "what difference does it make? Just go ahead and do it." Whatever she said encouraged Jorgenson to go back and do murder. Then she continued to assist him going to considerable lengths.

There was probable cause to charge her as a principal with first degree murder. The trial court's statement that Kilduff was "at best an accessory after the fact" is disingenuous and not reasonable. The trial court's weighing of this non-statutory mitigator is likewise clearly erroneous and an abuse of discretion.

Conceding Appellant's greater culpability, the disparity in the treatment of Kilduff is just enormous. Death versus total immunity. It is inexplicable that a trial court could rationally weigh that as having "minimal weight", i.e. practically no weight.

Prosecutorial discretion is beyond the Court's purview. But fairness in capital sentencing is uniquely this Court's business. Whether the State had good reason to give Kilduff immunity does not matter. Appellant states most forcefully that such extreme disparity as seen here is inherently unconscionable and offends any rational concept of justice and fairness in capital sentencing. When one co-perpetrator, even though less culpable, gets total immunity, and Appellant gets the unique supreme penalty of death, without extremely powerful and cogent reasons for it such as multiple serious aggravators, capital sentencing becomes by definition arbitrary, capricious and irrational.

This Court, under the Constitution, is the final arbiter of justice in capital sentencing for the people of Florida. It literally stands between the individual prisoner and the aberrations of irrationality, prejudice, and emotional hysteria which often threaten our constitutional ideals. It simply must not permit even a trial court's erroneous rationale in service of a private agenda destructive of those ideals to prevail. As former Justice of the Supreme Court of North Carolina, the late Sam Ervin, said more than fifty years ago in reversing a death penalty:

> What may be the ultimate fate of the prisoner is of relatively minor importance in the sum of things. His role, like ours, soon ends. But what happens to the law is of gravest moment. The preservation unimpaired of our basic rules of procedure is an end far more desirable than that of hurrying a single sinner to what may be his merited doom."

For these reasons alone, Appellant's death sentence should be vacated and life imprisonment imposed.

ARGUMENT

ISSUE VII.

THE SENTENCE OF DEATH IS DISPROPORTIONATE WHEN COMPARED WITH OTHER CAPITAL PENALTY DECISIONS OF THIS COURT BECAUSE THE ONLY AGGRAVATING CIRCUMSTANCE IS OUTWEIGHED BY SUBSTANTIAL MITIGATING CIRCUMSTANCES.

The death penalty has been recognized as a form of criminal punishment unique in our law. ***Furman v. Georgia, 408*** **U.S. 238,306** ***(1972)*** and ***Sate v. Dixon, 283*** **So.2d 1, 7** **(Fla.** 1973). Accordingly, the law of Florida reserves the application of the death penalty to only those crimes which are most aggravated and least mitigated. Appellant has a constitutional right to proportionality review under Article V, Section 3 (b)(1) granting this Court mandatory, exclusive jurisdiction over death appeals as well as Article I, Section 17, and Article I, Section 9 of the Constitution of the State of Florida. Under these concepts "because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." ***Porter v. State, 564*** **So.2d 1060, 1064 (Fla. 1990);** ***Tillman v. State,*** **591 So.2d 167, 168-69 (Fla. 1991).**

This case is one in which **a single aggravating circumstance** was offered by the State and found by the trial court. That was a prior violent felony consisting of Appellant's second degree murder conviction in a 1966 homicide in Colorado. As set forth in Issue IV. above, that prior homicide was diminished in weight by the fact it was an imperfect self-defense type case, by its' remoteness, and by its' domestic aspects (Appellant's pregnant sister was being beaten by her boyfriend who was in a drunken rage and then attacked Appellant). It was also diminished in weight by the fact that Appellant lived a law-abiding life for almost twenty years thereafter, until

he became addicted to methamphetamines in late 1991. The trial court gave that prior violent felony "great weight." The trial court also found that it "far outweighed" the two non-statutory mitigators found by the court (under the influence of drugs at time of offense and disparate treatment of an accomplice) to each of which the court gave "minimal weight."

If that was all there was in this case, it would still be a close case. However, the strength of Appellant's proportionality argument rests upon one or more other arguments made in this appeal, any of which, if corrected, would make this death penalty clearly disproportionate. Specifically, the Appellant has presented herein arguments that the trial court:

a.) Erroneously failed to give proper qualitative weighing to the one statutory aggravator in that it failed to discount its weight in light of its facts (See Argument Issue IV.)

b.) Erroneously failed to find established and to appropriately weigh the two statutory mental mitigating circumstances (or the lesser non-statutory versions thereof). See Argument Issue III.

c.) Erroneously failed to find established and weigh one primary non-statutory mitigator (emotionally heightened domestic situation), and eleven lesser non-statutory mitigators, all as set forth in Argument on Issue III.

c.) Erroneously considered and permitted the jury to hear inadmissible evidence of Appellant's bad acts (drug dealing) which caused undue prejudice and became a feature or sideshow of the trial. (See Arguments on Issues II. and V.).

d.) Erroneously failed to give sufficient weight to the non-statutory mitigators it did find, particularly as to the factor of disparate treatment of the accomplice herein. (See Argument Issue VI.)

This Court has repeatedly said it will uphold death sentences in cases involving a single

aggravator only where there is little or no mitigation. ***Nibert v. State,*** **supra at 1163;** ***Songer v. State,*** **supra at 1011;** ***White v. State,*** **616 So.2d 21 (Fla. 1993).** It is Appellant's position that this principle, and the fact that any one of the errors of the trial court recited above, if corrected, will either reduce the weight of the single aggravator or enhance the weight of mitigation, makes Appellant's death sentence disproportionate because of substantial mitigation.

Therefore, Appellant asserts that his case is not one which should result in the death penalty. There is only the one attenuated aggravator, and there was substantial mitigation, even though much of the latter was erroneously ignored or improperly weighed by the trial court.

This Court has considered many single aggravator cases. On its face Appellant's aggravator (a second degree murder in 1966) is significant. [However, see Issue IV.] A comparison of a number of cases from differing vantage points will be offered to put the facts of Appellant's case within a proportionality framework:

In ***Cochran*** v. ***State,*** 547 **So.2d 928 (Fla. 1989),** this court found that the single aggravator, a prior first degree murder in a robbery by defendant four days before the murder in question, was insufficient to apply the death penalty in light of extensive mitigation. It is granted that this was a life override situation. However, the jury had not been privy to the prior homicide. This court stated:

> "...this aggravating factor alone does not and cannot automatically nullify a jury's life recommendation..... This Court has held directly contrary.. . . , ...
> Indeed, to suggest that death is always justified when a defendant previously has been convicted of murder is tantamount to saying the judge need not consider mitigating evidence at all in such instances. The United States Supreme Court consistently has overturned cases in which mitigating evidence was deliberately or directly ignored. (Citations omitted) [at **532-33**].

Appellant would show that his case is not as much aggravated as was that of Cochran (Cochran's prior homicide was a first degree murder and was recent), and that the mitigation in Appellant's case was substantial. See also rape/double murder of neighbor and 11 year old girl, life override reversed due to mental mitigation. ***Amazon* v. *State*, 487 So.2d 8 (Fla. 1986).**

J.C. Fead killed his girlfriend by shooting her three times while both were intoxicated and while Fead was angry and jealous because she had been dancing with other men earlier. Fead had shot and killed another girlfriend in 1973 and was convicted of second degree murder. At trial a psychiatrist opined that Fead was very intoxicated at the time of the shooting and that the two statutory mental mitigators applied. At penalty phase it was shown that Fead was a hard worker, model prisoner, and had remorse for the killing. The jury recommended life. The trial court found two aggravators (under sentence of imprisonment and prior violent felony). It found no statutory mitigators, but did find one non-statutory mitigator (defendant a hard worker and good employee). The trial court imposed the death penalty. This Court reversed the override. This Court also found that the death penalty was not proportional. ***Fead* v. *State*, 512 So.2d 176, 178-79 (Fla. 1987).**

Appellant, like Fead, was previously convicted of a second degree murder, but at a time far more remote (27 years) from his present crime than was Fead, and under very different circumstances than his present crime. Unlike Fead, there was no second aggravator in Appellant's case. Like Fead, Appellant was severely intoxicated on methamphetamine at the time of the killing and two experts gave uncontroverted testimony that the two statutory mental mitigators applied. Appellant also had chronic effects from methamphetamine abuse including brain damage. Like Fead, Appellant had been in ongoing quarrels with his girlfriend and believed she was betraying

him by stealing from him and lying to him. The killing grew out of these domestic quarrels. Unlike Fead, Appellant had an accomplice who received total immunity. Like Fead, Appellant had a history of childhood deprivation. Appellant did get a jury death recommendation, but his jury, unlike Fead's, was exposed to irrelevant evidence that Appellant was a drug dealer. Appellant's death penalty is disproportionate in light of Fead's case.

In ***Kramer*** v. ***State,*** **619 So.2d 274, 276-78 (Fla. 1993)** this Court was presented with a bludgeoning murder which was heinous, atrocious and cruel and a second aggravator of prior violent felony (a very similar attempted murder conviction after which the victim ultimately died) was found. The jury recommended death and the court imposed it. The trial court found several mitigators including the statutory mental mitigators (because of defendant's severe intoxication), a drug and alcohol history, and that Kramer was a model prisoner and good worker in prior incarcerations. This Court found the death penalty disproportionate and imposed a life sentence.

In ***Clark*** v. ***State,*** 609 **So.2d 513 (Fla. 1992)** Defendant Clark was convicted of shooting a man to death because he wanted to take the man's job on a fishing boat. Clark incidentally also took his victim's boots and wallet. In mitigation the court found emotional disturbance (not to the statutory levels), alcohol abuse both chronic and at the time of the murder, and an abused childhood. This Court found that the single aggravator (murder for pecuniary gain), in light of these mitigators, made Clark's case fall outside the category of " most aggravated and unmitigated" and vacated the death sentence and imposed life imprisonment. [at 515-16].

Appellant's crime is no more aggravated than Clark's (Clark reloaded and shot his already seriously wounded victim a second time); that Appellant's single aggravator (even though a prior homicide) because mitigated by its own facts was no weightier than Clark's; and that Appellant's mitigation is at least equally significant as that in Clark, and probably considerably more

significant, provided that the Appellant's trial court had found and given proper weight to mental mitigation, domestic mitigation, and other non-statutory mitigation as it was obligated to do.

This Court has indicated that even when a jury recommends the death penalty, the presence of uncontroverted, substantial mitigation removes the case from the category of "the most aggravated, and least mitigated of serious offenses." When the trial court incorrectly weighs substantial mitigation and imposes death, then that penalty is disproportionate. See ***Penn v. Stale,*** *574* **So.2d 1079, 1083-84 (Fla. 1991);** ***Nibert v. State,*** *574* **So.2d 1059, 1063 (Fla. 1990);** ***Livingston v. State,*** 565 **So.2d 1288, 1292 (Fla. 1990).** Both ***Penn,*** in which part of mitigation was defendant's heavy drug use, and in ***Livingston,*** in which significant mental mitigation was present are similar to Appellant's case in terms of the type and degree of significant mitigation.

Further, in ***Penn v. State,*** **supra at** 1083-84, the single aggravator was heinous, atrocious, and cruel (Penn bludgeoned his mother to death with a claw hammer hitting her 3 1 times), and this Court reversed on a second aggravator cold, calculated and premeditated. The court found two statutory mitigators. This Court did not just remand for reweighing, but vacated the death penalty imposing a life sentence. Compared to Appellant, the aggravator is more serious in Penn's case and the mitigators are similar to those of Appellant, if properly determined. In ***Livinston v. State,*** **supra at** 1292, this Court found two properly established aggravators (prior violent felony and committed during an armed robbery). The mitigation was significant, but again no weightier than that in Appellant's case, if the latter was properly determined.

Eddie **Rembert,** who had been drinking, committed a robbery of a bait and tackle shop and bludgeoned the elderly clerk to death. The trial court found four aggravators: felony murder; to avoid arrest; C.C.P.; H.A.C. This Court reversed those findings with the exception of one (committed during course of a felony). The trial court found no mitigation, but this Court noted

evidence of non-statutory mitigation had been presented at trial. This Court imposed a life sentence on proportionality grounds. ***Rembert*** v. ***State,*** **445 So.2d 337,338; 340-41 (Fla. 1984).**

Carl Ray Songer walked away from a prison work-release program in Oklahoma. Several days later a Florida Highway patrolman approached a car in which Songer was sleeping and the officer was shot to death. The sole aggravator was that Songer was under sentence of imprisonment. There were three mitigators, the two statutory mental mitigators and Songer's age of 23. There were several non-statutory mitigators as well. This Court discounted the single aggravator (Songer did not actually break out of prison) and held the death penalty disproportionate. ***Songer v. State,*** **544 So.2d 1010, loll-12 (Fla. 1989).** Appellant's aggravator, like Songer's, is mitigated in weight, and mitigation is nearly as weighty, if properly determined.

In ***Lloyd*** **v.** ***State,*** **524 So.2d 396, 401-02 (Fla. 1988),** this Court found that the one aggravator (committed in the course of a robbery) against one statutory mitigator (no significant history of prior criminal activities) resulted in the death penalty being disproportionate. In a similar case, Derek Thompson robbed a Subway Sandwich Shop and shot the clerk to death. This Court reversed the trial court on three aggravators leaving the single aggravator of committed in the course of a robbery. This Court found the death penalty disproportionate because there was significant mitigation in the record.. ***Thompson v. State, 647*** **So.2d 824, 825, 827-28 (Fla. 1994).**

In ***McKinney v. State,*** 579 **So.2d 80, 84-85 (Fla. 1991)** this Court after finding two aggravators not supported by the record, found the death penalty disproportionate when McKinney's single aggravator (committed during the course of a violent felony) was balanced against one statutory mitigator (no significant prior criminal record) and non-statutory mitigation involving McKinney's mental deficiency and alcohol and drug history. Appellant's mitigation is probably more weighty than that of McKinney, if properly determined.

Kevin Sinclair robbed a cab driver in Melbourne and shot and killed him. The trial court found established only a single aggravating factor (committed in the course of a robbery). There were non-statutory mitigators including that Sinclair (1) cooperated with police (2) Sinclair had dull normal intelligence (3) Sinclair was raised without a father or positive male role model. This Court added that he had emotional disturbances. In light of the significant mitigation this Court found the death penalty disproportionate. ***Sinclair v. State,*** *657* **So.2d 1138, 1142-43** **(Fla.** 1995). By comparison in Appellant's case his single aggravator was balanced against (1) no father nor positive male role model (not found by trial court but clearly uncontroverted in the record-- See Statement of Facts); (2) no low normal I.Q. but measurable brain damage (also not found by trial court although uncontroverted on the record); (3) the presence of both statutory mental mitigators (again not found by the trial court but uncontroverted on the record); (4) murder arose in part due to the emotions of a romantic relationship gone wrong (also not found by the trial court but uncontroverted in the record); (5) less culpable co-perpetrator given disparate treatment by being given immunity (found by trial court given minimal weight); (6) under the influence of drugs at time of murder (found by trial court given minimal weight). (7) nine distinct other lesser non-statutory mitigators (not found by trial court but uncontroverted on the record-- See Argument Issue III and Statement of Facts).

Another reason that Appellant's death sentence is disproportionate is that this was a domestic killing. Appellant murdered his estranged live in girlfriend. In many such situations this Court has found the "passionate obsession" type domestic killings to be mitigated by the explosive emotional disturbances romantic relationships may engender. [See for example ***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);** ***Garron v. State,*** *528*

So.2d 353 (Fla. 1988); ***Irizarry v. State, 496*** **So.2d 822 (Fla. 1986);** ***Wilson v. State, 493*** **So.2d** 1019 **(Fla. 1986).**

Appellant's case record is limited on this subject. His case may not reach such emotional extremes as many of those other cases listed. Nonetheless, it is clear that the superheated emotions arising from this domestic/romantic relationship were, however, a significant factor. The victim due to her own tragic drug addiction lied and stole from Appellant. He felt betrayed by her and began to feel intense anger and rage toward her as the various threats and nasty comments he made toward her prior to the murder indicate. Appellant apparently had a new love interest (Kilduff), and the victim (Tammy) was angry, and jealous. It is true that Tammy was trying to save the relationship, but she did it in the very sad, erratic, counterproductive manner that her dependency, emotional instability, and advanced drug addiction caused.

The evidence, while not definitive, does gives rise to a clear inference that the victim viewed Laurie Kilduff as a rival for Appellant's affections and vice versa. Laurie and the victim did not get along and Tammy was jealous of her. We cannot know what jealous arguments and recriminations may have passed back and forth between Appellant and Tammy. But that there were some is probable. Appellant was quoted by Kilduff as saying Tammy whined all the time and talked about wanting to kill herself Perhaps such blackmail threats were part of the stresses in this relationship in a kind of "if you leave me for her, I'll do myself in" scenario. Appellant's own perception, judgment, and emotional stability were also affected by his own serious drug addiction. The facts are not as clear as one would like. However, ongoing domestic conflict evocative of substantial anger and jealousy are evident, This factor was uncontroverted. The trial court should have found it established and given it some weight. [See Argument Issue III.].

In the area of domestic mitigation, the Appellant compares ***his*** case to ***Wilson v. State,***

493 So.2d 1019 (Fla. 1986). Wilson in a lengthy and exceptionally violent attack murdered two people, his father and nephew, and severely injured his stepmother. The trial court found two aggravators, prior violent felony and heinous, atrocious and cruel. There was apparently little or nothing in mitigation, except that the killings grew out of a heated family argument resulting from Wilson being denied access to the refiidgerator by his stepmother. The jury recommended and the trial court imposed the death penalty. This Court nonetheless found the death penalty disproportionate and imposed a life sentence. While Appellant's crime does not reach the level of murderous passions exhibited in Wilson, his case involves an emotionally loaded domestic relationship, is less aggravated, and has far weightier mitigation.

In *Blakely v. State,* 561 So.2d 560 (Fla. 1990), the defendant murdered his wife with a hammer due to ongoing discord about their daughters. The jury unanimously recommended death. This Court without specifying which aggravators or mitigators applied, reversed the death sentence and imposed life imprisonment.

A case very close in many respects to Appellant's is *white v. State,* 616 So.2d 21 (Fla. 1993). There was a single aggravator (prior violent felony). The defendant killed a woman whom he had previously dated. He had previously attacked this former girlfriend and her companion in her apartment and went to jail convicted of burglary, assault and aggravated battery. In jail White told an inmate he would kill the woman if he got out. The next day, while out on bond, White went to a pawn shop and redeemed a shotgun. He went to the woman's work shot her as she ran and then administered a coup de grace to her back at close range.

There was significant testimony that White was intoxicated at the time of the offense and he offered a voluntary intoxication defense. He also had a serious cocaine addiction. One mental health expert testified to the presence of the statutory mental mitigators. The jury in White, as in

Appellant's case, recommended the death penalty by an 1 l-l vote. White's trial judge found in mitigation: a personality change in White caused by the drug problem, intoxication on cocaine at time of the offense, both statutory mental mitigators, and domestic mitigation. The court nonetheless imposed death in conformity with the jury recommendation. This Court on its' proportionality review found death disproportionate and imposed life imprisonment.

Appellant asserts that White's case is factually very like his own, and the mitigation evidence (substitute methamphetamine for cocaine) is also equivalent. It is true White's prior violent felony was not a homicide, but neither was it remote in time like Appellant's nor attenuated by its own facts. On the other hand, White's premeditation was as great or greater than Appellant's. Also, Appellant's case may have had stronger mitigation in the mental mitigation area because of his diagnosed brain damage and the uncontroverted testimony of two experts as to both statutory mental mitigators. Appellant's trial court did not weigh at all the domestic aspects. Appellant also had the disparity mitigator, not found in White, and a number of lesser non-statutory mitigators. One difference factually is that White was dumped by his girlfriend, Appellant wanted to get rid of his his girlfriend. Tammy was very jealous, unstable due to her drug problem, and wanted to hang on to him. Appellant's relationship was a current one, while White's was in the recent past. Thus, these are sort of mirror image situations, but equally emotionally supercharged, and both White and Appellant are less culpable because of domestic mitigation,

Another case useful for comparative purposes, although having two aggravators, is *Darcus* Wright *v. State,* 688 So.2d 298 (Fla. 1996). Mr. Wright killed his estranged wife over her unwillingness to let him visit the children and his belief he was being displaced in the children's lives. There was a history of violent conflict in the marriage. Wright had several years

earlier shot his wife's sister in the hand in a family dispute. The trial court found two aggravators (prior violent felony and murder during commission of a burglary), The court found one statutory mitigator (extreme emotional disturbance) and several non-statutory mitigators, including Wright's remorse, cooperation with police, heated domestic dispute, good military and employment record, attendance at church, mental abuse by stepfather. The jury recommended death and the court imposed the death penalty. This Court on direct review found the death penalty disproportionate.

In comparing Wright's case with Appellant's, the most important point is that Appellant had only one aggravator with its' weight diminished by its own facts. Wright's case is a more clear-cut and classic case of murder in a heated domestic dispute, but Appellant's case has the same elements although not as extreme. Last, Appellant's mitigation, if properly determined, is weightier than Wright's in that Appellant had both statutory mental mitigators and the disparity of treatment of his accomplice. In addition, Appellant had numerous non-statutory mitigators similar to those of Wright.

Yet another reason that the death penalty is disproportionate in Appellant's case, as alluded to above, is that his single aggravator is offset by significant mental mitigation. Dr. Dee testified to demonstrable brain damage in Appellant and opined it affected his memory, impulse control, emotional and moral self-regulation. Further, he found that on top of that the acute toxic effects of a larger than normal dosage of methamphetamines on the night of the murder which would have heightened these effects and could have triggered paranoid thinking approaching a psychotic state, or even an explosive rage-filled fugue state, Dr. Dee found both statutory mental mitigators present at the time of the murder [extreme mental or emotional disturbance and substantial impairment]. Dr. McClane concurred in all respects. McClane also noted the

importance of the larger than normal dosage of methamphetamine on the day of the murder in light of the fact that this drug at higher doses makes almost everyone lose touch with reality. He also emphasized the effect of the drug in destroying impulse control and heightening aggressiveness. Both doctors' testimony is uncontroverted on the record. [See Statement of Facts and Argument Issue III.]

The trial court in Appellant's case clearly erred in finding established no mental mitigation at all, statutory or non-statutory. The weight given these factors may be debated, but they were established in some form beyond dispute and deserve some substantial weight. The reason given by Appellant's trial court for not finding these mental mitigators at any level was its recital of the purposive planning and behavior (premeditation) by Appellant. (See Statement of the Case and Argument Issue IV above).

For comparison ***Spencer* v. *State*, 21 Fla. L. Weekly S366 (Fla. 1996)** may be useful even though it differed from Appellant's case in having two aggravating circumstances (prior violent felony and heinous, atrocious and cruel), and in that this Court in ***Spencer II.*** found the death penalty to be proportionate.

In ***Spencer v.*** State, 645 **So.d. 377 (Fla. 1994)** the trial court, as in Appellant's case, failed to find the existence of the two statutory mental mitigators despite uncontroverted testimony of Spencer's two experts that he suffered chronic alcohol and substance abuse, had a paranoid personality disorder, and that the mental mitigators applied. The trial court in Spencer, like that of Appellant, refuted the existence of the mental mitigation based on evidence of Spencer's purposive planning and premeditation (the Spencer court found C.C.P., later reversed), and the fact that Spencer was able to run a successful business during this period. The Appellant's premeditation was also used by his trial court to refute the mental mitigation, but Appellant's

premeditation does not appear to be as complete as Spencer's, who even wore gloves during the crime. Additionally, Appellant, unlike Spencer, was not able to maintain his prior successful lawful employment. Appellant was so affected by his increasing drug addiction that he was fired in 1992 from his job, held successfully for several years, as a manager of a bar and nightclub. [T. 2267-86]. This Court reversed the trial court in Spencer and found abuse of discretion in its failure to find and weigh the statutory mental mitigators. It should do the same in Appellant's case.

In Spencer there were horrible facts of a prolonged tortuous killing making out H.A.C., and there was also an attack on a second person (wife's teenaged son). As tragic as Ms. Ruzga's murder is, nothing comparable in this regard appears in Appellant's case. After remand, the trial court in Spencer found the two statutory mental mitigators proven, the trial court also discounted their weight due to Spencer's purposive planning and premeditation and his ability to run a successful business during that time. Appellant admits there was premeditation in his case, but the facts in Spencer show considerably more forethought. Appellant's mental mitigation certainly deserves some substantial weight. Appellant's single aggravator was mitigated, while Spencer's were indisputably weighty, especially the H.A.C. Appellant's trial court failed to weigh in its sentencing calculus mental mitigation, the domestic aspects of his case, and other mitigation, and also underweighed the factors of drug use and the disparity in treatment of his accomplice. For all these reasons, Appellant's case is not among those in which this Court has previously held the death penalty is appropriate (most aggravated, least mitigated).

Another reason Appellant's death penalty is disproportionate is that the trial court in Appellant's case did determine that the non-statutory mitigator (under the influence of drugs at time of killing) did exist, but erroneously gave it minimal weight despite expert testimony as to its

great effects on the crime itself (See cases on drug abuse as mitigation: ***Besaraba v. State, 656 So.2d 441,447 (Fla. 1995); Caruso v. Stale,* 645 So.2d 389,397 (Fla. 1994); *Heiney v. Dugger,* 558 So.2d 398,400 (Fla. 1990).**

Last the trial court in Appellant's case also dramatically underweighed the non-statutory mitigator of disparate treatment for an accomplice. See Argument Issue VI. And the trial court also failed to find or weigh a number of other non-statutory mitigators. See Argument Issue III.

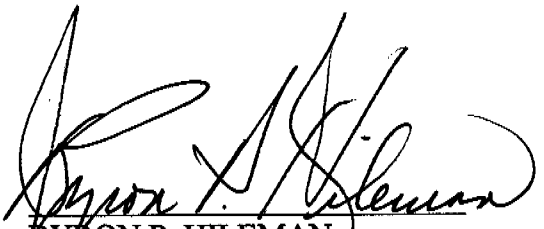
In conclusion, Appellant's case is not one in which the death penalty is appropriate. This assertion is based in part on the comparative cases set forth above. It is also founded on the facts that there was only one aggravator , its' weight mitigated by its own facts, and that there was substantial statutory and non-statutory mitigation established by the requisite proof Much of that mitigation erroneously was neither found nor weighed by the trial court, or not properly weighed. In view of the fact that Appellant's case is very little aggravated and has substantial mitigation, the death penalty is disproportionate. This Court should vacate the Appellant's death penalty and impose a life sentence.

CONCLUSION

Appellant asserts that reversible and harmful error was committed by the trial court in the guilt phase by the erroneous denial of his Motion to Suppress. He also asserts that the trial court erred in admitting irrelevant evidence of bad acts which irrevocably prejudiced his trial. Based on the facts set forth herein and the argument and authorities recited in Issues I. and II. Appellant asks this Court to vacate his conviction and remand his case for a new trial.

Appellant also states that the trial court erred and committed harmful error in failing to: properly qualitatively weigh his single aggravating circumstance (Issue IV); in failing to find established and weigh statutory and/or non-statutory mental mitigating circumstances, domestic mitigation, and a number of other non-statutory mitigating circumstances (Issue III); that the trial court erred abused its discretion in its' weighing of the two non-statutory mitigators found, including under the influence of drugs at the time of the murder and the disparity of treatment of an accomplice (Issue VI); that the trial court erred in permitting the penalty phase jury **and** its own sentencing decisions be influenced and contaminated by the wrongfully admitted evidence of Appellant's bad act in being a drug dealer (Issue V); and last, that the sentence of death imposed on Appellant is disproportionate to his crime in light of capital sentencing decisions in other cases by this Court (Issue VII). Based on the facts herein and the argument and authorities recited in Issues III, IV, V, VI and VII, the Appellants asks this Court to vacate his sentence of death and impose a sentence of life imprisonment, or, in the alternative to remand his case for a new penalty phase proceeding before a new penalty phase jury.

Respectfully submitted:



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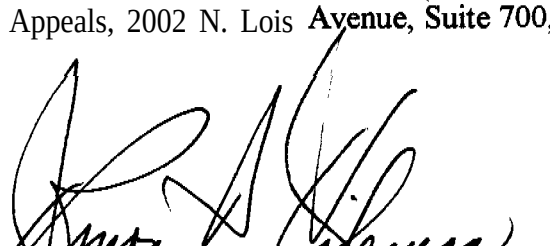
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant was served by mail on the Office of the Attorney General of Florida, Candance Sabella, Esq., Assistant Attorney General, Dept. Of Legal Affairs, Criminal Appeals, 2002 N. Lois Avenue, Suite 700, Tampa, FL 33607 on this 1 lth day of July, 1997.



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