IN THE SUPREME COURT OF FLORIDA

BOBBY ALLEN RALEIGH,

Appellant,

v. Case #: 87,584

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The State generally accepts Raleigh's rendition of the case as put forth in his initial brief.[1] Any additional matters pertaining to the case will be discussed in the **State's** Argument **as** they pertain to specific claims raised by Raleigh in his brief.

STATEMENT OF THE FACTS

The State generally accepts Raleigh's rendition of the facts as put forth in his initial brief, subject to the following additions and/or clarifications. The State would emphasize that Raleigh pled guilty to the capital murders of Douglas Cox and Timothy Eberlin. He proceeded directly to a Penalty Phase and the following facts are from that stage. There are no claims concerning guilt in Raleigh's initial brief.

1. Aggravation

Investigator Horzepa **was** the lead homicide investigator, and became involved in the murders of Douglas Cox and Tim Eberlin at

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'Appellant was the Defendant in the trial court. Appellee, THE STATE OF FLORIDA, was the prosecution, Henceforth, Appellant will be identified as "Raleigh" or Defendant. Appellee will be identified as the "State". "R" will designate the Record on Appeal. "T" will designate all Transcripts. "p" designates pages of Raleigh's brief. All emphasis is supplied unless otherwise indicated.

12:30 p.m., June 5, 1994 (T.818). He went to the murder scene and evidence found at the scene was admitted through him (T.819-843). Various witnesses were interviewed who established Raleigh as a prime suspect (T.844-49).

Patricia Pendarvis and Darin Chalkley, were friends of Douglas COX, and had driven to Douglas' trailer to pick up Patricia's boyfriend, Ronald Baker (T.844-47). Patricia provided the name of "Bobby", and a physical description of Raleigh (T.844-45). Douglas lived in a trailer located in an isolated area, difficult to find, and Patricia missed the entrance to the trailer because it was so dark (T.847). Darin exited the vehicle to relieve himself, and Patricia noticed another vehicle drive up behind them (T.847). The passenger door opened, Raleigh exited and fumbled with his waistband (T.847). Darin was scared, jumped back in the car with Patricia, and they returned to the trailer (T.847). The other vehicle followed (T.847). Raleigh again exited the other car, approached them with his hands outstretched, and identified himself as "Bobby" (T.847-48).

"Bobby" said he had seen Doug at the bar and Doug had told him to come over (T.848). Raleigh had to see Doug that night because he was heading back to Virginia (T.848). Raleigh climbed the gate and went to the trailer (T.849), Several minutes elapsed, and

Raleigh returned with Patricia's boyfriend, Ronald (T.849). Raleigh climbed back over the gate, and produced "a silver, satiny color semi-automatic pistol" (T.849). Raleigh said the Mexicans were his brothers, and he didn't want any "shit" (T.849). He also said he knew somebody in New York who wanted to make a deal (T.849). Raleigh said to Darin: "*[I]t's all* **about making money** (T.849)."

Investigator Horzepa testified as to escorting Raleigh from his parent's residence to the Operations Center (T.850-53). Through him, Raleigh's initial taped statement to the police was published to the jury (T.860). In his initial statement Raleigh related he had known the victim, Douglas Cox, since he was 12-years-old, and that the last time he had seen him was at Club Europe (T.863). Raleigh's co-Defendant, Domingo Figueroa, who is Raleigh's cousin, told him Douglas had started trouble with Raleigh's mom (T.864). Raleigh confronted Douglas outside, but Douglas' brother did all the talking because Douglas "was just messed up ..." (T.865). Raleigh's mother came out ranting and raving, causing Raleigh to get in an argument with her (T.865). Ultimately, Raleigh put his mom in Figueroa's rental car, a red Mercury (T.865). His mom took off on foot (T.866).

Raleigh apologized to the Cox brothers for his mom making

trouble and they shook hands in the parking lot (T.867). It was approximately 2:30 a.m. (T.868). Meanwhile, his mom took off on foot, so he and his cousin went looking for her (T.868). Unable to locate her, they later learned she had called her husband to pick her up at Walmart (T.869). Raleigh got to his parents' house between 2:30 and 3:30 a.m. (T.869). Raleigh related he "was so f***ing drunk" (T.869). He passed out on the living room floor and woke at 10:00 a.m. (T.870).

Raleigh related how his cousin had been arrested in Marion County on drug charges (T.871). He admitted he threatened Douglas, and that he was going to fight him, until he found out what was going on (T.872). He admitted he had a .38 at his parents' house, but that he didn't care for guns too much (T.873). His cousin did not own any guns that he knew of (T.875). The first tape concluded with Raleigh stating that he was drunk that night, and he did not remember "every specific detail" (T.876).

Investigator Horzepa further testified that as he and Raleigh were making their way to Operations, Ms. Pendarvis and Mr. Baker chose Raleigh's photo from a photo lineup as the man they saw the night of the murders (T.876-77). Investigator Horzepa was so informed (T.877). After Raleigh's first tape was concluded Horzepa interviewed Figueroa (T.878). Figueroa made a tape in which he

implicated Raleigh in the murders of Douglas and Timothy (T.879). Horzepa went back to Raleigh and told him his cousin had flipped on him (T.879-80). Raleigh then made a second taped statement (T.880).

Horzepa testified that when Raleigh made the first tape he "was cool, somewhat detached" (T.881). When Raleigh made the second tape after being implicated by his cousin, he "became more withdrawn" (T.881-82). The second tape was also published to the jury (T.883).

In the second tape, Raleigh related that he and Figueroa went to Raleigh's parents' house, and procured the murder weapons frotn a safe (T.888). After the murders, the guns were placed in Raleigh's 1991 green Subaru station wagon, which was then parked at some lady's house who he did not know (T.888-91). The guns were a .380 and a Ruger (.9 millimeter) (T.898-99). Raleigh had the Ruger, Figueroa the .380 (T.900). Raleigh went through the back door of the trailer, which had been left open (T.903). He spoke with Tim and walked into the living room (T.903). Douglas was lying on the couch (T.904).

Horzepa went and talked to Figueroa again (T.905). Figueroa gave up the location of the Subaru in which the guns were located in a hidden compartment (T.905-07). Figueroa called his wife, and

told her to help the police find the car (T.905). The Subaru was parked at a home rented by Sally Holt (T.906). It was registered to David Vanover, another of Raleigh's cousins, who lives in Wise, Virginia (T.908). Sally Holt divulged that Figueroa's wife, Elaine, Figueroa, and Raleigh showed up at her place between 2 and 4 p.m. (after the murders) (T.909). They asked if they could park the Subaru at her house, to which Sally agreed (T.910). The Subaru was seized pursuant to warrant and a search revealed the murder weapons. (T.910) .

Horzepa testified the Ruger was bent, broken and "bloody" (T.911-13). The piece broken from the Ruger (a recoil spring guide rod) was found on the bed in which Tim Eberlin was found (T.914). It also had blood on it (T.914). The blood on the Ruger and the spring guide rod matched Tim's blood (T.918).

On June 5, 1995, co-counsel for Raleigh, Mike Teal, deposed his client (T.931). The tape of the deposition no longer existed, but the transcription did (T.931). By stipulation, the transcribed deposition was published to the jury, and made part of the record (T.932, 936-1086).

Raleigh grew up next door to the Coxes, and was friends with Jason (T.938) . When Raleigh was 17 or 18-years-old he learned Douglas was selling acid, marijuana and other drugs (T.939). He

subsequently bought acid from Douglas (T.939). Raleigh met Tim Eberlin through Garret Lennon (T.939-40). Raleigh and Lennon "were *selling drugs"* (T.*939-40).* Raleigh quit dealing with Lennon because the latter ripped him off for some money (T.941).

Raleigh hooked up with another guy who he could not remember his name (T.941-942). This guy told Kirk and Douglas what they were into, and Kirk approached Raleigh about "buying some weed" (T.941-42). Raleigh went to Figueroa, who told him not to deal with Kirk because Kirk had ripped some people off (T.942).[2] Raleigh admitted: *"I was selling for Domingo..."* (T.963). Raleigh stole Lennon's customers as well as Jeff Hanes' (T.964-67).

Raleigh began running 10 pounds to Virginia every two weeks (T.970-73). Figueroa would front him the marijuana and he would return with the cash (T.970-73).[3] Eventually, Raleigh became nervous transporting marijuana every two weeks (T.973). Figueroa

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[2]At this point there was extensive testimony from Raleigh about Figueroa being busted in Ocala with 30 pounds in his possession. Raleigh was with him, but the drug agents let him go to report back to Elaine what had transpired. Raleigh was told if he did not cooperate he would be arrested with Figueroa. There was over 100 pounds of marijuana at the Figueroas' house, and Raleigh buried it under their house at their request. He then dug it back up the next night and it was quickly sold to some guys in Ocala and DeLand. (T.944-60)

[3]Raleigh was paying $1,000.00 a pound, and charged $1100.00 in Virginia.

told him if he purchased a better vehicle, he would front him 50 pounds (T.973).[4] Raleigh's cousin, David Vanover, purchased the Subaru for this purpose (T.974-77). Raleigh said Ray Hottinger came up with the idea to create a hidden compartment by welding an old Chevy gas tank underneath the Subaru (T.975-77). The plan was to increase the amount of marijuana carried so Raleigh would only have to make a run to Florida once a month (T.978).

In his last trip, Raleigh carried $12,000.00 cash in the extra gas tank, which he had received for the sale of marijuana in Virginia (T.983). He was supposed to return to Virginia with marijuana that Friday night, but Figueroa couldn't get any (T.987). On Saturday Figueroa still could not get his hands on any marijuana (T.987). Saturday night, Raleigh, his mom, and the Figueroas went to Club Europe between 10 and 11 p.m. (T.989-92). Raleigh had four beers before he left (T.997). At Club Europe, he had at least four "red deaths" and some shots of Golds lager (peppermint schnapps) (T. 997-1001).[5]

Sometime during the course of their partying at Club Europe,

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[4]Raleigh bought an El Camino in Virginia for Figueroa so the latter could drive to Mexico and pick up 100 pounds (T.993).

[5]Raleigh also related that he entered an underwear contest, although he wasn't wearing any, and won second place (T.997-1001).

Figueroa informed Raleigh that Douglas Cox slapped Raleigh's mom (T.1002). Raleigh confronted Douglas outside in the parking lot (T.1003). However, Douglas was so drunk that his brother Jason was "sitting there trying to hold him up," and he couldn't even talk (T.1003).

Meanwhile, Raleigh's mom burst out the front door (T.1003). Raleigh said she was drunk and had an "attitude" (T.1003). Raleigh wrestled her into Figueroa's car and headed back into the club (T.1008). On the way he apologized to the Cox brothers and shook Douglas' hand (T.1009). By the time he returned to the parking lot his mom was gone (T.1009).

Raleigh and Figueroa went to Raleigh's parents' house, and Figueroa took the guns from the safe (T.lO10). Figueroa was driving, and Raleigh was playing with the .380 and the .9 millimeter (T.1012). Figueroa told him to stop playing with the guns (T.1012). Figueroa knew the road Douglas' trailer was on, but did not know the exact location, so Raleigh had to guide him (T.1013).

When they arrived at their destination, there were two people, a guy and a girl,[6] in a car parked in front of Douglas' gate

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[6]Patricia Pendarvis and Darin Chalkley.

(T.1013). Figueroa gave Raleigh his T-shirt and the .9 millimeter (T.1013).[7] Raleigh talked to the guy and the girl (T.1014). He did not remember talking to Patricia's boyfriend, Ronald Baker (T.1015). He got back in the car with Figueroa and told him Douglas was not there (T.1014).

Figueroa drove the car to a dirt road alongside the trailer, retrieved the guns from under his seat, handed the Ruger to Raleigh, and allegedly said, "Come on" (T.1016). Raleigh first knocked on the glass door, and then the back door (T.1016-18). He heard Tim yell something so he went in (T.1018). Figueroa, .380 in hand, followed right behind him (T.1018). Raleigh asked Tim where Douglas was (T.1018). Raleigh walked into the living room, and "Douglas was laying on the couch" (T.1019).

Raleigh looked back toward Figueroa, and saw the latter had the .380 concealed under clothing (T.1021-22). When Raleigh saw that, he pulled the Ruger from his waistband and shot Douglas in the head from two feet away (T.1023-24). Raleigh thought he shot Douglas only twice (as opposed to the actual three times) (T.1024). Douglas was sleeping when he shot him (T.1026). Raleigh then ran to the back of the trailer (T.1037). Figueroa was shooting Tim

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[7] Raleigh's shirt was torn by his mom when he put her in Figueroa's car at Club Europe.

through the door (T.1038). He yelled to Raleigh that his gun was jammed (T.1039). Raleigh said he stopped running because he was afraid Figueroa was going to shoot him (T.1039).[8]

Tim was ***"screaming"*** (T.1038-39). Raleigh emptied his Ruger into Tim (T.1041). Tim was ***"still screaming"*** (T.1042). Raleigh began to hit Tim in the head with the Ruger (T.1045). Tim ***screamed*** as Raleigh hit him in the head (T.1045). Raleigh alleged that Figueroa told him to strike Tim in the head (T.1045). ***Raleigh did not stop hitting Tim until he stopped screaming*** (T.1046)

Raleigh ran out the door he entered through (T.1046). He and Figueroa climbed over the fence and ran down the dirt road (T.1046). Neither Tim or Douglas had a weapon or tried to defend themselves in any way (T.1047). Neither of the victims threatened Raleigh or Figueroa (T.1047). Figueroa gave Raleigh the guns once they were in their car, and Raleigh stuck them under his seat (T.1048).

They arrived back at Raleigh's parents' home and Raleigh placed the guns in the Subaru (T.1049). He and Figueroa changed their clothes and burned the clothes they had on during the murders

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[8]Not to belabor the obvious, but Figueroa's gun jammed according to Raleigh, Therefore, he would have been incapable of shooting Raleigh.

in a grill (T.1050-51). Figueroa pulled a couple of .9 millimeter shells out of his shirt, handed them to Raleigh, and Raleigh threw them in a neighbor's yard (T.1051-52). Raleigh passed out on the floor (T.1052).

Raleigh woke up later than morning, when Garret Lennon called and asked him where he was last night (T.1053). When Raleigh asked why, Lennon informed him Douglas **was** dead and hung up (T.1054). Raleigh then attempted to portray that the murders occurred during a "blackout" (T.1054).[9]

Raleigh called Figueroa, who allegedly told him not to worry about it, that he would take care of everything (T.1054). Figueroa and Elaine came over to Raleigh's parents' house for a cookout (T.1054). Elaine knew what had happened (T.1055). Figueroa allegedly spoke of taking off to either Utah or Mexico (T.1055). Raleigh's mom said he was not going 'to take the blame for all that shit, that [Figueroa] was involved, too" (T.1056).

Elaine called Sally Holt's house and asked her if they could park the Subaru at her house (T.1056). Raleigh hid the guns in the secret compartment (T.1056). It was allegedly Elaine's idea to

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[9]The State characterizes this as an "attempt" because Raleigh had already provided great detail about the murders of both victims, negating that Raleigh was in a "blackout" at that time.

take the Subaru and guns to Sally's house (T.1057). They took the Subaru over to her house, and Elaine yelled at them both as they returned to Raleigh's house (T.1058). Figueroa allegedly kept telling him to say he didn't have anything to do with the murders (T.1059).

That same afternoon he called David Vanover and told him he was involved in a shooting (T.1060-61). Vanover told him not to turn himself in, to wait until the police picked him up (T.1061-62). Raleigh admitted he was "basically ***partners*** with David up in Virginia..." (T.1061-63). Raleigh was the connection between Vanover and Figueroa (T.1065-66).

At the conclusion of Raleigh's deposition, Investigator Horzepa testified that a hole in the trailer coincided with a shot to Tim Eberlin's head, and that a .9 millimeter bullet was found outside the trailer which coincided with the hole (T.1087-89). This evidence indicated Raleigh was the one who shot Tim in the head (T.1090).

Under cross-examination, Investigator Horzepa testified that Darin Chalkley observed that Raleigh the night of the murders "didn't appear right" (T.1109). Darin said: "You know he [Raleigh] was talking real riddlely like he was heavily intoxicated or under the influence of some type of substance" (T.lllO). Ronald

Baker said Raleigh was "pretty wired out" (T.1111-12). The impression that Horzepa gained from interviewing Patricia Pendarvis and Chalkley was that "[i]t was all about an altercation at the Club Europe between Douglas Cox and a Mexican male ... subsequently identified as Domingo Figueroa" (T.114). However, Horzepa also pointed out that was not his impression but theirs when he was asked about Raleigh's comment about "all about money" (T.1114).

Figueroa's interview revealed that Raleigh's mom was in an altercation with Douglas Cox (T.1115). Douglas called his aunt a nasty name, and Domingo rose to defend her honor (T.1116). Figueroa bought the Ruger at a Walmart in DeLand (T.1117-18). The guns were kept in a safe to which Figueroa had the only key (T.1119).

On redirect, Horzepa related how a live .9 millimeter got on the porch of Douglas' trailer (T.1120-21). Ronald Baker was in the trailer waiting for Ms. Pendarvis to pick him up, when Raleigh knocked on the door (T.1120-21). Baker went out on the porch and talked to Raleigh, noticed the Ruger, and asked Raleigh if it was loaded (T.1121). Raleigh responded that he didn't know, pulled back the slide, and ejected a live round which struck Baker in the chest (T.1121).

Raleigh did not volunteer any information when he was first

picked up at his parents' home (T.1121). Nor did Raleigh divulge any information during the twelve-mile trip to the Operations Center (T.1122). When Raleigh was shown driver license photos of Douglas Cox and Tim Eberlin he was Very cold and removed" (T.1122-23).

Figueroa's taped statement was published to the jury (T.1125). Raleigh is his cousin, and Raleigh killed Douglas and Timothy (T.1128). Figueroa stated they were looking for Raleigh's mom, and Raleigh was worried "...something mighta happened to her because the guy was talking a lot of sh** to his mom. And he went in the house and got the guns" (T.1131-32). Raleigh owned the ,380 and Figueroa owned the Ruger (T.1133). However, that night Raleigh was carrying the Ruger and Figueroa the .380.

Figueroa related the interaction of Raleigh with Patricia Pendarvis and Chalkley, and the fact that he showed the guy the gun (T.1137). Raleigh knocked on a closed trailer door and Tim said: "What's up?" Raleigh asked where Doug was, but Tim refused to wake him up because when Doug was messed up one time he almost shot somebody (T.1140). Raleigh had the Ruger tucked in his pants, while Figueroa had the .380 in his hand (T.1141). Raleigh went to where Cox was crashed and then Figueroa heard shots (T.1142) . Tim started screaming so Figueroa shot once, not knowing whether he hit

him (T.1143). Raleigh unloaded the Ruger, which carries fourteen rounds (T.1144). Figueroa related that because of the insults to his mom, Raleigh wanted to go over and scare Douglas (T.1160).

Investigator Horzepa's redirect continued (T.1162). He testified that Figueroa's account of Raleigh's encounter with Ms. Pendarvis and Chalkley comported with theirs (T.1162). Even after Raleigh was told his cousin had given it up, Raleigh was not forthcoming with his account of what happened (T.1164). Neither Chalkley, Baker, or Ms. Pendarvis said that Raleigh was so messed up that they didn't understand what he was saying (T.1164).

Under recross, Horzepa testified that all three of the aforementioned individuals did express that Raleigh was intoxicated (T.1170). Further, when Raleigh was talking to Baker on the porch, before he ejected the live round from the Ruger, he pointed the gun at his face (T.1171). Raleigh terminated the second interview by requesting an attorney (T.1173).

Investigator Dewees processed the murder scene (T.1218-19). He found two .380 casings and one .380 live round in the east doorway of the bedroom Tim Eberlin was in (T.1223). He discovered a broken piece of metal rod, a .9 millimeter live round and two .9 millimeter casings in that same area (T.1223-24). The pillow under Douglas' head contained three ,9 millimeter projectiles (T.1233).

Susan Komar, firearms expert for FDLE, testified that the Ruger was not functional, and that the damage to it could have been caused by beating someone on the side of the head (T.1253). She demonstrated how the Ruger would "leave a crescent shaped mark" like the one found on Tim's skull, above the ear (T.1263-64).

Ronald Baker testified that he attended a party with Tim and Douglas the night of the murders (T.1280). At some point Douglas left the party to go to Club Europe (T.1281). Tim and Ron stayed at the party until 2:30 a.m., at which time they returned to Douglas' trailer (T.1281). Douglas was "pretty well intoxicated" and fell asleep while they were watching a movie (T.1281). Tim went into the back room and retired (T.1282). Ron continued watching the movie until 2:45 a.m., when somebody came up on the porch and knocked on the door (T.1282). When he opened the door, Raleigh identified himself as Robert, and he had a gun in his hand (T.1282).

Raleigh said Douglas had phoned him to tell him stuff was getting ready to go down with the Mexicans, and Raleigh was there to help (T.1283). Ron told him Douglas was sleeping (T.1284). Raleigh told him he needed to talk to Douglas because he had a guy down from New York who wanted to buy some marijuana (T.1284). Raleigh was "real nervous, . . . couldn't stand still" (T.1284).

Eventually, Raleigh put the gun in his pants (T.1285). When Ron asked him if it was loaded, he took it out, swung it around, looked at it, pointed it at himself, swung it around, and ejected a bullet which struck Ron in the chest, landed on the porch, ultimately settling underneath the porch (T.1285)."[10]

Ron told Raleigh to come back in the morning around 8:00 a.m. (T.1286). Raleigh related there were some people sitting out in the driveway he didn't know, maybe he should "pop a couple of caps in them" (T.1287). Raleigh said it was a guy and a girl (T.1287). Ron got cocky back at him and told Raleigh those two were his girlfriend and his friend, that he didn't need to go shooting at them (T.1287). Ron walked with Raleigh out to the car and they climbed the gate (T.1288). Raleigh continued to talk about seeing Douglas, and asked Ron if he would be there at 8 to which Ron said yes (T.1289). He got in Chalkley's car and they headed to Orange City (T.1289-90). Raleigh got in the passenger side of a vehicle, and the driver of that car followed them (T.1289-90).

His girlfriend, Patty, remarked that the driver was a Mexican, which worried Ron (T.1290). He told Darin to pull over so he could call Douglas and warn him, but all Ron reached was the answering

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[10]This . 9 millimeter live round was recovered (T.1239).

machine (T.1293). Ron asked Darin to run him back to Douglas' trailer, which he did (T.1292). Ron went in the trailer and tried to wake Douglas but he couldn't (T.1292). He did manage to wake Tim though, and told him what was going on (T.1292). Tim got up, grabbed a shotgun, and jumped back in bed (T.1292). Tim told him not to worry, it would be alright (T.1292). The door was close and locked when he left (T.1293). He left at approximately 3:30 a.m. (T.1293).

Under cross-examination, Ron testified that he smelled alcohol on Raleigh's breath and that Raleigh was wired (T.1295). However, Raleigh was not falling down drunk (T.1297). Douglas had a gun above him on the top of the couch, as it was his custom to sleep with a gun "because he was afraid that somebody would come in while he was sleeping and kill him" (T.1298). Douglas "was very drunk" (T.1298). On redirect, Ron said that Raleigh had no trouble walking or climbing the gate, which was 4 1/2 to 5 feet high (T.1299).

Patricia Pendarvis' testimony was consistent with that which Investigator Horzepa related previously (T.1300-13). She testified that when Raleigh approached them, he talked about some kind of deal he was suppose to make, and that ***"everything was all about making money" (T.1307).*** After Raleigh went up to Douglas' trailer

and returned with her boyfriend, Ron, she saw a gun in Raleigh's hand (T.1308). Raleigh said Mexicans were his family and he was their brother (T.1309). Raleigh repeated ***"everything was*** all ***about making money" (T.1309).*** Raleigh "had the stench of alcohol" and couldn't stand still (T.1309). After they returned to warn Douglas and Tim about Raleigh, Ron assured Patty and Darin he made sure the trailer was all locked up before he left (T.1312).

Under cross-examination, Patty testified that at Club Europe Doug was mad because somebody had tried to run his brother off the road (T.1313). She observed Doug arguing with a lady and a Mexican male in the back lot of Club Europe (T.1313) .[11] She also witnessed Doug threaten a Mexican (T.1314).

Dr. Reeves, Medical Examiner, testified he went to the murder scene (T.1322). Douglas "was shot three times in the head" (T.1322). The shots were mostly on the left side and came out the back of his head (T.1323). One of the wounds contained stippling (T.1323). When Douglas was shot he did not move (T.1335). It was an execution-style shooting (T.1336). Tim Eberlin was found cowered in the corner, "as far as he could [go] to the opposite end of the bed." Dr. Reeves further testified:

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[11]That would have been Raleigh's mom, and Figueroa (T.1313).

> [Tim] . . .died of three gunshot wounds as well. But he also was beaten over the head quite viciously and had injuries to the head that, in and of themselves, certainly could be fatal. (T.1338)

The head wounds were inflicted while Tim was ***alive,*** as were the gunshot wounds (T.1338). Based upon his observations at the murder scene, and his autopsy of Tim, Dr. Reeves testified that ***a*** possible scenario of Tim's demise was:

> ... someone who has been repeatedly shot trying to get away from the shooter by crawling into the corner and then being beaten until he stops screaming.[12] (T.1351)

As regards Tim's consciousness, Dr. Reeves testified on redirect that Tim would not have been screaming and trying to get to the corner of his bed, if he did not know what was happening to him (T.1358). When asked by the Court if Tim died of the gunshot wounds or the blunt trauma, Dr. Reeves answered "he died as a combination of both" (T.1359).

Joseph Miller testified that he ***was*** doing deals with Douglas Cox (T.1362-63). There was tension between Raleigh and Douglas (T.1363). The last time Raleigh had been to Doug's trailer he brought his then partner, Salta Martinez, who Doug did not like

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[12]Of course this had already been established by Raleigh's own deposition in which he admitted he shot Tim and then beat him until he stopped screaming.

because Salta had threatened to kill his brother, Jason, and attempted to run Jason of the road (T.1363-64). Consequently, Raleigh was kicked off Doug's property (T.1364-65).

In late 1993 or early 1994 he actually heard Raleigh ask Doug to give up part of his drug business (T.1365). When Doug responded he must be crazy, Raleigh answered, "one day or other I'm going to take over your business anyway even if I have to kick your ass" (T.1365-66). Everyone took it as a joke; Miller did not (T.1366). Later in 1994, Miller bought a couple of hits of acid from Raleigh at Club Europe (T.1367). Raleigh asked him why Doug kicked him off his property, to which Miller responded that it most likely was because of Salta (T.1368). Raleigh said Salta was his partner, and that Doug should not be that way, further stating Doug was being selfish (T.1368). Raleigh also said: "It doesn't matter anyway. I am either going to kick his ass or I'm going to kill him, one or the other" (T.1369). Raleigh hated that Doug made more money than him, "...it's the money thing is what it was" (T.1369). The times that Raleigh threatened to take over Doug's turf, Figueroa was not around (T.1396).

II. Mitigation

Additional matters Raleigh failed to relate in his initial brief regarding mitigation are as follows. Gene Collins, of Wise

County, Virginia, father of Raleigh's former girlfriend, Donna Stewart, admitted under cross-examination that after Raleigh broke up with his daughter, he knew "pretty much all the people Raleigh started hanging out with were all involved in ***dealing drugs*** (T.1472-73)." Further, after Mr. Collins denied he had knowledge that Raleigh ***was*** running drugs between Florida and Virginia, he was impeached by his deposition, in which he admitted Raleigh was running drugs, and that he would use Ray Hottinger's truck (El Camino), as well as Hottinger's gun during such runs (T.1473-74).[13]

Raleigh alleges at p.8 of his initial brief: "At the time of his birth, Appellant and his mother resided with his mother's father who sexually abused her in return for providing them a place to live." In fact, Janice Figueroa testified that she complied with her father's request for sex one time (T.1509).[14] She further testified her son ***was*** unaware she was abused by her father (T.1512). She knew her son was "***a drug dealer***" (T.1544).[15] Janice knew Raleigh became involved "***in the drug trade***" February 1, (1994)

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[13]Mr. Collins denied he said that Hottinger's gun ***was*** a .9 millimeter (T.1474).

[14]Janice's father, Leonard, was long since dead.

[15]Raleigh's co-counsel, Mr. Clayton, called his client a "drug dealer" (T.1544).

(T.1544-46).[16] Janice and her son had "a good relationship," in fact, Raleigh was her "best friend" (T.1546-47). However, she wanted Raleigh's ***drug dealing*** to stop (T.1572). Her son 'was ***making his living selling drugs"*** before the murders (T.1573-74).

Janice waited up for Raleigh to return from Douglas' trailer, which was 4:05 a.m. (T.1556-58). The night of the murders, in Janice's mind, whatever happened between her son and Douglas Cox was settled (T.1578). She admitted she was "pretty drunk" that night (T.1578). She watched as her son brought in the guns, wrapped in a T-shirt, her husband had seen Figueroa and him carry out earlier (T.1580). She retired, but Figueroa and Raleigh made quite ***a*** bit of noise, which she learned later in the morning, included their burning the clothes they wore at the murders in a grill (T.1581).

Janice further testified as follows

> Q And Bobby told you that he used the .9 millimeter gun?
>
> A Yes.
>
> Q To shoot Douglas, right?
>
> A Yes,
>
> Q Isn't if true that Bobby also said to you that

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[16]Again, 'in the drug trade" was used by Mr. Clayton (T.1546).

after he told you he had shot Douglas, he mentioned something about Tim or about another person in the trailer? And he said he didn't think he was dead?

A He *said Tim wasn't dead.* (T.1585-86)

When asked if her son also told her that since Tim wasn't dead, Figueroa should go back there, she responded that she was not sure her son told her that, that she was confused, and it may have come from Figueroa's statement, which she read (T.1586). She was impeached with her deposition, in which she said her son told her: "I swear, mother, ***I didn't think he was dead. I told Domingo he wasn't dead*** " ***(T.1587).*** She also admitted saying at her deposition that Raleigh told her ***Domingo should go back*** (T.1587).

As regards Raleigh's alleged suicide attempt, Dr. Myrna Garcia, who evaluated him in the ICU after he had been treated, testified Raleigh ingested approximately 50 diet pills, as well as roach poison, which he sprayed into a cup of ice cream (T.1617-19). Raleigh was 17 *at* the time (T.1620). Dr. Garcia testified Raleigh "was very depressed" (T.1621). "Apparently, he had gotten into some arguments with his ***parents*** about two days before the overdose relating to some coins he had stolen from his fathers coin collection (T.1621)."[17] Also, he had just been fired for throwing

[17]Janice testified that only her husband had argued with Raleigh about the coins (T.1574).

something at a co-worker which hit his supervisor, and he was worried about an upcoming court case he had for falsifying a drivers license (T.1621).

It was Dr. Garcia's diagnosis that Raleigh suffered from an "adjustment disorder with depressed mood, which is basically like a reactive depression to some environmental stress" (T.1621). She did not feel Raleigh met the criteria for clinical depression (T.1621). Raleigh admitted to her that he abused alcohol and smoked marijuana with friends (T.1622).

Dr. Upson testified that based upon the Wexler Adult Intelligence Scale, Raleigh's full scale IQ is in the normal range (T.1643-45). His verbal score placed him in the normal range, and his visual score in the high average range (T.1644). Based upon the Halsted Rayten battery, Dr. Upson was able to determine that Raleigh's speed of response was a little bit slower than expected for a person his **age** (T.1651). However, he was able to see, hear and feel appropriately, and his memory was Very good" (T.1651-53). Raleigh has deficiencies in abstract reasoning and logical analysis, which meant to Dr. Upson that when Raleigh was faced with a situation with cognitive demands, he fell apart (T.1655) This was not a brain problem, but "a task shifting problem" (T.1655). "Poor judgment" was a consequence (T.1655-56). Raleigh's MMPI

profile exhibited to Dr. Upson that Raleigh is a "passive dependent person . . . unable to take a dominant role in interpersonal relationships (T.1659-60)." In other words, in Dr. Upson's estimation, Raleigh is a "follower" (T.1660).

Dr. Upson viewed Raleigh's suicide attempt as "...more poor judgment and manipulation than it was a serious suicide attempt (T.1668)." He questioned the degree of which this suicide was caused by major depression (T.1668). Under cross-examination, Dr. Upson admitted that he knew nothing about the murders accept for what Raleigh chose to relate to him (T.1671, 1683-86). Raleigh chose not to relate to Dr. Upson that he beat Timothy Eberlin to death (T.1683-86). Dr. Upson did not know of Raleigh's encounter with Ronald Baker prior to the murders (T.1689-90). He did not know that Raleigh told Baker that he "better shoot" Baker's girlfriend and friend who were waiting outside the gate for Baker (T.1690). Dr. Upson did not know Raleigh had been kicked off of Douglas' trailer several months before (T.1690). Raleigh did not tell him he had threatened to kill Douglas Cox because he wouldn't share his drug trade (T.1690-91). Nor did Dr. Upson know that Raleigh had shot Tim Eberlin (T.1693).

Dr. Upson admitted he could only speculate as to Raleigh's impairment the night of the murders (T.1719-20). In addition, he

was not provided with all the records in formulating his opinion (T.1720). Raleigh told him "there was more money ***dealing drugs*** than working, so he quit his job" (T.1720). When Dr. Upson was asked if Raleigh was "building a better, bigger drug dealer out of himself," he responded: ***"He's expanding"*** (T.1721). Dr. Upson did not find that Raleigh was under extreme duress or substantial domination by another (T.1724). Raleigh did not take responsibility for what he had done until Figueroa pointed the finger at him (T.1724). Raleigh was impaired that night, but not substantially (T.1745).

Raleigh took the stand on his own behalf, and stated that his suicide attempt was mostly to get attention (T.1764-65). He admitted he was dealing drugs, but self-servingly classified himself as a "mule" (T.1770). He sold drugs in Florida just before Christmas, 1993, until the first week of February, 1994 (T.1771). About the incident at Club Europe, he testified that after he placed his mom in Figueroa's car, he apologized to the Cox brothers for what had happened because he figured his mom had instigated the trouble (T.1777) Raleigh said he shook Douglas' hand, and told Jason he was sorry, that his mom was drunk (T.17789-79). Raleigh acknowledged that he may have told Darin Chalkley, "it's all about money" (T.1782). When asked by his co-counsel where he was selling

pot at the time of the murders, Raleigh said only in Virginia (T.1792-93).

Under cross-examination, Raleigh admitted that most of the arguments he had with his stepfather were about his drug dealing (T.1808). He quit his job at Deltona Transformers because he had already begun dealing drugs, was staying out late at night, and couldn't get up for work (T.1810). Once he started hauling marijuana to Virginia he quit working there (T.1810). When Garret Lennon ripped him off for 11 pounds, he asked Figueroa for a gun so he could collect the money owed him (T.1813-14).[18] After Lennon ripped him off, Raleigh stole his customers so he could pay Figueroa back (T.1816).

He started ***dealing drugs*** in Virginia with Jeremy Lee, who he recruited to sell and distribute (T.1818). Raleigh and David Vanover were moving ten (10) pounds every two weeks (T.1820) Raleigh was making anywhere from $12,000, $13,000, up to $20,000 each run (T.1820). Raleigh was getting tired of running back and forth to Florida every two weeks, and asked Figueroa if he could increase the amount he carried to 50 pounds so he would only have

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[18]Figueroa fronted Raleigh 11 pounds, but warned Raleigh not to deal with Lennon because he ripped people off. Raleigh did anyway because Lennon and he grew up together and were friends (T.1771, 1814)

to make the run once a month (T.1821).[19] Figueroa said that was okay if he came up with the right vehicle, so Raleigh came up with the idea of a hidden compartment (T.1821).[20] Ray Hottinger installed an extra gas tank on the Subaru for that purpose (T.1822).

When the murders went down, Figueroa did not tell him to kill Douglas Cox (T.1837). Figueroa did not threaten Raleigh when his gun jammed and Raleigh finished Tim Eberlin off (T.1840). He burned his clothes and hid the Subaru (T.1848). Instead of calling the police, he called Figueroa (T.1849). Raleigh called his drug partner in Virginia, David Vanover, before he took the Subaru to Sally Holt's house, to tell Vanover he shot somebody (T.1850). The story he and Figueroa agreed upon as to their whereabouts at the time of the murder, was that they were looking for Raleigh's mom (T.1850). Raleigh did not start to cry until he knew he had been caught (T.1854). Once in Virginia, at Vanover's trailer, he threatened Charlie Hill with a .9 millimeter (T.1859-60). Raleigh hit Tim in the head more than twenty (20) times.

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[19]This meant he would be increasing the amount of marijuana he transported to Virginia every month by 10 pounds.

[20]In his deposition taken after his pleas to the murders, Raleigh said the idea of the hidden compartment was Ray Hottinger's idea (T.975-77).

SUMMARY OF THE ARGUMENT

I.

The trial court correctly exercised its discretion regarding the jury instructions for "no significant history of criminal activity," "pecuniary gain," and "cold, calculated and premeditated."

II.

The trial court correctly exercised its discretion regarding the removal of a juror who expressed hostility to one of the prosecutors in open court, and to other jurors in the jury room and break room. Raleigh has failed to demonstrate manifest error. Deference is due the trial judge who was present to observe the juror's demeanor.

III.

The evidence clearly supports the finding of the aggravating factors complained of by Raleigh in his brief. The murders occurred after alleged permission to enter one of the victim's trailer had been implicitly withdrawn by his execution-style murder. The other victim was brutally killed so as to eliminate him as a witness.

IV.

The trial court correctly exercised its discretion in finding

those mitigators which were reasonably supported by the evidence.

V.

Death was proportionate for this double homicide.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN INSTRUCTING THE JURY.

Trial judges have wide discretion in decisions regarding jury instructions, and appellate courts will not reverse decisions regarding instructions in the absence of prejudicial error that would result in a miscarriage of justice, ***Sheppard v. State, 659 So.*** 2d 457 (Fla. 5th DCA 1995). The trial judge has the responsibility to properly and correctly charge the jury in each case, and the judge's decision regarding the charge to the jury has historically had the presumption of correctness on appeal. ***Kearse v. State, 662 So.*** 2d 677, 681-82 (Fla. 1995).

Jury instructions must relate to issues concerning evidence received at trial. ***Butler v. State, 493 So.*** 2d 451, 452 (Fla. 1986) ; ***See also, Johnson*** *v. Singletary,* ***612 So.*** 2d 575 (Fla.), ***cert. denied,*** 113 S.Ct. 2049 (1993)(Trial judge has discretion not to instruct on aggravating factors clearly unsupported by any

evidence.). Similarly, a defendant is entitled to an instruction on a theory of defense only if there is evidence to support it *Robinson v. State, 574 So.* 2d 108, 110-11 (Fla.), *cert. denied, 112* S.Ct. 131 (1991). In this cause, the trial court correctly exercised its wide discretion regarding three instances Raleigh alleges error.

A. **No Significant History of Criminal Activity**

Raleigh concedes at p.14 of his brief:

> ...Appellant is aware of those cases that hold that this statutory mitigating factor can be rebutted by evidence of criminal activity which did not result in either arrests or convictions, see, Walton v. State, 547 so. 2d 622 (Fla. 1989) Smith v. State, 407 so. 2d 894 (Fla. 1982)... .

He concludes the aforementioned statement by stating that "these cases do not stand for the proposition that a trial court need not instruct the jury on this mitigating factor."

First, Raleigh completely ignores the aforementioned precedent which holds that a defendant is entitled to an instruction on his theory of defense only if there is evidence to support it. *Robinson v. State, supra*. Second, it would seem that what Raleigh is really arguing about here is not that the trial court failed to instruct on the statutory mitigator of "no significant history of prior criminal activity," rather it is that the trial court failed

to find this mitigator. Either way, it is a matter of the trial court's sound discretion. To get the instruction, the mitigator must first be supported by the evidence, and the standard of review regarding mitigation as espoused by this Court is as follows:

> The trial court, in considering allegedly mitigating evidence, must determine whether the facts alleged in mitigation are supported by the evidence, *See Rogers v. State, 511 So.* 2d 526, 534 (Fla. 1987), *cert. denied,* 484 U.S. 1020, . . . (1988). After making this factual determination, the trial court must then determine whether the established facts are of a kind capable of mitigating the defendant's punishment. (Footnote omitted.) The decision as to whether a mitigating circumstance has been established is within the trial court's discretion. *See Preston v. State,* 607 So. 2d *404* (Fla. 1992), *cert. denied, 507* U.S. 999, . . . ((1993); *Lucas v.* **State,** *568 So.* 2d 18 (Fla. 1990).

Bonifay v. State, 626 So. 2d 1310 (Fla. 1996).

In this cause, the evidence was overwhelming that Raleigh was not only a drug dealer, but a drug user as well, and he admitted as much on the witness stand.[21] When this matter was raised at the Charge Conference, the trial court found: "We have extensive ***evidence of drug dealing*** (T. ***1888-89).*** " The trial court acknowledged that counsel would not be precluded from arguing no prior conviction, but it would not give an instruction on 'no

[21]In the State's rendition of the facts in this brief, evidence of Raleigh's drug dealing was emphasized.

significant history of criminal activity," which was clearly refuted by the evidence adduced during the Penalty Phase (T.1889). The trial court was entirely correct in finding in its sentencing order for both the murders of Tim Eberlin and Douglas Cox, regarding the statutory mitigator of "no significant history of prior criminal activity, as follows: "This factor is not established. To the contrary, Raleigh had an **extensive history of *drug dealing and drug use*** (R.226, 233)." Raleigh's argument as to this point focuses on his self-categorization of himself as a 'mule" as evidence that he was not a "drug dealer", and completely ignores the evidence of his drug use. The State presents the evidence of both which supports the trial court's finding.

The night of the murders, Raleigh told Patricia Pendarvis and Darin Chalkley he needed to talk to Douglas Cox, because he knew somebody in New York who wanted to make a deal (T.849). Raleigh told Chalkley: ***"[I]t's all about making money*** (T.849)."[22] Raleigh's deposition, taken subsequent to his pleas on the murders of Tim Eberlin and Douglas Cox, was as much about drug dealing and drug use as it was about the murders of the victims, After Raleigh moved to DeLand, he learned at a keg party at his uncle's place

[22]Patricia Pendarvis testified she heard Raleigh say this twice (T.1307, 1309) .

that Douglas Cox was selling acid, marijuana and other drugs (T.939). Raleigh was 17 or 18-years-old at the time (T.939). Raleigh *bought 'acid"* from Douglas (T.939).

Raleigh stated he met Tim Eberlin through Garret Lennon, who he dealt drugs with until Lennon ripped him off for some money (T.939-41). Raleigh provided extensive testimony regarding Figueroa's arrest in Ocala, where he was carrying 30 pounds of marijuana (T.944-60). Raleigh was with Figueroa at this time, but the drug agents let Raleigh go so he could report back to Elaine Figueroa what had happened to her husband, and to give her a phone number where she could reach them (T.951-52). Raleigh was told if he did not cooperate, he would be arrested along with Figueroa (T.952).

Raleigh did report back to Elaine, and helped her hide 100 pounds of marijuana placed in trash cans under her house (T.953-54). The next night Raleigh dug the marijuana **back** up, so it could be quickly disposed of to some guys in Ocala with Georgia plates (78 pounds), with the remainder going to some other guys in DeLand (T.954-56). Raleigh related how there would be times at the Figueroa's house that he witnessed Elaine counting **thousands of dollars in cash stacked around her bed (T.958).** Elaine "handled all the money (T.959)." Raleigh admitted he "was selling for

Domingo" [Figueroa] to make up the money he lost when Lennon ripped him off for 11 pounds (T.963). Raleigh eventually ended up stealing Lennon's customers away from him (T.964-67).

Raleigh began running 10 pounds of marijuana to Virginia every two weeks (T.970-73). Figueroa would front him the marijuana and he would return with the cash (T.970-73). Raleigh became nervous transporting marijuana so frequently and asked Figueroa if he could transport more less often (T.973). Figueroa told him if he purchased a better vehicle, he would front him 50 pounds (T.973).[23] David Vanover, Raleigh's cousin, purchased a Subaru so Raleigh could transport more marijuana (T.974-77). A hidden compartment was created by welding an old Chevy gas tank underneath the Subaru (T. 975-77). The plan was to increase the amount of marijuana carried so Raleigh would only have to make the trip to Florida once a month (T.978).

The last trip Raleigh made he carried $12,000.00 cash in the secret compartment (T.983). Raleigh was suppose to return with marijuana that Friday night, but Figueroa couldn't get his hands on any (T.987). The next day, Saturday, he still couldn't get any, and in the early morning hours of Sunday, Raleigh committed the

[23]Raleigh had purchased Figueroa an El Camino in Virginia so he could drive to Mexico and pick up 100 pounds (T.993).

murders (T.987). At Club Europe, prior to the murders, Raleigh had approached Garret Lennon to ***purchase*** some ***cocaine,*** but his mother intervened (T.lOOO). Sunday afternoon, he called Vanover, who he admitted he was partners with up in Virginia, and told him he was involved in a shooting (T.1060-63). Raleigh was the connection between Figueroa and Vanover, neither had access to the other without Raleigh (T.1065-66).

Reverend Hal Marchman testified Raleigh told him "he had ***messed with drugs and sold drugs*** (T.1206)." Ron Baker testified that on the night of the murders, when he encountered Raleigh on Douglas' front porch, Raleigh told him he needed to talk to Douglas about a guy from New York who wanted to buy some marijuana (T.1284). Ron's girlfriend, Patricia Pendarvis, testified that when Raleigh approached her and Darin Chalkley he spoke of some deal he was suppose to make,. and that ***"everything was all about making money"*** (T.1307). Raleigh repeated this statement when he returned with Ron (T.1308-09).

Joseph Miller testified he was dealing with Douglas Cox (T.1362-63). Miller, in late 1993 or early 1994, heard Raleigh ask Doug to give up part of his drug business (T.1365). When Doug responded he must be crazy, Raleigh answered, "one day or other I'm going to take over your business anyway even if I have to kick your

ass" (T.1365-66). Miller said those present took it as a joke, but he did not (T.1366). Later in 1994, Miller bought a couple hits of acid from Raleigh at Club Europe, and Raleigh asked him why Doug had thrown him off his property (T.1367-68). Miller said it was probably because of Raleigh's partner, Salta, who had threatened Doug's brother, Jason (T.1363-65, 1368). Raleigh complained that Doug was being selfish about his drug trade, and commented: "It doesn't matter anyway. I am either going to kick his ass or I'm going to kill him, one or the other (T.1369)." Raleigh apparently hated that Doug was making more money than him (T.1369). In Miller's eyes, the murders were attributable to "the money thing" (T. 1369). He saw Raleigh take ***LSD,*** and testified Raleigh was a ***heavy drug user*** (T.1392).

Raleigh's case in mitigation also revealed evidence of his drug dealing. Gene Collins of Wise County, Virginia, father of Raleigh's former girlfriend, Donna Stewart, admitted he knew "pretty much all the people Raleigh started hanging out with were all involved in dealing drugs (T.1472-73)." Mr. Collins also knew Raleigh was running drugs between Florida and Virginia (T.1473-74).

Raleigh's mother, Janice Figueroa, testified she learned her son was ***using cocaine*** when he was 18 (T.1542) She also knew he ***took acid*** (T.1542). She lectured her son, and told him he couldn't

live under her roof if he continued using drugs (T.1543). Raleigh moved to Virginia (T.1543).

Raleigh's co-counsel, Mr. Clayton, referred to his client as a ***"drug dealer,"*** when he was questioning Raleigh's mother Janice Figueroa (T.1544). Janice admitted she knew her son was "a drug dealer" (T.1544). Mr. Clayton also asked Janice when she knew Raleigh became involved ***"in the drug trade,"*** to which she responded February 1, 1994 (T.1544-46). Janice testified she had wanted her son's drug dealing to stop, and admitted he "***was making his living selling drugs***" before the murders (T.1573-74).

Dr. Garcia testified that when she evaluated him after his alleged suicide attempt, Raleigh told her he abused alcohol and ***smoked pot*** with friends (T.1622). Dr. Upson testified Raleigh became involved with ***drugs*** in high school (T.1649). Raleigh stated during his interview ***"there was more money dealing drugs than working,*** so he quit his job (T.1720)." When asked if Raleigh was "building a better, bigger drug dealer out of himself," Dr. Upson responded: ***"He's expanding*** (T.1721)."

Raleigh, himself, admitted on the witness stand he ***took acid, huffed Freon, used cocaine, took sleeping pills (T.1767).*** He also admitted ***dealing drugs,*** but self-servingly referred to himself as a "mule" (T.1770). He sold drugs in Florida just prior to

Christmas, 1993, until the first week of February, 1994 (T.1771). He admitted he was selling pot in Virginia at the time of the murders (T.1792-93). He quit his job at Deltona Transformers because he had already begun dealing drugs (T.1810). He dealt drugs in Virginia with Jeremy Lee, who he had recruited to sell and distribute (T.1818).

Raleigh and his cousin, David Vanover were moving 10 pounds of marijuana every two weeks (T.1820). Raleigh was making anywhere from $12,000 to $20,000 each run (T.1820). He was getting tired of running back and forth to Florida so often, and had arranged with Figueroa to transport 50 pounds once a month, increasing the quantity he had been carrying twice a month by 10 pounds (T.1821). Truly, as Dr. Upson testified, Raleigh was ***"expanding"*** his drug business at the time of the murders. In a letter the trial court allowed Raleigh to read to the jury, he admitted: "You always hear people preaching about how alcohol and ***drugs*** destroy your life, but they never explain to you how your problems can really devastate and destroy other people's lives (T.1866)."

Given this overwhelming evidence of Raleigh's ***drug dealing*** and ***drug use,*** not the least of which was his own testimony, the trial court was entirely correct in finding that the statutory mitigator of "no significant history of prior criminal activity" did not

exist, and in not giving a jury instruction on the same. Contrary to Raleigh's assertion at p.15 of his brief, "[w]hether this evidence constituted 'significant criminal conduct,' is open to debate," this evidence clearly demonstrated **Raleigh *had a significant history* of *prior criminal activity,*** and his argument in this regard is spurious. Further, in view of this overwhelming evidence, the trial court's failure to give such an instruction if deemed error, which the State does not concede, would most certainly be harmless beyond a reasonable doubt. *State v. DiGuilio, **491 So,*** 2d 1129 (Fla. 1986).

B. **Pecuniary Gain**

At pp.15-16 of his brief, Raleigh complains that the trial court erred in instructing the jury on the "pecuniary gain" aggravator. The State is aware that the trial judge found this factor was not proven beyond a reasonable doubt as to both murders, and that such a factual determination is entitled to deference. However, simply because the trial judge made this finding, does not mean that the evidence would not have supported a contrary finding, much less that the evidence was insufficient to warrant an instruction on this aggravator. In *Bowden **v. State, 588 so.*** 2d 225, 231 (Fla. 1991) this Court opined:

> The fact that the state did not prove this

> aggravator to the trial court's satisfaction does not require a conclusion that there was insufficient evidence of robbery to allow the jury to consider the factor. Where, as here, evidence of a mitigating or aggravating factor has been presented to the jury, an instruction on the factor is required.

This Court has further opined:

> In certain limited circumstances where the aggravator is unquestionably established on the record and not subject to factual dispute, this Court will find an aggravator that the trial court has failed to find. See, e.g., Pardo v. Stat-e, 563 so. 2d 77, 80 (Fla. 1990) (prior violent felony aggravator), cert. denied, U.S. , 111 S.Ct. 2043, 114 L.Ed.2d 127 (1991).

DeAngelo v. State, 616 So. 2d 440 (Fla. 1993). "A judge should instruct ***a*** jury only on those aggravating circumstances for which credible and competent evidence has been presented." *Hunter v. State,* 660 So. 2d 244, 252 (Fla. 1995), *cert. denied,* 116 S.Ct. 946 *(1996).* "For actual sentencing purposes, the aggravating circumstances must be proven beyond a reasonable doubt." (emphasis this Court's) *Id., citing Atkins v. State, 452 So.* 2d 529, 532 (Fla. 1984). The evidence in this cause was sufficient to support a "pecuniary gain" instruction.

Patricia Pendarvis testified that when Raleigh talked to Darin Chalkley and herself, Raleigh was talking about a deal he was suppose to make, and that ***"everything was all about making money"***

(T.1307). After Raleigh went up to Douglas Cox's trailer, and returned with her boyfriend Ron Baker, he repeated *"everything was all about making money"* (T.1309).

Joseph Miller, who worked deals with Douglas Cox, testified that in late 1993 or early 1994, he heard Raleigh ask Doug to give up part of his drug business (T.1365). When Doug responded he was crazy, Raleigh answered, "one day or other I'm going to take over your business anyway even if I have to kick you ass" (T.1365-66). Those present took it as a joke; Miller did not (T.1366). Later in 1994, at Club Europe, Miller bought a couple of hits of acid from Raleigh (T.1367). Raleigh commented that Doug was being selfish about his drug trade (T.1368). He went on to say: "It doesn't matter anyway, I am either going to kick his ass or I'm going to kill him, one or the other (T.1369)." Miller testified Raleigh hated the fact that Doug made more money than him, and opined: "...it's the money thing is what it was" (T.1369). At the time of the murders, Raleigh was "expanding" his drug dealing.

Even if it was error for the jury to be instructed upon the "pecuniary gain" factor, which the State does not concede, it would be harmless beyond a reasonable doubt "because we can presume that the jury disregarded the factors not supported by the evidence." *Fotopolous v. State, 608 so.* 2d 784 (Fla. 1992), *cert. denied, 113*

S.Ct. *2377* (1993), *citing Sochor* ***v. Florida, 504*** U.S. 527, 538, 112 S.Ct. 2114, **2122,** 119 L.Ed.2d 326 (1992). The cases cited by Raleigh do not refute this conclusion. *Omelus v. State, 584 so.* 2d **563** (Fla. 1991) and *Bonifay v. State, 626 So.* 2d 1310 (Fla. 1993) concerned the improper finding by the trial court of the heinous, atrocious or cruel aggravator, and this Court sent those causes back because it could not determine what effect finding this factor had in the sentencing process. A similar result occurred in *Padilla v. State, 618 So.* 2d 165 (Fla. 1993) regarding the finding of cold, calculated and premeditated. Given the aforementioned presumption, and the trial court's finding the "pecuniary gain" factor was not proven beyond a reasonable doubt, this Court can discern the complained of instruction had no effect upon the sentencing process.

C. **Special Instruction on Cold, Calculated and Premeditated**

In *Jackson* v. *State,* 648 So, 2d 85, 89, n.8 (Fla. 1994), this Court ordered as follows:

> **8.** ***Until such time as a new standard jury instruction can be adopted, the following instruction should be used:***
>
> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. In order for you to consider this aggravating factor, you must find the

> murder was cold, and calculated, and premeditated, and that there was no pretense of moral or legal justification. "Cold" means the murder was the product of calm and cool reflection. "Calculated" means the defendant had a careful plan or prearranged design to commit the murder. "Premeditated" means the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder. A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

At the Penalty Phase Charge Conference in this cause, the matter of the CCP instruction was addressed as follows:

> THE COURT: That is footnote 8 in Jackson, right?
>
> MR. DALY: Yes, sir.
>
> MR. CLAYTON: I understand that. Does the court have Judge Shaffer's [Schaeffer'sl little treatise with him right now?[24]
>
> THE COURT: I do. I can put my hands on it real quick.
>
> MR. DALY: They don't give prosecutors that treatise for some reason.
>
> MR. CLAYTON: We have two -- and since it's so well written. Page 46 of Judge [Schaeffer'sl treatise -- let me give this to Sean -- is better, more complete. Page 45 and 46 is what I asked the Court

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[24]Raleigh referred to the Judge as Susan Schaeffer at p.16 of his brief. The State will presume this is the correct spelling, and will utilize this spelling of her name in place of the court reporter's.

to look at.[25]

> THE COURT: I would -- I am aware of that, but I am ***still going to go with footnote 8 in*** **Jackson.** ***The Supreme Court said until we draft another one, use footnote 8.*** I was **aware** she had some other ideas in her treatise here but --
>
> MR. CLAYTON: You don't think -- I'm not arguing, but you don't think that hers complies with footnote 8 of Jackson and also -- but makes it clearer?
>
> THE COURT: No, I feel I am sort of compelled to go with ***Jackson*** in the meantime. (T.1904-05)

The CCP instruction given in this cause was as follows:

> 6. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, In order for you to consider this aggravating factor, you must find the murder was cold and calculated and premeditated, that there was no pretense of moral or legal justification. "cold" means the murder was the product of a calm and cruel reflection, "Calculated" means the defendant had a careful plan or prearranged designed to commit the murder. "Premeditated" means the defendant exhibited ***a*** higher degree of premeditation than that which is normally required in a premeditated murder, A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce a degree of homicide,

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[25]The trial court ordered these pages be made a "Court Exhibit" (T.1905). Raleigh's discussion of Judge Schaeffer's Treatise fails to provide ***a*** record cite as to this document. Instead, he quoted the relevant instruction in his brief. The State's review of the record did not reveal Defense Proposed Instructions, and the Master Index to Exhibits does not contain such a "Court Exhibit."

> nevertheless reflects the otherwise cold and calculating nature of the homicide.
>
> "Premeditation" as required in a premeditated murder is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law doesn't fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of the time must be long enough [to] allow reflection by the defendant. The premeditated intent to kill must be formed before the killing. (R.166; T.1981-82).

At the conclusion of its charge, the trial court inquired:

> THE COURT: . . . Any additions or corrections to the instructions as read?
>
> MS. BLACKBURN: Not from the State.
>
> MR. TEAL (Defense): None your Honor. (T.1991)

First, Raleigh did not renew his objection to the CCP instruction when the trial court instructed the jury, and his claim in this regard is, therefore, *procedurally barred. See, Freeman v. State,* **563 So.** 2d 73 (Fla. 1990), *cert. denied, 501* U.S. 1259 (1991). Second, the trial court can hardly be found to have erred for following the directive of this Court in *Jackson* regarding the CCP instruction.

Interestingly, the CCP instruction given in this cause was very similar to the standard instruction which **was** "proposed by the committee in response to Jackson..." and adopted by this Court on

December *7, 1995, Standard Jury Instructions in Criminal Cases (95-2)*, ***665 so,*** 2d 212 (Fla. 1995). The 1995 CCP standard instruction reads:

> *9.* The crime for which the defendant is to be sentenced was committed in a cold and calculated and premeditated manner, and without any pretense of moral or legal justification. "Cold" means the murder was the product of calm and cool reflection. "Calculated" means having a careful plan or prearranged design to commit murder.
>
> [As I have previously defined for you] a killing is "premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing. However, in order for this aggravating circumstance to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.
>
> A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated or premeditated nature of the murder.

At p.18 of his brief, Raleigh argues:

> ***The requested instruction is virtually identical to the one given [in this cause] with the exception of an additional paragraph.*** Defense counsel argued that it was this paragraph that he was most interested in which talked about the heightened level of premeditation as demonstrated by deliberate ruthlessness. This was important in the

> instant case since there was a great deal of evidence concerning Appellant's ingestion of alcohol on the evening in question, and whether, in light of this, he could in fact act with deliberate ruthlessness so as to constitute the heightened premeditation necessary for this aggravating factor.

There are a few matters in Raleigh's argument the State would take issue with. First, he incorrectly represents that his trial counsel "argued that it was this paragraph that he was most interested in which talked about the heightened level of premeditation as demonstrated by deliberate ruthlessness." Nowhere in the State's reading of the discussion of the CCP instruction at the Charge Conference did defense counsel make the argument regarding Judge Schaeffer's "deliberate ruthlessness" paragraph that he now makes for the first time on appeal (T.1904-05). Therefore, not only is Raleigh's claim here procedurally barred for failing to renew his objection, but it is procedurally barred for failing to make this argument in the lower court. *See Larkins v. State,* 655 So. 2d 95, 99 (Fla. *1995); Peterka v. State, 640 So.* 2d 59 (Fla. 1994), *cert. denied,* 115 S.Ct. 940 (1995); *Bertolotti v. State,* 565 So. 2d *1343* (Fla. *1990); Jackson* v. State, 451 So. 2d 458 (Fla. 1984); *Steinhorst v. State, 412 So.* 2d 332 (Fla. 1982).

Second, the State would note that Judge Schaeffer's proposed CCP instruction was obviously available to the committee at the

time it formulated the standard CCP instruction. Her "deliberate ruthlessness" is conspicuously absent from the standard instruction. Therefore, the trial court was certainly under no obligation to utilize an instruction with language that was not adopted by the committee and this Court. Further, not only is the CCP instruction in this cause similar to the current standard instruction, it is arguably clearer than that found constitutionally sufficient in *Hunter v. State, supra*. In short, there was no error.

Third, in the sentence preceding the aforementioned argument, Raleigh argued that the instruction given by the trial court was "the one fashioned on an emergency basis in light of this Court's decision in Jackson . . . ." The clear implication here is that this Court's instruction in footnote 8 was not well thought out. It is the State's position that this Court would not have promulgated an order regarding an instruction unless it was carefully considered.

If this Court were to find that the trial court erred in complying with this Court's directive regarding the CCP instruction, which the State does not concede, then it was harmless beyond a reasonable doubt because the facts surrounding Douglas Cox's murder established his demise as CCP under any definition, including Judge Schaeffer's. *Larzelere v. State, 676 So.* 2d 394

(Fla. 1996); *Archer v. State, 673* So. 2d 17, 19 (Fla. 1996); *Foster v. State, 654 so.* 2d 112 (Fla.), *cert. denied,* 116 S.Ct. 314 (1995). The trial court's findings of fact regarding the CCP aggravator, which come to this Court clothed with a presumption of correctness,[26] clearly demonstrate harmlessness and were as follows:

> Before the murders the Defendant and co-Defendant drove to Raleigh's house to obtain the handguns. They then drove a distance to Cox's trailer that was located in a rural area down an unlighted dirt road. Raleigh had to show Figueroa where the trailer was located. On the dirt road they bumped into Pendarvis and Chalkley. The Defendant first tried to conceal something. Shortly after that he came out of the car with his hands up, Then he proceeds, armed with a 9MM, to the trailer for the first time. He meets Baker and displays the loaded 9MM. On the way back from the trailer, going towards the road, the Defendant tells Baker he should "pump a couple of caps at them" (at Pendarvis and Chalkley). After Baker, Pendarvis, and Chalkley leave the Defendant doubles back and enters the locked trailer. He executes a sleeping cox, then eliminates Eberlin. For the fourth time that night he leaps the fence (see State #2) and leaves. He and the co-Defendant then burn their clothes, hide the guns in a secret compartment, and dump bullets in a neighbor's yard.
>
> These facts clearly establish a cold, calculated and premeditated murder. There was ample time to reflect. There was opportunity to abandon the plan, especially when Defendant first left Baker. Instead the Defendant doubled back and went to the trailer a second time. There is no doubt but that the Defendant had a prearranged plan to go to Cox's

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[26] *Shapiro* v. State, 390 So. 2d 344 (Fla. 1980).

trailer and murder him. (R.225)

POINT II

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN DISMISSING JUROR CHANDLER.

"The test for determining juror competency is whether the *juror* can lay aside any bias or prejudice and render his verdict solely on the evidence presented and the instructions on the law given ... by the court." *Vining v. State, 637 So.* 2d 921, 927 (Fla.), cert. *denied 115* S.Ct. 589 (1994), *quoting Lusk* v. State, **446** *So.* 2d 1038, *1041* (Fla.), *cert. denied,* 469 U.S. 873 (1984). "To prevail on this issue, a defendant must show that the trial court, in excusing the prospective juror for cause, abused its discretion." *Hannon v. State,* 638 So. 2d 39, **41** (Fla. 1994), cert. *denied,* 115 S.Ct. 1118 (1995); *Vining* v. State, *supra.*

"It is within the trial court's province to determine if a challenge for cause is proper, and the trial court's determination of juror competency will not be overturned absent manifest error." *Foster v. State, 679 So.* 2d **747** (Fla. 1996). "Despite a lack of clarity in the printed record,

> there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . . [T]his is why

> deference must be paid to the trial judge who sees and hears the juror.

Hannon v. State, supra, at *41, quoting Wainwright v. Witt, 469* U.S. 412, 424, 105 S.Ct. 844, 852-853, 83 L.Ed.2d 841 (1985). "This is subject to an abuse of discretion review because the trial court has the opportunity to observe and evaluate the prospective juror's demeanor and credibility." *Castro v. State,* 644 So. 2d 987 (Fla. *1994).* In this cause, the trial court was left with the impression that Juror Chandler would not be able to faithfully execute his duties and impartially render his recommendation regarding the death penalty because of his personal animosity toward one of the prosecutors.

In order to make a fair determination upon this issue, a more complete rendition of the facts surrounding this matter, than that afforded by Raleigh in his brief at pp.20-21, is necessitated. When Raleigh was further cross-examined by prosecutor, Sean Daly, after being allowed to read a letter expressing his alleged remorse, the record exhibits the following transpired:

> Q Then you talked to doc Upson and you **gave a** statement to the State?
>
> A Yes.
>
> Q In the statement, you still don't say you know who killed these two individuals, do you?

A No. I don't know why.

Q Because you remember things like taking the gun --

JUROR (Mr. Chandler): ***Sit down dummy, shut up.*** (T.1870)

Defense objections of "outside the scope" and "asked and answered" were sustained, and Mr. Daly ceased asking questions (T.1870). Court was recessed for the day to reconvene August 15, 1995, at 8:30 a.m. (T.1871). The next morning commenced with the Charge Conference, at the conclusion of which, the State made the following record:

> MS. BLACKBURN: Your Honor, I heard yesterday at the close of the proceedings Mr. Chandler, who is the second juror from the left end in the back row against the wall --
>
> THE COURT: Charles Chandler.
>
> MS. BLACKBURN: -- indicated during the recross-examination of Mr. Raleigh when Mr. Daly was standing -- ***he made a statement that I heard as "Sit down, dummy."*** Apparently, he had made a statement earlier in the day, also words to the effect of, "Oh, shit" when --
>
> THE COURT: Pardon, ma'am?
>
> MS. BLACKBURN: -- when Mr. Daly stood up to recross examine Dr. Upson who testified in the morning.
>
> It is the State's concern that those types of statements when the State was proceeding in its cross examination, has created a -- for lack of a

better word -- a ***hostile juror*** and is inappropriate. ***And we would ask at this time for the Court to strike that juror and move in the first alternate juror in his place.***

The defense rejoined:

MR. CLAYTON: Quite frankly, Your Honor, I was surprised this morning to hear the State believing that statement was made to Mr. Daly. I heard the second statement. I did not hear the first one. Last night we were wrestling with what to do because we were convinced that the statement was directed at me during one of my objections to Mr. Daly, And, in fact, our client even heard it from the witness stand and was absolutely convinced that it was my objection, that they were fed up with me instead of Mr. Daly.

That's all I can say. We don't want to have him struck. ***I think he might be fed up with the whole process, quite frankly.***

THE COURT: I didn't quite hear the one in the morning. I did hear the one in the afternoon. And, ***frankly, the way I took it was just frustration with*** the ***proceedings dragging on. It was directed at Mr. Daly,*** but I didn't take it as hostile to him personally, just the fact that the witnesses had been battered and bruised yesterday by the attorneys. And I think that particular juror felt that was enough at that point.

So, I don't feel there is really that much cause to remove him. ***I don't think he was hostile necessarily to either the*** State ***or the defense,*** just ***the proceedings dragging on and on.***

State, I will do this, since ***I agree with you that it was directed at the State as opposed to the defense,*** if you want, I'll read him that instruction on Page 1093 about remembering that the lawyers aren't on trial. If you want that, I will

give it. (T. 1916)

Ms. Blackburn accepted the trial court's offer, and that was that at least temporarily (T.1916-17). The jury **was** called in briefly so both sides could rest and the trial court could explain how the day **was** to proceed (T.1921). The jury was then given a recess until 10:30 a.m. (T.1922).

The State renewed its motion to remove Mr. Chandler from the jury, based upon additional comments made by him during the recess in the presence of the State's Clerk, Lock Battell, who was called to testify (T.1925). Lock testified that he had gone to the jury's break room to get a cup of coffee when he overheard Mr. Chandler making comments to at least 4 or 5 other jurors about Mr. Daly (T.1926-27).

> BY MS, BLACKBURN:
>
> Q What did he say and who was he saying it to?
>
> A As far as the comments that were made, it was said that he didn't like the way Mr. Daly handled himself. He thought that his actions in court were very inappropriate, and ***the comments he made were taken, by me, as hostile towards the State.***
>
> Q Can you be anymore specific about any other comments that he made?

> A Basically, he just stated he didn't like the way he handled himself, He said he was going to far in his cross examinations. He was aggravating the situation and aggravating him personally. (T.1926-27)

Under cross-examination, Lock testified Mr. Chandler's tone of voice **was** "aggravated," and he took it that Mr. Chandler "was angry" (T.1928).

The State argued that this new information revealed that Mr. Chandler was "commenting on the proceedings that are going on in the Court, and that is not appropriate (T.1929)." It further argued that if Mr. Chandler was allowed to remain seated on the Jury it would be prejudiced by his attitude toward Mr. Daly (T.1929). The Defense argued Mr. Chandler's comments did not taint the other jurors, and there was a jury instruction concerning attitudes toward attorneys that could handle the situation (T.1930).

The trial court observed that it had agreed factually with the State regarding Mr. Chandler's remark the day before, and "[t]hose things taken in connection with what apparently has happened here this morning, I am leaning towards granting the State's motion of removing him (T.1930-31)." However, "out of an abundance of fairness," the trial court offered to allow the Defense to examine Mr. Chandler on the witness stand, which they accepted (T.1931-33).

Initially, Mr. Teal remarked:

> Judge, I just ask that my objection be noted on the record if the Court decides to remove him. ***I have no other concern.*** ***We*** **have** ***two alternates, I believe.*** We are eight days into the case. I don't know if they have approached it from the standpoint, well, it looks like I'm not going to be participating, and have they quit paying attention?

The court indicated it was going to move Ms. Mason in, but again offered Defense the opportunity to examine Mr. Chandler (T.1932). The Defense took the second offer and Mr. Chandler **was** called (T.1933-35).

Mr. Chandler admitted he had said in the jury's break room that he was aggravated with Mr. Daly (T.1934). He also admitted that he had become aggravated with him the preceding morning and had made comments to other jurors in the jury room (T.1934-35) He did not think his ill-feelings toward Mr. Daly would prevent him from reaching an unbiased decision (T.1935). Nonetheless the trial court ruled accordingly: "On the basis of the two comments yesterday, and on the basis of the comments today in the jury room, State's motion is granted (T.1935)."

It was the State's position below, and it is now, that Mr. Chandler's admitted hostility toward Mr. Daly would have prevented him from making an unbiased decision regarding the sentence in this cause. The trial court found this position to be a valid one and

removed Mr. Chandler as a juror. "[D]eference must be paid to the trial judge who sees and hears the juror." *Wainwright v. Witt, supra.*

Raleigh has failed to demonstrate the trial court abused its discretion in this regard, and that manifest error occurred. When the State moved to strike Mr. Chandler a second time, after Lock Battell testified as to his comments in the break room, Mr. Teal expressed obvious ambivalence to his being excused, noting that there were 2 alternates present (T.1932). When the matter was first raised, Mr. Clayton remarked "he might be fed up with the whole process, quite frankly (T.1916)." Quite frankly, if this were true, Mr. Chandler should have been removed for this reason.

The bottom line is that the trial court was in the best position to determine Mr. Chandler's competency to continue to serve as a juror. Even if it erred in this matter, which the State does not concede, it would be harmless beyond a reasonable doubt given Mr. Chandler's replacement by an alternate juror. *State v. DiGuilio, supra.* Indeed, that is why alternates are chosen, to step in under circumstances such as the trial court was confronted with in this cause.

POINT III

THE TRIAL COURT PROPERLY FOUND EACH OF THE AGGRAVATORS COMPLAINED OF BY RALEIGH IN HIS BRIEF,

The trial court found the following aggravating factors for each of the murders of Douglas Cox and Timothy Eberlin were proven beyond a reasonable doubt (R.224-25, 231-32). For Count I, the murder of Douglas Cox, the trial court found the following aggravating circumstances applied:

> 1. Convicted of another capital felony, i.e. the first degree murder of Tim Eberlin.
>
> 2. The capital felony was committed while the defendant was engaged in a burglary.
>
> 3. The capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R.224-25)

Raleigh does not challenge the first aggravator, the first degree murder of Tim Eberlin.

As for Count II, the murder of Tim Eberlin, the trial court found the following aggravators:

> 1. Convicted of the first degree murder of Douglas cox .
>
> 2. The capital felony was committed during a burglary.
>
> 3. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

4. The capital felony **was** especially heinous, atrocious or cruel. (R.231-32)

Again, Raleigh does not challenge the first degree murder of Douglas Cox. Before discussing the aggravators challenged by Raleigh **at** pp.23-28 of his brief, the State would note that the trial court's findings of fact in this regard come to this Court clothed with a presumption of correctness. *Shapiro v. State, supra.*

A. The Caeital Murders Occurred During a Burglary.

This Court has found that a burglary has been committed when the defendant "remains in" a structure with the intent to commit an offense therein. *Routly v. State,* 440 So. 2d 1257 (Fla. 1983). In Ray v. State, 522 So. 2d 963, 966 (Fla. 3d DCA 1988), the Third District opined:

> ...it is undeniably true that a person would not ordinarily tolerate another person remaining in the premises and committing a crime, and that when a victim becomes aware of the commission of a crime, the victim implicitly withdraws consent to the perpetrator's "remaining in the premises".

See also, Bundy v. State, 455 So. 2d 330 (Fla. 1984).

The trial court in this cause found as follows for each murder:

> This murder did occur during a burglary. The Defendant entered the locked trailer, at night, armed with a loaded pistol, with the intent to commit murder. If Defendant initially gained entrance with Eberlin's permission it **was** through

> false pretense; and, any permission was certainly withdrawn when Defendant shot Cox three times in the head and remained in the trailer to kill Tim Eberlin. (R.225, 232)

The trial court's finding was supported by the evidence, Both Ron Baker and Patricia Pendarvis testified that when Baker returned to Doug's trailer to warn him about Raleigh, Baker made sure the trailer was all locked up (T.1292-93, 1312). Raleigh's accomplice, Domingo Figueroa told police that Raleigh knocked on a closed trailer door and Tim said: "What's up?" (T.1140). Raleigh then gained access to the trailer (T.1140). Tim refused to wake him up, so Raleigh went to where Doug was sleeping on the couch in the living room and Figueroa heard shots (T.1140-42). Raleigh's account was similar (T.1016-18).

The trial court concluded that Raleigh gained access to the trailer through false pretenses, and any permission Tim may have given was certainly withdrawn when Raleigh executed Douglas Cox. This aggravating circumstance was proven beyond a reasonable doubt. Where there is a legal basis for finding an aggravator, this Court will not substitute its judgment for that of the trial court. *Occhione v. State, 570 So.* 2d 902 (Fla. 1990). However, if this Court should determine that it was improperly found, which the State does not concede, then it was harmless beyond a reasonable

doubt in light of two (2) remaining aggravators for Doug's murder, including the capital murder of Tim, **and** the three remaining aggravators for Tim's murder, including the capital murder of Doug. *See Peterka v. State, supra.*

B. Tim Eberlin Was Murdered To Avoid Arrest.

Murder with the motive to eliminate a potential witness to an antecedent crime can provide the basis for finding the aggravating factor of committing murder for purpose of avoiding or preventing lawful arrest. *Fotopolous v. State, 608 So.* 2d 784 (1992), *cert. denied, 113* S.Ct. *2377* (1993); *See also, Stein v. State, 632 So.* 2d *1361* (Fla.), *cert. denied,* 115 S.Ct. 111 (1994) (Record clearly reflected that defendant and accomplice planned to eliminate any witness to avoid arrest, murder weapon was procured in advance, there was lack of resistance or provocation, and killing appeared to be carried out as matter of course,). This aggravator has been upheld where circumstantial evidence has been used to infer a motive for killing a victim without having the benefit of direct evidence of the offender's thought processes as are present in this cause. *See Hall v. State,* 614 So. 2d 473 (Fla. *1993); Preston v. State, 607 So.* 2d 404 (Fla. 1992), *cert. denied, 507* U.S. 999 (1993) ; *Swafford v. State, 533 so.* 2d 270 (Fla. 1988), *cert. denied,* 489 U.S. 1100 (1989). In this case, as in *Correll* v.

State, 523 So. 2d 562 (Fla.), cert. *denied, 488* U.S. 871 (1988), it is hard to discern why Tim Eberlin was killed except to eliminate him as a witness,

The trial court found:

> The dominant motive for the murder of Eberlin was witness elimination (see Correll v. State *523* So.2nd *562,* (Fla. 1988)). He knew the Defendant was seeking out Cox, saw the Defendant go towards cox, then heard the shots. He knew what happened and who did it. Additionally, there was no evidence Eberlin, unlike Cox, *was* involved in the drug trade or caused the earlier incident at Club Europe. So the only reason for the murder of Eberlin was witness elimination. (R.232)

This finding was supported by the evidence, the most telling of which, concerning Raleigh's intent, was his mother's testimony. Janice Figueroa testified that her son told her late in the morning after the murders that *"Tim wasn't dead* (T.1585-86)." When asked if her son also told her that since Tim wasn't dead, Figueroa should go back there, she responded that she was not sure her son told her that, that she *was* confused, and it may have come from Figueroa's statement, which she read (T.1586). She was impeached with her deposition, in which she said her son told her: "I swear, mother, *I didn't think he was dead. I told Domingo he wasn't dead* (T.1587)." She also admitted saying at her deposition that Raleigh told her *Domingo should go back* (T.1587).

This aggravating circumstance was proven beyond a reasonable doubt. Where there is a legal basis for finding an aggravator, this Court will not substitute its judgment for that of the trial court. *Occhione v. State, supra.* However, if this Court should determine the trial court erred, which the State does not concede, then it was harmless beyond a reasonable doubt in light of the three remaining aggravators for Tim's murder, including the capital murder of Doug. *See Peterka v. State, supra.*

C. Doualas Cox's Murder Was Cold, Calculated and Premeditated.

There are four elements that must exist to establish CCP.[27] *Walls v. State, 641 So.* 2d 381, 387 (Fla. 1994). First, the murder was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage. *Id.* The trial court in its finding as to this aggravator carefully delineated the events leading up to Raleigh's execution of Douglas Cox while he was sleeping (T.225) . This included obtaining the handguns at Raleigh's house, driving a distance to an isolated rural area where Cox's trailer was located at Raleigh's directions, and Raleigh's opportunity to "abandon the plan, especially when Raleigh left with

[27]The State has already published the trial court's finding regarding this factor in its first argument concerning the CCP instruction.

Baker after the first time he went up to the trailer (R.225)." As in *Walls,* the "calm and deliberate nature" of Raleigh's actions establish this element beyond any reasonable doubt,

Second, the murder must be the product of a careful plan or prearranged design to commit the murder before the "fatal incident," *Walls, supra,* at *388, citing Jackson* v. State, 648 So. 2d 85 (Fla. 1994). Again, Raleigh obtained the murder weapon, directed his accomplice on how to get to the victim's trailer located in an isolated rural area, and had the opportunity to abandon his plan. Raleigh "obviously had formed a 'prearranged design' to kill" Cox, because he returned after being thwarted at his first attempt by Baker. Walls, at 388. As the trial court concluded: "There is no doubt but that the Defendant had a prearranged plan to go to Cox's trailer and murder him (R.225)."

Third, there must be heightened premeditation. Therein lies the "deliberate ruthlessness" of Judge Schaeffer's proposed CCP instruction. See Bonifay v. *State, 680 So.* 2d 413 (Fla. 1996); *Wuornos v. State, 644 So.* 2d 1000, 1008 (Fla. 1994); *Walls, supra,* at 388. Such was demonstrated by Raleigh's persistence in gaining access to the trailer and the manner of the execution itself, where he shot a sleeping Cox at close range not once, not twice, but three times in the left temporal area.

Raleigh contends in his brief at p.26 that he was too drunk to have the heightened premeditation necessary to satisfy this aggravator. However, the trial court carefully related in its finding the goal-directed behavior Raleigh engaged in, not the least of which was the navigation of a fence on Cox's property on four separate occasions (R.225). This fence was 4 1/2 to 5 feet high, and was such a significant obstacle that the trial court referred to a photograph of it, State Ex. #2 (R.225; T.1299).

Fourth, the murder must be without a pretense of moral or legal justification, *Walls,* at 388. There is no contention, let alone any evidence of any such justification for the execution-style killing of Douglas Cox. Certainly, Raleigh's voluntary intoxication does not provide such.

There was a legal basis for finding the CCP aggravator for Cox's murder, and it should, therefore, be affirmed. *Occhione v. State, supra.* Alternatively, without conceding as much, if this Court deems there was error, it was harmless beyond a reasonable doubt given the two remaining aggravators, including the capital murder of Tim Eberlin. *Pietri v. State, 644 So.* 2d 1347, 1354 (Fla. *1994); Peterka v. State, supra; Stein v. State, supra.*

D. **Tim Eberlin's Murder Was Heinous, Atrocious or Cruel.**

> ...It is not merely the specific and narrow method in which a victim is killed which makes a murder heinous, atrocious, or cruel; rather, it is the entire ***set of circumstances surrounding the killing.***

Magill v. State, 386 So. 2d 1188 (Fla. 1980), *cert. denied,* 101 S.Ct. *1384* (1981), *(Magi11 I), appeal upon remand, 428 So.* 2d 649, *651* (Fla. 1989), *cert. denied, 104* S.Ct. 198. It has further opined:

> ...In arriving at a determination of whether an aggravating circumstance has been proved the trial judge may apply a ***"common-sense inference from the circumstances,"*** *Swafford v. State, [supra,* at 277], and the common-sense inference from the facts is that the victim struggled with her assailant and suffered before she died, We find no abuse of discretion. *Grossman v. State, 525 So.* 2d 833, 841 (Fla. 1988), *cert denied, 489* U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989).

Gilliam v. State, 582 So. 2d 610, 612 (Fla. 1991).

"The ***mindset or mental anguish*** of the victim is an important factor in determining whether this aggravating circumstance applies." *Phillips v. State, 476 So.* 2d 194, 196 (Fla. 1985). ***"Fear and emotional strain*** may be considered as contributing to the heinous nature of the murder, even where the victim's death **was** almost instantaneous." *Preston v. State, supra,* at 409-10; See *also, Hitchcock v. State, 578 So.* 2d *685, 693* (Fla.), *cert. denied,*

112 S.Ct. ***311 (1990);*** *Rivera v.* ***State, 561 So,*** 2d 536, 540 (Fla. 1990) ; *Chandler v. State, 534 So.* 2d 701, 704 (Fla. 1988), *cert. denied, 490* U.S. *1075 (1989); Phillips v. State, supra; Mason v. State,* 438 So. 2d 374 (Fla. 1983), *cert. denied* 104 S.Ct. 1330 (1984); ***Adams v. State, 412 So.*** 2d ***850*** (Fla.), *cert* ***denied, 103*** S.Ct. 182 (1982). "Moreover, ***the victim's mental*** **state** ***may be evaluated for purposes*** *of* ***such determination in accordance with*** **a** ***common-sense inference from the circumstances."*** *Swafford v. State,* supra, at 277; *See also Preston v. State, supra,* ***at*** *946* ("victim ***must have*** felt terror and fear as these events unfolded" [emphasis this court's]).

The trial court's finding for this factor graphically depicts Tim Eberlin's absolute terror:

> This aggravator was established by the evidence. Raleigh returned from killing Cox then shot a ***screaming*** Eberlin several times. Raleigh's gun jammed, and Eberlin ***kept screaming.*** Eberlin cowered in **a** corner trying to escape. Raleigh then savagely beat Eberlin in the head with the barrel of the 9MM (see State Exhibits 47-49). This beating occurred while Eberlin was still alive. ***The beating*** **was so** ***savage that the barrel penetrated Eberlin's skull*** (see State Exhibit 50). Timothy Eberlin's killing was pitiless, shockingly evil, and unnecessarily torturous. (R.232)

This finding derived from Raleigh's own statements and the testimony of the Medical Examiner, Dr. Reeves, who performed the

autopsy on Tim Eberlin.

Raleigh, himself, described the murder of Tim Eberlin as follows . Tim was **"screaming"** (T.1038-39). Raleigh emptied his Ruger into Tim (T.1041). Tim was ***"still screaming"*** (T.1042). Raleigh began to hit Tim in the head with the Ruger (T.1045) . Tim screamed as Raleigh hit him in the head (T.1045) . ***Raleigh did not stop hitting Tim until he stopped screaming (T.1046).***

Dr. Reeves testified that both the head wounds, and the gunshot wounds [3], were inflicted while Tim was ***alive*** (T.1338). He further testified that Tim would not have been screaming and trying to get to the corner of his bed, if he did not know what was happening to him (T.1358). Tim died of the gunshot wounds and the blunt trauma to his skull (T.1359). The fact that Raleigh related to his mother later that day that he was still concerned Tim was alive, provides further evidence of this aggravator.

Clearly, these facts demonstrate a legal basis for the finding of the HAC factor in the murder of Tim Eberlin. *Occhione* v. State, *supra.* Error, if any, without conceding as much, was harmless beyond a reasonable doubt, because three strong aggravators remain if HAC was struck, including the capital murder of Douglas Cox. *See Watts v. State, 593 So.* 2d 198, 204 (Fla.), *cert. denied,* 112 S.Ct. 3006 (1992) (eliminating HAC harmless where three aggravators

remained to be weighed against one statutory and one nonstatutory mitigator).

POINT IV

THE TRIAL COURT PROPERLY CONSIDERED AND WEIGHED APPLICABLE MITIGATING CIRCUMSTANCES.

At pp. 29-33 of his brief, Raleigh argues the trial court improperly rejected or improperly assigned insufficient weight to both statutory and nonstatutory mitigating factors. "Technically, a trial judge does not reject evidence which is considered in mitigation. Instead, the trial judge finds that its ***weight*** is insufficient to overcome the aggravating factors." *Echols* ***v. State,*** 484 So. 2d 568, 576 (Fla.), *cert. denied, 479* U.S. 871 (1986).

The decision as to whether a mitigating circumstance has been established is within the trial court's discretion, and the court's decision will not be reversed merely because an appellant reaches a different conclusion. ***See Hall v. State, supra; Preston v. State, supra; Lucas v. State, 568 So.*** 2d ***18*** (Fla. 1990), ***appeal after remand, 613 So.*** 2d ***408, 410*** (Fla. 1992); ***Sireci v. State, 587 So.*** 2d 450 (1991), ***cert. denied, 112*** S.Ct. 1500 (1992). "Moreover, whether a mitigator has been established is a question of fact, and

a court's findings are presumed correct and will be upheld if supported. *Campbell v. State,* 571 So. 2d 415 (Fla. 1990)." *Lucas, after remand,* at 410.

Much of what Raleigh "really complains about here is the weight the trial court accorded the evidence [he] presented in mitigation." *Echols, supra,* at *576; citing Porter v. State, 429* So. 2d 293, *296* (Fla.), *cert. denied, 464* U.S. 865 (1983) . "However, 'mere disagreement with the force to be given [mitigating evidence] is an insufficient basis for challenging a sentence."' *Id., citing Quince v. State, 414 So.* 2d 185, 187 (Fla. 1982). Even if this Court should find that one or a combination of the mitigating circumstances discussed infra were not properly applied, failure to do so would be harmless beyond a reasonable doubt given the 7 strong aggravators found for this double homicide. *See Wuornos v. State, 644 So.* 2d 1000, 1011 (Fla. 1994)

A. Raleish Was Not Under Figueroa's Substantial Domination

The trial court's finding in this regard was:

> The defense contends the Defendant was under the domination of his Co-Defendant and cousin, Domingo Figueroa. They presented some evidence that Raleigh **was** a follower, he looked up to the older Figueroa, and that Figueroa was the dominant drug dealer.
>
> The Court does not find this statutory mitigator to have been reasonably established. Looking to

> the murders it was Raleigh and Raleigh alone who killed Cox in his sleep. It was Raleigh who finished off Eberlin at close range. It was also Raleigh, not Figueroa, who went to the trailer, the first time with a 9MM. Raleigh was the principal perpetrator during the two murders. Finally, the evidence indicated it was Raleigh, not Figueroa, who may have wanted a piece of Cox's drug trade.

Raleigh focuses on the trial court's last statement regarding Cox's drug trade as the reason it failed to find this mitigator. By now this Court has become familiar enough with this case to know that there was evidence to this effect, but that the trial court did not feel that it was sufficiently proven to establish the pecuniary gain aggravator.[28]

However, the trial court's real focus was upon the nature of the murders themselves. It was Raleigh that went to Cox's trailer, alone, the first time, and was denied entry by the intercession of Ron Baker. It was Raleigh who entered first when he returned to the trailer. Raleigh executed Cox by shooting him 3 times at close range in the temple as he lay sleeping. Raleigh then shot and savagely beat Tim Eberlin to death. When Raleigh was on the witness stand he admitted under cross-examination that Figueroa did not tell him to shoot Douglas Cox (T.1837). Nor did Figueroa

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[28]It is the State's position that the incident between Cox and Raleigh's mother served as an impetus to Raleigh's desire to eliminate Cox so he could take over his drug trade.

threaten him when Figueroa's gun jammed, and Raleigh finished Tim Eberlin off (T.1840). The trial court was correct in finding this statutory mitigator did not exist. *See Valdes v. State, 626 So.* 2d *1316* (Fla. 1993), *cert. denied, 114* S.Ct. 2725 (1994).

B. **Raleigh's Extensive History of Drug Dealing and Drug Use.**

The trial court's finding in this regard was as follows: "This factor is not established. To the contrary Raleigh had an extensive history of drug dealing and drug use (R.226) ." Raleigh's argument at p.30 of his brief completely ignores his own admitted drug abuse, and focuses on his self-serving categorization *of* himself **as** a "mule." Raleigh was more than a mule, he admitted he was partners with David Vanover, and that neither Figueroa or Vanover could deal with one another without him (T.1066). The State previously argued this point extensively relative to Raleigh's first claim concerning the instruction, and will adopt the same for this argument. Simply put, there was extensive evidence of both drug dealing and drug use, just as the trial court found. It was entirely correct in finding this mitigator did not exist. *See* **Slawson** *v. State, 619 So.* 2d 255 (1993)(In capital case, mitigating factor of no significant criminal activity may be rebutted by record evidence of criminal activity, including drug activity.)

C. Raleigh's Alleged Remorse and Cooperation With Authorities.

The trial court found: "B. Remorseful: The court finds the Defendant is remorseful for the killings (R.228, 234)." Under the trial court's 'Discussion of non-statutory mitigating factors "A" through "E" it found in part:

> This Court finds the plea of guilty and offer to testify against the Co-Defendant to be the most significant and the most mitigating. On the other hand, the Defendant may be remorseful now, but he was not remorseful or cooperative on the day following the murders. (R.228, 235)

When Raleigh was on the witness stand, under cross-examination, he admitted that after Garret Lennon called, asked him of his whereabouts, and informed him Douglas Cox was dead, he called Co-Defendant, Figueroa, instead of the police (T.1053-54, 1849). Later, he called his drug partner in Virginia, David Vanover, to let him know he had shot somebody (T.1850). He then drove his Subaru, where the murder weapons were hidden in a secret compartment, to Sally Holt's house to prevent the police from finding them (T.888-91, 1056-57).

Investigator Horzepa testified Raleigh did not volunteer any information when he first picked Raleigh up at his parents' house (T.1121). Nor did Raleigh volunteer any information during the 12 mile ride to the Operations Center (T.1122). When Raleigh was

shown driver license photographs of the victims, he was "very cold and removed" (T.1122-23). As Raleigh made his first taped statement, he "was cool, somewhat detached" (T.881). Raleigh did not start to cry until his cousin, Figueroa, implicated him in the murders (T.1854). Investigator Horzepa further testified that even after Raleigh was told his cousin had given it up. Raleigh was not forthcoming with his account of what happened (T.1164).[29] These facts support the trial court's conclusion regarding Raleigh's alleged remorse.

D. Figueroa's Sentences

The trial court found:

> H. Sentence of Co-Defendant: The Co-Defendant, Domingo Figueroa, received two life sentences for the same murders. While this could be a mitigating factor the Court does not find it to be so in this case. As previously pointed out [finding for "under substantial domination of another"], Raleigh was the principal perpetrator in these killings. Figueroa, while a participant, played a lesser role. So the distinction in the sentences is logical and warranted. (R.229, 236)

"...A death sentence is not disproportionate when a less culpable co-defendant receives a less severe sentence. *Hannon v. State, supra,* at *44, citing Coleman v. State, 610 So.* 2d 1283, 1287

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[29]This can be easily verified by comparing Raleigh's taped statement, with his deposition taken a year later after he pled to the double homicide.

(Fla. 1992), *cert. denied, 114* S.Ct. 321 (1993); *Craig v.* State, 510 so. 2d *857* (Fla.), *cert. denied, 484* U.S. 1020 (1987). "When co-defendants are not equally culpable, the death sentence of the more culpable co-defendant is not unequal justice when another co-defendant receives a life sentence." *Steinhorst v. Singletary, 638* So. 2d *33* (Fla. 1994), *citing Garcia v. State, 492 So.* 2d 360 (Fla.), cert. *denied,* 497 U.S. 1022 (1986). The trial court's finding relative to the statutory mitigator, "under the substantial domination of another," exhibits the correctness of its finding for this nonstatutory mitigator (R.227, 235).

E. **Raleish's Voluntary Intoxication**

The trial court first addressed Raleigh's intoxication under the statutory mitigator, "under the influence of extreme mental or emotional disturbance," as follows:

> There is no doubt that Raleigh consumed a great deal of alcohol before the murders. This Court **cannot** find, however, that his condition **was** "extreme". *He **acted too** purposefully and competent* [ly] in getting the guns, going to the trailer, doubling back after encountering Baker, et al, in executing Cox, physically beating Eberlin, and in disposing of evidence afterwards. If Raleigh was under **extreme** [emphasis court's] mental or emotional disturbance he would not have been able to accomplish all this. Also, witnesses said while Raleigh was under the influence he was coherent, could carry on a conversation, had no trouble walking, and had no trouble climbing the fence. Finally, the Defendant himself admitted he

> has developed quite a tolerance for alcohol. The Court concludes that while there was some mental or emotional disturbance, it was not extreme [emphasis court's].
>
> While the Court does not find this statutory mitigating factor to have been established, it will consider intoxication as a non-statutory mitigating factor. (R.226, 233)

True to its word, the trial court found as a non-statutory mitigator: "A. Intoxication: The court finds voluntary intoxication to be reasonably established (R.227-28, 234)." Under discussion, the trial court held: "The Court is also not inclined to give much weight to the voluntary intoxication mitigator in light of what the Defendant did at the trailer early that morning (R.228, 235)."

The trial court correctly exercised its discretion in finding as it did regarding Raleigh's voluntary intoxication. This Court has opined:

> While voluntary intoxication or drug use might be a mitigator, whether it actually is depends upon the particular facts of a case. Here, the evidence showed less and less drug influence on Johnson's actions as the night's events progressed and support the trial court's findings. There was too much purposeful conduct for the court to have given any significant weight to Johnson's alleged drug intoxication, a self-imposed disability that the facts show not to have been a mitigator in this case. (citation omitted) Therefore, we find no error in the trial court's consideration and treatment of Johnson's proposed mitigating

evidence.

Johnson v. State, 608 So. 2d 4 (Fla. 1992), *cert. denied, 113* S.Ct. 2366 (1993). Raleigh's complaint here is mere disagreement with the weight afforded his voluntary intoxication, which "is an insufficient basis for challenging a sentence." See *Echols v. State, supra; Quince v. State, supra.*

The trial court's findings regarding each of the complained of mitigating circumstances were supported by the evidence. When weighed against the predominant aggravating circumstances in this cause, Raleigh's two sentences of death should be affirmed.

POINT V

THE TRIAL COURT CONSCIENTIOUSLY WEIGHED THE AGGRAVATING CIRCUMSTANCES AGAINST THE MITIGATING CIRCUMSTANCES AND CONCLUDED THAT DEATH WAS WARRANTED.

Proportionality review, as delineated by this Court, is as follows:

> ...In reviewing a death sentence, this Court must consider the particular circumstances of the case on review in comparison to other decisions we have made, and then decide if death is an appropriate penalty in comparison to those other decisions.

Hunter v. State, supra, at 254. This cause involves a double homicide, each murder exhibited strong aggravating circumstances.

Douglas Cox's murder was aggravated by the capital murder of Tim Eberlin, an armed burglary, and the fact it was cold, calculated and premeditated (R.224-25). Tim Eberlin's murder was aggravated by the capital murder of Douglas Cox, armed burglary, witness elimination, and heinous, atrocious or cruel (T.231-32). In contrast, the trial court found no statutory mitigating circumstances, and negligible non-statutory mitigating circumstances, which were offset by the facts surrounding the murders (R.226-229, 232-36).

When the particular circumstances of the two murders in this cause are juxtaposed with those found in other decisions by this Court, death is seen as the appropriate sentence. *See e.g., Gamble v. State, 659 So.* 2d 242 (Fla. 1995) (Death proportionate where defendant struck landlord in head, got on top of him and held him down as co-defendant repeatedly struck landlord's head, ultimately strangling him with a cord.); *Colina v. State, 634 So.* 2d 1077 (Fla. 1994) (Defendant dealt several more blows with tire iron to one victim when she began to moan and to other victim when he started to get up, and he dealt fatal blows to both victims while they were lying on ground.); *Stein v. State, supra* (Trial judge properly found that murders were committed to avoid arrest and CCP; record clearly reflected that defendant and accomplice planned to

eliminate any witness to avoid arrest, murder weapon was procured in advance, there was lack of resistance or provocation, and killing appeared to be carried out as matter of course.); *Lucas v. State,* 613 so. 2d 408 (Fla. 1992), cert. *denied 114* S.Ct. 136 (1993) (Death proportionate where defendant shot victim, pursued her into house, struggled with her, hit her, dragged her from house, and finally shot her to death while she begged for her life.); *Cherry v. State, 544 So.* 2d *184* (Fla.), *cert. denied,* 108 L.Ed.2d 963 (1989)(Defendant burglarized a small two-bedroom house owned by elderly couple, and literally beat to death the wife.); *Kokal v. State, 492 so.* 2d 1317 (Fla. 1986) (Imposition of death penalty appropriate where murder was preceded by violent robbery, a march at gunpoint to the murder site, and a vicious and painful beating during which the victim unsuccessfully pleaded for his life.).

Raleigh's argument at pp.34-39 appears to focus on the following mitigating factors which he feels outweighs the strong aggravation already presented. He speaks of the "disproportionate treatment given to the codefendant in this case." As the trial court found:

> ...[I]t was Raleigh and Raleigh alone who killed Cox in his sleep. It was Raleigh who finished off Eberlin at close range. It was also Raleigh, not Figueroa, who went to the trailer the first time with a 9MM. Raleigh was the principal perpetrator

during the two murders. (R. 227, 234)

Raleigh also argues at pp.36 -37 that an important factor for this Court to consider is his "addiction to and/or intoxication from drugs or alcohol." Yet, there was ***no evidence*** that he was ***addicted*** to drugs or alcohol. The trial court did find the following non-statutory mitigator: "G. Drug Use: There was evidence the Defendant used drugs and alcohol rather extensively. The Court has considered this but gives it little weight a(R.229, 236)." Much of this evidence, however, was supplied by Raleigh himself in his statements, interviews with Dr. Upson, and at trial. As regards his voluntary intoxication the night of the murders, as previously delineated, the trial court found his actions to be ***too purposeful*** to constitute extreme mental or emotional disturbance, and for the same reason afforded it little weight as a non-statutory mitigator.

The State respectfully submits Raleigh's sentences of death for the cold murder of Douglas Cox and the heinous murder of Tim Eberlin should be affirmed.

CONCLUSION

Based on the above cited facts, legal authorities, and arguments, the State respectfully requests this Honorable Court to affirm Raleigh's convictions and sentences of death.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to, MICHAEL BECKER, Assistant Public Defender, Counsel for Appellant, 112 Orange Ave., Ste. A, Daytona Beach, FL, 32114, this 24th day of February, 1997..

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