IN THE SUPREME COURT OF FLORIDA

BOBBY ALLEN RALEIGH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee .

CASE NUMBER 87,584

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On June 21, 1994, the grand jury, in and for Volusia County, Florida, returned an indictment charging Appellant with two counts of first-degree murder in violation of Section 782.04(l)(a)l, Florida Statutes (1993), one count of burglary of a dwelling while armed in violation of Section 810.02(2)(b), Florida Statutes (1993), and one count of shooting at or into an occupied dwelling in violation of Section 790.19, Florida Statutes (1993). (R4-5) On June 6, 1995, Appellant appeared before the Honorable S. James Foxman, Circuit Judge, and entered a plea of guilty to the two counts of first-degree murder in exchange for which the state agreed to nolle pros the remaining counts. (T371-383) Judge Foxman conducted an inquiry of Appellant and determined that he understood that the state was not giving up its right to seek the death penalty, but, that by entry of the plea, Appellant was giving up his right to a jury trial on the issue of guilt. (T377-379) Judge Foxman accepted the plea and found that it was made knowingly, intelligently, voluntarily, and with the advice of competent

counsel with whom he was satisfied. (T380) On June 19, 1995, Judge Foxman signed an order changing venue for the penalty phase to St. Augustine. (R107)

The penalty phase was conducted on August 8- 15, 1995, before Judge Foxman in St . Augustine, Florida. (T403-1999) Following deliberation, the jury returned advisory verdicts unanimously recommending the death penalty on each count. (T1995; R176-177) On February 16, 1996, Appellant appeared before Judge Foxman who adjudicated him guilty and sentenced him to death for each of the murders. (R214-220; T2046-2061) Judge Foxman filed his findings of fact in support of the death penalty on each of the cases. (R224-230,230-237) Appellant filed a timely Notice of Appeal on March 14, 1996. (R242) Appellant was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (R24 1)

STATEMENT OF THE FACTS

On the evening of June 4, 1994, Appellant, his mother Janet Figueroa, his cousin Domingo Figueroa, and Domingo's wife Elaine, went to the Club Europe, a nightclub in DeLand. (T992-994,1548,1775) Prior to going to the club, Appellant had drunk four beers and had taken some Tylenol PM, (T1776) Once at the club, Appellant drank a great deal more including numerous "red deaths", a drink which contains seven kinds of alcohol, and shots of Goldschlager's schnapps. (T997-1001,1386-87,1549-50,1775-76) Appellant participated in an underwear contest at the bar for which he won second place, (T1002,1551, 1777) After the contest, Domingo came to Appellant and told him that somebody had slapped his mother. (T1002) Appellant and Domingo went outside and encountered Douglas Cox and his brother Jason. (T1003,1778) Appellant asked Jason what had happened and while they were talking Appellant's mother ran out of the bar screaming at Cox that he wasn't going to mess with Appellant. (T1003,1553,1778) Appellant thought his mother was drunk so he grabbed her and took her to the car. (T1003,1554,1778) Appellant then returned to Jason and Douglas and apologized for his mother and he shook Doug's hand. (T1009,1778-79) Appellant then went into the bar, got Domingo and his wife, and came back out to the car. (T1009,1555,1779) When they returned to the car, they found that Appellant's mother had left so they got in the car and tried to find her. (T1010,1555,1779) When they could not find her, they went home and found that she had called her husband and he had come and picked her up. (T1010,1556) While at the house, Appellant and Domingo retrieved guns from Domingo's safe, got in the car and drove to Douglas Cox's trailer in DeLeon Springs.

(T1010-12,1132-33,1780) When they arrived at Cox's trailer, there was another car pulled in front of the gate. (T1013,1135,1306,1781) Inside the car were Patricia Pendarvis and Darin Chalkey who had gone to Cox's to pick up Pendarvis' boyfriend, Ronald Baker. (T1306-7) Appellant jumped the gate, went up to the trailer, and knocked on the door. (T1283) Ronald Baker answered the door and encountered Appellant with a gun in his hand. (T1283) Baker asked Appellant what he wanted and Appellant told him that Douglas had called him and said there was stuff getting ready to go down with the Mexicans and he was there to help. (T1283) Baker told Appellant that Cox was asleep. (T1284) Appellant then told Baker that he needed to talk to Doug because he had a guy from New York who wanted to buy some marijuana, (T1284) When Baker told Appellant that they didn't need any help, Appellant said, "I guess I don't need this," and put the gun back in his pants. (T1285) When Baker asked Appellant if it was loaded, Appellant took it out, pointed it at himself, swung it around, ejected a bullet out of the gun that hit Baker in the chest and said, "I guess it is loaded," and put the gun back in his pants, (T1286) When Appellant asked Baker when he could see Doug, Baker told him in the morning, so Appellant and Baker walked out to the driveway. (T1286) Appellant asked Baker if he was going to be there in the morning and Baker said yes, so Appellant said he would see him then. (T1289) Appellant got back in the car where Domingo was still located and Baker got into the car with Pendarvis and Chalkey, (T1289,1308) Both cars then pulled out and left. (T1016,1137,1289-90,1310,1783) As they drove to Orange City, Pendarvis told Baker that a Mexican had been driving the car that Appellant was in, and that it might have been the same Mexican with whom Cox had argued at Club Europe earlier that evening. (T1290,13 11-14) This worried Baker so they stopped at a 7-Eleven where Baker tried to call

the trailer but only got an answering machine. (T1791) Baker then asked Darin to take him back to the trailer so he could tell Cox and his roommate, Tim Eberlin, about the Mexican and the person he saw with the gun. (T1791) When they got back to the trailer, Baker again jumped the fence and went inside and tried to awaken Cox but was unable to. (T1292) Baker then told Eberlin about the situation and said to keep a close watch. (T1292) Eberlin grabbed a shotgun and told Baker that he wasn't worried. (T1292) Baker locked the sliding glass door and then left the trailer by the other door. (T1292-93) Eberlin locked the door behind Baker. (T1293) Baker also testified that he knew that Cox always slept with a gun nearby, (T1298)

When Appellant and Domingo left, they went down a nearby dirt road, parked, and returned to Cox's trailer. (T1016,1137,1783) Both Appellant and Domingo had a gun. (T1137,1783) When they got to the trailer Appellant knocked on the door and Tim Eberlin came and talked to him. (T1018,1784) Appellant asked Eberlin to get Cox, but Eberlin said he was asleep and warned Appellant that Cox was whacked out on cocaine and pills. (T1018, 1142,1784) Appellant walked back to the end of the trailer where Cox was asleep and noticed that Domingo had followed him into the trailer, (T1020,1784) Appellant noticed that Domingo had the gun in his hand which was wrapped in a shirt, and knew that Domingo wanted him to shoot Cox. (T1021-23,1785) Appellant pulled out his gun and shot Cox three times in the head, (T1023-25,1785) Appellant turned and ran out the back door and had to stop because Domingo was shooting at Tim from the doorway. (T1037-38,1785) Tim was screaming and Domingo yelled at Appellant that his gun was jammed and Appellant should shoot Tim. (T1039,1785) Appellant fired at Tim until his gun also jammed, so he hit Tim in the head with his gun causing a piece of the gun to break off. (T1041,1144,1786) When Tim

stopped screaming Appellant ran out of the house and he and Domingo climbed the fence and went back to the car. (T1046,1149,1786) At the car, Domingo gave Appellant the guns and told him to put them under the seat, which he did. (T1048,1786) They returned to Appellant's house where they burned the clothes they were wearing. (T1049-50,1786) Domingo told Appellant they had to talk but Appellant fell asleep in the dining room. (T1051, 1787)

The next morning, Appellant received a telephone call from Garrett Lennon. (T1053, 1560,1787) Lennon asked Appellant where he had been the night before and when Appellant asked why, Lennon told him that Cox was dead. (T1054,1560,1787) Appellant hung up and asked his mother if he left home after he came back from Club Europe, and his mother said that he and Domingo came in and left again with the guns. (T1054,1560,1788) Appellant said "Oh my God I think I shot Douglas," and went into the bathroom and got sick. (T1054,1560, 1788) Appellant told his mother to call the police, but she called a lawyer and a judge instead. (T1561,1788) Appellant called Domingo who told him to wait. (T1561) Domingo came over to Appellant's house, assured Appellant that no one would tie them into the shootings, and that if anyone asked, Appellant should simply tell them that they went out looking for Appellant's mother and when they did not find her they returned home. (T1054,1582,1789) Domingo's wife, Elaine, called a friend and asked if they could park a car at her place for a while. They loaded the guns into the car and drove it to the friend's house where they left it. (T1056) The police came to Appellant's house that night and he agreed to talk to them. Appellant complied with all the requests made by the police officer and gave a taped statement wherein he acknowledged knowing both Cox and Eberlin, but disavowed any knowledge of their deaths.

(T859-76) Appellant repeated the story that Domingo had told him to tell the police about being out looking for his mother the night before. (Id.) At the same time that Appellant was giving this statement, Figueroa also gave a statement implicating Appellant in the murders. (T879) When the police returned to Appellant and told him that Figueroa had implicated him, Appellant agreed to give a second statement wherein he admitted killing Cox and Eberlin. (T886-903) Appellant told the officers where the guns could be found. (T888, 1103)

The people that saw Appellant at Cox's trailer all agreed that Appellant was heavily intoxicated. (T1 110,1112,1295,1309) Domingo owned the safe that was kept at Appellant's house and which contained the guns. (T1118-19) Domingo and Elaine were the only ones who had keys to the safe. (T1556) The incident at the trailer was about the altercation that occurred earlier between Douglas Cox and Domingo Figueroa at Club Europe. (T1114) Both Pendarvis and Baker agreed that Appellant never made any threats towards them. (T1297, 1314)

Ronald Reeves, the chief medical examiner, responded to the scene and found the bodies of two white males. (T13 15-21) Douglas Cox was lying on his back on a couch and Timothy Eberlin was lying in a fetal position on his bed. (T1321) Dr. Reeves performed autopsies on both bodies and determined that Douglas Cox was shot three times in the head. (T1322) The autopsy of Timothy Eberlin also revealed three gunshot wounds and numerous other injuries to the head that were consistent with being hit with the muzzle of a gun. (T1338,1346) One of the gunshot wounds travelled through Eberlin's lung, heart, liver, and diaphragm. This shot was fatal. (T1356) The wounds to the head made by the gun were inflicted while Eberlin was still alive. (T1350) Dr. Reeves concluded that Eberlin probably

lived a short period of time "assuming the shots were not all fired before the beating." (T1356)

Joseph Miller was the best friend of Douglas Cox and Timothy Eberlin. (T1361) More than six months prior to the murders, Miller remembered a discussion Appellant had with Douglas Cox in which Appellant asked for part of Cox's drug business. (T1365-66) Cox refused and Appellant replied that one day he would take over the business "if I have to kick your ass." (T1366) Everybody that was present when this was stated took this as a joke, however, except for Miller. (T1366) Miller claimed that Appellant repeated this statement to him later at Club Europe. (T1369) Miller admitted that he did not immediately come forward with this information and only did so when approached by Cox's family. (T1385)

Appellant's mother gave birth to Appellant when she was fifteen years of age. (T1437, 1507) Appellant never knew who his father was. (T1437) 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. (T1442,1510) Appellant's early years were marked by being shuffled around from place to place. (T1510-22) Eventually, Appellant and his mother moved to Florida where Appellant's mother met Jose Figueroa and married him in 1981. (T1528) Appellant's half-brother Tony was born in 1985 when Appellant was eleven years of age. (T1534) At this point Appellant went from having all the attention focused on him, to having none of the attention focused on him, (T1534) Appellant's mother was hospitalized after the birth of Tony and subsequently had to work two jobs in order to support the family which meant that Appellant was given the task of taking care of his baby brother. (T1537-39) Appellant and his mother were always very very close. (T1440,1539) A few weeks before he

turned eighteen, Appellant tried to commit suicide by taking pills and pesticides. (T1448, 1542,1618-19) Dr. Myrna Garcia, a psychiatrist from Orange City evaluated Appellant after the suicide attempt and found him to be very distraught and depressed. (T1621) Although she did not diagnose Appellant as being clinically depressed, she noted that he had an adjustment disorder with a depressed mood, (T1621) Dr. Garcia noted that Appellant had problems relating to others, and exhibited poor judgment and a lack of impulse control. (T1621,1624) Although Dr. Garcia recommended in-patient evaluation, Appellant and his mother decided against it. (T1630)

Dr. James Upson, a clinical neuropsychologist, interviewed Appellant for a total of 11 ¼ hours while he was in jail. (T1639-40) Dr. Upson also interviewed Appellant's mother and reviewed numerous documents that were provided to him. (T1641) Appellant was very cooperative with Dr. Upson and appeared to answer his questions honestly and straight forward. (T1641-42) Appellant's IQ test indicated that his verbal ability was in the low normal range while his visual spatial performance was in the high average range, with his overall abilities rated as average. (T1643-44) On achievement tests Appellant scored average in virtually all areas except in arithmetic and there were no signs of any learning deficit. (T1645-46) After reviewing Appellant's school records, Dr. Upson noted that his early school grades were fairly good and declined slightly until the seventh grade when he experienced great difficulty and had to repeat the class. (T1646) Appellant did well in the eighth and ninth grades but then in the tenth grade his performance level dropped again and he dropped out of school. (T1646) Eventually, however, Appellant did earn his G.E.D. (T1647) The neuro-psychological tests revealed all negative results meaning that there were no great problems

with Appellant. (T1651) Dr. Upson noted that Appellant's irnpulsivity score increased with time which indicated a tendency to get bored. (T1653) Dr, Upson noticed that where judgments were called for Appellant did have deficiencies. (T1654) Appellant's performance in this regard is in the impaired range. (T1654) When faced with a complex situation, Appellant gets overcome by situational stress and tends to fall apart. (T1655) If he is not required to make a lot of decisions during these times Appellant will be alright but if need be he tends to make bad judgments in times of stress. (T1656) Appellant acts out of emotion rather than positive planning. (T1658) The MMPI that was administered to Appellant revealed that he was depressed, tense, nervous and had difficulty differentiating between fantasy and reality. (T1659) Appellant has chronic feelings of insecurity, inadequacy, and inferiority. (T1659) Appellant is a passive dependent person who is unable to take the dominant role in interpersonal relationships. Appellant is a follower, not a leader. (T1660) Appellant exhibits low self-esteem and is easily manipulated by others. (T1664) Appellant is not always aware that he is being manipulated by others. (T1665) Appellant is not an aggressive individual. (T1680) Dr. Upson expressed his opinion that, at the time of the shootings, Appellant's judgment was impaired. (T1740) Further, Dr. Upson believed that Appellant could function adequately in a confined setting and could profit by educational and vocational programs that are available. (T1750)

Appellant had a history of abusing alcohol and drugs. (T1766-67) In November, 1993, Appellant got a job driving Garrett Lennon around to collect drug money. (T1768) Appellant continued this job until February of 1994 when he started delivering marijuana from DeLand to Virginia for his cousin Domingo and his cousin David Vanover. (T1769)

Basically, Appellant was a mule who merely delivered the marijuana to Virginia and then returned with the money which he gave to Domingo. (T1770)

SUMMARY OF THE ARGUMENTS

POINT I: The trial court erred in failing to give an instruction on a statutory mitigating factor where evidence was presented to support it. The trial court also erred in instructing the jury on an aggravating circumstance for which there was no evidence. The trial court further erred in refusing to give Appellant's requested instruction on the aggravating circumstance of cold, calculated and premeditated.

POINT II: The trial court abused its discretion in dismissing a juror without any grounds to do so particularly where the juror assured the court that he would follow his oath and fairly determine the issues during deliberations.

POINT III: The evidence fails to prove the aggravating factors that the murder was committed in the course of a burglary, that the murder was committed for the purpose of eliminating a witness, that the murder was committed in a cold, calculated and premeditated fashion, and that the murder was especially heinous, atrocious and cruel.

POINT IV: The trial court erred in its analysis of mitigating factors based in part on misconstructions of the evidence and total rejection of unrebutted evidence.

POINT V: Appellant's death sentences are disproportionate, excessive, inappropriate, and constitute cruel and unusual punishment.

ARGUMENTS

POINT I

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 17, AND 22, OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN INSTRUCTING THE JURY .

At the charge conference defense counsel requested that the trial court instruct the jury on the statutory mitigating factor provided in Section 921.141(6)(a), Florida Statutes (1993), which provides that the defendant has no significant history of prior criminal activity. (T1888-89) The trial court denied the request on the grounds that there was evidence that Appellant had been involved in drug dealing. (T1889) However, defense counsel noted that they had not waived this statutory mitigator and did not feel that the evidence of the drug dealing constituted "significant history." (T1889) Defense counsel also objected to the trial court instructing the jury on the aggravating circumstance that the capital murder was committed for pecuniary gain as provided in Section 921.141(5)(f), Florida Statutes (1993), on the grounds that there was simply no evidence to support the contention that Appellant stood to gain anything financially from the murder. (T1900-1901) Finally, defense counsel requested that if the court was going to instruct on the aggravating circumstance of cold, calculated and premeditated, that the court give the instruction as set forth in the manual entitled Conducting the Penalty Phase of a Capital Case authored by Susan Schaeffer, Circuit Judge in the Sixth Judicial Circuit of Florida. (T1904-1905) The trial court indicated that he was familiar with the treatise and had a copy of it, but felt "compelled" to give the instruction set forth in

Footnote 8 in Jackson v. State, 648 So. 2d 85 (Fla. 1994). (T1904) Appellant asserts that the trial court erred in each of these rulings and will treat them in order,

A. Failure to Give the Statutory Mitigating Instruction on No Significant History of Criminal Activity.

It is undisputed that Appellant had no criminal arrests or convictions. Thus, defense counsel rightfully chose not to waive reliance on this mitigating factor. The trial court denied a jury instruction on this factor based on the evidence that Appellant had engaged in drug dealing. While 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), these cases do not stand for the proposition that a trial court need not instruct the jury on this mitigating factor, In Robinson v. State, 487 So. 2d 1040 (Fla. 1986), this Court reversed a death sentence and remanded for a new penalty phase because the trial court failed to instruct the jury on the statutory mitigating factor that the defendant was an accomplice, his participation was relatively minor, and that he had an impaired capacity to appreciate the criminality of his conduct. This Court noted that the degree of Robinson's participation was certainly open to debate and the evidence of his impaired capacity may have been such that the trial court did not believe it, but still found it error not to instruct the jury that they could find these statutory mitigating factors. In so ruling this Court stated:

> The jury must be allowed to consider any evidence presented in mitigation, and the statutory mitigating factors help guide the jury in its consideration of a defendant's character and conduct, We therefore find that the court erred in not instructing on these two statutory mitigating circumstances. Regarding mitigating evidence

> and instructions, we encourage trial courts to err on side of caution and to permit the jury to receive such, rather than being to restrictive.

Id. at 1043. In the instant case, the evidence of Appellant's drug dealing consisted of the testimony that he was involved basically as a mule or middle man in the delivery of drugs begirming in November of 1993. This constituted a period of approximately eight months. Whether this evidence constituted "significant criminal conduct" is open for debate. However, the trial court took this determination away from the jury. The fact that the court told defense counsel that he would not preclude them from arguing that Appellant had no prior convictions does not compensate for the failure to properly instruct the jury. Argument of counsel is never meant to be a substitute for the trial court's instructions concerning the law. United States v. Pedigo, 12 F.3d 618, 626 (7th Cir. 1993); Fitzgerald v. Mountain States Tel. and Tel. Co., 68 F.3d 1257, 1262 (10th Cir. 1995). The failure of the trial court to instruct on this important mitigating factor undermines the reliability of the jury's recommendation. Appellant is entitled to a new penalty phase. Robinson, supra; see also, Smith v. State, 492 So. 2d 1063 (Fla. 1986); Stewart v. State, 558 So, 2d 416 (Fla. 1990).

B. Improper Instruction on the Aggravating Circumstance of Pecuniary Gain.

Defense counsel objected to the instruction on the aggravating circumstance of pecuniary gain on the grounds that there was simply no evidence to support this factor. It is important to note that in his findings of fact, the trial court specifically found that this factor was not proven beyond a reasonable doubt and, in fact, the primary motive for the murders seemed to be the argument that occurred earlier in the evening at Club Europe. (R224-30, 231-37) In Stewart v. State, 549 So. 2d 171 (Fla. 1989), this Court held that a trial judge in a

capital case is to instruct the jury only on those aggravating circumstances for which evidence has been presented in the penalty phase. Despite the lack of evidence for this aggravating factor, the state below emphasized this aggravating factor beginning with their opening statement where they began with "it's all about money," and continued right through the closing argument where they again returned to this same theme, "it's all about money." This Court has not hesitated to reverse death sentences and remand for new penalty phases where the jury was erroneously instructed on an inapplicable aggravating factor which was emphasized by the prosecution. See Omelus v. State, 584 So. 2d 563 (Fla. 1991); Bonifav v. State, 626 So. 2d 1310 (Fla. 1993); and Padilla v. State, 618 So. 2d 165 (Fla. 1993). Appellant is entitled to a new penalty phase.

C. **The Requested Instruction on Cold, Calculated and Premeditated.**

Defense counsel requested that the trial court instruct the jury on the aggravating factor of cold, calculated and premeditated using the instructions set forth by Judge Susan Schaeffer in her handbook entitled Conducting. the Penaltv Phase of a Capital Case which was presented to circuit judges at the Florida Advanced College of Judicial Studies. Judge Foxman had a copy of this manual with him on the bench and understood the instruction which provided:

> 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 and not prompted by emotional frenzy, panic, or a fit or rage.
>
> "Calculated" means having a careful plan or prearranged design to commit murder.

> . . . .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 timed 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 deliberate ruthlessness, 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.

The trial court denied this request and stated he felt "compelled" to give the instruction that this Court set forth in Footnote 8 of Jackson v. State, 648 So. 2d 85 (Fla. 1994), which provides as follows:

> Six, the crime for which the defendant is to be sentenced was committed in a cold, calculated and pre-meditated manner without any pretense or 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, 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 the allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

(T1981-82) The trial court in the instant case acknowledged that the instruction requested was proper yet denied the request solely because he felt "compelled" to give the standard jury instruction. (T1905) The trial court was incorrect in concluding that he was compelled to use the standard instruction. In Guzman v. State, 644 So. 2d 996 (Fla, 1994), this Court noted that trial courts, in most cases, should follow the standard jury instructions. However, this Court acknowledged that there will be cases that require some deviation from the standard jury instructions. With regard to the cold, calculated and premeditated instruction, the one given is the one fashioned on an emergency basis in light of this Court's decision in Jackson v. State, Supra, that the then existing CCP instruction was unconstitutional. The instruction is virtually identical to the one given 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 the deliberate ruthlessness so as to constitute the heightened premeditation necessary for this aggravating factor. Appellant submits that the trial court erred in concluding that it had no discretion to give the requested instruction. Once again, Appellant is entitled to a new penalty phase wherein the jury will be instructed properly.

POINT. II

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DISMISSING A JUROR OVER DEFENSE OBJECTION WHERE THERE WAS NO SHOWING THAT THE JUROR COULD NOT BE FAIR.

After the charge conference, the state moved to replace Juror Chandler with one of the alternates on the grounds that he had expressed hostile comments about Assistant State Attorney Sean Daly. Specifically, the state noted that he made one comment during cross-examination of Appellant to the effect of, "sit down you dummy and shut up, " and during the cross-examination of Dr. Upson had stated, "oh shit." (T1914-16) The trial court acknowledged that the juror did make these comments but did not take it to be hostile to Sean Daly but only his expression of frustration with the proceedings. (T1916) The court then concluded that there was not enough justification to remove Juror Chandler. (T1916) A short time later the state renewed its motion to have Juror Chandler removed on the grounds that the clerk heard the juror express an opinion in the break room that he did not like the way that Daly handled himself and thought his actions were inappropriate. The clerk noted that Chandler was not addressing his statement to other jurors necessarily and expressed these opinions in normal tones, (T1925-28) The state agreed that Mr. Chandler did not discuss any of the facts of the case inappropriately. Defense counsel argued the jury instructions would properly inform the jurors not to let the actions of the attorneys influence their consideration of the case, (T1929-31) When Juror Chandler was questioned he admitted that he did express

the opinion in the break room although he did not clearly remember making the comments during the actual trial. (T1933-34) Juror Chandler was positive, however, that his feelings of frustration with Daly would have no influence on his ability to deliberate and reach a proper decision. (T1933) The trial court granted the motion to replace Chandler over defense objection.

Appellant recognizes that a trial judge had broad discretion in deciding whether a juror may sit. Callowav v. State, 189 So. 2d 617 (Fla. 1966). However, in the instant case, the removal of Juror Chandler represented a blatant abuse of discretion. The standard for review of such error is set forth in Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). It is the duty of the party seeking exclusion to demonstrate, through questioning, that a potential juror lacks impartiality. The trial judge must then determine whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. On appeal, the question is not whether a reviewing court might disagree with the trial court's finding, but whether those findings are fairly supported by the record. Trotter v. State, 576 So. 2d 691 (Fla, 1990).

In the instant case, the only questioning of Juror Chandler prior to his dismissal revealed that he could be completely fair in his deliberations and would not let his feelings of frustration with Daly affect his judgment. It must be noted that Mr. Chandler's comment came at the conclusion of a particularly long day which culminated in a blistering cross-examination of Appellant by Daly. Undoubtedly, everyone in the courtroom had similar feelings. In fact, defense counsel thought that the comment might have been directed at him rather than at Mr. Daly. The alleged comment during the cross-examination of Dr. Upson

does not appear on the record, However, if such a comment was made it is quite understandable, given the way that Mr. Daly began his cross-examination of Dr. Upson:

> Good morning Doctor, my name is Sean Daly. We haven't met before. Before I attack somebody, I like to tell them my name,

(T1669) Such a comment, would undoubtedly elicit comments such as are attributed to Juror Chandler. Where the state chooses to make its own bed, they cannot be heard to complain when they are forced to lie in it. Additionally, the record indicates that even the trial court tended to lose his patience with Mr. Daly where the court had to order him to sit down or else he was going to have him removed from the courtroom. (T1435)

In summary, Juror Chandler had been accepted as a juror by both sides. There is no indication whatsoever that he would not follow his oath and his instructions during deliberations. Juror Chandler's removal, without any cause, constitutes a blatant abuse of discretion on the part of Judge Foxman.

POINT III

APPELLANT'S DEATH SENTENCES WERE IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES, THUS RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

In imposing the death penalty for each of the murders, Judge Foxman found that the state had proved three aggravating factors with regard to the murder of Douglas Cox and four aggravating factors with regard to the murder of Timothy Eberlin. (R224-230,231-37) Appellant contends that two of the aggravating factors with regard to the murder of Douglas Cox and three of the aggravating factors with regard to the murder of Timothy Eberlin were improperly found. These will be discussed below.

A. The Capital Murders Were Not Committed During the Course of a Burglary.

Although the state initially charged Appellant with burglary, this charge was dropped as part of the plea agreement when Appellant entered his pleas of guilty to the murders. While it is not necessary to have the underlying felony charged, the state must still, nevertheless, prove the underlying felony beyond a reasonable doubt. In the instant case, the evidence fails to prove that a burglary was committed.

Ronald Baker, the state's witness, testified that after originally leaving the trailer with Appellant that evening, he returned to warn Eberlin and Cox about Appellant and the Mexican who was driving the car. Baker testified that he personally locked the sliding glass doors

before he left again. (T1292) When Baker left, Timothy Eberlin locked the door behind him. (T1293) When Appellant and Figueroa arrived at the trailer, they approached and Appellant knocked on the door. Certainly there is no evidence of any forcible entry into the trailer. Indeed the evidence is clear that Appellant had been to the trailer on several occasions and knew both Douglas Cox and Timothy Eberlin. Under these circumstances, it is probable that Eberlin consented to Appellant entering the trailer. Merely because someone commits a crime inside a residence, an otherwise consensual entry is not converted into a burglary, If this were true, then every murder that occurs in either someone's house or someone's place of business would automatically have an aggravated factor of in the course of a burglary since, just as the trial court below stated, any consent was revoked once Appellant started to commit the murders. This is an untenable proposition. This aggravating factor has not been proven beyond a reasonable doubt and must be stricken,

B. The Murder of Eberlin Was Not Done to Eliminate a Witness or to Avoid Arrest.

If the victim of a murder is not a police officer, this aggravating factor applies only where the evidence clearly shows that the dominant or only motive was to eliminate the person as a witness, and evidence of that intent must be "very strong." Harmon v. State, 638 So, 2d 39 (Fla. 1994). The state must prove by positive evidence, rather than by default or elimination, that the dominant motive was to eliminate a witness, Scull v. State, 533 So. 2d 1137 (Fla. 1988); Jackson v. State, 592 So. 2d 409 (Fla. 1986). Even where the victim may know the defendant, this factor does not apply unless the state shows witness elimination was the dominant reason for the murder. Geralds v. State, 601 So. 2d 1157 (Fla. 1992); Perry v.

State, 522 So, 2d 817 (Fla. 1988); Floyd v. State, 497 So. 2d 1211 (Fla. 1986).

In Cook v. State, 542 So. 2d 964 (Fla. 1989), this Court struck a finding of witness elimination where the evidence showed that the defendant shot the victim to keep her quiet because she was yelling and screaming. This Court agreed that the facts indicated the defendant shot instinctively and not with a calculated plan to eliminate the victim as a witness. The facts of the instant case show that Appellant went to the back of the trailer and shot Douglas Cox. At the same time, Figueroa began shooting Eberlin which caused Eberlin to start screaming. Appellant ran down the hallway and stopped to avoid the shooting that was being done by Figueroa. Figueroa then yelled to Appellant that his gun had jammed and that Appellant should shoot Eberlin. Appellant did so because he was screaming. When Appellant's gun jammed he used his gun to beat Eberlin until he stopped screaming. Once again, the actions of Appellant were instinctive rather than evincing a careful plan to eliminate Eberlin as a witness. The instant case is factually indistinguishable from Cook. It is also important to note that according to Appellant's mother, Appellant made statements the next day that he believed that Eberlin was still alive when they left. Thus, it hardly appears that the murder of Eberlin was committed to eliminate him as a witness if in fact Appellant believed that he left him alive. This aggravating circumstance was not proven beyond a reasonable doubt and must be stricken.

C. The Murder of Douglas Cox Was Not Committed in a Cold, Calculated and Premeditated Fashion.

To support this aggravating factor, the evidence must prove beyond a reasonable doubt that the murder was calculated, that is committed pursuant to "a careful plan or prearranged

design to kill. " Rogers v. State, 511 So. 2d 526 (Fla. 1987). This aggravating circumstance focuses on the state of mind of the perpetrator. Mason v. State, 438 So. 2d 374 (Fla. 1983). A defendant who is under the influence of excessive drug or alcohol use may be deemed incapable of forming the degree of premeditation required for this factor. White v. State, 616 So. 2d 21 (Fla. 1993). Simply proving a premeditated murder is not enough to support this aggravating circumstance; this Court has required greater deliberation and reflection. See Walls v. State, 641 So. 2d 381, 388 (Fla. 1994). In the instant case, the evidence is not clear that Appellant developed a plan to kill Douglas Cox. While it is true that he and Figueroa went to his house and got guns and then went to Cox's trailer, the subsequent actions on Appellant's part do not show a careful and prearranged plan designed to effectuate the killing of Douglas Cox. Each of the witnesses who observed Appellant that evening at the trailer, agreed that he was quite intoxicated. The evidence of his alcohol consumption is overwhelming. According to the state's own evidence, the statement of Domingo Figueroa, Appellant told Figueroa that he was only intending to "scare the hell out of Cox." (T1139) As Judge Foxman himself recognized, the murder of Douglas Cox was primarily sparked by whatever happened between Cox and Appellant's mother at Club Europe earlier that night. (R226) While there may have indeed been sufficient evidence to prove premeditation, the evidence is woefully insufficient to prove the heightened premeditation necessary to prove this aggravating factor, This factor must also be stricken.

D. The Murder of Eberlin Was Not Especially Heinous, Atrocious and Cruel.

With regard to the murder of Timothy Eberlin, the trial court found that the murder was especially heinous, atrocious and cruel, and in support of this finding stated:

> 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.

Appellant asserts that this finding cannot be sustained.

In State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), this Court held:

> . . .that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Over the years this Court has refined the definition of this aggravating factor. In Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990), this Court held:

> The factor of heinous, atrocious or cruel is proper only in torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.

In Richardson v. State, 604 So. 2d 1107 (Fla. 1992), this Court reaffirmed that to qualify for heinous, atrocious and cruel, "the crime must be **both** conscienceless or pitiless **and** unnecessarily torturous to the victim. " In other words, in order for a murder to be classified

as heinous, atrocious and cruel, there must be evidence that the defendant deliberately intended to inflict a high degree of pain, See also Santos v. State, 591 So. 2d 160 (Fla. 1991); Shere v. State, 579 So, 2d 86 (Fla. 1991).

In the instant case, Timothy Eberlin did not have any reason to believe that he was going to be killed until he actually was shot. The evidence clearly shows that Figueroa shot Eberlin at the same time that Appellant was shooting Cox. As Appellant tried to leave the trailer, Figueroa's gun jammed and Appellant shot Eberlin. It was only when Appellant's gun also jammed, and Appellant believed that Eberlin was still screaming, that Appellant hit him with the gun, None of Appellant's actions were done with any kind of intent to unnecessarily torture Timothy Eberlin. In fact, the medical examiner's testimony reveals that one of the bullet wounds was in fact a fatal wound. (T1356) According to both Appellant and Figueroa, the beating commenced only after both guns jammed. According to the medical examiner, Eberlin lived a short period of time "assuming the shots were not all fired before the beating. " (T1356) Since all the shots were indeed fired before the beating, Eberlin did not linger in unbearable pain for any appreciable amount of time. Quite simply, while the murder of Timothy Eberlin was indeed senseless and tragic, it falls short of the standard necessary to support a finding of heinous, atrocious and cruel. This factor must be stricken.

POINT IV

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN ITS CONSIDERATION OF VALID MITIGATING FACTORS IN IMPOSING SENTENCES OF DEATH.

In its findings of fact in support of the death sentence, the trial court made certain findings regarding both statutory and nonstatutory mitigating factors. Appellant asserts that these findings are fatally flawed in that they have no basis in the evidence. Appellant will discuss these mitigating factors separately.

A. Appellant was Under the Substantial Domination of the Codefendant, Domingo Figueroa.

In rejecting this mitigating factor, the trial court stated that it was Appellant alone who killed Cox in his sleep and also Appellant who finished off Eberlin. The court also noted that it was Appellant, not Figueroa, that went to the trailer the first time with the 9mm gun. Finally, the trial court noted that it was Appellant and not Figueroa who may have wanted a piece of Cox's drug trade. (R234) The evidence presented and acknowledged by Judge Foxman in his order, clearly shows that the murders were committed as a result of the incident that occurred at Club Europe earlier in the evening. This incident involved Douglas Cox and perhaps Domingo Figueroa according to the state's witnesses. Appellant's mother may have been involved in this incident, but it is clear that Appellant himself was not involved, Judge Foxman's allusion to Appellant wanting a piece of Cox's drug trade is simply unfounded. The evidence clearly showed that the guns in question were kept in Figueroa's safe for which only

he (Figueroa) had a key. The evidence is equally clear that Appellant worked for Figueroa as a mule delivering marijuana. Dr. Upson's evaluation of Appellant, as well as testimony by Appellant's mother, clearly shows that Appellant is not a dominant person or a necessarily aggressive person, but rather is one that is easily manipulated by others and subject to strong domination, Certainly it must be concluded that a reasonable quantum of evidence was presented to support this mitigating factor, and Judge Foxman's total rejection of it is improper. Campbell v. State, 571 So. 2d 415 (Fla. 1990) and Nibert v. State, 574 So. 2d 1059 (Fla. 1990).

B. No Significant History of Criminal Activity.

The trial court, in its findings of fact, totally rejected this mitigating factor by stating, "this factor is not established. To the contrary, Raleigh had an extensive history of drug dealing and drug use. " (R233) The problem with this analysis, such that it is, is that it does not take into consideration that Appellant's involvement in the drug trade began in November, 1993, a mere seven to eight months prior to the murders. Appellant contends that this does not amount to significant criminal activity. This is especially true given what Appellant's role in the drug business was: Appellant was a "mule," a person who merely acts as a middle man and delivers drugs and picks up payments. The evidence supports the conclusion that it was Figueroa in DeLand and David Vanover in Virginia who were the major drug dealers for whom Appellant merely acted as deliveryman. It is totally unrebutted that Appellant had no criminal arrests and no criminal convictions. Thus, while a trial court is certainly entitled to determine what weight he wants to assess to the mitigating factor, the total rejection under these facts was improper.

C. **Appellant% Remorse and His Cooperation With the Authorities.**

The trial court, although finding these mitigating factors, basically dismissed them with the following statement. "On the other hand, the Defendant may be remorseful now, but he was not remorseful or cooperative on the day following the murders. " (R235) This statement, once again, has no basis in the evidence. According to Investigator Horzepa, who interviewed Appellant the day following the murders, Appellant was indeed cooperative with them. Although the first statement that Appellant gave turned out to be untrue, Appellant gave a second statement on the same day fully admitting to the crimes and assisting the police in locating the guns. Indeed, Investigator Horzepa clearly stated that it was Appellant, not Figueroa, who told them where to fmd the guns. (T1103) Appellant's remorse was clearly shown through the testimony of his mother who testified that Appellant immediately wanted to call the police, and it was she who called other people first. Appellant can be heard crying on the tape during his statement. There is no suggestion in this record that Appellant's remorse was anything but genuine, and the trial court's dismissal of these factors is improper.

D. The Sentences Received By Figueroa.

Where an equally culpable codefendant receives a life sentence, this is a proper consideration in mitigation. Messer v, State, 403 So. 2d 341 (Fla. 1981). In rejecting this mitigating factor, the trial court once again stated that Figueroa, while a participant, played a lesser role. (R236) Contrary to the trial court's conclusion, Figueroa was the main participant in the entire criminal incident. The trial court itself recognized that the murders were the result of a previous altercation which occurred at Club Europe earlier that evening. It was Figueroa, and not Appellant, who was a major factor in this altercation. It was Figueroa who

owned the guns and had the only access to the guns that were used in this crime. It was Figueroa who drove to Cox's trailer that evening. It was Figueroa who came up with the idea to tell the police that they had only been out looking for Appellant's mother that evening. While it is true, that Appellant alone killed Douglas Cox, and also participated in killing Timothy Eberlin, this does not in any way diminish the importance of Figueroa in this criminal incident. When the facts are considered in connection with the testimony of Dr. Upson concerning Appellant's psychological makeup, it is easy to see that basically Figueroa got off easy thus making Appellant's death sentences clearly disproportionate.

E. Appellant's Voluntary Intoxication.

The trial court recognized that there was evidence of voluntary intoxication. However, the trial court accorded it little weight in light of what occurred at the trailer. Appellant asserts that the trial court's basic rejection of this mitigating factor is improper. The evidence of Appellant's intoxication that evening is overwhelming. All three of the state's witnesses who saw Appellant at the trailer the night of the murders, testified that Appellant was indeed heavily intoxicated, although they all noted that he was not falling down drunk. Given Appellant's level of tolerance for alcohol, it is not surprising that he could still appear to function while being heavily intoxicated. This is very common in alcoholics. Appellant's memory loss indicates that the voluntary intoxication did in fact affect his abilities that evening. Additionally, some of Appellant's actions at the trailer indicate just the opposite of what the trial court found. Ronald Baker testified that when he asked Appellant whether the gun was loaded, Appellant took it out, pointed it at himself, ejected a bullet, and said, "I guess it is." Baker testified that it appeared that Appellant did not know the gun was in fact loaded.

(T1294) Thus, the trial court's analysis of this mitigating factor has no basis in the evidence.

In summary, Appellant asserts that the trial court's analysis of the mitigating factors was flawed in that it was in part based on misconstructions of the evidence presented in court and total rejection of unrebutted evidence. These mitigating factors, when properly assessed, mandate a life sentence particularly in light of the paucity of aggravating circumstances. (See Point III, Appellant is entitled to be resentenced to life.

POINT v

APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE, EXCESSIVE, INAPPROPRIATE, AND IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As noted in Point III, supra, two of the aggravating circumstances with regard to the murder of Douglas Cox are invalid, and three of the aggravating circumstances with regard to the murder of Timothy Eberlin are invalid, thus leaving a single aggravating circumstance for each murder, This aggravating circumstance is the contemporaneous murder conviction. The trial court found a good bit of mitigation and thus when compared to the single aggravating factor, the inescapable conclusion is that the death penalty is disproportionate.

The death penalty is so different from other punishments, "in its absolute renunciation of all that is embodied in our concept of humanity," Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring), that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So. 2d 1, 17 (Fla. 1973). See also Coker v. Georgia, 433 U.S. 584 (1977) (the requirement that the death penalty be reserved for the most aggravated crimes is a fundamental axiom of Eighth Amendment jurisprudence). This Court, unlike individual trial courts, reviews "each sentence of death issued in this state," Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988), to "guarantee that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case," Dixon, 283 So. 2d at 10, and to determine whether all

the circumstances of the case at hand "warrant the imposition of our harshest penalty. " Fitzuatrick, 527 So. 2d at 812. Appellant's case is neither the "most aggravated" nor is it "unmitigated. " Indeed, it is one of the least aggravated and one of the most mitigated of death sentences ever to reach this Court. The "high degree of certainty in . . . substantive proportionality [which] must be maintained in order to insure that the death penalty is administered even-handedly , " Fitzpatrick, 527 So. 2d at 811, is missing in this case, and the death penalty is plainly inappropriate on this record,

First, this case is not "the most aggravated. " As argued previously, there is a single aggravating circumstance present for each of the murders. This aggravating circumstance is the contemporaneous murder. This Court has affirmed death sentences based on the single aggravating factor of a prior violent felony. Duncan v. State, 619 So. 2d 279 (Fla. 1993); Ferrell v. State, 21 Fla. L. Weekly S166 (Fla. April 11, 1996). However, in each of those cases, the prior murders occurred years previously, thus indicating, clearly, a failure on the defendant's part to have been rehabilitated. This Court has recognized that, where this aggravating factor is based on contemporaneous crimes arising out of a single criminal episode, the import of the aggravating factor is lessened. Terrv v. State, 668 So. 2d 954 (Fla. 1996).

Second, this is not "the sort of 'unmitigated' case contemplated by this Court in Dixon. " Fitzpatrick, 527 So. 2d at 812. Numerous mitigating circumstances were found by the sentencing judge and supported by abundant testimony. Other mitigation was also presented including the disproportionate treatment given to the codefendant in this case. A review of some of the cases which this Court has reversed on proportionality grounds leads to

the conclusion that Appellant's death sentences cannot stand.

In Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988), this Court accepted the sentencing judge's finding of five statutory aggravating circumstances, including those that showed culpable intent. Fitzpatrick had been convicted of the murder of a law enforcement officer. Fitzpatrick shot the officer while holding three other persons hostage with a pistol in an office. Fitzpatrick had also previously been convicted of violent felonies. The trial court found the existence of three statutory mitigating circumstances, Mr. Fitzpatrick's crime was significantly more aggravated then Appellant's, yet this Court found his actions to be "not those of a cold-blooded, heartless killer," since, "the mitigation in this case is substantial. " Id. at 812.

In Livingston v. State, 565 So. 2d 1288 (Fla. 1988), the defendant killed a store attendant, shooting her twice with a pistol during the commission of an armed robbery. This Court found that two aggravating circumstances (prior violent felony and felony murder) when compared to two mitigating circumstances (age and unfortunate home life), "does not warrant the death penalty. " Id. at 1288. Of special importance to this Court in mitigation in , Livingston is the offender's addiction to and/or intoxication from drugs or alcohol, This factor is also present in Appellant's case.

In Songer v. State, 544 So. 2d 1010 (Fla. 1989), this Court reviewed a death penalty imposed by a trial judge based on one statutory aggravating factor, that the murder of a highway patrolman was committed while Songer was under the sentence of imprisonment. Due to the presence of several mitigating factors, this Court overturned the death sentence and remanded for imposition of a life sentence despite a jury recommendation of death. The

reasoning of this Court is instructive:

> Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders. State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). To secure that goal and to protect against arbitrary imposition of the death penalty, we view each case in light of others to make sure the ultimate punishment is appropriate.
>
> Our customary process of finding similar cases for comparison is not necessary here because of the almost total lack of aggravation and the presence of significant mitigation. We have in the past affirmed death sentences that were supported by only one aggravating factor, (see, e.g., LeDuc v. State, 365 So. 2d 149 (Fla, 1978), cert. denied, 434 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979), but those involved either nothing or very little in mitigation. Indeed, this case may represent the least aggravated and most mitigated case to undergo proportionality analysis.
>
> Even the gravity of the one aggravating factor is somewhat diminished by the fact that Songer did not break out of prison but merely walked away from a work-release job. In contrast, several of the mitigating circumstances are particularly compelling. It was unrebutted that Songer's reasoning ability was substantially impaired by his addiction to hard drugs. It is also apparent that his remorse is genuine.

Id. at 1011.

In Penn v. State, 574 So. 2d 1079 (Fla. 1991), this Court approved the trial court's finding that the murder was heinous, atrocious or cruel. In mitigation, the court found that Penn had no significant history of prior criminal activity and that he acted under the influence of extreme mental or emotional disturbance. This Court then concluded:

> Generally, when a trial court weighs improper aggravating factors against established mitigating factors, we remand for reweighing because we cannot know if the result would have been different absent the impermissible factors. Oats v. State, 446 So. 2d 90 (Fla. 1994), receded from on other grounds, Preston v. State, 564 So. 2d 120 (Fla. 1990). However, one of our functions "in reviewing a death sentence is to consider the circumstances in light of our other decisions and determine whether the death penalty is appropriate." Menendez v. State, 419 So. 2d 312, 315 (Fla. 1982). Under the circumstances of this case, including Penn's heavy drug use and his wife telling him that his mother stood in the way of their reconciliation, this is not one of the least mitigated and most aggravated murders. See State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Compare Smalley v. State, 546 So. 2d 720 (Fla. 1989) (heinous, atrocious, cruel in aggravation; no prior history, extreme disturbance, extreme impairment in mitigation); Songer v. State, 544 So. 2d 1010 (Fla. 1989) (under sentence of imprisonment in aggravation; extreme disturbance, substantial impairment, age in mitigation); Proffitt v. State, 510 So. 2d 896 (Fla. 1987) (felony murder in aggravation; no prior history in mitigation); Blair v. State, 406 So. 2d 1103 (Fla. 1981) (heinous, atrocious, cruel in aggravation; no prior history in mitigation). After conducting a proportionality review, we do not find the death sentence warranted in this case.

Id. at 1083-84. See also McKinney v. State, 579 So. 2d 80 (Fla. 1991) (death sentence disproportionate given only one valid aggravator, and mitigation shows that defendant had no significant criminal history, had mental deficiencies, and alcohol and drug history).

Of considerable importance in the instant case is the disparate treatment between Appellant and Domingo Figueroa. After Appellant's penalty phase, Figueroa stood trial and received life sentences. Under normal circumstances, an accused is entitled to present evidence at a penalty phase that a codefendant received a sentence less than death, Messer v.

State, 403 So. 2d 341 (Fla. 1981). Now what the jury in the instant case would have done had they known that Figueroa received a life sentence.

The instant case is simply not one in which the death penalty is warranted. This Court must vacate the sentences and remand the cause for imposition of life sentences.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to vacate his sentences and remand the cause with instructions to impose life sentences, or in the alternative, to order a new penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to, Mr. Bobby Allen Raleigh, #124052 (R2S3), Florida State Prison, P.O. Box 747, Starke, FL 32091-0747, this 21st day of November, 1996.

Michael S. Becker

MICHAEL S. BECKER
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