IN THE SUPREME COURT OF FLORIDA

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| ROBERT JEFFREY TREASE, | : | |
| Appellant, | : | |
| vs. | : | Case No. 89,961 |
| STATE OF FLORIDA, | : | |
| Appellee. | : | |
| | : | |

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

# INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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## PRELIMINARY STATEMENT

The record in this case consists of 31 volumes and one supplemental volume. Volumes 1 through 12 contain records supplied by the clerk, including depositions. These volumes will be designated "C" in the Initial Brief. The remaining volumes contain transcripts of the hearing and trial and will be referred to as "R" in the Initial Brief. The supplement will be referred to as "S". Arabic numerals shall be used to designate the Volume numbers.

The Appellant in this case, Mr. Trease, shall be referenced by the use of his name. The co-defendant, Hope Seigel shall be referred to as "Seigel".

Summaries of the depositions will not be done in the Statement of the Facts in the interest of page conservation. When necessary, they will be referred to in the brief and referenced as being testimony contained only in deposition.

## STATEMENT OF THE CASE

On September 28, 1995, the Appellant, Robert Trease, was indicted by the Grand Jury for Sarasota County, the Twelfth Judicial Circuit, for the murder of Paul Edenson on August 17, 1995. (Vol.1, C31-32) Hope Seigel was charged as a co-defendant in a separate indictment. (Vol.1, C37) Conflict counsel was appointed to represent Mr. Trease. (Vol.1, C8,132) Mr. Trease was also charged with Armed Burglary and Robbery with a Firearm arising out of the same incident as the murder, and these charges were consolidated for trial. (Vol.1, C183)

Numerous pre-trial motions were filed by the State, including Notices of Intent to Use Evidence of Other Crimes and Wrongs (Vol.1, C188-189; Vol.2, C211-212,374-375; Vol.3, C513-514); Motions in Limine regarding the co-defendant (Vol.3, C509-510), victim (Vol.3, C511-512), defense witnesses (Vol.3, C576-577), and the co-defendant's statements to others (Vol.4, C625-626).

Defense counsel also filed numerous pre-trial motions, including moving to Appoint Co-Counsel (Vol.1, C58-59) to strike the Notice of Other Crimes (Vol.4, C637-638); to Suppress Statements (Vol.4, C628-634); Motions for Koon and Nelson inquiries (Vol.2, C353-363, Vol.3, C451-453,496-500); and Motions in Limine (Vol.4, C655-636; Vol. 12, C 1770-1774)

Mr. Trease sought to remove defense counsel on numerous occasions. The first motion to dismiss counsel was filed on

September 6, 1996. (Vol.2, C242-246) A supplement to the motion was filed on September 12, 1996. (Vol.2, C258-264) An emergency Motion to Dismiss Counsel was filed on September 30, 1996. (Vol.2, C280-295) Defense counsel moved to withdraw on October 7, 1996. (Vol.1, S2407-2410) An ex-parte hearing was heard on the motion on the same day. (Vol.32, C303-333) Mr. Trease then filed an Second Emergency Motion to Dismiss Counsel on October 9, 1996. (Vol.2, C334-341) All motions were denied. (Vol.2, C353-370) Mr. Trease unsuccessfully attempted to appeal this denial to the Second District Court of Appeal. (Vol.2, C373,377-378, Vol.4, C679)

Mr. Trease was tried by a jury from November 25, through December 11, 1996. (Vol.18-29) The jury returned a verdict of guilty as charged on December 11, 1996. (Vol.1 , C1846-1847)

Penalty phase was held on December 16 through 19, 1996. (Vol. 30-31) The jury returned an advisory recommendation of 11-1 in favor of execution. (Vol.29, C1884-1885)

The trial court sentenced Mr. Trease to death on January 22, 1997. (Vol.12, C2232-2246) The Notice of Appeal was filed on February 18, 1996. (Vol.12, C2335-2336)

## STATEMENT OF THE FACTS

### GUILT PHASE

The body of Paul Edenson was found by his housekeeper on August 18, 1995. (Vol.22, R1490-1492) Mr. Edenson was lying in a pool of blood in the living room of his home just off the Boulevard of the President's in Sarasota, Florida, clad in a bathrobe and underwear. (Vol.22, R1492,1499) The police were summoned. They secured the area and sent for the medical examiner. (Vol.22, R1497-1508) The police found no signs of forced entry and observed only the couch near the body seemed to be out of place. (Vol.22, R1507-1508)

Dr. James Wilson, the medical examiner, viewed the body at the scene. (Vol.22, R1513) He observed the body on the floor in a large pool of blood and a one to two inch piece of tissue lying four to six feet from the body. (Vol.22, R1514-1520) When the body was turned over a piece of rubber from the tip of a rubber glove was found. (Vol.22, R1522-1525)

Dr. Wilson, through observation at the scene and a subsequent autopsy, determined that Mr. Edenson had been shot on the right side of his face, with the gun most likely having been placed against his head. (Vol.22, R1531) The bullet passed through the frontal lobes and exited through the right eye, completely disrupting it and causing it to be dislodged to the floor. (Vol.22, R1531-1535,1535-1543; Vol.23, R1584) The gunshot wound was

consistent with having been made by a 9mm bullet. (Vol.22, R1539) Wilson stated the injuries would ultimately be fatal, but that they would not have immediately caused death. Brain stem function, which controls breathing, was not immediately affected. (Vol.22, R1543)

The left eye and tip of the nose also showed signs of abrasion consistent with him having been struck. (Vol.22, R1535-1537) There were some small marks on the back of the right arm which might be consistent with having been caused by a stun gun. (Vol.23, R1589-1590)

Dr. Wilson also observed severe trauma to the neck. (Vol.22, R1545) Dr. Wilson found three large wounds which cut deeply into the neck and were made from right to left. (Vol.22, R1550-1555) The most likely instrument used to make them was a knife (Vol.22, R1571-1573) The piece of tissue found on the floor of the house a few feet from the body was the hyoid bone which is located just above the larynx. (Vol.22, R1557-1558) Dr. Wilson opined that it would take a very powerful cutting or thrusting movement to expel that tissue and to account for the depth of the cuts. A tremendous amount of force was required to cause these injuries. (Vol.22, R1558) Dr. Wilson acknowledged that sometimes great anger or rage can lead to increased strength. (Vol.23, R1591-1592)

Dr. Wilson opined that Mr. Edenson was struck in the face shortly before his death. He was then shot and his head pulled

back with the assailant behind him and his throat cut. (Vol.22, R1559-1563) Dr. Wilson also believed that Mr. Edenson would have been capable of some movement after being shot. (Vol.22, R1565) Mr. Edenson may have been subdued in his level of consciousness, but he could have been aware that he had been injured and tried to escape further injury. (Vol.22, R1566) He may have been able to make some vocalization sounds. (Vol.22, R1566) The neck wounds in combination with the gunshot wound would have caused death in a matter of minutes. (Vol.22, R1569)

Hope Seigel testified that she was present at the death of Paul Edenson. (Vol.23, R1603) Seigel was a 25 year old, single parent of a 9 year old girl. (Vol.23, R1604) Seigel liked black panthers, and sometimes signed her name "Black Panther". (Vol.23, R1753) She lived at her parents home in Bradenton. (Vol.23, R1615) Seigel's mother, Mary, cared for her child. (Vol.23, R1616)

Seigel had been in a serious car accident in 1992. (Vol.23, R1748) It caused her to be moody, to be forgetful, and much more emotional due to the brain injuries she suffered. (Vol.23, R1749) Mary Seigel noted that Seigel "couldn't take everything" in and would be easily frustrated. (Vol.24, R1852) Seigel admitted to taking several drugs, including Vicodin and Valium. (Vol.23, R1768) She would take Prozac if it was around. (Vol.23, R1769) According to her mother, Seigel was right handed. (Vol.23, R1850)

Seigel pled guilty to the charge of principal to a second degree murder after being charged with first degree murder and was awaiting sentencing at the time of her testimony (Vol.23, R1803). Seigel agreed to testify consistent with the statement she had given at her arrest. (Vol.23, R1815) She expected to receive between 10 and 20 years prison as punishment for her participation in the murder of Mr. Edenson. (Vol.23, R1604-1605) Seigel was aware that no evidence linking Mr. Trease to the crime was found at the scene. (Vol.23, R1803) The only evidence placing him at the murder was Seigel's word. (Vol.23, R1803) Seigel admitted to contacting Mr. Trease after they were arrested to try to get him to say things to incriminate himself and exonerate her. (Vol.23, R1808) She admitted to sending him a pornographic picture she drew of herself. (Vol.23, R1809-1810)

Seigel testified that she was Mr. Trease's sometime girl-friend. (Vol.23, R1607) They began to date in December 1994, broke up in the spring of 1995, and then got back together toward summer. (Vol.23, R1612) Seigel admitted she was very jealous of Mr. Trease, she sought out his girlfriend when she and he were broken up, and was very angry. (Vol.23, R1752-1753) During the break-up Seigel dated a man named David Shorin several times and had an intimate relationship with him. (Vol.23, R1613,1754,2213) She was aware that Shorin had guns in his bedroom. (Vol.23, R1614,1755)

Seigel had some familiarity with handguns and was planning on taking shooting lessons. (Vol.23, R1757-1760)

Seigel and Mr. Trease took a trip to Biloxi together, which was the beginning of their reconciliation, and while there planned to burglarize Shorin. (Vol.23, R1616) They went to Shorin's house, and after making sure he was not home, they entered through a window and stole a safe. (Vol.23, R1618) They took the safe in Seigel's truck back to Seigel's house. (Vol.23, R1618) They found guns, money, and knives in the safe. (Vol.23, R1619,2203-2205) Mr. Trease left town with several of the guns. (Vol.23, R1620) When he returned he had kept several of the guns, including a very small one and a Glock. (Vol.23, R1621) Mr. Trease would carry the Glock in the back of his pants. (Vol.23, R1622)

Seigel saw Mr. Shorin after the burglary. (Vol.23, R1620) She did not tell him that she had committed the burglary. (Vol.23, R1620,1762-1763) In his words, she was "cool as a cat". (Vol.25, R2215)

According to Seigel, Mr. Trease told her that he had worked for the FBI and the DEA or something. (Vol.23, R1625) In fact, Seigel had worked for the police and owned two shirts that said "Police" on them. (Vol.23, R1625,1748)

Mr. Trease stayed with Seigel at her parent's home while her parents and daughter were in Pennsylvania. (Vol.23, R1626) She

observed him practice defensive martial arts called "Aikido". (Vol. 23, R1626)

Seigel met Paul Edenson in 1995 when she went with Mr. Trease to Bayview Motors for the purpose of selling his Mercedes. (Vol.23, R1995) Edenson owned Bayview Motors. (Vol.23, R1609) Mr. Trease's car was taken by Bayview on consignment, but did not sell. It was returned. (Vol.24, R1938-1939) Seigel went to the dealership three or four times and also ran into Mr. Edenson once in a restaurant. (Vol.23, R1611) Seigel and Mr. Trease would sometimes drive by the car lot and Mr. Trease would wonder if there was a safe in the store. (Vol.23, R1627)

According to Seigel, it was Mr. Trease's idea for her to call Mr. Edenson and arrange a date with him in order for her to find out if he had a safe they could then steal. (Vol.23, R1628) Seigel called and talked to Mr. Edenson. (Vol.23, R1629)

She called Mr. Edenson again on her phone on August 17, 1995. (Vol.23, R1629) Seigel claimed she didn't want to make the calls, and she called different numbers to fool Mr. Trease. (Vol.23, R1630) According to Seigel, Mr. Trease got frustrated, took the phone, dialed information, and had the operator connect the call, and then handed her the phone. (Vol.23, R1631) Phone records reflected that three calls were made to Bayview Motors on August 17 from the Seigel residence. (Vol.24, R1906) The calls were present on the bill because they utilized directory assistance. (Vol.24,

R1910) Instead of hanging up, Seigel arranged a date for that evening with Mr. Edenson. (Vol.23, R1631-1632)

Rick Goldman was in Paul Edenson's office on August 17, 1995, when Edenson received a phone call around 6:30 p.m. (Vol.24, R1878) Due to the gestures and facial expressions Mr. Edenson gave him during the call, Goldman believed the caller was a female. (Vol.24, R1881)

Seigel got very dressed up for the date, wearing a black dress and high heels. (Vol.23, R1633) She did her hair up big. (Vol.23, R1633) Seigel took some drugs, Vicodin and Valium, with some vodka. (Vol.23, R1636) Seigel carried her purse, which contained her stun gun. (Vol.23, R1729,1776) Mr. Trease dressed in casual clothes and then she drove them down to Mr. Edenson's house in her pick-up truck. (Vol.23, R1634) Once they got to his neighborhood, she saw Mr. Edenson in his yard. He waved and Mr. Trease ducked down so he wouldn't be seen. (Vol.23, R1636-1637) Seigel drove around the block and dropped Mr. Trease off at a bar called ChaCha Coconuts. (Vol.23, R1638) Seigel returned alone to Mr. Edenson's. (Vol.23, R1638)

Seigel went in the house and sat in a massage chair while Mr. Edeson showered. (Vol.23, R1638) She then sat on the couch with Edenson while he was wearing only bikini underwear and smoked a joint with him. (Vol.23, R1638-1643) Mr. Edenson seemed sad and talked to Seigel about money troubles. (Vol.23, R1643-1645) Seigel

commiserated with him and offered to help him. Then they decided to order Chinese food and have it delivered rather than going out to eat. (Vol.23, R1645) Christopher Gauthier, who worked at China Palace Restaurant, received a call for take out Chinese at 8:53 p.m. He delivered it around 10:00p.m due to the long distance between the restaurant and Mr. Edenson's house.. (Vol.24, R1890) He saw a white truck and a Mercedes in the driveway. (Vol.24, R1891)

While they were waiting on the food to arrive Seigel testified that she decided to go find Mr. Trease, although she testified to no prearranged meeting. (Vol.23, R1645) Seigel lied to Mr. Edenson, telling him she needed to see a friend at the Columbia, and then left, walking to ChaCha Coconuts. (Vol.23, R1647-1648) Mr. Edenson had suggested she walk.

Seigel discovered Mr. Trease sitting at the bar talking to two Brazilian women. (Vol.23, R1648-1649) This angered her, especially when Mr. Trease ignored her. (Vol.23, R1649-1650,1778) She became even more angry when she saw one of the women giving Mr. Trease her phone number. (Vol.23, R1650) Mr. Trease got up and left the bar and Seigel followed him. (Vol.23, R1650)

Margarida Wortman and Edjanira Viana were the two Brazilian women in the bar. (Vol.24, R1945) They recalled meeting Mr. Trease and talking to him for about 20 minutes. (Vol.24, R1948,1970) Edjanira gave him her phone number on a piece of paper. (Vol.24,

R1949,1973-1977) The women recalled Seigel coming in because she was dressed up. (Vol.24, R1950) She seemed very nervous and was smoking non-stop. (Vol.24, R1950,1978) Seigel did not seem normal. (Vol.24, R1957) Seigel did not speak to Mr. Trease, but he said he knew her. (Vol.24, R1951) Mr. Trease said Seigel was the police according to Wortman. (Vol.24, R1952) When the women left they saw Mr. Trease and Seigel arguing outside on the street. (Vol.24, R1953,1984) They saw Seigel push Mr. Trease, but he didn't touch her. (Vol.24, R1960)

Seigel's story was that she and Mr. Trease argued about whether or not Mr. Edenson had a safe and whether they should call the thing off. (Vol.23, R1651,1779) Mr. Trease was also angry because Seigel had messed things up with the woman in the bar. (Vol.23, R1651,1780) They continued to argue and Seigel walked back toward Mr. Edenson's house. (Vol.23, R1653) She turned once and saw Mr. Trease behind her. (Vol.23, R1653) Seigel also remembered passing another man who smelled good. (Vol.23, R1654) When she turned again, she did not see Mr. Trease. (Vol.23, R1783)

Edward Koleck was the man that Seigel passed and thought smelled good. (Vol.24, R1914) Mr. Koleck lived on North Boulevard of the Presidents. (Vol.24, R1914) He was walking to the Columbia on the night of August 17 at around 10:00 p.m. (Vol.24, R1914) He remembered passing Seigel because she was wearing a very tight dress, high heels, and had a good build. (Vol.24, R1917) Koleck

saw a man a short ways behind her, with a medium build and long curly hair. (Vol.24, R1918) Both were walking quickly. (Vol.24, R1920) Koleck watched for a minute, decided they had had a lover's quarrel, and went on. (Vol.24, R1921) When he went home at 12:30, he heard the T.V. on very loudly at Mr. Edenson's home. (Vol.24, R1922) The next day he learned Mr. Edenson had been killed. (Vol.24, R1926) Koleck later saw the girl's picture on T.V. and contacted the police. (Vol.24, R1927)

Seigel knocked on Edenson's door, he answered in a bathrobe, and she went in. (Vol.23, R1655) Mr. Edenson locked the door and went back to serving the Chinese food. (Vol.23, R1655) According to Seigel she again lied to Mr. Edenson, telling him she needed to get her cigarettes from her truck, when she was really planning to leave. (Vol.23, R1655) Mr. Edenson unlocked the door for her; and as he did so, Mr. Trease jumped into the room. (Vol.23, R1657-1659)

Seigel stated that Mr. Trease struck Mr. Edenson in the face, causing him to fall back and in doing so, Mr. Edenson grabbed Mr. Trease's shirt. (Vol.23,1659-1660) Mr. Trease continued to strike Mr. Edenson and Seigel stated she saw gloves on Mr. Trease's hands. (Vol.23, R1660) Seigel stated she heard Mr. Trease tell Mr. Edenson that he should kill him for tearing his shirt. (Vol.23, R1662)

Seigel then said Mr. Trease got into one of his karate positions and got Mr. Edenson down on the floor. (Vol.23, R1662)

Mr. Trease was sitting on Mr. Edenson's back. (Vol.23, R1662) Mr. Trease was demanding to know where a safe was and Mr. Edenson was saying that it was at the store. (Vol.23, R1664) Seigel then claimed that Mr. Trease told her to go to the truck and get the gun. (Vol.23, R1664) Seigel then acknowledged that she went to the truck, found the gun, brought it into the house, and claimed she gave it to Mr. Trease. (Vol.23, R1664-1666)

Seigel claimed she saw Mr. Trease put the gun to Mr. Edenson's head and heard Mr. Trease ask Mr. Edenson if he wanted to live. (Vol.23, R1666) Mr Edenson was saying yes. (Vol.23, R1666) Seigel claimed she looked away, then heard a gunshot.(Vol.23, R1667) She turned and saw Mr. Edenson trying to get up. (Vol.23, R1667-1668) Seigel saw blood and then claimed that Mr. Trease told her to bring him a knife. (Vol.23, R1668) Again, it was Seigel who went to the kitchen, found a knife in a drawer, and then claimed she took it to Mr. Trease. (Vol.23, R1668) Seigel said she saw Mr. Trease pull Mr. Edenson's head back and then she turned away. (Vol.23, R1669) She saw three movements. (Vol.23, R1670)

Seigel then claimed that Mr. Trease had her search the house for valuables and help him clean up. (Vol.23, R1671) Seigel testified that she picked up a bullet, the knife, and a piece of a rubber glove, and put the things into a bag. (Vol.23, R1672) Wine glasses with Seigel's prints were also put into the bag. (Vol.23, R1672) Seigel went with the things to the car and a short

time later Mr. Trease came out. (Vol.23, R1673) Seigel drove off and Mr. Trease purportedly told Seigel that he had heard Mr. Edenson's last breath and that he had enjoyed that. (Vol.23, R1674)

Seigel and Mr. Trease returned to Seigel's parent's home. (Vol.23, R1675) Their clothes were burned in the fireplace. (Vol. 23, R1677) The remaining items, including the knife and a jewelry box, were placed in a garbage bag, weighted down with a paint can, and dumped into the river by Seigel's house. (Vol.23, R1674-1680) Seigel later led police to the bag. (Vol.23, R1740)

After disposing of everything, Seigel got dressed up again and she and Mr. Trease went to a local bar called Tink's. (Vol.23, R1794) They had a few drinks and Seigel claimed she went into the bathroom and cried. (Vol.23, R1796)

Seigel and Mr. Trease then left Bradenton in Seigel's truck. (Vol.23, R1681) They headed for Pennsylvania, where Seigel was from. Seigel had already planned a trip to visit an old girl-friend. (Vol.23, R1781,1731)

Mary Seigel testified that when she returned to Florida on August 18, she found her house very messy. (Vol.23, R1862) There were two pieces of metal in the fireplace. (Vol.23, R1862) She also found some items belonging to Mr. Trease in the house, which she gave to the police. (Vol.23, R1863)

Seigel testified that the trip to Pennsylvania took several days. (Vol.23, R1732) According to Seigel, Mr. Trease threatened

her on the way. (Vol.23, R1732) Mr. Trease threatened to kill her or have someone else do it if she testified against him. (Vol.23, R1732) He yelled at her when she drove and told her that if they were stopped, he would kill the cop. (Vol.23, R1733) Mr. Trease also told Seigel that he would marry her so she couldn't testify against him. (Vol.23, R1733) He got mad at Seigel when she cried. (Vol.23, R1735)

Seigel called her mother several times while on the road to get money. (Vol.23, R1735) According to Mary Seigel, Seigel seemed nervous on the phone. (Vol.24, R1866) Seigel told her mother that something bad had happened, she was there, but couldn't prove she hadn't done anything. (Vol.24, R1870) Seigel said she was in the wrong place at the wrong time. (Vol.24, R1871) Mary Seigel agreed to cooperate with the police and wired money to Seigel. (Vol.24, R1872; Vol.27, R252510-2511) After they arrived at her friend Heather's house in Pennsylvania, she and Heather were on the way to pick up some money that was being wired to her when she was arrested. (Vol.23, R1737-1739,1800)

Heather Tomilson testified that Seigel and Mr. Trease arrived at her apartment in late August 1995. (Vol.25, R2078) Mr. Trease had a black handgun and a gun that looked like a tire gauge. (Vol. 25, R2081) Seigel had a stun gun. (Vol.25, R2081) At one point when Heather and Seigel were alone, Seigel got all red faced and had a "nervous breakdown" in Heather's kitchen. (Vol.25, R2084)

Seigel said she would never see her family again and that she was stuck with Mr. Trease for the rest of her life. (Vol.25, R2085) Heather tried to guess what had happened, and Seigel denied that murder had been committed. (Vol.25, R2088) According to Heather, and admitted over objection, Mr. Trease asked Heather if she knew anyone with a safe that they could rob. (Vol.25, R2099-2100)

The Pennsylvania police, in co-operation with the Sarasota police, learned that Seigel and Mr. Trease were staying with Heather. (Vol.25, R2108-2110) They detained Seigel on a witness warrant while she and Heather were on their way to pick up a wire from Seigel's mother. (Vol.25, R2111) Seigel told them where to find Mr. Trease and told them he had a gun. (Vol.25, R2114)

The police went to Heather's residence. When they knocked, no one answered. (Vol.25, R2113) They entered the apartment with their guns drawn and Mr. Trease made a lunging motion toward them. (Vol.25, R2114,2128) When he saw the guns, Mr. Trease stopped and was detained without incident. (Vol.25, R2115) Mr. Trease told them where to find the Glock gun. (Vol.25, R2116,2140) Mr. Trease denied any knowledge of a murder in Sarasota. (Vol.25, R2118,2131) Mr Trease said he had found the gun behind Seigel's house. (Vol.25, R2119-2110) Mr. Trease said he had a heart condition and did not have long to live. (Vol.25, R2121,2132) During the interview, Mr. Trease was arrested as a fugitive from justice for First Degree Murder in Florida.

The Edenson home was dusted for prints. (Vol.24, R1995) A latent shoe print was found on the floor of the home from a deck type shoe. (Vol.24, R2003; Vol.27, R2406) It was not known if the shoe print matched a pair of Mr. Edenson's or if it was a female shoe. (Vol.24, R2045; Vol27, R2410) One palm print belonging to Seigel was found by the door on the inside. (Vol.24, R2010-2011) No fingerprints belonging to Mr. Trease were found in the house. Bullet fragments and the rip of a rubber glove were also recovered. (Vol.24, R2004) Blood swabbings were taken, but no blood samples matched Mr. Trease's. (Vol.24, R2008) A blue bag was recovered from a lake, which contained a safe belonging to David Shorin and a knife. No prints or blood were found on these items. (Vol.24, R1032) The FDLE crime lab was unable to determine if the Glock gun taken from the Tomilson apartment had fired the bullet removed from Mr. Edenson due to the small size of the fragments recovered. (Vol. 26, R2349,2352) Hair samples could not be compared due to the short length of the sample from Mr. Trease, who had shaved his head in the jail upon his arrest. (Vol.26, R2358) However, no black hairs, the color of Mr. Treases' hair, were found in the vacuumings and samples obtained from Mr. Edenson's house. (Vol.26, R2367) All of the DNA samplings done were either determined to be Mr. Edenson's or inconclusive. (Vol.27, R2397)

Over objection, Deputy Harry Keffer testified that he arrested Seigel in Pennsylvania. (Vol.26, R2253) He read her her Miranda

rights and she talked to him about the homicide. (Vol.26, R2255) A taped statement was eventually made. (Vol.26, R2256) Keffer noted that Seigel was very upset and very emotional on the tape. (Vol.26, R2257) One sound on the tape is that of Seigel shredding paper towels. (Vol.26, R2258) Over objection the taped interview was played to the jury. (Vol.26, R2262-2319)

Becky Bishop testified over objection that she was employed as a massage therapist and knew Mr. Trease. (Vol.25, R2226) They had met at a restaurant in October 1994. (Vol.25, R2228) They dated for a month and Mr. Trease wanted to marry her. (Vol.25, R2230) She was given a ring (Vol.25, R2230) Mr. Trease told her he worked in law enforcement. (Vol.25, R2231) Bishop related how she observed Mr. Trease practicing karate moves. (Vol.25, R2231) At one point Mr. Trease said they could make a lot of money if she had rich clients. (Vol.25, R2234) A mistrial was requested and denied. (Vol.25, R2235)

Over objection, Jeffery Colson testified that he was from Las Vegas, Nevada. (Vol.27, R2440) He knew Mr. Trease a couple of years before in a business context. (Vol.27, R2440) He had dinner at Mr. Trease's house several times. (Vol.27, R2441) Mr. Colson had observed Mr. Trease perform some martial arts moves and Mr. Trease had told him that he had a black belt in Karate. (Vol.27, R2442) The moves were visually stunning. (Vol.27, R2442) Mr. Trease also demonstrated proficiency with knives and showed Mr.

Colson handmade knives of superior craftsmanship. (Vol.27, R2443) Mr. Trease demonstrated how someone's throat might be cut with two people standing face to face. (Vol.27, R2444-2445)

Over objection, Bridgett Berousek testified that in the early part of 1995 she dated Mr. Trease. (Vol.27, R2449) Their relationship ended in May. (Vol.27, R2450) In March, Mr. Trease had asked her if she knew anyone with safe, drugs, or valuables that they could steal. (Vol.27, R2451) Berousek would also see Mr. Trease do karate moves in the house they were living in together. (Vol.27, R2451) As part of a proffer outside the jury, Berousek testified that she did have one occasion to deal with Seigel when Seigel came to where she worked to talk to her. (Vol.27, R2455) Seigel was upset and angry. (Vol.27, R2455)

Deputy Ralph Robinson interviewed Mr. Trease in Pennsylvania. (Vol.27, R2487) Mr. Trease agreed to talk and told Robinson the route he and Seigel had taken to Pennsylvania. (Vol.27, R2489) On the evening of the murder, Mr. Trease said he had stayed up late the night before and had not gotten up until about 8p.m.. (Vol.27, R2490) Seigel and he spent the evening at the residence. (Vol.27, R2491) Mr. Trease did not think he had been around St. Armand's Circle on the night of the murder. (Vol.27, R2492) Mr. Trease stated he owned no guns, but had found the Glock by the Seigel's pool. (Vol.27, R2493)

On August 26, in another interview, Mr. Trease indicated that he was taking medication for his heart. (Vol.27, R2499) He also indicated that on the night of the murder, Seigel may have gone out on a date with a "john". (Vol.27, R2500)

Detective Wildtraut also interviewed Mr. Trease with his consent. (Vol.27, R2513) Mr. Trease claimed he had some memory loss caused by his medication. (Vol.27, R2513) Mr. Trease repeated the route he and Seigel took to Pennsylvania. (Vol.27, R2515) Mr. Trease denied owning weapons, but said that Seigel owned a nine millimeter handgun, a Taser stun gun, and a pen gun. (Vol.27, R2517) Mr. Trease said he knew the victim because he had once tried to sell a car through him, but that was the only contact. (Vol.27, R2518) Mr. Trease said he wanted to cooperate and would speak with the detectives in Florida when he was returned there. (Vol.27, R2519)

Before his return to Florida, Mr. Trease asked to speak to Seigel. He stated that she was only 24, had a child, and did not need to go to prison for the rest of her life. (Vol.27, R2520) Mr. Trease said he might have to take the fall for her. (Vol.27, R2520)

In Florida, Mr. Trease inquired about Seigel's charges and said he didn't want her charged with anything. (Vol.27, R2521) He said she had killed no one. (Vol.27, R2521) Mr. Trease said that he did not kill Mr. Edenson, but that he didn't care what happened to him. (Vol.27, R2522)

On September 18, Mr. Trease again requested an interview. He told Detective Wildtraut that he didn't kill Mr. Edenson, and that if he had done so, he would not have been so stupid as to leave a witness. (Vol.27, R2524) He asked if the murder weapon had been found, indicated he did not care what happened to Seigel, and that she could fry for what she had done to him. (Vol.27, R2524)

Dr. Daniel Sprehe testified that the medications Mr. Trease was taking were tranquilizers and analgesics. (Vol.27, R2536) They are not heart medication. (Vol.27, R2537)

Lieutenant Gordon Hoffmeister testified concerning the use and capabilities of stun guns. (Vol.27, R2545-252550) He examined Seigel's stun gun. (Vol.27, R2550) The gun was operational, but left no effect when it was used. (Vol.27, R2552)

The following evidence was presented by the defense:

Rebecca Bostic was the bartender at Tink's bar on August 17, 1995. (Vol.28, R2571) She recalled Mr. Trease and Seigel coming into the bar around 12:30 and leaving around 1:30 a.m. (Vol.28, R2573) They were well dressed and the women appeared to be under the influence of alcohol when they arrived. (Vol.28, R2573-2574) The girl went to the bathroom several times, but never appeared to have been crying. (Vol.28, R2575) The girl looked cool and calm and the man did not look like he had been involved in a bloody fight. (Vol.28, R2581)

Heather Ciambrone, a inmate at the jail with a pending first degree murder charge, was called by the State. She invoked the Fifth Amendment and did not testify. (Vol.28, R2584-2586)

Janene Silkwood testified that she shared a cell with Seigel and the two became very close friends. (Vol.28, R2597) While they were friends, Seigel told Silkwood that she had killed Mr. Edenson by herself. (Vol.28, R2597) She claimed to have slashed his throat three times. (Vol.28, R2598) Seigel said that she had used a stun gun on him after he began to make unwanted sexual advances. (Vol. 28, R2599) Seigel said she tricked Edenson into lying on the floor by promising to play a sexual game, stunned him, and then shot him. (Vol.28, R2599) Because he was still moving, she slashed his throat. (Vol.28, R2599) Seigel claimed the eyeball came out and she had to be careful she didn't step on it in her heels. (Vol. 28, R2601) Seigel claimed they'd never believe she did it because of her size. (Vol.28, R2601) Seigel was laughing and carefree when she described the murder. (Vol.28, R2604)

Seigel had also told Silkwood earlier that Mr. Trease killed Mr. Edenson in front of them and that it was a Mafia hit. (Vol. 28, R2600) Initially, Seigel had told a story consistent with her trial testimony. (Vol.28, R2611)

At one point Seigel and Silkwood had a falling out and were no longer friends. (Vol.28, R2601-2602,2612) Silkwood had never met Mr. Trease. (Vol.28, R2604) She did send him a letter after she

and Seigel were no longer friends because she felt that it was not fair what Seigel was doing. (vol.28, R2604)

Tonya Sterling was another inmate at the jail and shared a cell with Seigel. (Vol.28, R2641) Seigel told Sterling that her hand was on the gun and her finger was on the trigger, but that Mr. Trease had physically made her pull the trigger. (Vol.28, R2642) Sterling stated she didn't talk much to Seigel about her case. (Vol.28, R2650) Seigel did claim that everything she did, Mr. Trease made her do. (Vol.28, R2651)

Dr. Cynthia Bailey testified that she treated Seigel following her car accident in 1992. (Vol.28, R2673) Dr. Bailey is a psychologist. (Vol.28, R2673) Seigel came because she was having temper control problems, was under stress, and feeling very emotional. (Vol.28, R2673,2675) Bailey also noted that Seigel had an IQ of 82, or low average. (Vol.28, R2674)

**PENALTY PHASE**

Penalty phase began on December 16, 1996. (Vol.30) Mr. Trease was not present at his request. (Vol.30, R2827-2866)

The State introduced into evidence copies of judgments and convictions of Mr. Trease's prior record. (Vol.30, R2895) In one, Colleen Harmon was robbed at gunpoint while working at the Sands Motel. (Vol.30, R2896)

Edward Beran testified that on January 7, 1981, his son was accosted at gun point by three men in the family garage. (Vol.30, R2898) The men came in the house, tied up the family, and Mr. Trease told the others to shoot Mr. Beran's wife because she was screaming. (vol.30, R2895) Mr. Beran was pistol whipped by Mr. Trease. (Vol.30, R2900) One necklace was taken. (Vol.30, R2901)

Karen Sherman testified that in 1981 she was accosted by Mr. Trease. (Vol.30, R2905) He followed her into the underground and hit her in the face. He tried to take her jewelry. (Vol.30, R2905) As a result of the beating, Ms. Sherman has had three surgeries on her lips with one more scheduled. (Vol.30.R2907)

The defense presented the following:

Corrections Officer Robert Owen testified that Mr. Trease had never caused a problem during his incarceration in the county jail. (Vol.30, R2913) He acted as a peacemaker within the cell. (Vol.30, R2914) Corrections Officer Michael Davino testified that Mr. Trease has adjusted well to being incarcerated. (Vol.30, R2921)

When one cellmate tried to commit suicide, Mr. Trease alerted the guards and helped to save the man. (Vol.30, R2923)

Lorraine Mendyk lives in Michigan. (Vol.30, R2930) She lived next door to the Trease family when Mr. Trease was a child, probably from 1956 through 1959. (Vol.30, R2931) During the day she would babysit the Trease children. (Vol.30, R2931) There were four children, three older girls, Mr. Trease, and one younger girl. (Vol.30, R2932) The father was a fireman. He was always drunk when he was at home. (Vol.30, R2933)

Mrs. Mendyk observed signs of physical abuse on two of the girls, Carol and Linda, and on Mr. Trease. (Vol.30, R2933) She saw strap marks on their backs and, at least once or twice a week, would hear the children screaming in the house at night when the father was home. (Vol.30, R2934) In the spring and summer when the windows were open she could hear the children being beaten. (Vol. 30, R2934) The children were fed the same food for all their meals everyday: oatmeal for breakfast, peanut butter sandwiches for lunch, and goulash for dinner. (Vol.30, R2934) The father was the meanest man Mrs. Mendyk had ever seen. (Vol.30, R2934)

The children were frightened around their father. (Vol.30, R2936) They didn't know what would trigger him. (Vol.30, R2937) No police were ever involved and never were called because in that time that was just not done. (Vol.30, R2939) Mrs. Mendyk knew of

no intervention available during that time. (Vol.30, R2940) Mrs. Mendyk last saw Robert in 1962. (Vol.30, R2936)

Carol Rutowski is Robert's sister and the oldest of the children. (Vol.31, R2955) Carol recalled living next door to Mrs. Mendyk and that she was their babysitter. (Vol.31, R2957) Linda Peltier is also Robert's sister. (Vol.31, R2990) They both testified as to the conditions of their and Robert's childhood. (Vol.31)

Carol testified that when she was a child her father worked as a fireman. (Vol.31, R2958) He would be gone for two or three days at a time, then home for three days. (Vol.31, R2958) When he was home he would beat the children every day. (Vol.31, R2958) Linda recalled praying every day that she would come home and her father would be dead. (Vol.31, R2991)

Carol stated that if the children misbehaved while the father was away, when he returned he would get them out of bed. (Vol.31, R2959) The children would be forced to take off their clothes and then would be beaten naked with a strap he wore with his uniform or a braided dog leash. (Vol.31, R2959,2991) The children would be lined up, forcing them to watch the others being beaten. (Vol.31, R2960) These beatings usually took place in the children's bedroom. (Vol.31, R2960)

The father would also beat the children in his bedroom. (Vol. 31, R2931) The naked children were tied on the bed to the bedposts and then beaten from the neck down. (Vol.31, R2961)

As the children got older, the location of choice for the beatings became the basement. (Vol.31, R2961) The basement had beams across the ceiling. (Vol.31, R2961) The children would be stripped, their hands tied with a rope that was then thrown over the ceiling beam, and the suspended children were beaten. (Vol.31, R2961,2992) All of the children watched the others being beaten in this fashion. (Vol.31, R2961) The children were beaten for such things as leaving roll marks on a tube of toothpaste. (Vol.31, R2974-75,3002) The children would scream and cry while being beaten, although Robert stopped as he got older. (Vol.31, R2975, 2994) The abuse continued until the children left home. (Vol.31, R2977,3001)

The father drank all the time he was home, he was always drunk. (Vol.31, R2962,2993) When he drank he would often require the children to sit naked at the table with him. (Vol.31, R2962) He would use a pointer and point out their body parts. (Vol.31, R2962) Robert was often included in this. (Vol.31, R2962) When the father was drunk at night, he would sexually molest the children. (Vol.31, R2963)

Carol testified that her father tried to "bother" her. (Vol. 31, R2963) Robert would come and try to help her. (Vol.31, R2964)

Linda was also sexually abused. (Vol.31, R2979,2995) The sexual abuse began when she was seven and occurred all the time. (Vol.31, R2995-2996) Robert knew of this and couldn't stand it. (Vol.31, R2979)

The father often told Robert that he was not his child, but rather the child of his uncle. (Vol.31, R2964,2997-2998) Robert was often sent into his mother's bedroom. (Vol.31, R2964,2997) The father would tease Robert about the size of his penis. (Vol.31, R2964,2997) At one point their father decided to teach Robert how to defend himself. (Vol.31, R2966) He bought two sets of boxing gloves and would order Robert to fight him. (Vol.31, R2967) Robert would cry and the father would just beat and punch him, trying to make him fight. (Vol.31, R2967) Another time Robert was caught smoking. (Vol.31, R2973) The father made the girls watch while he forced Robert to drink beer and smoke cigarettes until he vomited. (Vol. 31, R2973-2974)

Robert had a bed wetting problem that occurred every night until he was around 9. (Vol.31, R2971) On days the father was not home, the children would get up early and wash the wet sheets so they would not be found. (Vol.31, R2972) If the sheets were discovered, Robert would be beaten. (vol.31, R2972) The bathroom was located where the children would have to pass by their father at night, so none of them wanted to go. (Vol.31, R2971) They would urinate onto clothes, then hide them. (Vol.31, R2971)

One time their father made the children beat him. (Vol.31, R2969,2998) He said if they didn't do it, he would beat them. (Vol.31, R2969) The children cried and didn't want to do it, but they did. (Vol.31, R2969-2970)

The children were not allowed to have friends outside the family. (Vol.31, R2965) Their father would try to hypnotize them and the children would pretend that it worked. (Vol.31, R2966) He would wash their hair in beer and egg. (Vol.31, R2971) On one occasion he put all their heads in a dirty diaper pail because they had not cleaned it well enough. (Vol.31, R2974,3000)

The father also beat their mother. (Vol.31, R2975,2994) The children would be awakened by the sound of the strap hitting their mother's skin. (Vol.31, R2976,2994) Robert would want to go defend his mother and kill their father. (Vol.31, R2976) It took three of the girls to hold him down. (Vol.31, R2976) Their father also slept with a gun and one time shot their mother in the arm. (Vol. 31, R2979,3003) Robert, then a teenager, took his mother to the hospital. (Vol.31, R2980)

Their father died in 1972. (Vol.31, R29 ) Robert at one time went and urinated on the grave. (Vol.31, R2980)

Robert ran away from home as a teenager. (Vol.31, R2970,3005) As a young child, he once locked himself in the car with a knife and threatened to kill himself if his father ever touched him again. (Vol.31, R2980) When he was older, Robert once took his

father to the ground and threatened to kill him if the abuse did not stop. (Vol.31, R2981,3004) However, the abuse did not end. (Vol.31, R2981)

Carol knew that Robert had one child named Marissa. (Vol.31, R2981) She was sixteen and lived in Milwaukee. (Vol.31, R2981)

Carol had finished high school and held down a job. (Vol.31, R2987) She has not been convicted of any violent crimes. (Vol.31, R2987) Her contact with Robert ended in 1972 when the father died. (Vol.31, R2987) Robert has limited contact with his child. (Vol. 31, R2988)

**SENTENCING**

Mr. Trease appeared for sentencing on January 22, 1997. Both the defense and State submitted memorandums regarding sentencing. The court found the following aggravators: that Mr. Trease had been previously convicted of a felony involving force or violence; the capital felony was committed while Mr. Trease was engaged in the commission of a burglary or robbery; the capital felony was committed to avoid or prevent a lawful arrest; and the capital felony was especially heinous, atrocious, and cruel. (Vol.31, R3088-3093) The court found in mitigation that Mr. Trease had adjusted well to incarceration and that he assisted in the prevention of the suicide of another inmate. (Vol.31, R3093) The court stated it gave these factors little or no weight. (Vol.31, R3093) The court found that Mr. Trease was abused as a child on

occasions to numerous to recount. (Vol.31, R3093) This factor was given considerable weight. (Vol.31, R3094) The court recognized the disparate sentence received by Seigel and gave that factor little weight. (Vol.31, R3094)

The court stated after giving consideration to each of the mitigating and aggravating factors and after giving the jury recommendation great weight, he sentenced Mr. Trease to death. (Vol.31, R3094-3095) Mr. Trease also received a life sentence, consecutive to the death sentence on the remaining charges. (Vol.31, R3095)

## SUMMARY OF THE ARGUMENT

The trial court, based upon the facts in this case, erred in failing to appoint a second attorney to assist in the defense in this case. This error was further compounded by the difficulties which arose between appointed counsel and Mr. Trease.

The trial court erred in denying both Mr. Trease's and counsel's request that counsel be allowed to withdraw from representing Mr. Trease and that another lawyer be appointed. New counsel was necessary where conflicts between the two rose to the level that counsel was unable to provide effective assistance of counsel.

The trial court in the admission of the testimony of the co-defendant, Seigel. Initially, the trial court impermissibly limited the cross-examination of Seigel regarding her employment, drug usage, and prior suicide and psychiatric hospitalizations. This evidence was critical to the presentation of Mr. Trease's defense and completely precluded him from showing the bias, prejudice, and motive of Seigel in testifying. The jury was wholly deprived of crucial facts by which they should have judged the crediblilty of the State's key witness.

The trial court further erred in allowing the State to improperly buttress the testimony of Seigel by allowing the State to admit into evidence a prior consistent statement made by Seigel to the police which the State claimed was admissible to rebut a

defense claim of recent fabrication. There was no basis for this exception and the prejudice resulting from the admitting of the statement was further enhanced by the use of a police officer as the vehicle for the admission of the evidence.

The trial court erred in permitting the admission of improper character evidence against Mr. Trease regarding prior ownership of knives and demonstration of defensive tactics using a knife several years before the murder, prior false statements he made to various women about being a police officer and about using Vicodin and Valium as medication for a heart condition. There was no basis for the admission of this evidence, it was not relevant to any material fact in issue, and served only to portray him as a liar.

The court erred as well in the improper admission of Williams rule evidence concerning the alleged solicitations by Mr. Trease of other women to help him commit burglaries by providing him with the names of people or places where safes or money might be obtained. The evidence had little to no probative value, it’s prejudicial impact was great, and was not relevant to any material fact in issue. It's sole purpose was to portray Mr. Trease a bad person with a propensity to commit crime.

The trial court erred in preparing an ambiguous sentencing order with respect to the mitigation concerning Mr. Trease's adjustment to incarceration where he assigned little or no weight to that factor.

The trial court erred in finding the aggravating factor of the murder being committed to avoid arrest applied in this case where there was the probability that the homicide occurred in a fit of anger due to the thwarted robbery and the tearing of Mr. Trease's shirt.

## ARGUMENT

### ISSUE I

THE TRIAL COURT ERRED IN DENYING COUNSEL'S REQUEST TO HAVE A SECOND ATTORNEY APPOINTED TO ASSIST IN THE DEFENSE OF MR. TREASE.

On November 3, 1995, defense counsel Mercurio filed a motion with the trial court requesting that a second attorney be appointed to assist in the defense. (Vol.1,C58-59) Mercurio expounded upon his request at a hearing on November 15, 1995 before Judge Rapkin. (Vol.12, R-23) Mercurio named the attorney he wished to work with and told the court a second attorney was necessary because this was a death case. (Vol.12, R14) Mercurio advised the court that the second attorney had experience he, himself, did not possess, that a second attorney was one of the standards promulgated by the American Bar Association, and the second attorney would concentrate on the penalty phase. (Vol.12, R15) Mercurio stated that this would allow better rapport with the jury and maintain a greater degree of credibility with them. (Vol.12, R15,17-18

The county attorney was present at the hearing and objected to the appointment. They simply did not wish to pay for more than one attorney. (Vol.12, R19)

Judge Rapkin opined that he didn't know where the "trend came from to have two lawyers" (Vol.12, R14) and noted that these cases already have a lot of expenses. Judge Rapkin dismissed the idea of

credibility problems with one lawyer with the jury, was concerned that there would be duplication of hours spent on the case, and feeling that the trend was going to be toward allowing only one lawyer anyway, denied the request. (Vol.12, R20)

The "trend" has not gone the way Judge Rapkin felt it would. Nor should such a critical issue be dismissed lightly as "trendy" or "too expensive". Prior to Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963), there were most certainly those who argued that the idea that one lawyer was necessary in a criminal case was a trend certain to go nowhere.

Currently this Court is considering the adoption of a new rule of Judicial Administration in Capital Cases. In Re: Proposed Amendment to Florida Rules of Judicial Administration- Minimum Standards for Appointed Counsel in Capital Cases, 22 Fla. Law Weekly S407 (Fla. July 3, 1997) Under Section G, "A court must appoint lead counsel and co-counsel to handle every capital trial in which the defendant is not represented by retained counsel or the public defender." Comments to the proposed rule are currently being accepted. However, it is clear that the trend is not to continue with only one lawyer in capital cases. Obviously, it is recognized that the sheer volume, complexity, and time demands of capital cases require the skills and talents of two qualified attorneys.

Although there is no constitutional right that a second attorney be appointed, it is a matter within the trial court's discretion based upon a determination of the complexity of the case and the attorney's effectiveness therein. See, Armstrong v. State, 642 So. 2d 730 (Fla. 1994). In this case it was an abuse of discretions for the trial court to deny the request for a second attorney to focus on penalty phase. The trial in this case lasted over three weeks, including the penalty phase. significant numbers of witnesses were located out of state -- all the family of Mr. Trease, as well as the police and other witnesses, were located in Pennsylvania. The trial court's concerns about duplication of effort during depositions was a simple situation which could have been resolved between the two attorneys handling the case, it was certainly not sufficient grounds upon which to deny the request. The conflicts of interest between Mr. Trease and Mercurio further created a need for a second attorney. Mr. Trease should receive a new trial with two, conflict-free attorneys appointed to represent him.

## ISSUE II

THE TRIAL COURT ERRED IN REFUSING TO APPOINT DIFFERENT COUNSEL TO REPRESENT MR. TREASE.

A substantial conflict of interest arose between Mr. Trease and court-appointed counsel. The trial court erroneously denied both counsel and Appellant's requests to have a different lawyer appointed to represent Mr. Trease.

The trial court was first appraised of the problems, according to the record, on September 6, 1996, when Mr. Trease filed a motion to dismiss Mercurio and a second motion seeking to have another attorney, Ben Kay, appointed to represent him. (Vol.2, C242-246) On September 12, 1996, Mr. Trease filed an emergency supplement to the motion to dismiss counsel. (Vol.2, C258-264) In these motions Mr. Trease alleged that Mercurio had told him he would work harder for an innocent client and that the mitigation specialist employed by Mercurio had told his family that he would be found guilty. (Vol.2, C242-243) Mr. Trease advised the court that he had spoken with attorney Ben Kay and Kay was willing to represent him. (Vol.2, C245) In the emergency supplement, Mr. Trease alleged that Mercurio had breached the attorney-client privilege, was refusing to listen to Mr. Trease regarding how he wished to proceed with his case, and had refused to request a change of venue. (Vol.2,C258-260)

At the first hearing on this request Mr. Trease again stated his desire to be represented by Ben Kay. (Vol.13, R63) Mr. Trease did not believe that Mercurio felt he was innocent and would work hard for him. (Vol.213, R64-66) Mr. Trease also explained that at Mercurio's request he had given him lists of things that he felt were important, such as people to interview, and that had not been followed through on. (Vol.13, R67)

Mr. Trease was also concerned that the only thing Mercurio wanted was for him to plead to life. (Vol.13, R68) Mr. Trease felt the plea was being shoved down his throat by Mercurio and the mitigation specialist, Ms. Petty. (Vol.13, R69) Mercurio told him that he believed he would be found guilty if he went to trial and would be sentenced to death. (Vol.13, R70) Mr. Trease also advised the court that he had written letters to the Florida Bar. (Vol.13, R73-74)

Mercurio agreed that he had had a conversation with Mr. Trease about whether he would work harder for and innocent person, a 100% innocent person. (Vol.13, R76) Mercurio believed that Mr. Trease was taking his response out of context. (Vol 13, R76) Mercurio denied breaching the attorney-client privilege and neither did the Bar feel that he had done so. (Vol.13, R77,80)

The trial court found no ethical violation or ineffectiveness by Mercurio and denied the request. (Vol.13, R89-90) The court

asked Mr. Trease if he wished to represent himself, to which Mr. Trease responded "No". (Vol.13, R91)

Mr. Trease again moved to dismiss Mercurio on September 30, 1996. (Vol.2, C284-295) In this motion Mr. Trease stated that Mercurio had told employees of the Sheriff's office that he was guilty. (Vol.2, R285) According to the motion, Mercurio told the mitigation specialist in the presence of a jail guard that he had never had an innocent client, that he just tried to prove them innocent, and that Appellant was guilty too. (Vol.2, C287)

Mercurio filed a Motion to Withdraw on October 7, 1996. (Supp. Vol., C2407-2410) In it Mercurio denied making the statements to sheriff's employees, yet stated that the attorney-client relationship had completely broken down, they did not trust each other, and that it was in the best interests of everyone to grant the request for a different attorney. (Supp.Vol., C2409-2410)

The court conducted a sealed hearing on the motions on October 7, 1996. (Vol.13, C303-309) Mercurio told the court during the hearing that he and Mr. Trease were at such opposite points of view as to how the case should be handled that problems would just continue to develop. (Vol.2, C304) Mercurio stated he did not believe it was in the interest of justice or Mr. Treases's best interest for him to continue his representation. (Vol.2, C306) Mr. Trease stated that he believed that if the trial was conducted the

way Mercurio wanted to, he would be found guilty. (Vol.2, C307) The motion to withdraw was denied. (Vol.13, R111)

A portion of the hearing was also conducted in open court. (Vol.13, R97-112) At this hearing Mr. Trease stated that the name of the person whom Mercurio had made comments to was Officer Clay. (Vol.13, R97) Mercurio told the court that two bar complaints had been filed, that Mr. Trease was doing things against his advice such as talking to the media, and still seeking to dismiss him. (Vol.13, R99) Mercurio believed there was no way for them to effectively work together. (Vol.13, R100)

Officer Clay was brought to the court room. He stated he recalled the conversation that Mr. Trease had reported. (Vol.13, R104) Officer Clay stated the conversation was not directed at him, but that he, Mercurio, and Cheryl Pettry were in an elevator going to the fourth floor in the jail. (Vol.13, R104) Clay knew they were going to see Mr. Trease. (Vol.13, R104) Officer Clay heard Mercurio say that he did not believe that many of his clients were innocent, he felt most of them were guilty. (Vol.13, R104) Clay thought that Mercurio was also referring to Mr. Trease because he knew of Mr. Trease's concerns regarding Mercurio. (Vol.13, R104-105) There was no specific mention of Mr. Trease. (Vol.13, R106)

The court denied the motion to discharge because the comments were not specific to Mr. Trease. (Vol.13, R109) The court asked Mr. Trease if he wanted to represent himself. (Vol.13, R109) Mr.

Trease asked if he did, could he have a lawyer as co-counsel. (Vol. 13, R109) The court said he could not unless he hired one. (Vol. 13, R109) Mr. Trease stated that he did not wish to represent himself at this time. (Vol.13, R110)

On October 9, 1996, Mr. Trease filed a Second Emergency Motion to Dismiss Court Appointed Counsel. (Vol.2, C334-341) In it he asked the court to reconsider the prior day's ruling.

On October 10, 1996, copies of the Bar's request to Mercurio regarding Mr. Trease's complaint, and a lengthy reply from Mercurio were filed. (Vol.2, C346-352) In the letter to Mr. Trease, Mercurio stated he had been informed that Mr. Trease did not wish to speak to him again and that he had requested a hearing on October 10. (Vol.2, C351) Mercurio provided case law regarding self-representation to Mr. Trease. (Vol.2, C351)

Mr. Trease then filed a motion requesting a Nelson hearing. (Vol.2, C353-363)

The court held a hearing on October 10, 1996. (Vol.213, R114) Mr. Trease said he did not wish to represent himself, but he believed that he was entitled to another lawyer if Mercurio was ineffective. (Vol.13, R117) Mr. Trease said that felt that Mercurio had admitted that he could not be effective. (Vol.13, R117-118) The request was again denied. (Vol.13, R121-122)

Mr. Trease then filed a Notice of Appeal with the Second District Court of Appeal. (Vol.2, C373) The trial court quashed

the Notice of Appeal, it was re-instated by the Second District, and eventually dismissed for lack of jurisdiction. (Vol.2, C378-380)

On November 8, 1996, Mr. Trease filed a Second Emergency Motion to Dismiss Counsel. (Vol.3,C486-495) In this motion Mr. Trease again stated he felt that Mercurio had acted in an unethical fashion, alleged counsel was failing to obtain certain witness interviews, failing to pay the private investigating firm, and alleged he had other witnessers to attest to counsel making statements that he believed that Mr. Trease was guilty, and had requested a Koon inquiry where none was required. (Vol.3, C486-495) The record reflects that counsel had filed a motion requesting a Koon hearing on October 30, 1996. (Vol.3, R451-453) Several days later Mr. Trease filed a letter with the court asking that this request and three others relating to the Koon inquiry be disregarded. (Vol. 3, C504) No hearing was held on these motions.

At a hearing on the Koon motion on October 31, 1996, Mr. Trease advised the court that he was not a death volunteer. (Vol. 13, R134) Mr. Trease did state that he had told counsel that he would not allow the presentation of any mitigating evidence from his family. (Vol.13, R133-134) Counsel acknowledged that he had found mitigation from the family. (Vol.3, R132,135-137)

Initially, Appellant acknowledges that the courts have ruled that a criminal defendant is not entitled to a "meaningful"

relationship with his attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983). However, the law is clear that a criminal defendant is entitled to effective assistance of his court-appointed lawyer. Substantial deterioration of the attorney/client relationship can result in a situation where counsel cannot give effective aid in the presentation of a defense. Sanborn v. State, 474 So. 2d 309, 314 (Fla. 3d DCA 1985).

A criminal defendant is also entitled to conflict-free counsel, and a defendant must establish that an actual conflict adversely affected his lawyer's performance. See, Bouie v. State, 559 So. 2d 1113, 1115 (Fla. 1990), quoting, Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)) The party seeking the withdrawal bears the burden of demonstrating that substantial prejudice will result if withdrawal is not allowed. Schwab v. State, 636 So. 2d 3, 5-6 (Fla. 1994).

The factors surrounding the comments made in the elevator by defense counsel which were overheard by Officer Kay to the effect that most all of Mercurio's clients were guilty were of a sufficient nature to create an actual conflict of interest between Mercurio and Mr. Trease. This confirmed statement combined with Mercurio's statements concerning the amount of work performed for innocent clients as opposed to guilty ones creates the probability that performance was affected.

Mercurio admitted in his motion to withdraw that the conflicts between he and Mr. Trease had reached the level that any attorney-client relationship was impossible, that his effectiveness would certainly be in question, and that is was in the interest of justice to appoint a different attorney. While Mercurio claimed that the problems were Mr. Trease's fault, Mr. Trease was in arguable way responsible for Mercurio's foolish statements in the elevator. Thus, it cannot be said that the disintegration of the relationship was largely the cause of Mr. Trease. See, Bowden v. State, 588 So. 2d 225 (Fla. 1991) Thus, it was an abuse of discretion for the trial court to deny both Mercurio and Mr. Trease's requests that he be represented by someone else. A new trial is required with counsel other than Mercurio being appointed to represent Mr. Trease.

## ISSUE III

THE TRIAL COURT ERRED IN THE ADMISSION OF THE TESTIMONY AND PRIOR CONSISTENT STATEMENTS OF THE CO-DEFENDANT, HOPE SEIGEL.

Hope Seigel was, by her own admission, the only witness who could provide any direct evidence which placed Mr. Trease at the home of Paul Edenson.(Vol.23, R1803) It was only the testimony of Hope Seigel which implicated Mr. Trease in the homicide. Grave errors were made by the trial court in the admission of the testimony of Seigel. These included improper limitations on the ability of the defense to impeach her character and present an accurate portrayal of her to the jury and the admission of a prior consistent statement that she had given upon her arrest to the Pennsylvania police. The jury was presented a sanitized picture of Seigel as a victim which had little basis in fact.

The jury was informed by Hope Siegel that she was a single mother who dated Robert Trease. Seigel had suffered some memory loss as the result of an auto accident. On the day of the homicide she had a drink or two, maybe a Valium or Vicodin. Against her will, she was forced by Mr. Trease to arrange a date with Paul Edenson for the purpose of finding out if there was a safe at his house. According to Seigel, she was forced to meet Edenson and then became a horrified witness to his murder at the hands of Mr. Trease.

The only problem with this testimony is that, because of the omissions, it was essentially a lie. The real Hope Seigel was not recognizable from her trial appearance due to the improper granting of the State's Motion in Limine.

A. THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION IN LIMINE,THUS PROHIBITING THE DEFENSE FROM PRESENTING A DEFENSE

Following the deposition of Hope Seigel, the State filed a motion in limine seeking to sanitize their star witness. (Vol.5, C509-510) Hope Seigel was far from the poor little manipulated girl the State presented to the jury and upon whose testimony the State's case hinged. In reality, according to her own admissions at her deposition, Seigel was far from naive and with ample motive of her own to kill Paul Edenson.

According to Seigel in her deposition, in 1994, she began working for an escort service owned by her friend Holly. (Vol.6, C1003-1007) Seigel also began to work at a lingerie shop as a "model". (Vol.6, C1008) As part of her job as an "escort" Seigel would meet with the men who would call the service, dance with the dates, perform oral sex and engage in sexual intercourse with these men for money. (Vol.6, C1013) Group sex with Holly and the client was also engaged in by Seigel. (Vol.6, C1014-1015) Seigel was paid a hundred dollars, per act, in cash. (Vol.6, C1015)

As a lingerie model at various establishments Seigel would dance and strip off her lingerie for the male customers. (Vol.6,

C1019) Seigel would masturbate the customers. (Vol.6, C1031-1032) During this employment Seigel became involved with a man named Don Lambert, with whom she had sex with for money. (Vol.6, C1021) It was during this period Seigel met Mr. Trease as well. She quit her lingerie job to open her own escort service, advertised in the newspaper as "Lucious Lucinda". (Vol.5, C1025-1026,1037-1038) She had also previously advertised as an escort under the name "Dancing Beauty". (Vol.6, C1027-8) Even after beginning her relationship with Mr. Trease, Seigel continued to have sex with Don Lambert, and presumably others, for money. (Vol.6, C1029-1030, Vol.7, C1289)

Seigel also obtained a rented car from Lambert. (Vol.6, C1120) She and Mr. Trease damaged the car in an argument, but Seigel falsely reported a robbery to the police. (Vol.6, C1123; Vol.7, C1299-1302)

Seigel went with Mr. Trease to Biloxi, Mississippi to gamble, but ended up calling Lambert for money to come home on. (Vol.6, C1102; Vol.7, C1290) During this time period she willingly committed burglaries with Mr. Trease to obtain money for drugs. (Vol.6, C1105-1109,1115-1116)

Seigel was a heavy user of cocaine during this period. (Vol.6, C1040-1041) She described herself as an addict who used coke on a daily basis. (Vol.6, C1042) While she and Mr. Trease used drugs together, it was Seigel who would purchase them from dealers she knew because she had the money to do so. (Vol.6, C1052,1083) She

free-based so much she would have convulsions. (Vol.6, C1042) Her cocaine usage led to her being admitted twice in January 1996 to the hospital emergency room. (Vol.5, C965-967) Seigel also ran in front of a car a few weeks before the murder, in a suicide attempt. (Vol.6, C968,991) This incident led to her being kept over night at Glen Oaks, a psychiatric facility and the institution of Baker Act proceedings against her. (Vol.5, C993) At the time of the homicide she would often use $200 worth of cocaine per day. (Vol.6, C1043) At the time of the murder she was using crack. (Vol.6, C1043-1044) According to Seigel, there was never a break in the crack usage between she and Mr. Trease. (Vol.6, C1044) They engaged in a cycle of using drugs, sleeping the next day, and then Seigel going out to buy more drugs. Although Seigel wasn't sure if she smoked crack on the day of the homicide, she knew that she had smoked very recently before that. (Vol.6, C1131) Seigel also drank more than usual before the homicide. (Vol.6, C1047) Seigel admitted she was "addicted big time" to Valium and Vicodin up to the homicide. (Vol.6, C1048,1054) Seigel also tried opium. (Vol.6, C1057)

The trial court precluded the defense from cross-examining Seigel about these activities. This decision by the trial court was error. This decision by the trial court improperly restricted the cross examination and precluded the defense from presenting to the jury relevant impeachment evidence. As a result, Mr. Trease

was not afforded an adequate and fair opportunity to demonstrate Seigel's bias, prejudice, and motive to lie. He was, in essence, denied the right to present his defense.

The defense position was that Seigel had gone to Edenson's house with her own motivation to obtain money. She killed Edenson herself after he made unwanted sexual advances and after she had become angry after seeing Mr. Trease involved with two other women in a bar. Critical to this theory was the need to establish that Seigel would have willingly placed herself in Edenson's house to obtain money, that she needed money, and that she was unstable enough to commit murder. It was also necessary to impeach her credibility with the jury in view of the fact that her testimony was the only evidence linking Mr. Trease to the Edenson's house.

The exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross examination. Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974). It is, of course, fundamental that a criminal defendant has a constitutional right to a full and fair cross examination to show a witness's possible bias or motive to be untruthful. Lewis v. State, 570 So. 2d 412 (Fla. 1st DCA 1990), citing Davis v. Alaska. The refusal to allow the presentation of testimony as to matter which are at the heart of the accused's defense is also reversible error. Godorov v. State,

365 So. 2d 423 (Fla. 2d DCA 1978), cert. denied, 376 So. 2d 76 (Fla. 1979); O'Reilly v. State, 516 So. 2d 107 (Fla. 4th DCA 1987).

A jury must have information regarding bias, motive, prejudice, intent, and corruptiveness if they are to correctly assess the credibility of a witness. This is particularly true when that witness is crucial to the state's case and there is little to no independent evidence which establishes the defendant as the perpetrator. Limiting the scope of cross examination in a manner which keeps from the jury relevant and important facts bearing on the trustworthiness of the crucial testimony constitutes error. Jaggers v. State, 536 So. 2d 321, 328 (Fla. 2d DCA 1988). The importance of a full and detailed cross-examination is rather colorfully summed up by the Fifth District Court of Appeal in the case of Gamble v. State, 492 So. 2d 1132, 1134 (Fla. 5th DCA 1986) In Gamble the defendant had been limited in his cross-examination the rape victim as to arrest affidavits she had filed against her jealous and violent boyfriend. The court stated:

> The exclusion of defense counsel's inquiry as to these specifics was error. This was similar to serving up spice cake without the spice, or a bloody Mary without the vodka. It is the specifics, the details,the nitty gritty of life that proves or disproves generalities and which permits effective cross-examination.

Each of the facts excluded by the trial court's ruling specifically related to issues of Seigel's credibility and were critical in evaluating her bias, prejudice, and motive.(Vol.14,

R261) The fact that she was a crack addict with a $200 a day habit, had been subject to a Baker Act, and tried to commit suicide shortly before the murder supplied both a motive for her to be at Edenson's to obtain money, whether from having sex with him or robbing him, and would underscore the probability of her behaving irrationally and violently.

The fact that Seigel was well accustomed to going on "dates" with unknown men as part of her livelihood as a prostitute was proper impeachment of her claim that she was only at Edenson's house because Mr. Trease forced her to be there. (Vol.14, R261) It also provided her with a motive for being at the home to obtain money. The fact of Seigel's drug use and hospitalization for suicide attempts as a result of her drug addiction was also a critical fact in impeaching her ability to recall the events of the homicide accurately. (Vol.14, R219) A well-established means of impeaching a witness's credibility is to show through testimony that the witness has some defect in his or her capacity to accurately testify. A witness' mental state or condition is a proper basis for this type of impeachment. Hawkins v. State, 326 So. 2d 229, (Fla. 2d DCA) cert. denied, 336 So. 2d 108 (Fla. 1976); Gamble v. State, 492 So. 2d 1132, 1133-1134 (Fla. 5th DCA 1986).

The trial court excluded evidence about Seigel’s cocaine usage relying on Edwards v. State, 548 So. 2d 656 (Fla. 1989) and Tullis v. State, 556 So. 2d 1165 (Fla. 3d DCA 1990). The trial court was

correct that these cases set forth the correct method by which to evaluate the admissibility of the evidence, however the trial court misapplied that method. Under Edwards and Tullis the evidence of Seigel's drug use was admissible.

Under both these cases evidence regarding drug usage is admissible if it can be shown that the witness had been using drugs at or about the time of the incident which is the subject of the witness's testimony or if it is shown by other relevant evidence that the drug usage affects the witness' ability to remember or recount. Seigel stated that she used cocaine, if not on the day of the homicide, then very recently. Very recently, according to her deposition testimony, meant that there was only a break in the drug usage if she was sleeping it off or on her way to purchase more drugs. Thus, Seigel, by her own admission was using cocaine about the time of the homicide. Neither Edwards or Tullis excluded evidence which was recent -- in Edwards the witness had not used drugs for several years and in Tullis the delusional behavior which was excluded had occurred six months after the conversations between the witness and the defendant. In fact, in Tullis the defendant was allowed to cross-examine the witness about his pre-incarcerative drug usage.

In this case it was also clear that Seigel suffered from memory problems. The deposition is replete with incidents that Seigel was unable to recall. (See, for example, Vol.6,

C1010,1016,1025, 1029,1164, Vol.7, C971) Seigel was even unsure if she had used cocaine on the day of the homicide. Seigel admitted to short term memory loss as well, some of which resulted due to a automobile accident. Seigel's mother also confirmed Seigel suffered memory loss. (Vol. 24, R1852) With this independent corroboration of memory problems, testimony about Seigel's cocaine usage was admissible.

By prohibiting Mr. Trease from impeaching Seigel with specific information, the jury was likely to believe that Mercurio's cross-examination was ". . . a speculative and baseless line of attack on the credibility of an apparently blameless witness" Davis, 415 U.S. at 318. Mr. Trease was at least entitled to an opportunity to level the playing field. The means by which he could present his defense and demonstrate to the jury the fallibility of Seigel's testimony was denied to him. The jury was entitled to have the benefit of the defense theory before them so they could make an informed decision as to what weight to place on the crucial testimony of Seigel. Because this opportunity was not afforded to the jury and Mr. Trease, the conviction must be overturned.

## B. THE TRIAL COURT ERRED IN ALLOWING A PRIOR CONSISTENT STATEMENT OF SEIGEL'S TO BE ADMITTED INTO EVIDENCE

After Seigel had testified at trial and been cross-examined, the State sought to introduce the taped interview that Seigel had given to the Pennsylvania police upon her arrest. In this

statement, Seigel claimed that Mr. Trease had committed the homicide. The statement did not differ in any material fashion from her trial testimony. The State claimed that it was entitled to present this evidence of a prior consistent statement to rebut the defense's alleged charge of recent fabrication. The defense objected strongly, arguing to the court that it had certainly not made the claim that Seigel was recently fabricating her testimony. It was the defense position that Seigel had lied all along, both in that initial statement to the Pennsylvania police and during her trial testimony when she claimed that Mr. Trease had committed the homicide. (Vol.23, R1869) The trial court ruled that the statement could be admitted, but that any references to the facts subject to the motion in limine would be removed. The tape was then played to the jury during the testimony of the Trooper Keffer, who conducted the interview.

The tape is emotional and hysterical. As explained by the officer, one of the sounds on the tape is the sound of paper being shredded by Seigel. She was apparently given a stack of paper towels, which she tore up during the statement.

The trial court's ruling permitting the introduction of the prior consistent statement was error. It amounted to an improper buttressing of Seigel, a severely prejudicial action in this case which completely hinged upon her credibility.

"It is well established that a witness's prior consistent statements are generally inadmissible to corroborate that witness's testimony." Jackson v. State, 498 So. 2d 906,909 (Fla. 1986); accord, Dawson v. State, 585 So. 2d 443, 444-45 (Fla. 4th DCA 1991). Section 90.801(2)(b), Florida Statutes (1995), sets forth an exception to that general rule- when the prior consistent statement is offered to rebut an express or implied charge of improper influence, motive, or recent fabrication. Chandler v. State, 22 Fla. Law Weekly S653 (Fla. October 16, 1997); State v. Jones, 625 So. 2d 821, 826 (Fla. 1993); Cortes v. State, 670 So. 2d 119, 121 (Fla. 3d DCA 1996); Colutino v. State, 620 So. 2d 244, 245 (Fla. 3d DCA 1993). However, the exception applies only when the prior consistent statement was made before the existence of the fact which gave rise to the improper influence or motive to falsify. Jackson, at 910; Cortes, at 121; Colutino, at 245; and Dawson v. State, 528 So. 2d 1309, 1311 (Fla. 2d DCA 1988).

As previously stated, the main issue at trial was whether or not Mr. Trease or Hope Seigel had killed Paul Edenson. At trial, defense counsel on cross-examination, tried to establish that the killer was Hope Seigel. Seigel's motive to lie and claim Mr. Trease was the killer was obvious- to prevent herself from going to prison for the rest of her life or to avoid the electric chair. This motivation was present from the beginning, not just after her formal arrest and after she had made a plea bargain. While Seigel

obviously wanted to keep the benefit of her plea bargain, which required her to pin the homicide on Mr. Trease and testify consistently with the statements she gave upon her detention in Pennsylvania, it is equally clear that her motivation all along was lessen the severity of her own punishment and secure favorable treatment for herself. In this case, the motive for Seigel to testify falsely existed from the time of her detention on. (Vol.23, R1748) Seigel knew she was in serious trouble with the law. She acknowledged this to her mother and to her friend Heather. Seigel also admitted that she and Mr. Trease had conversations about the potential penalties the crime carried on their flight to Pennsylvania.(Vol. 7,C1219; Vol.23, R1734) Seigel's motivation to lie about her involvement was present when she was stopped in Pennsylvania. It did not only arise after she was offered a plea bargain. The plea bargain only reinforced the motivation to lie, as it was conditioned upon Seigel giving testimony consistent with her initial statement. (Vol. 23, R1803)

The existing case law requires that the prior consistent statement be made before the existence of the fact giving rise to a motive to testify in order to be admissible. In this case, defense counsel did not suggest or imply there were multiple reasons to fabricate or offer two different motives in different time periods as in Chandler, supra. Nor did the defense imply that Seigel's story had changed after she made her plea. See, Anderson

v. State, 574 So. 2d 87 (Fla. 1991). Thus, it was error for the statement to be admitted and it cannot be said that the error was harmless.

The erroneous admission of a witness's prior consistent statement should not be deemed harmless when the credibility of the witness is critical to the case. Although in Anderson this Court found the admission of one statement harmless, but it did so only after determining that a far more damaging prior consistent statement was admissible. In this case that does not exist.

Not only was the state allowed to buttress Seigel's testimony, they did it through a police officer. It is especially harmful to allow the State to bolster the credibility of such a witness through the testimony of a police officer because the police officer is generally regarded by the jury as disinterested, objective, and highly credible. Rodriguez v. State, 609 So. 2d 493, 500 (Fla. 1992), cert. denied, 510 U.S. 830, 114 S. Ct. 99, 126 L. Ed. 2d 66 (1993); Barnes v. State, 576 So. 2d 439 (Fla. 4th DCA 1991); Quiles v. State, 523 So. 2d 1261 (Fla. 2d DCA 1988). Absent any evidence that Seigel's motive to fabricate her testimony had occurred before her plea agreement, the admission of the prior statement was clearly error. The improper and prejudicial admission of this testimony requires that Mr. Trease's conviction be reversed for a new trial.

ISSUE IV

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF OTHER BAD ACTS OF MR. TREASE.

Pre-trial, the State filed four separate notices that it intended to utilize Williams Rule evidence. (Vol.1, C118-119; Vol.3, C374-375; Vol.4, C513-314) Defense counsel filed a motion objecting to each notice, arguing the evidence was being used only to show propensity and bad character. (Vol.4, C637-638) A hearing was held on the admissibility of these matters on November 22, 1996. (Vol.14, R258-362). The State argued that it was seeking admission under Florida Statutes Section 90.404(2)(a), with the exception of the testimony relating to Shorin and the theft of the murder weapon. (Vol.14, R332-338) The State argued that the questioning of the other females established a unique modus operandi and, most importantly, corroborated the testimony of Seigel. (Vol.14, R334-335) At that hearing defense counsel conceded that the evidence relating to the burglary of David Shorin's home was admissible. (Vol.14, R329) However, defense counsel continued to object to the testimony of Bridgette Berousek, Heather Tomilson, Ken Creye, and Joe Bavaro as failing to be sufficiently similar, not relevant, and only showing propensity and bad character. (Vol. 14, R327-331) The court ruled that the State would be permitted to introduce the evidence. The State chose to

offer the testimony of Tomilson and Berousek, but did not offer testimony about Creye and Bavaro.

The defense also objected to other bad act or character evidence that was admitted at trial which portrayed Mr. Trease as a liar. Over objection Seigel, Becky Bishop, and Edjanira Viana testified that Mr. Trease had lied to them by telling them that he was a police officer or had worked for the police or DEA. (Vol.23, R1625; Vol. 24, R1777-1778; Vol.25, R2231)

Heather Tomilson, Detective Wildtraut, and Seigel were permitted to testify over defense counsel's objection that Mr. Trease took Vicodin and Valium for a heart condition.(Vol.25, R2101; Vol. 27, R2513) Subsequent to Berousek, the State called Dr. Spehre, who testified that the medication Mr. Trease was taking were not heart medications. (Vol.27, R2357)

At trial Heather Tomilson testified over objection that while Seigel and Mr. Trease were staying with her in Pennsylvania after the murder, Mr. Trease asked her if she knew anybody that had a safe, of any stores with safes, or if she knew anyone who was rich that they could rob. (Vol. 25, R290-2100)

Becky Bishop testified that she had met Mr. Trease in at a bar in Sarasota the week before Halloween in 1994. (Vol.25, R2228) They dated for a month, during which time Mr. Trease asked her to marry him. (Vol.25, R2229-2230) Mr. Trease told her that he worked in law enforcement as a drug enforcement agent. (Vol.25, R2231) She

observed him practice martial arts. Bishop was asked if Mr. Trease ever threatened her, to which a motion for mistrial was made and denied. (Vol.25, R2232-2233) Mr. Trease told Bishop that they could make a lot of money because she was a massage therapist and had rich clients. (Vol.25, R2233-2234) That response was stricken by the court. (Vol.25, R2234)

No notice was filed by the State regarding the following testimony, however, Jeffery Colson testified that he was from Nevada and knew Mr. Trease. (Vol.27, R2440) They had a business relationship several years earlier. (Vol.27, R2441) Once, while visiting Mr. Trease, Mr. Trease demonstrated to Colson some martial arts moves. (Vol.27, R2441-2) Mr. Trease also showed Colson a collection of handmade knives with very long blades and superior workmanship. (Vol.27, R2443) He demonstrated to Colson how one person might disable another when defending oneself. (Vol.27, R2443) The demonstration included placing a knife against someone's throat. (Vol.25, R2444) Mr. Trease stood face to face with Colson during the demonstration. (Vol. 25, R2445)

Bridgette Berousek testified that she had a relationship with Mr. Trease during the early part of 1995, from February to May. (Vol.27, R2449) They lived together, but she saw him last at the end of May. (Vol.27, R2450) In March 1995, Mr. Trease asked her if she knew anyone that had any valuables, drugs, money, or safes.

(Vol.27, R2451) Mr. Trease wanted to burglarize them. (Vol.27, R2451) Berousek chose not to share any information.

Berousek also testified she saw Mr. Trease practice martial arts. (Vol.25, R2451)

On cross, defense counsel attempted to ask Berousek about her encounter with Seigel at her job site. The court refused to allow the jury to hear the evidence, but the proffer stated that Seigel was angry and appeared to be under the influence of drugs or alcohol. (Vol.27, R2462) When Seigel spoke, she made no sense. (Vol.27, R2463)

Williams Rule governs the admissibility of similar fact evidence and is codified at Section 90.404(2)(a), Florida Statutes, (1995). It permits the admission of similar fact evidence of other crimes, wrongs, or acts when relevant to prove a material fact in issue, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. It is inadmissible where it is relevant solely to prove bad character or propensity. As with all evidence, similar fact evidence is also excludable under Section 90.403, Florida Statutes (1995) when its probative value is substantially outweighed by its prejudicial impact, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence.

The evidence admitted in this case as similar fact evidence, that being the solicitations about committing other burglaries, was

not properly admitted under Section 90.404(2)(a), Florida Statutes (1995). In this case the State's contention was that this evidence was relevant to the issue of identity. "Although similarity is not a requirement for admission of other crime evidence, when the fact to be proven is, for example, identity or common plan or scheme it is generally the similarity between the charged offense and the other crime or act that gives the evidence probative value." Williams v. State, 621 So. 2d 413, 414 (Fla. 1993) Upon examining the testimony relating to these conversations, it is clear that the evidence was not of sufficient similarity to the charged offense to render it of sufficient probative value to qualify for admission as similar fact evidence.

Perhaps the most glaring difference between the actual offense and these conversations is that there were only conversations. There were no completed burglaries. There were no details as to how the other burglaries would be committed, there were merely conversations about whether or not there were potential monies to be obtained. There is really no way to compare similarities and dissimilarities between the two due to the limited nature of the conversations. There are simply not enough facts present in the solicitation conversations to give them any uniqueness at all. Thus, the threshold question of admissibility, that of similarity, is not met.

The conversations were also not admissible because they did not involve completed crimes. The Second District Court of Appeal in Audano v. State, 641 So. 2d 1356 (Fla. 2d DCA 1994), held that before collateral crimes can be admitted under Williams Rule, there must be clear and convincing evidence that the former offense was actually committed by the defendant. Certainly with regards to the conversations between Mr. Trease, Berousek, and Tomilson there was no evidence that any offense at all was committed. Appellant submits that the testimony, on the authority of Audano was not admissible.

Even if this Court disagrees with Appellant's contention that the conversation about other burglaries is sufficiently similar to qualify as Williams rule evidence, that does not automatically render it admissible. Collateral crime evidence is not relevant and admissible just because it involves the same type of offense. Peek v. State, 488 So. 2d 52 (Fla. 1986). If the collateral crime evidence tends only to prove propensity or bad character it is also excludable. Peek, quoting Drake v. State, 400 So. 2d 1217 (Fla. 1981). For example, in Castro v. State, 547 So. 2d 111 (Fla. 1987), the defendant was charged with stabbed the victim to death. The state presented collateral crime evidence that four days before Castro had ripped up a sheet and tied and gagged another man and then threatened to stab him. This Court ruled that the admission of the collateral crime evidence relating to this incident should

not have been admitted. This Court found that this evidence was not relevant to any material fact in issue and the only discernible purpose for it was to show a bad character and propensity for violent behavior. In this case, the testimony about the solicitations to commit burglaries showed only Mr. Trease's propensity to commit crime and to establish that he was a bad person. It did not establish his identity as the killer, as the state had argued. It quite simply had no other purpose than to convince the jury that Mr. Trease was a bad person who was constantly trying to induce others to commit crime as it was not relative to any material fact in issue. Appellant submits that not only does the testimony of Berousek and Tomilson not involve the same type of offense, but that even if stretched to the outermost limits in that regard, it is still not relevant.

Any implication of collateral crimes not relevant to any material fact in issue should not be admitted. Czubak v. State, 570 So. 2d 925 (Fla. 1990). This Court has held that the erroneous admission of irrelevant collateral crime evidence is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime they demonstrated as evidence of guilt of the crime charged." Castro, at 115, quoting Straight v. State, 397 So. 2d 903, 908 (Fla.), cert. denied, 454 U.S. 1022, 102 S. Ct. 556, 70 L. Ed. 2d 418 (1981). The State has the burden of proving that the error was not harmless beyond a reasonable doubt.

State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). In this case the State cannot meet that burden. There was no direct evidence save that of Seigel linking Mr. Trease to this crime. The jury could easily have been persuaded that if Mr. Trease had been willing to commit other burglaries, then Seigel was telling the truth. This error of showing bad character on the part of Mr. Trease was even further compounded by the trial court's refusal to allow defense counsel to present an accurate picture of Seigel's character to the jury. Thus, the error cannot be said to be harmless and a new trial is required.

Even if this Court should determine that the testimony relating to the other burglary solicitations had some relevance, relevancy is not the sole test for admittance. Even if relevant, evidence must still pass the hurdle of section 90.403, Florida Statutes (1993). Section 90.403 excludes evidence, even if relevant, where the probative value of such evidence is outweighed by its prejudicial impact. As this Court held in Sexton v. State, 22 Fla. Law Weekly S469 (Fla. July 17, 1997), the trial court must balance the import of the evidence with respect to the case of the party offering it against the danger of unfair prejudice. Only when the unfair prejudice substantially outweighs the probative value of the evidence should it be excluded.

In this case the scales are tipped in favor of exclusion. While counsel cannot conceive of the slightest relevancy of this

evidence to a material fact in issue, even identity, the probative value of the evidence of these conversations was marginal at best. The prejudicial impact, however, was great. It certainly implied to the jury that Mr. Trease was seeking to become a one man crime wave. Thus, when balanced, the evidence should have been excluded.

In addition to the improper testimony about the burglary solicitations, the trial court also erred in admitting the testimony relating to the claim by Mr. Trease that he used the medications Vicodin and Valium for a heart condition, which was then testified to as being a lie. Whether or not Mr. Trease used the medication for his heart or merely took it was of no relevance to any issue in this case. All it did was to portray this non-testifying witness who had not placed his credibility in issue by taking the stand to be a liar. Mr. Trease had not offered any evidence relating to his truthfulness, therefore character evidence of this type as offered by the State was inadmissible under Section 90.404 (1)(a), Florida Statutes (1995); Albright v. State, 378 So. 2d 1234 (Fla. 2d DCA 1979); Lewis v. State, 377 So. 2d 640 (Fla. 1979).

The State was also allowed to present additional evidence which had no relevance to a material fact in issue and severed only to portray Mr. Trease as someone of bad character and a liar. Seigel, Bishop, and Viana all testified that Mr. Trease had told them that he worked as a police officer or for the DEA. Again, all

this testimony amounted to was an improper attempt to paint Mr. Trease as a liar before the jury.

Even assuming, by some stretch of the imagination, that Mr. Trease's reputation for truth and veracity had been placed into issue, the testimony about the drugs and work as a police officer were not proper methods of impeachment. A witness's reputation for truth and veracity may not be impeached by the introduction of specific instances of dishonesty. Instead, only the general reputation within the community for truth and veracity of the person in question may be testified to Section 90.405, Florida Statutes (1993); Hodges v. State, 403 So. 2d 1375 (1981), rev.denied, 413 So. 2d 877 (Fla. 1981). At the time of its introduction into evidence there was no basis for admission. The admission of this improper character evidence demands that a new trial be granted, especially when the prejudicial impact is added to that of the improper admission of the Williams rule evidence of other burglary solicitations.

The State was also able to admit the testimony of Mr. Colson, an acquaintance of Mr. Trease from several years previous in Nevada. Mr. Colson testified that he was shown a collection of handmade knives belonging to Mr. Trease. The admission of this testimony was completely irrelevant. In this case there was no issue relating to the origin of the knife and no suggestion that it was a knife of any uniqueness. Seigel admitted that she obtained

the knife from Mr. Edenson's own kitchen drawer. The knife used in the homicide was recovered from the lake where it had been thrown. In Castro v. State, 547 So. 2d at 114, the state was allowed to present testimony from a witness who lived in the same apartment house as the defendant that several days after the murder he had found a steak knife outside the defendant's apartment building. This Court ruled the admission of this testimony was not relevant where it was undisputed that this knife could not be the murder weapon because the defendant had broken the knife used in homicide into pieces and had thrown it into a lake. Thus, this evidence of Mr. Trease's ownership of handmade knives several years earlier had no relevance and was likewise not admissible in this case. Once again, the admission of this evidence was extremely inflammatory and prejudicial to the jury. It again only served to show, once again, that Mr. Trease had a propensity toward violence.

Lastly, the State also introduced through Mr. Colson that Mr. Trease, several years earlier, had demonstrated a defensive move using a knife placed against the throat. The move was accomplished with Mr.Trease and Mr. Colson standing face to face. According to Colson, it was not done in a threatening manner and he was not afraid. Again, this testimony had no relevance to the present case. In Escobar v. State, 22 Fla. Law Weekly S415 (Fla. July 10, 1997), this Court held that evidence that the defendant had held a pistol to another man's chest and threatened to kill him was not

admissible in the defendant's trial for killing a police officer because it only proved bad character. The description of the incident between Mr. Colson and Mr. Trease was in no way similar to the incident and method by which Seigel had claimed that Mr. Trease had cut Mr. Edenson's throat. In the homicide Mr. Trease, according only to Seigel, was never intimated to have been placed in a defensive posture. According to Seigel, the murder was clearly one of fear by Mr. Edenson and aggression by Mr. Trease. With no similarity, no qualifications as a prior bad act or crime, the testimony of Colson must fall into the category of evidence which again, only established a propensity to violence.

When the entire record in this case is examined as a whole, the cumulative result is that of a trial characterized by great unfairness and prejudice. In addition to the objected to errors detailed above, there were other instances of improper evidence being admitted, admittedly sometimes without objection or where objections were sustained, which further created an atmosphere of manifest injustice.

For example, the defense had specifically sought a Motion in Limine to prevent the State from introducing testimony relating to Mr. Trease's statements concerning his sexual conquests. Despite the court's pretrial ruling that this would be inadmissible, on two separate occasions the prosecutor intentionally delved into this area. First, Trooper Richard Terek was asked if Mr. Trease had

made any comments concerning his associations with women. (Vol.25, R2118) The court sustained defense counsel's objection. Despite this, the prosecutor then asked Agent Mark Sykes if Mr. Trease had referred to himself as the "Great American Gigiolo". (Vol.25, R2135) Again defense counsel objected and the jury was ordered to disregard the question. Another example of intentional efforts by the State to introduce irrelevant testimony was the question put to Becky Bishop as to whether Mr. Trease had ever threatened her, to which an objection was sustained. Likewise there were instances of unobjected to testimony, such as Seigel's testimony that Mr. Trease stated during their trip to Pennsylvania that if they were stopped, he would "cap" the cop which were extremely prejudicial. (Vol.24, R1733) Although questionably preserved by defense trial counsel for independent review, instances such as this only served to further impinge upon Mr. Trease's right to a fair trial. While instances such as these may not be appropriate for individual consideration, the cumulative effect of all this testimony of little to no probative value and great prejudicial impact can still be considered in reviewing the record as a whole when the harmfulness of the unquestionably preserved errors addressed in both this issue and the preceding issue are considered.

When viewed in its entirety, the record before this Court cannot support the conclusion that Mr. Trease received a fair trial. The combined restrictions of his right to present a defense

and to effectively attack the credibility of Seigel as argued in Issue III combined with the grossly unfair admission of irrelevant and highly prejudicial collateral crime and character evidence outlined in this issue vitiated any semblance of due process in this case. At minimum, Mr. Trease was entitled to a level playing field, and he was denied even that. The pervasive and manifest unfairness which occurred in this case requires that the conviction be reversed and Mr. Trease be afforded a new trial during which the basic tenents of due process are respected.

ISSUE V

THE TRIAL COURT ERRED IN ASSIGNING LITTLE OR NO WEIGHT TO THE MITIGATING FACTOR THAT MR. TREASE HAD ADJUSTED WELL TO INCARCERATION AND ASSISTED IN PREVENTING THE SUICIDE OF ANOTHER INMATE.

During the penalty phase, defense counsel introduced testimony from several jail guards that Mr. Trease had adjusted well to incarceration and that when another inmate in his cell had tried to commit suicide, Mr. Trease had alerted the guards and assisted in preventing the man's death. The trial court considered this in mitigation of the death sentence. In both his written order and oral pronouncement, the trial court stated that he had considered this factor and was giving it little or no weight. (Vol.31, R3093; Vol.12, C2235)

It was error in this case for the trial court to give this mitigator no weight. This Court has consistently held that although it will not review the amount of weight assigned to a mitigator, the trial court is required to consider each mitigator and assign it some weight- it cannot assign a mitigator no weight. See, Spencer v. State, 691 So. 2d 1062 (Fla. 1996). The trial court's ambiguous order in this case makes it just as likely that he gave this mitigator no weight as opposed to little weight. Because of this ambiguity, it cannot be determined if the principal

outlined in Spencer was followed. The case must be returned to the trial court for a proper weighing consideration of this factor.

ISSUE VI

THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING FACTOR THAT THE HOMICIDE WAS COMMITTED TO AVOID ARREST.

In his sentencing order the trial court found that the aggravating factor of the capital felony being committed to avoid or prevent a lawful arrest or effecting an escape from custody had been established. (Vol.12, C2236) The trial court relied upon the testimony of Seigel, who had stated that Mr. Trease told her that Mr. Edenson had to be killed to prevent his identification and because the victim had torn his shirt. The court found that the evidence established the dominant motive for the killing was to avoid arrest.

In Preston v. State, 607 So. 2d 404, 409 (Fla.1992), this Court held that in order to establish this aggravating factor where the victim is not a law enforcement officer, the State must show that the sole or dominant motive for the murder was the elimination of the witness. Accord, Perry v. State, 522 So. 2d 817, 820 (Fla. 1988). In this case it is not clear whether the dominant motive for the killing was because Mr. Edenson might know Mr. Trease or if the killing occurred in a fit of rage over the thwarted robbery and the torn shirt. Seigel testified that during the confrontation when Mr. Trease's shirt was torn, he told Mr. Edenson that he had torn his shirt and that he should kill him for that. (Vol.23, R1662) It is entirely possible that rage fueled the homicide

rather than subsequent identification and that irrational rage was the dominant motive for the killing. Because of the possibility of another motive, it is error to apply this aggravator to the instant case.

## CONCLUSION

Based on the foregoing arguments and citation of authorities, Appellant respectfully requests that this Honorable Court reverse the sentence of the lower court and remand this cause for a new trial.

## CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of August, 2000.

Respectfully submitted,

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