IN THE SUPREME COURT OF FLORIDA

JOHN M. BUZIA,)
)
Appellant,)
)
vs.) CASE NO. SC04-582
)
STATE OF FLORIDA,)
)
Appellee.)
_____)

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

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

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STATEMENT OF THE CASE

John M. Buzia, hereinafter referred to as appellant, was charged by four count indictment with Murder in the First Degree; Attempted First Degree Murder; Armed Burglary and Armed Robbery. (R 20) The appellant filed pretrial motions challenging the constitutionality of the Florida death penalty scheme.[1] The trial

[1] Motion to Declare Section 921.141 Florida Statutes Unconstitutional (R 123) (R 125) (R 133) (R 296) (R 309) (R 348); Motion to Declare Section 921.141(5)(d) Florida Statutes Unconstitutional (R 129); Motion to Declare

court denied the pre-trial constitutional challenges to the Florida death penalty. (R 243) The appellant filed a Motion to Disqualify Trial Judge in part because the trial judge is married to a career prosecutor in Orange County, Florida. (R 254) The trial court denied the Motion to Disqualify Trial Judge finding it was legally insufficient. (R 259) The appellant filed a Motion for Nelson Hearing requesting a discharge of the Office of the Public Defender. (R 2238) The trial court denied the Motion for Discharge. (R 2286)

The state rests. (R 1255) The appellant made a motion for judgment of acquittal to Count III of the indictment, the offense of burglary of a dwelling with assault and battery. (R 1256) The trial court found that with respect to all other counts there is sufficient basis to proceed. (R 1298)

The defense rests. (R 1359) The appellant renewed all previous motions including the pretrial motion for judgment of acquittal. (R 1360) The trial court granted those motions they had granted previously and denied those motions they had denied previously. (R 1360) The jury returned a verdict of guilty on all counts. (R 1463)

PENALTY PHASE

Section 921.141(5)(b) Florida Statutes Unconstitutional (R 131); Motion to Declare Section 921.141(5)(h) Florida Statutes Unconstitutional (R 137); Motion to Declare Section 921.141(5)(m) Florida Statutes Unconstitutional (R 141)

The appellant objected to the felony murder aggravating circumstance with kidnaping being the predicate felony because kidnaping was not charged in the indictment. (R 1933) The trial court permitted the felony murder aggravating factor instruction over appellant's objection. (R 1947) The appellant objected to the cold, calculated and premeditated (CCP) aggravating factor based upon ***Geralds v. State***, 601 So. 2d 1157 (Fla. 1992). (R 1949) The trial court found that appellant had time to reflect before committing the murder and allowed the CCP aggravating factor over appellant's objection. (R 1954) The appellant objected to the heinous, atrocious and cruel (HAC) aggravating factor because the actions that caused the death of the victim all took place within a very short period of time, and there is no evidence the victim was in a conscious state of mind during that brief period of time. (R 1955) Since it was not clear when the victim lost consciousness, the trial court was going to instruct the jury on HAC over appellant's objection. (R 1957)

During closing argument the state argued that there were six statutory aggravating factors.[2] (R 1966-82) The appellant argued that the crime occurred

[2] The six aggravating factors are prior violent felony; felony murder; pecuniary gain; witness elimination; heinous, atrocious and cruel (HAC) and cold, calculated and premeditated (CCP).

during an extreme mental or emotional disturbance. (R 2028) The jury recommended a sentence of death by a vote of 8-4. (R 2057)

The appellant filed a Motion for Judgement of Acquittal as to the Imposition of the Death Penalty. (R 512) The appellant filed a sentencing memorandum arguing that five of the six aggravating factors argued by the state where inapplicable.[3] (R 636)

The trial court issued a sentencing order finding the following aggravating factors: Prior Violent Felony (Great Weight); Felony Murder (No Weight); Witness Elimination (Great Weight); Pecuniary Gain (No Weight); Heinous, Atrocious and Cruel (Great Weight); Cold, Calculated and Premeditated (Great Weight). (R 656-69) The trial court found non-statutory mitigation that the appellant was under the influence of extreme mental or emotional disturbance (Substantial Weight); the appellant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (Substantial Weight); Appellant was gainfully employed (Little Weight); Appropriate courtroom behavior (Little Weight); Appellant cooperated with law enforcement (Little Weight); Difficult childhood (Little Weight); Appellant expressed remorse (Little Weight). (R 669-

[3] The five aggravating factors that appellant argued do not apply are felony murder; pecuniary gain; witness elimination; heinous, atrocious and cruel (HAC) and cold, calculated and premeditated (CCP).

75) The trial court found that the aggravating factors outweighs the mitigating factors and sentenced appellant to Death as to Count I; Life Imprisonment as to Count II, III and IV. (R 677)

STATEMENT OF THE FACTS

Seminole County deputy sheriff Joseph McGrath responded to a battery call at the River Walk Subdivision. (R 467) McGrath knocked on the door and Thea Kersch answered the door with injuries to her head. (R 468-70) McGrath asked Kersch "who did this" and she responded, " John Buzia." (R 472) While Deputy McGrath searched through the home, Thea Kersch collapsed on the floor in the front hall. (R 474) McGrath called in paramedics waiting outside to attend to Thea Kersch. (R 474)

Thea and Charles Kersch resided together in the River Walk Subdivision in Oviedo. (R 493) They worked together managing the real estate investment properties located in Winter Park, Florida. (R 493) John Buzia worked for Charles Kersch at his rental properties and also in his home. (R 495) The day of the murder, Buzia was scheduled to come Charles Kersch's house at 8:00 am to install

the floor in the attic. (R 497-98) Charles Kersch arranged to pick-up Buzia at University Avenue and drive him back to the house. (R 498) Buzia did not show up, so Kersch left home to run errands. (R 502) Thea Kersch arrived home from errands at approximately 4:30 in the afternoon and observed John Buzia standing in front of the house. (R 504) Buzia came over to Kersch's car in the driveway and told her that his brother had been beaten up the night before and he needed to talk to Thea Kersch's husband. (R 504) Thea Kersch invited Buzia to wait in the pool patio area for her husband to come home. (R 505)

While Kersch was in the kitchen, Buzia came to the sliding glass door that leads to the patio area and handed her a tray that had been left out there a couple of days before. (R 508) Buzia then struck Thea Kersch on the head with his fist several times until she was unconscious. (R 514) Kersch recalled regaining consciousness in the den, and being struck again in the head and losing consciousness. (R 518) Thea Kersch regained consciousness in the den and crawled to the office and called 911. (R 520) When the deputy sheriff arrived, Kersch let him in and told him that she was struck in the head by John Buzia. (R 523) After the attack, Thea Kersch found that cash; credit cards; her husband's wallet and her husband's car were missing. (R 533) Prior to the attack, John Buzia had asked Charles Kersch for a loan, but Kersch had refused. (R 533)

Denise Lohrman was a teller at the National Bank of Commerce in Winter Park. (R 539) Lohrman had known Thea and Charles Kersch as customers and also knew John Buzia to come by and cash checks from the Kerschs a couple different times. (R 540) John Buzia appeared at the bank in a white Toyota Camry in the drive through. (R 541) Buzia presented Lohrman with a check to be cashed. (R 543) The check was for over $800.00 made out from Charles Kersch's checking account. (R 543) Buzia did not have proper ID to cash the check and Lohrman called the Kersch's to see if they would okay the check. (R 546) There was no answer at the Kersch home so Lohrman left a message. (R 546) A co-worker named Harriett Fickett informed Lohrman that she had some concerns about John Buzia and that she was going to call the police. (R 547)

Harriett Fickett arrived to work at the National Bank of Commerce and noticed a peculiar car in the parking lot. (R 551) Fickett had heard a news story on TV regarding a missing car being sought by the police. (R 551) Fickett reviewed the newspaper in the bank to confirm the tag number and compared it with the car that was in the bank drive-thru. (R 552) The tag number matched the number listed in the newspaper, so Fickett called the police. (R 557)

Officer Robert Johns of the Winter Park Police was dispatched to the bank where a stolen vehicle and a possible suspect was in the drive-thru. (R 559) When

Officer Johns arrived on the scene, he confirmed that a white Toyota matching the stolen car was in the drive-thru. (R 560) After backup officers arrived, Johns effected the arrest of the appellant. (R 564) At the time of arrest, the appellant appeared disheveled and unkept. (R 582) The appellant looked like somebody who might not have gotten much sleep in a while. (R 582)

Officer Jeffrey Biles took the appellant into custody. (R 586) Officer Biles immediately read the appellant his ***Miranda***[4] rights. (R 587) The appellant was then transported to the Winter Park Police Station where he was held in the booking area. (R 588) The appellant was very calm and did not appear to be under the influence of any drugs or alcohol, and he had no problem following conversations and talking intelligently. (R 589) Officer Biles noticed that the appellant had dried up blood on his cuticles and also on his shoes. (R 590)

The appellant provided a video taped statement to Seminole County Sheriff's office. (R 689) The appellant attended Florida State University to his junior year. (R 692) The appellant was currently doing house painting and general maintenance on homes. (R 693) The appellant was working for Charles Kersch putting a new floor in his attic. (R 694) The appellant came to the Kersch home to

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[4] Miranda v. Arizona, 384 U.S. 436 (1966)

finish the job, but when he arrived at the Kersch home no one was there. (R 698) The appellant waited awhile and Charles Kersch's wife, Thea Kersch arrived home. (R 698) The appellant waited in the back porch for Charles Kersch to come home, and then noticed a serving tray in the porch that Thea Kersch had left from the day before. (R 699) The appellant picked up the tray and walked to the back door to give it to her. (R 699) The appellant then assaulted Thea Kersch to take her money and car keys. (R 699) The appellant punched Thea Kersch in the face a few times and hit and kicked her to knock her out. (R 700) The appellant then went in her purse and took eight dollars. (R 700-702) The appellant hit Thea Kersch really hard and the appellant wondered what the hell he was doing. (R 701) The appellant then pulled Thea Kersch into the den and put a blanket over her. (R 702) The appellant then searched around the house for valuables to steal and also took Thea Kersch's credit cards. (R 704)

The appellant then heard the garage door open, and assumed that Charles Kersch had come home. (R 704) The appellant began thinking what was he going to do; Charles Kersch was going to come home and there is blood on the floor. (R 705) Charles Kersch then came in from the garage, and the appellant hit him and Kersch went down. (R 706) When Kersch fell he hit his head real hard on the cement tile floor and was unconscious. (R 708) Kersch then was seen trying to get

up on all fours and the appellant hit him again with his hands. (R 709) The appellant then took Kersch's wallet out of his pants to see if he had some money. (R 709) Kersch had close to $100.00 in his wallet. (R 710)

The appellant admitted hitting Thea Kersch with an axe that he found in the garage, but initially denied every hitting Charles Kersch with the axe. (R 711-13) The appellant stated that had not been drinking or doing any drugs at the time of the murder. (R 723) The appellant put duct tape on the door handle in the back den to hold the door shut so that Thea Kersch could not get out when she came to. (R 726)

The appellant stated at some point he blacked out and that he did hit Charles Kersch with the axe. (R 734) The appellant never used the sharp side of the axe, and his intention was to slow down Charles Kersch so that he could get out of the house. (R 735) The appellant did not hit Charles Kersch with a full swing of the axe but hit him hard enough to "knock him silly". (R 751) After appellant hit Charles Kersch with the axe, he heard Thea Kersch starting to moan and groan in the den. (R 738) Appellant then went with the axe and struck Thea Kersch. (R 738) The appellant then left the Kersch home in Charles Kersch's car and went to buy a twelve pack of Busch beer. (R 748) The appellant denied having any drug problem but he did admit taking crack cocaine a couple of weeks before. (R 750)

The appellant did not know that he had killed Charles Kersch. (R 766)

Crime scene technicians processed latent fingerprints from the garage of the Kersch home. (R 843) The technicians also processed footwear impressions throughout the Kersch home. (R 853) Technicians also processed the appellant's wallet which had Charles Kersch's Mastercard in it. (R 903) Based on the blood spatter patterns there were at least two separate swings of an object to Charles Kersch's head. (R 986) The blood splatter patterns were cast-off from medium velocity impacts. (R 987) The victim was struck on or near the floor. (R 1145)

The Florida Department of Law Enforcement tested blood stains found on the appellant's t-shirt, socks, shorts and shoes. (R 1053) The blood stain on the appellant's sock, left shoe, and shorts matched those of Thea Kersch. (R 1053) A blood stain on appellant's shorts and a blood stain on the axe from the garage all matched Charles Kersch. (R 1053) The fingerprints lifted from the garage cabinet door matched the fingerprints of the appellant. (R 1099)

Several shoe impressions were recovered from the crime scene. (R 1208) Seven of the shoe impressions found at the scene matched the shoes of the appellant. (R 1209)

The autopsy of the victim revealed blunt force injury to the eye common to injuries suffered during a physical altercation with a fist. (R 1239) The back of the

victim's head had a laceration of the scalp and a small skull fracture in the area. (R 1240) The small skull fracture could have been caused by an axe or it could have been caused by a rapid fall to the floor. (R 1242) The victim also had a large complex laceration which surrounded a superficial abrasion and soft tissue hemorrhage. (R 1242) The injury to the left side of the head could have been caused by someone striking the victim with an axe or it could have been possible with hitting the floor. (R 1243) There was also a ragged laceration with complex margins at the base of the victim's skull. (R 1243) Underneath that laceration, the skull bone was fractured. (R 1243) There was also injury to the right eye that was possibly caused by this blow known as a blow up fracture of the right orbital roof. (R 1244)

The fracture to the base of the skull was consistent with having been struck with the flat side of an axe and was inconsistent with hitting his head on the floor. (R 1246) The skull fracture to the base of the victim's head required significant force, the kind of force that was commonly seen in automobile accidents. (R 1247) The blunt force injury to the base of the head would have caused unconsciousness immediately and caused death within a couple of minutes. (R 1250) The victim's cause of death was blunt force injuries to the head. (R 1250) The victim was struck one time in the left side of the head with a blunt force object. (R 1253) The other

injury to the victim's back of his head was either caused by a blunt force object or from the force of hitting his head on the floor. (R 1253)

Penalty Phase

The appellant's parents divorced when the appellant was in high school. (R 1566) At the time of appellant's parent's divorce, the appellant's father was an alcoholic. (R 1530) The appellant was living with his father at the time of his father's death. (R 1578) The appellant was the one that discovered that his father had died in the house. (R 1578) The appellant was very upset and unhappy over his father's death. (R 1578)

The appellant began to inhale powder cocaine recreationally with his sister and brother-in-law. (R 1616) Soon thereafter a dependency started, and instead of just one little packet for the day, two little packets, and then up to three packets of cocaine would be used per day. (R 1617) The cocaine dependency began in the period of 1995 to 1996. (R 1617) Prior to alcohol and drug abuse, the appellant was a very sincere person, he would never look to gain off of anybody and was perfect for the hospitality business. (R 1620) After becoming addicted to cocaine, the appellant became less communicative, was less sociable, and friends were not around anymore. (R 1621) In college, the appellant was a very hard worker, took pride in his work and was very good at managing people because he made them

feel at ease. (R 1656) The appellant was a cook for Outback Steakhouse. (R 1667) Appellant was a very diligent good worker, and produced at a high level for the kitchen. (R 1667) The appellant worked with a good demeanor and handled the stress of a high volume steakhouse very well. (R 1667) The appellant left his employment at Outback for excessive tardiness. (R 1668)

At college, John was pretty outgoing, and he was very nice to everybody. (R 1695) He was very athletic, all the guys kind of gravitated towards him as the guy to talk to. (R 1695) A student from New York introduced cocaine at a college party. (R 1703) The appellant consumed cocaine at that party. (R 1703) The appellant continued using cocaine during college. (R 1705) There was an incident in college where appellant showed great restraint. (R 1711) The incident was with a guy named Tommy. (R 1711) Tommy began screaming and yelling at appellant, and then spit in his face and the appellant didn't hit him. (R 1711)

The appellant had a college going away party. (R 1711) The appellant's father was at the party and appeared intoxicated. (R 1713) The appellant's drug use continued after he dropped out of college. (R 1714) Appellant stayed in Tallahassee and worked two jobs. (R 1714) The appellant worked at a deli and worked at the Governor's Inn. (R 1714) The appellant was a workaholic. (R 1714)

The appellant asked friends at a wedding for money to get cocaine. (R 1719)

When appellant was under the influence of drugs during college he would act weird. (R 1720) The appellant would either be laid back or really pumped up and wired. (R 1721)

In 1991, the appellant had a court appearance. (R 1728) The appellant was very disheveled. (R 1728) Appellant had a substance abuse problem, and became a transient because of his drug problems. (R 1728) In college, appellant was vibrant and looked like a movie star. (R 1728) In 1991, the appellant looked bad, and was not dressed for court the way one would expect him to be dressed for court. (R 1728) The appellant seemed eager and anxious. (R 1728)

At the time of appellant's arrest, the appellant looked at the arresting officer with a blank stare and appeared impaired in some way. (R 1757) The appellant had a groggy look and was challenged several times, and said nothing verbally and gave a blank stare. (R 1758) The appellant appeared to be wearing clothes that he had been in for a long period of time. (R 1758) The appellant had the odor of the impurities of alcoholic beverages on him, and was very lethargic, almost dazed. (R 1767) The appellant looked like a classic impaired driver. (R 1767)

The appellant was employed at the Mayflower Retirement Community as a grounds keeper. (R 1810) The appellant was far and away the best worker. (R 1813) The appellant was dependable, and he was a hard worker. (R 1813)

Dr. William Riebsame performed an evaluation of the appellant. (R 1830) The appellant talked about his positive relationship with the victim; expressed remorse; became somewhat tearful; and acknowledged that he was responsible for what happened. (R 1834) The appellant took an achievement test and the Minnesota Multiphasic Personality Inventory (MMPI-Two). (R 1836) The appellant scored in the 86th percentile on the achievement test. (R 1835) On the MMPI the appellant scored at fifty-eight on the potential for substance abuse, which is a clinically significant level for the potential of substance abuse. (R 1840) The appellant's highest score on the MMPI reflects that personality characteristic of denial. (R 1841) His high score is the scale of three, which has to do with an individual's lack of insight or denial of their psychological problem (R 1841) Appellant is an individual who fails to rationally recognize his alcohol and drug addictions. (R 1841)

From interviews of family members it was determined that appellant's father was very manipulative, mean spirited and there were examples of at least two incidences where Buzia was physically abused by his father. (R 1846) The appellant stated that everybody's an alcoholic in his family. (R 1848)

The appellant started cocaine use in 1990, and in 1997 he began to use crack cocaine. (R 1849) The appellant stated that the affect of crack cocaine is very

intense and it became the focus of his day-to-day activities. (R 1849)

The appellant met the criteria for alcohol and cocaine dependence. (R 1849) There's a family history of alcohol dependence, and the appellant is drinking excessively. (R 1849) The appellant developed a tolerance for alcohol. (R 1849) He is experiencing certain symptoms of alcohol withdrawal that require him to drink the next day to diminish those symptoms. (R 1849) The alcohol becomes a focus of most of his activities. (R 1849)

Appellant performs in the normal range on neurological tests, therefore there is no neuropsychological or neurological problem or deficit in Buzia's case that would affect his behavior. (R 1850) There was no indication of antisocial or psychopathic or sociopathic personality disorder in Buzia's case. (R 1850) He doesn't have a history that reflects it either. (R 1850) He's got a history of certain antisocial acts including retail theft, having drug paraphernalia, the injuring of Mr. and Mrs. Kersch. ® 1853) However, the other aspects of a criminal personality, the self-centeredness, the need for stimulation and excitement, the lack of a conscience, are not shown in Buzia’s case. (R 1853)

The average person has a global assessment of functioning of seventy-five to eighty. (R 1854) Dr. Riebsame estimated that the appellant’s global assessment of functioning on the day of the attack on Mr. and Mrs. Kersch would be forty. (R

1854) According to the diagnostic and statistical manual, forty indicates an individual with serious impairment in their ability to understand what's happening around them and behave logically. (R 1854) There will be impairment in their work functioning, impairment in family relations, judgments and moods. (R 1854) Examples are a severely depressed person who avoids people, neglects his family, and is not able to function in employment. (R 1854)

The day before the murder, Charles Kersch paid appellant approximately two hundred dollars for a week's work. (R 1858) The appellant took a hundred dollars after work that day to a Target store somewhere in the vicinity and bought a hundred dollars worth of clothes. (R 1858) The appellant spent the other hundred dollars on crack cocaine. (R 1858) Appellant went back to Target the next morning to return the new clothes and get a refund. (R 18858) The appellant used the refund money on crack cocaine. (R 1858)

The appellant had been living on the streets around this time period until he ran into his brother at McDonald's where his brother invited him to live in a tent in the back yard. (R 1859) The brother would sneak food out to him, so some evenings he would be in the tent, some evenings he would be out on the street or at a crack house. (R 1859)

Dr. Riebsame questioned Buzia on three different occasions about the events

surrounding Charles Kersch's death, and each time Buzia gave him the same consistent report of what happened. (R 1861) The appellant described being paid by Kersch for work in the attic. (R 1861) The appellant had been wearing the same clothes for several days, so he used a hundred dollars of it to go to Target to spend on clothes and the other hundred dollars he spends on the crack cocaine. (R 1861) The next morning the appellant went to Target to return the clothes and take the refund to buy crack cocaine. (R 1861) Appellant missed the morning's work at the Kersch home. (R 1861)

In the afternoon, the appellant took the bus across town to the Kerschs' home. (R 1861) Along the way the appellant stopped at a fast food store and a convenience store and he used crack cocaine at each of these stops. (R 1861)

The appellant got to the entrance of the gated community and walked to the Kerschs' household, and waited for someone to come home. (R 1862) Thea Kersch arrived home and she invited the appellant to wait on the back porch. (R 1862) The appellant then began to feel very paranoid. (R 1862) Thea Kersch was looking at appellant as if something was wrong. (R 1862) Thea Kersch knew appellant was wearing the same clothes all week. (R 1862) Appellant feels his heart beating, begins sweating, and he feels an adrenalin rush. (R 1862) Appellant hadn't slept for days, had not eaten and was high on crack. (R 1862) At that point, Thea

Kersch served him lunch and he decided to strike her with the lunch tray. (R 1862) The appellant then struck Thea Kersch and he knows that she has money. (R 1863) He dragged Thea Kersch to the den. (R 1863) The appellant went into Thea Kersch's purse and took between sixty and a hundred dollars. (R 1863) The appellant then went searching around the house, going from room to room looking for money. (R 1863) Then appellant heard the garage door open with the arrival of Charles Kersch. (R 1863)

The appellant met Charles Kersch in the garage area. (R 1864) The appellant punched Charles Kersch, and reached for an axe and struck Kersch, and Kersch went down. (R 1864) The appellant hears Thea Kersch in the background and he also hears Charles Kersch still stirring. (R 1864) He hits Charles Kersch again, he's not sure how many times he hit Charles Kersch. (R 1864) He then takes Charles Kersch's wallet, and goes again around the household looking for money that he might take with him. (R 1864) Appellant went to the refrigerator and took a twelve pack of beer and left in Charles Kersch's car with his wallet, the beer and the money that he was able to find in the household. (R 1864) The appellant went down town to a crack apartment immediately and spent the money he stole on crack cocaine. (R 1864)

According to Dr. Riebsame, Buzia suffered from a cocaine delirium at the

time of the incident on March 14th of 2000. (R 1865) Buzia experienced symptoms of cocaine withdrawal, having done cocaine on the way to the Kersch home. (R 1865) The withdrawal symptoms reflect the paranoia, the agitation, the lack of sleep, the panicky experience, and the heart palpitations. (R 1865) The delirious aspect has to do with the disorientation, unable to recall what exactly happened in what room, some incomplete memory of some of the aspects of the crime, his inability to stay focused on what he's supposed to be doing in some sort of organized fashion. (R 1865) The appellant was able to recall generally what he did, but the withdrawal symptoms and the symptoms of delirium describe his behavior at that time pretty accurately. (R 1865)

The appellant planed to go to the Kerschs' home to get money. He denied planning to harm the Kerschs, until he was sitting on the porch and struck Thea Kersch. (R 1866) The appellant submitted receipts from the Target dated the evening of March 13th, and another was dated the morning of March 14th. (R 1867)

The state expert witness Dr. Danziger opined that cocaine withdrawal does not involve delirium. (R 1896) Buzia had a relatively clear recollections of what happened and was able to describe things to the police in detail, such as how much money he took, that the credit card was a Mastercard, the whole sequence of events and other relatively small details that would require a great deal of memory.

(R 1899) There was nothing to suggest that he was hallucinating, that he was hearing voices or seeing things. (R 1899) There was nothing to suggest that he was so confused he didn't know where he was or what he was doing. Rather, the appellant described to the police his actions to rob and incapacitate the Kerschs, which is suggestive of goal directed and purposeful behavior. (R 1899) At the time of the murder the appellant had a physiological dependence on alcohol and cocaine. (R 1909) The appellant moved Thea Kersch from the kitchen area to the bedroom so that she could not be seen, to get her out of the back window so that no one could see her. (R 1909)

The appellant made a statement at the Spencer Hearing. (R 2576) The appellant expressed remorse for his actions, and asked the court to spare his life so that he could devote his life to crime prevention programs. (R 2581) Seminole County Deputy Samuel Peterson was bringing back Buzia and another inmate back to their cells, when Deputy Peterson discovered that another inmate attempted to take his own life by hanging. (R 2583) Buzia assisted Deputy Peterson in saving the inmate's life. (R 2584)

The Seminole County Sheriff's Office participates in Operation Right Track a program designed to keep youth from turning to a life of crime. (R 2586) Buzia participated in the program on a weekly basis working with the children. (R 2588)

The appellant had a physical and psychological dependence on cocaine. (R 2613) At the time of the murder, the appellant was dejected from his family, homeless, and working from paycheck to paycheck for purposes of satisfying his habit. (R 2613) Cocaine addicts have a propensity for violent behavior, poor social skills and exhibit drug seeking behavior. (R 2616) Buzia was at the extreme end of the drug addiction continuum. (R 2621) Buzia was in an irrational drug seeking mode and the time of the murder. (R 2634)

SUMMARY OF ARGUMENT

Point I: The trial court claimed in the sentencing order that the prior violent felony aggravating circumstance was proven and should be given great weight. The trial court relied upon the contemporaneous conviction for the attempted first degree murder of Thea Kersch. This aggravating factor, by its very terms, requires a previous "conviction" of the violent felony to qualify. In the instant case, the trial court had not adjudicated Buzia guilty of the attempted murder prior to the sentencing jury's recommendation. Hence, it did not fall into this statutory aggravator which requires a conviction "at the time the jury considered it recommendation to the trial judge. Even if this Court now would rule, contrary to the specific language of the statute, that a conviction need not be entered prior to the sentencing jury's recommendation, a contemporaneous conviction where Buzia had up to that time lived a violence-free life, must be given lesser weight. The aggravating nature of a "prior" violent or capital felony is most influential for people who have multiple violent felonies over a period of time.

Point II: The trial court claimed in the sentencing order that the avoiding arrest aggravating circumstance was proven and should be given great weight. The trial court admitted in the sentencing order that there is no direct evidence of Buzia's thought process to prove the motive of the murder. Rather, the trial court

is inferring the motive from the circumstances of the crime. The circumstantial evidence was not sufficient to support the finding of the aggravating circumstance beyond a reasonable doubt.

Point III. The trial court claimed in the sentencing order that the Heinous, Atrocious or Cruel aggravating circumstance was proven and should be given great weight. The trial court found that the beating of Charles Kersch took place in three stages, and that Buzia beat Kersch with a measured approach causing the victim to have a high degree of pain and awareness of his plight. This finding is not supported by the evidence.

Point IV. The trial court claimed in the sentencing order that the Cold, Calculated and Premeditated (CCP) aggravating circumstance was proven and should be given great weight. The trial court found that the Buzia's cleaning of the residence after attacking Thea Kersch and changing his shirt, along with attacking Charles Kersch as soon as he entered the residence, demonstrates that Buzia had a careful plan or prearranged design to commit murder before attacking and killing Charles Kersch. This finding is not supported by the evidence.

Point V. The trial court found six aggravating factors. Four of these are not supported by the evidence. Only one aggravating factor remains: either pecuniary gain or felony murder. This single aggravating factor is found in the vast majority

of first-degree murder cases, capital or not. Florida reserves the death penalty for the most aggravated and least mitigated of first-degree murderers. The totality of the circumstances of this case, compared with other capital cases, render the death sentence a disproportionate penalty.

Point VI. The Florida death penalty is unconstitutional under the United States Supreme Court ruling in ***Ring v. Arizona***.

POINT I

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT IMPROPERLY INCLUDED THE PRIOR VIOLENT FELONY AGGRAVATING CIRCUMSTANCE.

The trial court claimed in the sentencing order that the prior violent felony aggravating circumstance[5] was proven and should be given great weight. The trial court relied upon the contemporaneous conviction for the attempted first degree murder of Thea Kersch.

This aggravating factor, by its very terms, requires a previous "conviction" of the violent felony to qualify. The contemporaneous violent felony can be tried in the same trial as the capital felony and still qualify as a prior violent felony but it has been limited to actual convictions for violent felonies. ***Sireci v. Moore***, 825 So. 2d 882 (Fla. 2002); ***Elledge v. State***, 346 So.2d 948 (Fla. 1977). An arrest or pending, untried charge does not qualify. ***Id***. In ***Lucas v. State***, 376 So.2d 1149, 1152-1153 (Fla. 1979), this Court ruled that the contemporaneous attempted murders could be used as the prior violent felonies since both convictions "were

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[5] The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. §921.141(5)(b), Florida Statutes (1999)

entered 'previous' to sentencing and were therefore appropriately considered by the trial judge as an aggravating factor." Similarly, in ***King v. State***, 390 So.2d 315, 320-321 (Fla. 1980), the Court noted that even violent felonies committed after the murder for which he was on trial could still be used as long as there was a conviction at the time of sentencing:

> Although the facts are not identical, an analogous result was reached in ***Elledge v. State***, 346 So.2d 998 (Fla.1977), wherein the sentencing judge properly considered as an aggravating circumstance a murder committed later in time than the subject murder, but for which a conviction already had been obtained in a separate proceeding. The legislative intent is clear that any violent crime *for which there was a conviction at the time of sentencing* should be considered as an aggravating circumstance. Prior convictions in existence at the time of sentencing is a normal factor considered in all sentencing and is generally recognized as appropriate in sentencing guidelines. See ABA Sentencing Alternatives and Procedures (1979).

(*overruling* ***Meeks v. State***, 339 So.2d 186 , 190 (Fla. 1976)).

In the instant case, the trial court had not adjudicated Buzia guilty of the attempted murder prior to the sentencing jury's recommendation. Hence, it did not fall into this statutory aggravator which requires a conviction "at the time the jury considered it recommendation to the trial judge."***King v. State***, *supra*.

Even if this Court now would rule, contrary to the specific language of the statute, that a conviction need not be entered prior to the sentencing jury's recommendation, a contemporaneous conviction where Buzia had up to that time lived a violence-free life, must be given lesser weight. The aggravating nature of a "prior" violent or capital felony is most influential for people who have multiple violent felonies over a period of time, such as Daniel Remeta:

> On February 8, 1985, an Ocala, Florida, convenience store clerk was murdered after being shot four times. Two days later, in Waskom, Texas, Remeta and a companion robbed a convenience store and shot the cashier five times; the cashier survived the shooting. On February 13, 1985, a Kansas gas station attendant was shot and killed with that same gun. Shortly after the Kansas murder, a sheriff stopped Remeta's vehicle. One of Remeta's companions shot the sheriff twice. Remeta and his companions fled; they went to a grain elevator, where they abducted two men and took their truck. The two men were forced to lie face down in the roadway and each was shot in the back of the head and killed with the same gun used in the other murders.

Remeta v. State, 710 So.2d 543, 544 (Fla. 1998). The "prior violent felony" also weighs heavily in favor of the death penalty for serial killers, such as Danny Rolling, who carefully committed five first-degree murders, three sexual batteries, and three armed burglaries over a 72-hour period. ***Rolling v. State***, 695 So.2d 278, 282-83 (Fla.1997).

Where as here, contemporaneous violent crimes are not preceded by *any*

prior violence on the part of the defendant, the weight of this factor is substantially less than for those with a long history of prior violent crimes. *See* ***Almeida v. State***, 748 So.2d 922, 933 (Fla.1999) (Life sentences appropriate in homicide case where, "In addition to the mental health mitigation . . . , the defendant was twenty years old at the time of the crime, and the present crime and the [two] prior capital felonies all arose from a single brief period of marital crisis that spanned six weeks. We note that the jury vote was seven to five.") (emphasis added); ***Terry v. State***, 668 So.2d 954, 965 (Fla.1996) ("While this contemporaneous conviction qualifies as a prior violent felony and a separate aggravator, we cannot ignore the fact that it occurred at the same time, was committed by a co-defendant, and involved the threat of violence with an inoperable gun. This contrasts with the facts of may other cases where the defendant himself actually committed a prior violent felony such as homicide."). Thus all the circumstances must be considered.

While contemporaneous convictions for violent crimes do qualify as "prior" violent felonies, it is clear from the evidence that symptoms of cocaine addiction and withdrawal including paranoia, agitation, the lack of sleep, the panicky experience, the heart palpitations mitigate the application of this aggravating circumstance in this case. The evidence conclusively shows that John Buzia was in a drug seeking mode and that violence was totally out of character for him.

The appellant's family and friends testified that they were shocked when they heard about the charges against appellant. There is no evidence in the record even suggesting that John Buzia has ever before been violent, and the testimony of the family members, friends and experts who knew him and reviewed the records all show that violence is totally out of character for John Buzia. In fact, one friend testified about an incident in college where a guy named Tommy began screaming and yelling at appellant, and then spit in his face and the appellant didn't hit him.

A contemporaneous violent crime is not entitled to great weight in light of the mitigating evidence. This factor does not make this the most aggravated and least mitigated of first-degree murders. This factor either must be rejected (because of no prior adjudication for the offense) or, at the very least, be given minimal weight.

POINT II

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT IMPROPERLY INCLUDED THE AVOIDING ARREST AGGRAVATING CIRCUMSTANCE.

The trial court claimed in the sentencing order that the avoiding arrest aggravating circumstance[6] was proven and should be given great weight. The trial court admitted in the sentencing order that there is no direct evidence of Buzia's thought process to prove the motive of the murder. Rather, the trial court is inferring the motive from the circumstances of the crime relying upon ***Swafford v. State***, 533 So. 2d 270 (Fla. 1988).

The elements of the Avoiding Arrest aggravator are:

1. The defendant committed a capital felony, and,
2. the dominant motive for the commission of the capital felony was:
    a. to avoid a lawful arrest, or
    b. to prevent a lawful arrest, or
    c. to effect an escape from custody.

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[6] The capital felony was committed for the purpose of avoiding arrest or effecting an escape from custody. §921.141(5)(e), Florida Statutes (1999).

This aggravating circumstance focuses on the motivation for the murder, and it is most easily found where the evidence demonstrates that the defendant killed a police officer who was attempting to apprehend the defendant. E.g., ***Farina v. State***, 801 So. 2d 44 (Fla. 2001)***; Cruse v. State***, 588 So.2d 993 (Fla. 1991); ***Mikenas v. State***, 367 So.2d 606 (Fla. 1978); ***Cooper v. State***, 336 So.2d 1133 (Fla. 1976). The circumstance also applies to the murder of victims who are not police officers. ***Riley v. State***, 366 So.2d 19 (Fla. 1976). However, when the victim is not a police officer, the evidence must prove that the dominant or only motive was to eliminate the victim as a witness. ***Bell v. State***, 841 So.2d 329 (Fla. 2003); ***Anderson v. State***, 841 So.2d 390 (Fla. 2003); ***Hannon v. State***, 638 So.2d 39 (Fla. 1994).

The state must prove by positive evidence (rather than by speculation**,** default, or elimination) that the dominant motive was to eliminate a witness. ***Farina v. State***, 801 So. 2d 44 (Fla. 2001)***; Scull v. State***, 533 So.2d 1137 (Fla. 1988); ***Jackson v. State***, 592 So.2d 409 (Fla. 1986); ***Connor v. State***, 803 So. 2d 598 (Fla. 2001)(other motives as likely). Consequently, even when the victim knows the defendant, this factor does not apply unless the State has additional evidence showing witness elimination was the dominant motivation for the murder. E.g.,

Bell v. State, 841 So.2d 329 (Fla. 2003); ***Zack v. State***, 753 So.2d 9 (Fla. 2000); ***Jennings v. State***, 718 So.2d 144 (Fla. 1998); ***Geralds v. State***, 601 So.2d 1157 (Fla. 1992); ***Perry v. State***, 522 So.2d 817 (Fla. 1988); ***Floyd v. State***, 497 So.2d 1211 (Fla. 1986).

The appellant concedes that circumstantial evidence can be sufficient to prove witness elimination as the dominate motive. ***Lugo v. State***, 845 So.2d 74 (Fla. 2003); ***Preston v. State***, 607 So.2d 404 (Fla. 1992); ***Swafford v. State***, 533 So.2d 270, 276 (Fla. 1988); ***Caruthers v. State***, 465 So.2d 496 (Fla. 1985). However, "the trial court may not draw 'logical inferences' ....when the State has not met its burden." ***Robertson v. State***, 611 So.2d. 1228 (Fla. 1992).

For example, in ***Zack v. State***, 753 So.2d 9 (Fla. 2000) Zack and the victim (Smith) left a bar together and went to the victim's house. Immediately upon entering the house Zack hit Smith with a beer bottle. Zack pursued Smith down the hall to the master bedroom leaving a trail of blood. Once in the bedroom Zack sexually assaulted Smith. Following the attack Smith managed to escape to the empty guest bedroom across the hall. Zack pursued her and beat her head against the bedroom's wooden floor. Once he incapacitated Smith, Zack went to the kitchen where he got an oyster knife. He returned and stabbed Smith in the chest

four times with the knife. Zack went back to the kitchen, cleaned the knife, put it away, and washed the blood from his hands. He then stole items from the house and fled.

After he was arrested, Zack confessed to the Smith murder and claimed he and Smith had consensual sex and that she thereafter made a comment regarding his mother's murder. The comment enraged him, and he attacked her. Zack contended the fight began in the hallway, not immediately upon entering the house. He said he grabbed a knife in self-defense, believing Smith left the master bedroom to get a gun from the guest bedroom.

While these facts certainly suggest that Zack committed the murder to avoid arrest, they nevertheless did not amount to the "very strong" evidence this court in ***Riley*** said was required to support a finding of this factor.[7] In those cases where this court has found this factor inapplicable, it has done so because the evidence was circumstantial and inconclusive.[8]

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[7] In ***Riley*** the evidence was sufficient because the victim was murdered after one of the perpetrators expressed concern that the victim could identify them.

[8] ***Geralds v. State***, 601 So.2d 1157 (Fla. 1992)(mere fact victim knew and could identify defendant insufficient); ***Enmund v. State***, 399 So.2d 1362 (Fla. 1981)(the equivocal nature of the pathologist's conclusions that the victims were laid out prone to "finish [them] off" was insufficient); ***Jackson v. State***, 502 So.2d 409 (Fla. 1986)(avoiding arrest only one of several explanations for murder); ***Amazon v. State***, 487 So.2d 8 (Fla. 1986)(evidence inconclusive where the

The trial court relied upon ***Harich v. State***, 437 So.2d 1082 (Fla. 1983) for the proposition that circumstantial evidence can be used to prove the avoiding arrest aggravating circumstance. In ***Harich***, the defendant transported the victim to a remote location and sexually assaulted her. Before murdering the victim, Harich stated if the victim was quite he would not shoot her. Harich then shot the victim in the head and then slit her throat. It should be noted that Harich testified at trial, and what he said at trial is not known from the opinion. Moreover, Justice McDonald filed a dissenting opinion stating that the evidence was insufficient to support the avoiding arrest aggravating factor.

Here, Buzia by his owns words did not intend to kill Charles Kersch. Buzia was in a "drug seeking mode" and intended to "knock him silly" so that Buzia could flee the home and get high. Nonetheless, the trial court concluded that Buzia waited for Charles Kersch to come home and murder him to eliminate him as a witness to the robbery and assault of Thea Kersch. The trial court does not address the fact Buzia left Thea Kersch as a witness against him in the den, using

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defendant killed his next-door neighbor as she called for help during the burglary and the detective said the defendant told him he killed to avoid arrest); ***Garron v. State***, 528 So.2d 353 (Fla. 1988)(victim shot while talking on the phone asking for the police held insufficient).

duct tape to try to lock Thea Kersch in the bedroom so that he had time to get away. Nor, did the trial court address the fact that Buzia was arrested the next day in the victim's car looking at the arresting officer with a blank stare and appeared impaired in some way.

The evidence equally supports that the appellant did not intentionally murder Charles Kersch, or if he intentionally murdered Charles Kersch, he did so during cocaine withdrawal or delirium. As such, the state has failed to prove this factor beyond a reasonable doubt. The conclusion of the trial court should be rejected. The death sentence must be vacated and reduced to life or remanded for a new penalty phase.

POINT III

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT IMPROPERLY INCLUDED THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.

The trial court claimed in the sentencing order that the Heinous, Atrocious or Cruel aggravating circumstance[9] was proven and should be given great weight. The trial court found that the beating of Charles Kersch took place in three stages, and that Buzia beat Kersch with a measured approach causing the victim to have a high degree of pain and awareness of his plight. This finding is not supported by the evidence.

This Court has defined the aggravating circumstance of heinous, atrocious, or cruel in ***State v. Dixon***, supra at 9:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, ***Tedder v. State***, 322 So.2d 980, 910

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[9] The capital felony was especially heinous, atrocious or cruel. §921.141(5)(h), Florida Statutes (1999)

(Fla. 1975), this Court further defined its interpretation of the legislature's intent that the aggravating circumstance only apply to crime especially heinous, atrocious, or cruel.

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

State v. Dixon, supra at 9.

As this Court has stated in ***Santos v. State***, 591 So.2d 160, 163 (Fla. 1991), and ***Cheshire v. State***, 568 So.2d 908, 912 (Fla. 1990), this factor is appropriate only in torturous murders which exhibit a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. ***See, e.g., Douglas v. State***, 575 So.2d 165, 166 (Fla. 1991) (torture-murder involving heinous acts extending over four hours). The present murder happened too quickly with no substantial suggestion that Buzia intended to inflict a high degree of pain or otherwise torture the victim. Accordingly, the trial court erred in finding this factor to be present.

Here, however, the medical examiner testified that the victim's cause of death was blunt force injuries to the head. The victim was struck one time in the left side

of the head with a blunt force object. The other injury to the victim's back of his head was either caused by a blunt force object or from the force of hitting his head on the floor.

John Buzia initially denied ever striking Charles Kersch with an axe. He stated that he struck Charles Kersch with his fist and Kersch fell and struck his head hard on the tile floor and was unconscious. Kersch then started to rise up on all fours so Buzia struck him again with his fists to "keep him down longer, so maybe I could drive away and get more time." Buzia then heard Thea Kersch groaning in the back bedroom. He went to the garage and got an axe and struck Charles Kersch with the axe, and then went to the bedroom and struck Thea Kersch with the axe. Buzia then used duct tape on the bedroom door to keep Thea Kersch in the bedroom. Buzia had no intention of killing Charles Kersch, but rather struck him hard enough to "knock him silly." When Buzia left the Kersch house moments after the attacks, Charles and Thea Kersch were both alive.

The testimony and physical evidence supports the conclusion that Charles Kersch was killed quickly after entering his home. The injury to Charles Kersch's head when he fell to was sufficient to immediately stun him and cause unconsciousness. There was no suggestion that Buzia intended to kill Charles Kersch or intentionally torture Charles Kersch. The evidence is rather that Buzia

wanted to rob Charles and Thea Kersch, and render them incapacitated so that he could get away and get high.

The HAC factor is appropriately given enormous weight when there is intentional torturing and intentional mental anguish inflicted upon a suffering victim:

> The murder described in gruesome detail in this record is a most heinous and calculated slaying. Prior to the murder, appellant kidnaped, repeatedly abused, sexually molested, bound and gagged, and literally toyed with the victim. At one point, the victim was stretched and tied to a sawhorse; at another, she was wired between two trees. It is clear from the statements of Frantz that Mendyk actually planned the murder of Larmon in advance and calculated upon that plan as he returned to the site where she was bound. It is equally clear that the torture and terror this the victim must have endured for a lengthy period of time which was directly intended by Mendyk was certainly extreme, rendering this murder heinous, atrocious and cruel.

Mendyk v. State, 545 So.2d 846, 850 (Fla. 1989)(emphasis added). *See* ***Booker v. State***, 773 So.2d 1079, 1091 (Fla.2000) ("It is uncontested in this case that HAC was properly established in the brutal sexual battery and stabbing death of the ninety-four-year-old female victim."); ***Chandler v. State***, 534 So.2d 701, 704 (Fla. 1988) ("We agree with the trial court's finding these murders to have been heinous, atrocious, or cruel after considering that this elderly couple, of whom the wife was very frail, must have suffered great fear and apprehension after being subdued and

abducted from their home by a young man armed with a baseball bat and knife and then beaten to death in each other's presence.")

This Court is all too aware of the depravity of those who intentionally torture and enjoy the suffering of others. It is in cases like that, and for people who intentionally do things like that, where the crimes become the most aggravated of capital crimes. *See* ***Schwab v. State***, 636 So.2d 3, 8 (Fla. 1994) (HAC appropriate where boy was abducted, taken to motel room, stripped naked, bound and gagged, anally raped, and then smothered to death); ***Power v. State***, 605 So.2d 856, 863 (Fla. 1992) (HAC appropriate where 25 year old man took small 12-year-old girl prisoner, terrorized her, anally and vaginally raped her, hog-tied and gagged her, then stabbed her and left so that she slowly bled to death over period of 10 to 20 minutes). The death penalty is reserved for such defendants, who commit such crimes.

The circumstances of this case, on the other hand, do not support the conclusion that John Buzia intended to kill or cause any unnecessary suffering to Charles Kersch. Rather, the evidence is consistent with Charles Kersch being quickly killed when struck on the left side of the head with an axe. The mental and emotional condition of John Buzia is an important aspect of his response to striking Thea Kersch and then burglarizing the Kersch's home. There is no evidence in the

record contradicting the fact that John Buzia was dependent on crack cocaine, was under extreme mental and emotional disturbance at the time of the homicides, and that his capacity to conform his conduct to law was substantially impaired in the early morning hours of June 24, 2000. "In light of these mitigating circumstances, one may see how the aggravating circumstances carry less weight and could be outweighed by the mitigating factors. The heinous, atrocious and cruel murders were committed in an irrational frenzy." ***Amazon v. State***, 487 So.2d 8, 13 (Fla. 1986). The death penalty is not the appropriate sentence for John Buzia when the totality of circumstances is considered, because his case is not the most aggravated and least mitigated of capital crimes.

The appellant submits that the state failed to meet its burden in this case. In ***Rhodes v. State***, 547 So.2d 1201 (Fla. 1989), the decomposing body of an approximately forty-year-old female, missing her lower right leg, was found in debris being used to construct a berm in St. Petersburg. The medical examiner determined manual strangulation to be the cause of death because the hyoid bone in the victim's throat was broken. Rhodes was interviewed by detectives, and during that and subsequent interviews, Rhodes gave different and sometimes conflicting statements to his interviewers, always denying that he raped or killed the victim. He subsequently offered to tell how the victim had died if he could be guaranteed he

would spend the rest of his life in a mental health facility. Rhodes then claimed the victim died accidentally when she fell three stories while in a hotel. At trial three of Rhodes' fellow inmates at the jail were called as witnesses for the state. Each inmate testified that Rhodes admitted killing the victim.

The trial court in ***Rhodes*** had found that HAC applied stating:

> That the murder of Karen Nieradka was especially heinous, atrocious and cruel in that the victim was manually strangled and the clumps of her own hair found in her clenched hands indicates the pain and mental anguish that she must have suffered in the process.

This Court, however, rejected the trial court's finding of the HAC aggravating circumstance, finding that the victim may have been semiconscious at the time of her death according to the conflicting stories told by Rhodes. Further, the Court, quoting ***State v. Dixon***, *supra,* found nothing about the commission of this capital felony "to set the crime apart from the norm of capital felonies."

In ***DeAngelo v. State***, 616 So.2d 440 (Fla. 1993), the defendant struck the victim on the head, used manual strangulation, and then strangled the victim with a ligature. The trial court did not find the presence of this aggravator. In rejecting the state request for the HAC aggravating circumstance, this Court upheld the trial court, agreeing that the state had failed to prove that the victim was conscious

during the ordeal, relying on the medical examiner's testimony as to the possibility that at the time she was strangled with the ligature the victim was unconscious as a result of the pressure of the manual choking or as a result of a blow to her head and the absence of evidence of a struggle. This is precisely the situation here. The facts of the instant case reveal that there was no intentional torture of the victims.

The state presented absolutely no testimony from the medical examiner to support any conclusion that there was excessive pain or torture involved here. There was no testimony the victim was acutely aware of impending death. The testimony and evidence is all to the contrary; the victim here was rendered unconscious in a very brief time, with little suffering and pain. *Contrast, e.g.*, ***Davis v. State***, 604 So.2d 794 (Fla. 1992), wherein the medical examiner testified that the 73-year-old victim likely was not rendered unconscious by a blow to the head and could have been conscious for thirty to sixty *minutes*, while slowly bleeding to death from the stab wounds.

The contrast between those cases involving torture or depravity and the instant case should be clear. As such, in the instant case, the state has failed to prove this factor of torture or depravity beyond a reasonable doubt. The conclusion of the trial court should be rejected. The death sentence must be vacated and reduced to life or remanded for a new penalty phase.

POINT IV

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT IMPROPERLY INCLUDED THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE.

The trial court claimed in the sentencing order that the Cold, Calculated and Premeditated (CCP) aggravating circumstance[10] was proven and should be given great weight. The trial court found that the Buzia's cleaning of the residence after attacking Thea Kersch and changing his shirt, along with attacking Charles Kersch as soon as he entered the residence, demonstrates that Buzia had a careful plan or prearranged design to commit murder before attacking and killing Charles Kersch. This finding is not supported by the evidence.

The CCP aggravating circumstance has four elements. ***Jackson v. State***, 648 So.2d 85 (Fla. 1994); ***Walls v. State***, 641 So.2d 381 (Fla. 1994) As this court explained them in ***Walls***,

> Under ***Jackson***, there are four elements that must exist to establish cold calculated premeditation. The first is that "the killing was the product of cool and

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[10] The capital felony was was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. §921.141(5)(j), Florida Statutes (1999)

> calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage." ***Jackson*** [648 So.2d at 89]....
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> * * * *
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> Second, ***Jackson*** requires that the murder be the product of "a careful plan or prearranged design to commit murder before the fatal incident." ***Jackson***,[648 So.2d at 89]....
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> * * * *
>
> Third, ***Jackson*** requires "heightened premeditation," which is to say, premeditation over and above what is required for unaggravated first-degree murder....
>
> * * * *
>
> Finally, ***Jackson*** states that the murder must have "no pretense of moral or legal justification." .... Our cases on this point generally establish that a pretense of moral or legal justification is any colorable claim based at least in part on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide....

Walls, 641 So.2d at 387-388.

Buzia made a full confession to the crime and was cooperative with the police. Buzia never used the sharp side of the axe, and his only intention was to slow down Charles Kersch so that he could get out of the house. After Buzia hit Charles Kersch with the axe, he heard Thea Kersch starting to moan and groan in the back room. Buzia then went with the axe and struck Thea Kersch. Buzia then left the Kersch's house in Charles Kersch's car to buy crack cocaine. Buzia did not hit Charles Kersch with a full swing of the axe but hit him hard

enough to "knock him silly." Buzia was not aware that he had killed Charles Kersch. The murder of Charles Kersch lacked heightened premeditation, therefore, the trial court erred in finding this aggravating circumstance.

This Court's decision in ***Geralds v. State***, 601 So.2d 1157 (Fla. 1992) is instructive on the necessary evidence to support CCP. In ***Geralds***, the victim was found beaten and stabbed to death on the kitchen floor. There were two stab wounds on the right side of the victim's neck and one fatal stab wound on the left side. The wounds were consistent with a knife found in the kitchen sink. The medical examiner found a number of bruises and abrasions on the head, face, chest, and abdomen of the victim caused by some form of blunt trauma. The examiner also determined that the victim's wrists had been bound with a plastic tie for at least twenty minutes prior to her death. The victim's car and jewelry was missing.

Geralds like Buzia had worked on the remodeling of the victim's house. About one week prior to the murder, the victim encountered Geralds in a shopping mall where Geralds learned that the victim's husband was out of town on business. Geralds again confirmed with the victim's son that the husband was out of town days before the murder.

Geralds argued that the court erred in finding that the homicide was

committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. This court held that:

> To establish the heightened premeditation required for a finding that the murder was committed in a cold, calculated, and premeditated manner, the evidence must show that the defendant had a "careful plan or prearranged design to *kill.*"***Rogers v. State***, 511 So.2d 526, 533 (Fla.1987) (emphasis added), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). A plan to kill cannot be inferred solely from a plan to commit, or the commission of, another felony. ***Jackson v. State***, 498 So.2d 906, 911 (Fla.1986); ***Hardwick v. State***, 461 So.2d 79, 81 (Fla.1984), cert. denied, 471 U.S. 1120, 105 S.Ct. 2369, 86 L.Ed.2d 267 (1985). As we said in ***Hardwick****:*
>
> The premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for purposes of this aggravating factor. What is required is that the murderer fully contemplate effecting the victim's death. The fact that a robbery may have been planned is irrelevant to this issue. 461 So.2d at 81.

In ***Geralds*** the State contended that the evidence at trial established more than simple premeditation. The State argued that Geralds planned the crime for a week after Geralds ascertained when family members would be present in the house; Geralds brought gloves, a change of clothes, and plastic ties with him to the house; Geralds left his car at a location away from the house so that no one would see it or identify it later; Geralds bound and stabbed his victim.

Geralds argued that this evidence establishes, at best, an unplanned killing in

the course of a planned burglary, and that a planned burglary does not necessarily include a plan to kill. Geralds offers a number of reasonable hypotheses which are inconsistent with a finding of heightened premeditation. Geralds argues, first, that he allegedly gained information about the family's schedule to *avoid* contact with anyone during the burglary; second, the fact that the victim was bound first rather than immediately killed shows that the homicide was not planned; third, there was evidence of a struggle prior to the killing; and fourth, the knife was a weapon of opportunity from the kitchen rather than one brought to the scene.

This court found that where events were susceptible to different interpretations the State has failed to meet its burden of establishing beyond a reasonable doubt that this homicide was committed in a cold, calculated, and premeditated manner. ***Geralds*** is indistinguishable from the instant case. As such, the state has failed to prove heightened premeditation beyond a reasonable doubt. The conclusion of the trial court should be rejected. The death sentence must be vacated and reduced to life or remanded for a new penalty phase.

POINT V

THE DEATH PENALTY IS NOT WARRANTED IN THIS CASE WHERE ONLY ONE VALID AGGRAVATOR EXISTS, WHILE THE MITIGATION IS SUBSTANTIAL.

The circumstances of Charles Kersch's death is known. John Buzia was arrested hours after the murder and made a detailed confession. Buzia detailed the events three times to Dr. Riebsame. Buzia also testified at the Spencer Hearing to explain to all how out of character the actions of that fateful day were, and the sorrow and remorse he felt for the pain that he has caused to everyone. The details of his confession have been consistent with the physical evidence, and Buzia's remorse and actions in assisting law enforcement supports a finding that the murder occurred as Buzia has described.

With that in mind, this Court must consider that the trial court found six aggravating factors. Four of these are not supported by the evidence. ***See*** Point I - IV. Only one aggravating factor remains: either pecuniary gain or felony murder. This single aggravating factor is found in the vast majority of first-degree murder cases, capital or not. Florida reserves the death penalty for the most aggravated and least mitigated of first-degree murderers. ***State v. Dixon***, 283 So.2d 1, 7 (Fla. 1973). The totality of the circumstances of this case, compared with other capital

cases, render the death sentence a disproportionate penalty.

Weighed against the one aggravator, is the substantial mitigation accepted by the trial court. Although the trial court found no statutory mitigators, the trial court found that the evidence established at least seven non-statutory mitigating factors. The trial court's weight given to each non-statutory mitigator varied from substantial weight to little weight.

The substantial non-statutory mitigating evidence established that John was dependent on alcohol and cocaine. The trial court found that Buzia's substance abuse and drug addiction impacted his overall ability to function appropriately. The trial court found that Buzia's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. Moreover, due to Buzia's long-term alcohol and cocaine dependence, the trial court found that Buzia was suffering from a mental or emotional disturbance at the time of the murder. After being alcohol and cocaine free in prison, Buzia has proven the desire to help young people from following his path by participating in youth crime prevention programs.

John Buzia has something to offer. He has proven the desire to help young people. Since his incarceration, he voluntarily participated in Operation Right Track. Elsewhere in this brief counsel has argued the fallacy in the trial court's

finding of four of the six aggravating factors. The one remaining aggravating factors is not weighty. Additionally, John Buzia is already sentenced to multiple life sentences for the contemporaneous felony convictions.

John Buzia's death sentence is disproportionate and must be reversed. ***see Stewart v. State***, 558 So.2d 416 (Fla. 1990) (defendant drunk most of the time and used drugs; his control over his behavior was reduced by alcohol abuse); ***Knowles v. State***, 632 So.2d 62 (Fla. 1993) (neurological deficiencies and intoxication); ***Heath v. State***, 648 So.2d 660 (Fla. 1994) (alcohol and marijuana consumption); ***Morgan v. State***, 639 So.2d 6, 13-14 (Fla. 1994) (voluntary intoxication); ***Carter v. State***, 560 So.2d 1166 (Fla. 1990) (extensive drug abuse and **possibility** of substantial intoxication at time of the murder); ***Campbell v. State***, 571 So.2d 415(Fla. 1990) (chronic drug and alcohol abuse, among other things); ***Songer v. State***, 544 So.2d 1010 (Fla. 1989); ***Burch v. State***, 522 So.2d 810 (Fla. 1988) (PCP usage); ***Amazon v. State***, 487 So.2d 8 (Fla. 1986) (long history of drug abuse and had taken drugs on night of offense). Any other result would violate due process and subject Buzia to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article I, sections 9 and 17 of the Florida Constitution.

POINT VI.

FLORIDA'S DEATH PENALTY IS UNCONSTITUTIONAL UNDER ***RING V. ARIZONA***.

In ***Ring v. Arizona***, 536 U.S. 584, 122 S.Ct. 2428 (2002), the United States Supreme Court held that Arizona's capital sentencing statute violated the Sixth Amendment, as construed in ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), because the judge, rather than the jury, was given the responsibility of making the findings of fact necessary to impose a sentence of death. In so holding, the Court overruled ***Walton v. Arizona***, 497 U.S. 639 (1990), "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." ***Ring***, 122 S.Ct. at 2443. In ***Mills v. Moore***, 786 So. 2d 532, 537 (Fla. 2001), the Florida Supreme Court rejected a claim that Section 921.141, Florida Statutes, was unconstitutional under ***Apprendi*** because ***Apprendi*** did not overrule ***Walton v. Arizona***, 497 U.S. 639 (1990). In ***Ring***, the Supreme Court *did* overrule ***Walton***, so the reasoning of the Florida Supreme Court in ***Mills*** is wholly undermined and fallacious. Because ***Walton***

expressly relied on cases upholding Florida's death penalty scheme, *i.e.* ***Hildwin v. Florida***, 490 U.S. 638 (1989) (per curiam); ***Spaziano v. Florida***, 468 U.S. 447 (1984); and ***Proffitt v. Florida***, 428 U.S. 242 (1976), the validity of those decisions are suspect.

The Florida Supreme Court has nevertheless concluded that it must uphold the constitutionality of Florida's statute unless and until the United States Supreme Court overrules ***Hildwin*** and expressly applies ***Ring*** to Florida. *See* ***Bottoson v. Moore***, 833 So. 2d 693 (Fla. 2002); ***King v. Moore***, 831 So.2d 143 (Fla. 2002) While concurring in the decision to defer to the United States Supreme Court, four justices (Anstead, Shaw, Pariente & Lewis) wrote separately to express their opinion that Florida's statute is problematic under ***Ring***. Florida's capital sentencing statute suffers from the identical flaw that led the Court in ***Ring*** to declare the Arizona statute unconstitutional. Florida law, like Arizona law, makes imposition of the death penalty contingent on a *judge's* factual findings regarding the existence of statutory aggravating circumstances. Section 775.082(1), Florida Statutes, alludes to first-degree murder as a "capital felony" and states specifically that a defendant may be sentenced to death only if "the proceeding held to determine sentence according to the procedure set forth in Section 921.141 results

in findings *by the court* that such person shall be punished by death, otherwise, such person shall be punished by life imprisonment." § 775.082(1), Fla. Stat. (1995) (emphasis added). Section 921.141(3), Florida Statutes, provides in turn that "[n]otwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." To enter a sentence of death, *the judge* must make "specific written *findings of fact* based upon the circumstances in subsections (5) [aggravating circumstances] and (6) [mitigating circumstances] and upon the records of the trial and the sentencing proceedings." *Id.* (emphasis added.). If the judge fails to "make the findings requiring the death sentence" within a specified period of time"the court shall impose a sentence of life." *Id.*

Thus, in Florida, as in Arizona, although the maximum sentence authorized for some homicides is death, a defendant convicted of first-degree murder *cannot* be sentenced to death without additional findings of fact that must be made, by explicit requirement of Florida law, by a judge and not a jury. The Florida statute is therefore unconstitutional under the Sixth, Eighth and Fourteenth Amendments, and Article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution, when the analysis contained in ***Ring v. Arizona*** is applied.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to order a new penalty phase or sentence the appellant to life imprisonment as to Point I, II, III & IV; and sentence appellant to life imprisonment as to Point V & VI.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Charles Crist, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. John Buzia, Florida State Prison, 7819 N.W. 228th St., Raiford, FL 32026, this 16th day of November, 2004.

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CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

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