IN THE SUPREME COURT OF FLORIDA

TODD ZOMMER,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER SC08-494
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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OTHER AUTHORITIES CITED:

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STATEMENT OF THE CASE

On May 17, 2005, a grand jury in and for Osceola County Florida returned an indictment charging appellant with first degree premeditated murder in violation of Section 782.04(1)(a), Florida Statutes (2004). (R 19-20) The state filed its notice of intent to seek the death penalty on June 6, 2005. (R 32) Appellant filed numerous motions to declare the death penalty unconstitutional based on allegations that the aggravating factors are not set forth in the indictment, the shifting of the burdens of proof and persuasion for life, lack of appellate review, the failure to require an unanimous death recommendation or unanimous findings concerning aggravating factors, the aggravating factors are vague and overbroad, and the jury instructions are inadequate to provide

sufficient guidance for the jury. (R 74-152, 185-189, 190-192, 193-214, 215-218, 219-222, 248-251, 252-260, 261-262, 265-283, 292-296, 297-301, 302-310, 311-338, 339-345, 346-357, 358-368, 369-379) Following a hearing, the trial court denied these motions. (R 426-457)

On June 30, 2006, appellant filed a motion to suppress his statements on the ground that they were taken in violation of his exercise of his right to counsel. (R 410-419) Hearings on the motion to suppress were conducted on August 23, 2006 (Supp. Vol. IV, 62-260) and on January 26, 2007. (Supp. Vol. V 261-317) Subsequently, the trial court issued an order granting in part denying in part the motion to suppress. (R 481-497) Thereafter, appellant filed a second motion to suppress statements and evidence taken subsequent to the previously ruled inadmissible statements. (R 620-641) Following a hearing, the trial court granted the motion to suppress statements given to the detective, but denied the motion as to the physical evidence seized from the dumpsters. (R 644) Appellant proceeded to jury trial on December 3-10, 2007, with the Honorable John B. Morgan, circuit court judge, presiding. (Vols. XIX-XXXI) After the jury was selected, appellant entered guilty pleas to all cases and counts pending against him except for the first degree murder charge. (Vol. XXVI 881-905) Following deliberations, the jury returned verdicts finding

appellant guilty as charged for first degree premeditated murder. (Vol. XXXI 1444; R 1728)

Appellant proceeded to the penalty phase trial on December 17-19, 2007, with Judge Morgan again presiding. (Vols. XXXII-XXXVI) Upon deliberations, the jury returned an advisory sentence, by a vote of 10-2, that appellant be sentenced to death. (R 1795; Vol. XXXVI 1944)

Appellant appeared before Judge Morgan for sentencing on February 22, 2008. (Vol. XVIII 2197-2242) After discussing the aggravating factors and the mitigating factors, Judge Morgan adjudicated appellant guilty and sentenced him to death for the first degree murder conviction. (Vol. XVIII 2232; R 1859-1860) Judge Morgan filed a written finding of fact in support of the sentence. (R 1862-1876)

Appellant filed a timely notice of appeal on March 3, 2008. (R 1887) Appellant was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (R 1886)

STATEMENT OF THE FACTS

A. Guilt Phase

Laura Schmid first met appellant through church in 1989. (Vol. XXVII, 947) In January, 2005, Schmid came home from work one night and found appellant standing on her lawn. (Vol. XXVII, 948) Appellant had walked from St. Cloud and his feet were bloody, so Schmid told appellant he could spend the night. (Vol. XXVII, 948) From January through April, 2005, appellant stayed with Schmid many nights. (Vol. XXVII 948) Because they were friends, Schmid was trying to help appellant out, but because she was anti-drug and anti-alcohol, she had strict rules that no one could use them in her house. (Vol. XXVII, 949-950) A man by the name of Roy Kelley was also staying at Schmid's house during this time. (Vol. XXVII, 950) Kelley owned a boat which he kept in Schmid's yard on a trailer. (Vol. XXVII, 950) In late February or early March, 2005, Kelley moved out but left the boat in Schmid's yard. (Vol. XXVII, 950) A couple of weeks after Kelley moved, Schmid noticed that the boat was gone. (Vol. XXVII, 951) Schmid's good friend, Corrine Robinson, who lived across the street from Schmid, spoke with Schmid about Kelley's boat. (Vol. XXVII, 951-952) Robinson saw someone taking it and thought that it might be Kelley and his brother, but was not sure because

she could not see well. (Vol. XXVII, 953) Schmid told appellant about the conversation with Robinson, but appellant never said anything about it. (Vol. XXVII, 953) Schmid had always allowed appellant to drive her vehicles including her Saturn and her pickup truck. (Vol. XXVII, 955)

James Vella and his mother Joanne, met appellant, on April 7, 2005, when they stayed in appellant's motel room while they looked for a place to live. (Vol. XXVIII, 1032-1033, 1060) At that time, appellant was driving a red Mazda pickup, an L-200 Saturn, and a red Mercury Tracer. (Vol. XXVIII, 1034) During the five days that the Vellas hung out with appellant, they were all using crack cocaine. (Vol. XXVIII, 1034, 1060) On Saturday, April 9, 2005, the Vellas saw appellant several times in order to get high with him. (Vol. XXVIII, 1036) Appellant borrowed James' father's white Nike sneakers and James never saw them again. (Vol. XXVIII, 1035) On April 11, 2005, appellant helped the Vellas move to the Knights Inn. (Vol. XXVIII, 1036) Appellant had a conversation with the Vellas wherein he told them about a boat he had stolen and a neighbor that had seen him take it. (Vol. XXVIII, 1037) Appellant told the Vellas that he had gone to the neighbor's house to borrow some money and, while she was pointing out some trinkets to him, appellant beat her over the head with a mandolin and then hit her over the head with a

ceramic lamp. (Vol. XXVIII, 1037, 1063) Because the victim was not dead, appellant told the Vellas he got a knife and tried to cut her throat, first with his left hand and then with his right hand. (Vol. XXVIII, 1037, 1063) James claimed that appellant was telling him about this because James and appellant had recently committed a robbery and appellant told James if James ever told anyone that he would end up like the victim. (Vol. XXVIII, 1039) However, Joanne Vella testified that appellant told them about the murder before he and her son committed the robbery. (Vol. XXVIII, 1070) After appellant told the Vellas about the killing, he left the motel in the red Mercury and the Vellas then packed their bags, got into the Mazda pickup truck and drove towards Poinciana. (Vol. XXVIII, 1039) About two miles down the road, the police pulled over the Vellas and ultimately they were charged with robbery and accessory after a robbery. (Vol. XXVIII, 1040, 1064) Both of the Vellas got plea agreements based on their willingness to testify against appellant. (Vol. XXVIII, 1042, 1064) During the entire five days that the Vellas knew appellant, they were using crack cocaine and spending $50.00-100.00 a day on the drugs. (Vol. XXVIII, 1043, 1067) During the five days, appellant would leave the Vellas when they ran out of drugs and when he returned he always brought more drugs with him. (Vol. XXVIII, 1045)

On Saturday, April 9, 2005, Laura Schmid was at work and talked to appellant and asked him to come down to her job site and meet her. (Vol. XXVII, 955) Appellant told Schmid that he could make it to their house but he did not have enough gas to get to her job and he did not have any money. (Vol. XXVII, 956) Schmid told appellant that she would call her neighbor Corrine to see if she had any money she could lend appellant. (Vol. XXVII, 956) Schmid called Corrine and she agreed to lend appellant $20.00 which Schmid would then pay back the next day. (Vol. XXVII, 956) Schmid called appellant and told him that he could go to Corrine's house and she would give him $20.00 for gas. (Vol. XXVII, 956) Appellant eventually came to Schmid's job at about 11:30 p.m. and did not say whether he had gone to Corrine to get the money. (Vol. XXVII, 957) Appellant was going to meet Schmid but he never showed up. (Vol. XXVII, 959-960) Schmid went home around 12:30 a.m., took a shower and noticed a crack pipe lying on her coffee table, which caused her to become quite upset. (Vol. XXVII, 960) The following morning, Schmid went to church and when she returned she got ready to go to Corrine's house to repay the money, but noticed that Corrine's car was gone. (Vol. XXVII, 960) Schmid then went to lunch, did some laundry and returned about 3:00 p.m., and noticed that Corrine's car was still missing. (Vol. XXVII, 961) Because her own cars

were also missing, Schmid called the sheriff's office between 4:00-5:00 p.m. and reported them. (Vol. XXVII, 961) The following day, Monday, Schmid still noticed that Corrine's car was gone and tried calling Corrine but got no answer. (Vol. XXVII, 961) Schmid knew that Corrine taught swimming so she called the place where she taught and left a message for Corrine to call her when she got to work, but Corrine never did. (Vol. XXVII, 962) Corrine's employer called Schmid and told her that Corrine failed to show up so Schmid called the police, they came out and she told them her concerns about Corrine, about appellant, and her missing cars. (Vol. XXVII, 962) While Deputy Butler was present, Schmid called appellant and handed the phone directly to him. (Vol. XXVII, 963) Deputy Butler told appellant that he had one hour to bring the vehicles back or Schmid was going to report them stolen and he would be the prime suspect. (Vol. XXVII, 930) Appellant said he was going to bring them back and Deputy Butler stayed at Schmid's home for an hour, but appellant never brought the cars back. (Vol. XXVII, 930) When appellant failed to return the cars, Schmid called the sheriff's department the next morning and Deputy Butler arrived at her place at approximately 6:10 a.m. (Vol. XXVII, 932, 964) Deputy Butler borrowed a ladder from a neighbor and attempted to look into Corrine's house. (Vol. XXVII, 933) Butler saw some

broken glass and some dark colored staining near the front door, so he immediately called for assistance. (Vol. XXVII, 933) The deputies made a forced entrance through the back door and when they entered they saw the body of Corrine Robinson lying face down in the hallway. (Vol. XXVII, 934, 945) The body was in a state of decay and there were dark colored stains throughout the house. (Vol. XXVII, 934, 945) Deputy Butler immediately issued a BOLO for Corrine's car which was a red Mercury Tracer. (Vol. XXVII, 939-940) Among the evidence collected in the home were pieces of broken wooden musical instrument and glass fragments from a hurricane lamp. (Vol. XXVII, 980) Laura Schmid gave the officers a pair of white pro-keds tennis shoes from her closet. (Vol. XXVII, 973) A small reddish area on the inside heel of the shoes tested positive for blood. (Vol. XXVII, 988) A serrated bread knife was seized and tested positive for blood stains. (Vol. XXVII, 991) The shirt worn by the victim was taken into evidence because it had a shoe tread on the back of it in a reddish substance. (Vol. XXVII, 994)

Christine Santiago worked at the Exxon Mobil Gas Station on the corner of John Young Parkway and Carroll Street. (Vol. XXVIII, 1073) When she came to work on April 10th at 7:00 a.m. she observed a Mercury Tracer parked in the parking area with its windows open and unlocked. (Vol. XXVIII, 1074)

Two days later on April 12, 2005, Officer Gary Johndro of the Kissimmee Police Department was on patrol when he received a BOLO concerning a Mercury Tracer. (Vol. XXIII, 1076-1077) Johndro observed a vehicle and followed it into the Bermuda Palm apartment complex. (Vol. XXVIII, 1078) Johndro confirmed that the vehicle was stolen and alerted law enforcement officers who responded. (Vol. XXVIII, 1079-1081) Three Kissimmee police department vehicles responded and followed the Tracer as it traveled south on John Young Parkway towards Columbia Avenue. (Vol. XXVIII, 1081, 1088, 1109) The vehicle got in the turning lane and turned left onto Columbia at which time the police officers activated their lights and sirens in an attempt to stop the vehicle. (Vol. XXVIII, 1081, 1090, 1109) The vehicle made an aggressive and evasive left turn into Victoria Park apartments and once in the complex made another evasive aggressive left turn and exited the complex although not through the designated exit. (Vol. XXVIII, 1090, 1082, 1111) When the vehicle accelerated, the Tracer went airborne with all wheels off the pavement and came down on Columbia Avenue and crashed into a ditch. (Vol. XXVIII, 1090, 1084, 1111) The driver identified as appellant, exited the vehicle, and jumped the fence into the Columbia Arms apartments, with the officers chasing him. (Vol. XXVIII, 1113-1114, 1085, 1092) Appellant was

ultimately stopped, arrested, and taken to a hospital. (Vol. XXVIII, 1101) A crack pipe was recovered from appellant. (Vol. XXVIII, 1097) Appellant admitted that he had been using crystal meth and crack cocaine and said he had done approximately ten thousand dollars worth of drugs in the past week. (Vol. XXVIII, 1086, 1103) A search of a dumpster at the Citco Station on the corner of John Young Parkway and Carroll Street revealed a Walmart bag containing a pair of Nike shoes and socks which were collected as evidence. (Vol. XXVIII, 1121) A comparison of the Nike tennis shoes to the footprint found on the shirt worn by the victim revealed that they were the same type of design. (Vol. XXX, 1226)

Sara Irrgang, a pathologist and associate medical examiner for the ninth circuit, conducted an autopsy of Lois Corrine Robinson on February 13, 2005. (Vol. XXIV, 1154-1156) Robinson was a 77 year old woman who was five foot four inches tall and weighed 152 pounds. (Vol. XXIV, 1157) The cause of death was a large incised wound to the neck with massive hemorrhaging. (Vol. XXIV, 1157) When Irrgang first examined Robinson, she had been dead for several days and was in a state of decomposition. (Vol. XXIV, 1157) There were at least two incisions on her neck which were made by a very sharp instrument. (Vol. XXIV, 1160) Robinson had head contusions behind the left

ear and on her face. (Vol. XXIV, 1161) One of the cuts on her neck began beneath one ear and continued across to beneath the other ear, severing the carotid artery and jugular vein. (Vol. XXIV, 1161) Dr. Irrgang believed that a lot of force was necessary to cut the throat through the cartilage down to the cervical spine. (Vol. XXIV, 1163) There were many blows to the head of Robinson which would not have immediately caused her to become unconscious. (Vol. XXIV, 1169-1170) However, the blows probably would have stunned her although she remained conscious. (Vol. XXIV, 1170) The neck wounds would have rendered Robinson unconscious very shortly, due to the loss of blood, making any kind of struggle unlikely. (Vol. XXIV, 1170) The head injuries were inflicted before the neck wounds and probably would have taken several minutes. (Vol. XXIV, 1171) Dr. Irrgang admitted that she could not tell for sure what happened, but did note that after Robinson's throat was cut, death occurred very shortly thereafter. (Vol. XXIV, 1177) The footprint on her back could have been made post-death. (Vol. XXIV, 1177) On cross examination, Dr. Irrgang did note that the blows to the head were administered first and could have rendered her unconscious but definitely stunned her. (Vol. XXIV, 1179)

Deputy Michael Fenton was assigned to the courtroom during the trial.

(Vol. XXIV, 1204) After a pretrial, Fenton testified that appellant told him that he had always owned up to his responsibilities and could not believe the system was making him and the victim's family go through this. (Vol. XXIV, 1205) Appellant just wanted to give his side of the story. (Vol. XXIV, 1205) Appellant was stressed and angry that Detective Colombrite had lied. (Vol. XXIV, 1205-1206)

Matthew Druckenmiller, a convicted felon, has known appellant for ten years. (Vol. XXX, 1233-1235) In April, 2005, Druckenmiller was hanging out with appellant and doing marijuana and crystal meth with him. (Vol. XXX, 1235) After appellant was arrested for the murder, he spoke to Druckenmiller about the events. (Vol. XXX, 1235) Appellant told him that the victim was aware that appellant had stolen a boat from the neighbor. (Vol. XXX, 1236) Appellant went over to the victim's house and she took him inside and began showing him some dolls that she had collected. (Vol. XXX, 1236) Appellant told Druckenmiller that he just lost it and hit the victim with the guitar and she fell over. (Vol. XXX, 1236) Appellant kicked the victim and said he knocked her teeth out and then tried to strangle her with the computer mouse cord but it was hard to choke someone when their fingers were in the way. (Vol. XXX, 1236-1237) Appellant then went to the kitchen, got a knife, and he cut through

one side of her neck to the other. (Vol. XXX, 1237) Appellant then said he heard a hissing sound and the victim was dead. (Vol. XXX, 1237) Appellant told Druckenmiller that he felt he had an out- of-body experience and when it first happened appellant claimed it was the best feeling he ever had, although Druckenmiller does not think appellant feels that way anymore. (Vol. XXX, 1238)

Dain Weister, a news reporter for WFTV in Orlando, contacted appellant to get an interview and appellant agreed. (Vol. XXX, 1257-1258) The interview was not done at the request of any law enforcement officer. (Vol. XXX, 1258) During the interview appellant admitted that he was not innocent and that he just wanted to get everything over with. (Vol. XXX, 1260) Appellant stated that he killed the victim because she did not mind her own business. (Vol. XXX, 1260) According to appellant he just hit a breaking point and the victim happened to be there but that her age and sex were not a factor. (Vol. XXX, 1260) According to appellant, the victim saw appellant steal something and when appellant met her he felt there was recognition on her part. (Vol. XXX, 1261) According to appellant, he beat the victim, stepped on her, jumped on her, kicked her, and then cut her throat using a knife. (Vol. XXX, 1262) Appellant first beat the victim with a wooden instrument, which caused it

to shatter and then beat her with a lamp which also broke. (Vol. XXX, 1262) Appellant then kicked the victim until she was knocked out after which he went into the kitchen to get a knife. (Vol. XXX, 1262) Appellant then straddled the victim, lifted her head up, and sliced her throat, which caused her to die. (Vol. XXX, 1262) Appellant then went home, took off all of his clothes and put them in a bag and then went back to the victim's house and drove her car down the street. (Vol. XXX, 1262) Appellant then went back to the victim's house and made the scene look like a robbery. (Vol. XXX, 1262) Appellant threw his shoes and socks away. (Vol. XXX, 1262) Appellant told Weister that he just wanted to get it all over with, because it was terrible in jail and he wasn't getting any help. (Vol. XXX, 1263) Appellant knew he needed help and tried to call a friend before this happened, but never got any answer and never had anyone call him back. (Vol. XXX, 1263, 1265-1266) According to appellant, he did not really care about the victim but killed her because something inside him snapped. (Vol. XXX, 1264-1265) Although appellant claimed the drugs had nothing to do with this event, he admitted that he was high when he went to bed the night before and had done drugs all week. (Vol. XXX, 1266-1269) Following the killing, appellant returned to doing drugs until he was arrested. (Vol. XXX, 1266)

Appellant testified that he did in fact kill Corrine Robinson. (Vol. XXX, 1280) Appellant testified that he had been doing drugs throughout the incident, but acknowledged that the drugs did not make him kill Robinson. (Vol. XXX, 1280) In the month leading up to the killing, appellant testified that he was doing a lot of drugs and it was costing him more than a $100.00 a day. (Vol. XXX, 1284) Appellant was using crystal meth, crack cocaine, and marijuana. (Vol. XXX, 1282-1283) Appellant was living with Laura Schmid and he stole a boat that belonged to man who lived there. (Vol. XXX, 1282) Originally, appellant was going to sell the boat and give the money to Laura, but instead appellant used it to buy more drugs. (Vol. XXX, 1282) On Friday, April 8, 2005, appellant did a lot of drugs during the day, but then spent the night at home with Laura. (Vol. XXX, 1285) On that evening, appellant tried to call a friend up north, Danny Newell, but was unable to reach him so he left a message. (Vol. XXX, 1286-1287) Appellant felt that his life was in disarray and needed to talk to Danny. (Vol. XXX, 1286-1287) The next morning Laura went to work at 5:30 a.m. and appellant stayed home until about 7:30 a.m., then he went to the Ambassador Motel where he had rented a room, but let James and Joanne Vella stay there. (Vol. XXX, 1287-1288) Appellant had rented the room in order to use drugs, out of respect for Laura who did not want them

consumed in her house. (Vol. XXX, 1288) When appellant got to the hotel, the Vella's gave appellant $40.00 to rent the room for another day, but instead appellant went to St. Cloud and bought crack cocaine. (Vol. XXX, 1288-1289) Appellant drove around for approximately two hours smoking crack and when he ran out he decided to leave St. Cloud. (Vol. XXX, 1289) On the way back, Laura called him and told him that her mother was sick and appellant asked Laura if she wanted him to come down to meet her at work and Laura said yes. (Vol. XXX, 1289-1290) Appellant had no gas money so Laura suggested that she would call her neighbor Corrine and see if she could lend appellant some money for gas. (Vol. XXX, 1292) Laura called Corrine and then called appellant back and told him that Corrine would give him money so appellant went straight to Corrine's house and pulled up into her yard and found Corrine standing in the doorway. (Vol. XXX, 1292-1293) This was the first time that appellant actually met Corrine and she gave him $20.00 after which appellant hugged her and thanked her and left. (Vol. XXX, 1293) Appellant went around the corner to get a pack of cigarettes and, instead of going to get gas, appellant went and bought more crack cocaine. (Vol. XXX, 1293) Appellant then called Laura and told her that he had a headache, so he was not going to come to see her, but told her that he would mow the lawn. (Vol. XXX, 1294) However,

appellant sat at the table and consumed some crack cocaine. (Vol. XXX, 1295) When appellant does crack cocaine, he gets the urge to talk to people so he decided to go over to Corrine's house. (Vol. XXX, 1295) Appellant was high when he went over there and acknowledged that he had previously told a reporter that he wasn't under drugs but he had done so to portray himself as someone who just did not care. (Vol. XXX, 1296) Appellant took no weapon with him when he went to Corrine's. (Vol. XXX, 1297) Appellant knocked on the door, Corrine answered, and appellant said he wanted to talk so she invited him in. (Vol. XXX, 1297) Appellant and Corrine talked about her house and her family and appellant had no intent to harm her as he just needed to talk. (Vol. XXX, 1298) After talking for a while, Corrine then suddenly said "I think you're one of the ones that stole the boat." (Vol. XXX, 1299) Appellant denied this and said it was JR's brother; Corrine said that she watched the house and knows what was going on. (Vol. XXX, 1299-1300) Appellant tried to explain that Laura knew what was going on but Corrine then started telling appellant how she did not like the way that he treated Laura, so appellant figured that Laura had confided in Corrine. (Vol. XXX, 1300-1301) Appellant tried to change the conversation and commented on some Indian trinkets that Corrine had so she went over to the shelf to explain some items to appellant. (Vol.

XXX, 1302) Corrine then started showing appellant some porcelain dolls that she collected and appellant told her that he felt they were "creepy." (Vol. XXX, 1303) Corrine went into her armoire and pulled out at box that had one of her prized possessions in it and she showed the doll to appellant who told her it was creepy. (Vol. XXX, 1304-1305) Corrine was on the floor getting the doll when appellant noticed a guitar-like instrument behind the table. (Vol. XXX, 1306) Appellant picked up the guitar and started strumming it and when Corrine turned around, appellant hit her in the face with the guitar. (Vol. XXX, 1306, 1308) Appellant does not know why he hit her but when he did, Corrine bounced back and said "My God, what was that?" (Vol. XXX, 1308) Appellant told Corrine it was the ceiling falling and when she looked up, appellant hit her again with the guitar. (Vol. XXX, 1308) The guitar shattered with the second hit, so appellant picked up a lamp and hit Corrine causing her to fall to her side where she just laid. (Vol. XXX, 1309-1310) It seemed like Corrine was knocked out, so appellant went into the back room and got a computer mouse in order to strangle her. (Vol. XXX, 1310) Corrine never fought back, never scratched him, and never put her hands up to try to prevent appellant from strangling her. (Vol. XXX, 1310-1311) Appellant put the computer mouse around Corrine's neck, but when he tried to pull it, it slipped out of his sweaty

hands. (Vol. XXX, 1312) Appellant went to the bathroom; Corrine was moaning and moving a bit, so appellant got on top of a chair, and stepped on her head, and kicked her in the face. (Vol. XXX, 1313) Appellant started having what he felt might be a heart attack, so he went to the kitchen and drank some tea out of the bottle in the refrigerator. (Vol. XXX, 1313-1314) When he closed the refrigerator, appellant saw knives on the counter, so he picked one up and went back to Corrine. (Vol. XXX, 1314) Appellant then cut Corrine's throat with his left hand and then cut her again with his right hand. (Vol. XXX, 1315) Corrine made a slight noise and then died. (Vol. XXX, 1316) Appellant freaked out and left, waiving to a neighbor as he did so. (Vol. XXX, 1316) Appellant went back to Laura's where he took off his shoes and clothes, put them in a bag, drove away, and put them in a dumpster. (Vol. XXX, 1316-1317) When appellant returned home he thought he needed to do something so he went back over to Corrine's house and drug her body to the hallway and started opening drawers to make it look like there had been a burglary. (Vol. XXX, 1318-1319) Appellant took nothing from the house, but as he was leaving, he saw a rack of keys so he took the car keys and took her car, so that Laura would think that Corrine was not home when she came to repay the money that she had lent him. (Vol. XXX, 1319) Appellant drove the car to a

car wash and parked it and then walked home and got into his truck and drove to the Ambassador Motel. (Vol. XXX, 1319) Appellant never intended to kill Corrine and does not know what happened to cause it. (Vol. XXX, 1322, 1324)

B. Penalty Phase Facts

Dr. Sara Irrgang, the medical examiner testified that based on appellant's description of the events, Corrine Robinson would have experienced pain and it would have taken "a period of time" to occur. (Vol. XXXII, 1468) Corrine Robinson had a single defensive wound on the back of each hand. (Vol. XXXII, 1469, 1472) Corrine was conscious during the time that appellant was hitting her with the wooden instrument and hurricane lamp. (Vol. XXXII, 1469) Dr. Irrgang also testified that strangling would normally cause pain. (Vol. XXXII, 1470) Dr. Irrgang has no way of telling whether Corrine was conscious when her throat was cut, but was able to testify that after her throat was cut, Corrine survived no more than four heartbeats. (Vol. XXXII, 1470-1471)

Edgardo Fuentes testified that on April 12, 2005 he was working at the Ramada Inn and, while he was walking in the parking area, he heard a car engine and then got hit by a car causing him to flip over and hit the windshield with his head. (Vol. XXXII, 1473) Fuentes was unconscious briefly, but when

he came too, two men were approaching him. (Vol. XXXII, 1474) Fuentes thought they were going to help him, but when he held out his hand, the men started kicking Fuentes in the face and chest. (Vol. XXXII, 1474) One of the men stole his wallet. (Vol. XXX, 1474) Fuentes identified appellant as one of the men who robbed him. (Vol. XXXII, 1475) Sargent Daryl Cunningham of the Osceola County Sheriff's office testified that in April, 2005 a person called him concerning a boat that he had bought recently that he thought might be stolen. (Vol. XXXII, 1482) Cunningham investigated, but received no report of any stolen boat and was unable to contact the owner of the boat. (Vol. XXXII, 1480-1483)

Howard Runyon and Kimberly Conley are appellant's younger siblings. (Vol. XXXIV, 1667, 1681) Their mother was not a very loving person and she was an alcoholic who drank virtually every day. (Vol. XXIV, 1669-1670, 1684) Appellant would bear the brunt of his mother's anger more than any of the other children. (Vol. XXIV, 1683) Once when appellant was about eight years old, he observed his stepfather on top of his mother choking her. (Vol. XXXIV, 1668-1669) Appellant went down, hit his father with something, and his father got off his mother, walked out of the house, and never came back. (Vol. XXXIV, 1669) Appellant was always very protective of his mother,

although she was not very nice to him. (Vol. XXXIV, 1669) Whenever his mother could not handle him, she sent appellant to the children center. (Vol. XXXIV, 1661) Howard did not think this was fair, because he felt that appellant was just a kid looking for love that everybody else got from his mother, but she would never give it to him. (Vol. XXXIV, 1671) When appellant would return home, he would be very bloated due to the medication he was on. (Vol. XXXIV, 1672) However, while at home, appellant would not continue on the medication, so he would get hyper and be sent back to the children's home. (Vol. XXXIV, 1672) Appellant was not present in his home for most of the holidays because he was probably at the children's center. (Vol. XXXIV, 1675) Appellant was always very protective of his silbings and took them to the movies and taught them to play basketball. (Vol. XXXIV, 1673) When appellant turned sixteen, his mother had him emancipated, told him he was own, and turned him out. (Vol. XXXIV, 1688-1689) Eventually appellant was able to get a job and once he did so he would take his mother out to lunch every Thursday. (Vol. XXXIV, 1673) When appellant got married, his brother Howard and his wife were the only family members to attend the wedding. (Vol. XXXIV, 1675)

Thomas and Deborah Ryan, appellant's aunt and uncle, have known

appellant since he was born. (Vol. XXXIV, 1712-1713, 1701-1702) Appellant's parents were alcoholics who drank constantly. (Vol. XXXIV, 1703-1704, 1719-1720) Appellant's mother had an affair with Deborah's first husband, Howard Runyon which precipitated the divorce between Ryan and Runyon. (Vol. XXXIV 1713) Appellant's biological father, Bobby Zommer, claims that appellant is not his son and believes that Howard Runyon was the real father although Zommer was married to appellant's mother at the time appellant was born. (Vol. XXXIV, 1713, 1716, 1702) Appellant's mother treated appellant very badly, as if he were a burden. (Vol. XXXIV, 1704) The Ryans never saw appellant's mother show any affection for appellant. (Vol. XXXIV, 1704) Appellant was always seeking attention and acted up a lot and consequently got punished by his mother. (Vol. XXXIV, 1725, 1727)

Dr. Jeffrey Danziger, a forensic psychiatrist, saw appellant on April 30, 2005, eighteen days after his arrest on the murder charge. (Vol. XXXIV, 1734, 1739) Before examining appellant, Dr. Danziger reviewed the charging documents, police reports, and the statements that appellant gave to the detective. (Vol. XXIV, 1739) When Dr. Danziger first met appellant, appellant was in isolation and was heavily shackled. (Vol. XXXIV, 1740) When Danziger asked appellant how he was feeling, appellant replied "I feel great!"

(Vol. XXXIV, 1740) This was quite an unusual response to someone in appellant's situation and when combined with appellant's very rapid speech and his irritability, Dr. Danziger believed that appellant may be suffering from bipolar mental disorder. (Vol. XXXIV, 1740) Appellant reported periods of depression and isolation during which time he increased his drug usage. (Vol. XXXIV, 1742) Appellant experienced no joy or pleasure, had erratic sleep and appetite habits, and experienced a general sense of worthlessness. (Vol. XXXIV, 1742) Appellant also reported two suicide attempts, one at age fourteen and one at age twenty-two. (Vol. XXXIV, 1742) A review of appellant's prior jail records, revealed that appellant was placed on an antidepressant, but, because it made him hyper, the jail stopped it. (Vol. XXXIV, 1744) Dr. Danziger believed that this was a classic sign of bipolar disorder. (Vol. XXXIV, 1744) After his arrest on a murder charge, a jail psychiatrist placed appellant on Depakine, which is a mood stabilizing agent, and Thorazine, an antipsychotic. (Vol. XXXIV, 1734) Although the jail psychiatrist made no diagnoses, the medication that was prescribed indicates a bipolar disorder. (Vol. XXXIV, 1744) Dr. Danziger also reviewed hospital records from 1982 in Connecticut which showed that appellant suffered from serious behavioral problems including fire setting and running away. (Vol.

XXXIV, 1745) In addition, appellant had trouble sleeping which is suggestive of a mood disorder. (Vol. XXXIV, 1746) Appellant at that time was diagnosed with attention deficit disorder (ADD) and was prescribed Ritalin, but that did not work, which meant that appellant was not suffering from ADD. (Vol. XXXIV, 1746) Based on what Dr. Danziger now saw in appellant, he believes that he was suffering a mood disorder back then. (Vol. XXXIV, 1746) Dr. Danziger next examined the records from appellant's stay at the children's center in Connecticut from 1983 to 1987. (Vol. XXXIV 1746) These records revealed that appellant had problems with sleeping, impulsivity, and acting silly. (Vol. XXXIV, 1747) Appellant was prescribed Haldol which is not prescribed for conduct problems because it does not work. (Vol. XXXIV, 1747) Rather, Haldol is a antipsychotic medicine with mood stabilizers. (Vol. XXXIV, 1747) This seem to calm appellant, but it caused him to gain weight and become lethargic, so the center took appellant off Haldol but did not try anything else. (Vol. XXXIV, 1747) Dr. Danziger believed that all of these indicated the early stirrings of a major mental illness. (Vol. XXXIV, 1747) There was also indication that appellant may have suffered from oxygen deprivation at birth which could cause brain damage. (Vol. XXXIV, 1748) Appellant had a family history of substance abuse and grew up in an

environment which was designed to make a mental illness worse. (Vol. XXXIV, 1748-1758) Traumatic early childhood events greatly increased the risk of adult mental illness. (Vol. XXXIV, 1749) When Dr. Danziger checked the Department of Corrections records, he found that appellant was never treated for a mental illness. (Vol. XXXIV, 1750) Ten days prior to Dr. Danziger's testimony, he again saw appellant and noted that appellant was on antidepressants, which one would expect to elevate appellant into a manic state. (Vol. XXXIV, 1750) When Dr. Danziger met with appellant he indeed showed signs of mania including fast speech, racing thoughts, and irritability. (Vol. XXXIV, 1751) Appellant was simultaneously feeling sad which corresponded to a mixed bipolar state. (Vol. XXXIV, 1751-1752) Dr. Danziger's opinion in December, 2007 was consistent with that in April, 2005 and that was that appellant suffers from bipolar disorder. (Vol. XXXIV, 1752) Dr. Danziger believes that at the time of the murder, appellant was suffering from a major mental illness with a secondary diagnosis of substance abuse which acted in combination with bipolar disorder. (Vol. XXXIV, 1753) The effect of cocaine and crystal meth on a person with bipolar disorder is like putting a match to a powder keg or rocket fuel on a fire. (Vol. XXXIV, 1754) The risk of violence is great. (Vol. XXXIV, 1754) When asked what caused appellant to get to the

point where he was, Dr. Danziger checked off all of the elements which combined to create "a perfect storm:" 1.) a family history of substance abuse; 2.) oxygen deprivation at birth; 3.) witnessing domestic violence; 4.) physical abuse; 5.) sexual abuse by older youths at the children's facility; 6.) the lack of parental love and emotion; 7.) hyperactivity and impulsivity; 8.) the early prescription of anti depressants; 9.) aggressive behavior; 10.) use and abuse of drugs as an adult. (Vol. XXXIV, 1756) Appellant's bipolar disorder, combined with his crystal meth and cocaine use, placed him in a state where he was actively mentally ill and acting in a cruel heartless manner. (Vol. XXXIV, 1756) Dr. Danziger did opine that appellant was not legally insane. (Vol. XXXIV, 1758) Dr. Danziger believes that appellant was using a lot of drugs at the time of the murder

based on the information that the day before and the day after the murder appellant was using crack cocaine in the amount of a $100.00 a day, that upon his arrest he had a crack pipe in his possession, and burns on his finger were consistent with drug use (Vol. XXXIV, 1774-1775)

Dr. Jethro Toomer, a clinical psychologist, evaluated appellant. (Vol. XXXIII, 1533, 1535) Prior to the evaluation, Toomer reviewed the charging document, past medical records from hospitals and the Department of

Corrections, the tape of the sheriff's interview with appellant, prior psychological evaluations, and depositions from family members. (Vol. XXXIII, 1536) Dr. Toomer also administered numerous psychological tests to appellant. (Vol. XXXIII, 1537) According to Dr. Toomer, appellant's account of his developmental history was consistent with the information that he had reviewed in the records; however, appellant tended to minimize a number of factors. (Vol. XXXIII, 1542) Dr. Toomer believed that appellant suffered from a borderline personality disorder (BPD) and also suffered from substance abuse. (Vol. XXXII, 1544) According to Dr. Toomer, a normal personality is flexible but where behavior is fixed that represents the disorder. (Vol. XXXIII, 1544) Borderline personality disorder is a maladaptive pattern of behavior that cuts across numerous aspects of functions. (Vol. XXXIII, 1544) The most prominent feature mood instability and unpredictability which can ultimately become a major mental illness. (Vol. XXXIII, 1545) One of the characteristics of BPD is exhibition of many psychotic episodes. (Vol. XXXIII, 1546) Once you have a preliminary diagnosis of BPD, Dr. Toomer believes that you need to look to a person's developmental history to see if it is consistent with the diagnosis. (Vol. XXXIII, 1549) There are three basic etiological factors to consider: 1.) history of abuse; 2.) parental neglect or nurturing deprivation; 3.)

erratic and unpredictable environmental climate. (Vol. XXXIII, 1549) Dr. Toomer found all three factors in appellant's history both from appellant's own account and from the records that he reviewed. (Vol. XXXIII, 1550) Appellant's mother was alcoholic and appellant himself was institutionalized on a regular basis including not being allowed home during the holidays. (Vol. XXXIII, 1550) Appellant was constantly medicated. (Vol. XXXIII, 1550) Next, Dr. Toomer looked for corroboration to rule out malingering and found it through family members. (Vol. XXXIII, 1551-1552) When appellant encounters stress, his behavior begins to decompensate. (Vol. XXXIII, 1554) Typically, an individual will self-medicate and indeed Dr. Toomer found that appellant suffered from substance abuse. (Vol. XXXIII, 1554) Ultimately, Dr. Toomer came up with a primary diagnosis of borderline personality disorder, a secondary diagnosis of psychoactive substance abuse, and a third diagnosis of possible adjustment disorder with anxiety. (Vol. XXXIII, 1556) Dr. Toomer noticed that all of appellant's siblings agreed that appellant was treated differently by his parents. (Vol. XXXIII, 1557-1558) Appellant suffered from oxygen deprivation at birth which caused some impairment of basic brain function such as abstract reasoning. (Vol. XXXIII, 1560) Appellant was first institutionalized at the age of eleven. (Vol. XXXIII, 1558) The records

revealed that appellant's parents first sought psychiatric services at the age of nine. (Vol. XXXIII, 1561) Appellant's mother took him to a psychiatric facility and simply dropped him off which caused appellant to suffer feelings of abandonment. (Vol.XXXIII, 1562-1564) During his stay in a psychiatric facility, several entries reflect that the caregivers believed that allowing appellant to go home for a visit would be detrimental to his treatment. (Vol. XXXIII, 1565) Appellant was medicated with Haldol which is an antipsychotic before he was fourteen years of age. (Vol. XXXIII, 1566) In 1985, the doctors indicated that appellant had poor impulse control which helps to validate Dr. Toomer's current diagnosis. (Vol. XXXIII, 1567) In October, 1986, an entry in the records indicated that appellant would do well when there was firm structure and external control factors. (Vol. XXXIII, 1571) According to Dr. Toomer that makes perfect sense for one diagnosed with BPD. (Vol. XXXIII, 1571) Dr. Toomer agreed that appellant was not legally insane and certainly knows the difference between right and wrong. (Vol. XXXIII, 1572-1573) Dr. Toomer noted that at a very young age, appellant set several fires but believed that this was done to act out on appellant's part. (Vol. XXXIII, 1574-1575) Dr. Toomer is aware that Dr. Tressler diagnosed appellant as an antisocial personality disorder, but noted that he made such diagnosis without any

corroboration. (Vol. XXXIII, 1599) An indication that the diagnosis was incorrect came from an examination of the totality of the circumstances. (Vol. XXXIII, 1600) Dr. Toomer noted that appellant spent two and a half years with his wife and son in North Carolina with no drug use and no criminal activity. (Vol. XXXIII, 1600) One diagnosed with antisocial personality disorder does not have episodes of conscience or appropriate functioning. (Vol. XXXIII, 1600) This is in contrast to a diagnosis of borderline personality disorder where a person suffering from it goes from worshiping someone to completely devaluing them. (Vol. XXXIII, 1601) Dr. Toomer believed that at the time of the killing, appellant was under an emotional disturbance and that his capacity to conform his conduct to the requirements of the law was impaired. (Vol. XXXIII, 1603-1604) Although a person suffering from BPD knows right from wrong he cannot not act on that knowledge. (Vol. XXXIII, 1605)

Danny Newell, the program supervisor at the children's center in Hamden Connecticut first met appellant when he was admitted to the center as a child. (Vol. XXXIII, 1616) At the center, the staff deals with children with mental illness and children sent there by the courts. (Vol. XXXIII, 1617) Most of the individuals have behavior and mental problems. (Vol. XXXIII, 1617) Appellant was somewhat impulsive and was prescribed both Haldol and Ritalin.

(Vol. XXXIII, 1626-1627) Haldol is not prescribed for people with behavioral problems only. (Vol. XXXIII, 1617) The normal stay at the Hamden facility is eighteen months. (Vol. XXXIII, 1628) Appellant was at this facility for almost five years. (Vol. XXXIII, 1628) Often appellant would not be able to go home on scheduled visits, because no one was available to take him. (Vol. XXXIII, 1629) Appellant stayed in touch with Danny and would call him out of the blue two or three times a year. (Vol. XXXIII, 1633) Sometime around April 8, 2005, Danny received a voice mail from appellant in which he sounded very stressed and said he needed to talk to Newell. (Vol. XXXIII, 1636) Near the end of April, Newell got two more voice mails saying that he needed to talk to appellant and left a number which when Newell tried calling found that it was a correctional facility so Newell knew that appellant was in trouble. (Vol. XXXIII, 1638)

Daisy Mendoza, a substance abuse counselor at the Osceola County Jail, has known appellant for three years. Appellant participated in their substance abuse classes and also completed his GED. (Vol. XXXIII, 1646-1648) Daisy believes that appellant would do well in a structured environment since he has never received a single DR in the three years that he has been in jail. (Vol. XXXIII, 1648-1649)

Dr. Daniel Tressler, a forensic psychologist also interviewed appellant. (Vol. XXXV, 1783-1786) Prior to examining appellant, Dr. Tressler reviewed a transcript of a deposition by Dr. Lipman, records from hospitals and children's homes in Connecticut, Department of Corrections documentation, and his Osceola County Jail medical records. (Vol. XXXV, 1787) Dr. Tressler wanted to conduct some psychological tests, but appellant refused saying that he was not in the mood and did not want to because he had done so previously for another one of the doctors in the case. (Vol. XXXV, 1788) Dr. Tressler was very interested in performing the psychological tests because it would be very helpful to determine what appellant's mental state and would assist him in making a diagnosis. (Vol. XXXV, 1789) Dr. Tressler noted that appellant had originally had a very good relationship with his wife when they lived in North Carolina but this deteriorated when they moved to Osceola county to be closer to her parents and appellant's wife took a job as a corrections officer. (Vol. XXXV, 1790) Appellant started using drugs and ultimately was separated from his son because of his drug use. (Vol. XXXV, 1790-1791) Dr. Tressler noted that appellant felt that his family had abandoned him at a early age and that he was in and out of hospitals. (Vol. XXXV, 1791) Appellant suffered from a lack of oxygen at birth and grew up with a alcoholic mother. (Vol. XXXV, 1792)

Although appellant was somewhat agitated, he did not seem out of control and Dr. Tressler found no evidence of depression. (Vol. XXXV, 1794) Dr. Tressler's diagnosis of appellant was an antisocial personality, polysubstance abuse, and attention deficit disorder. (Vol. XXXV, 1796) Dr. Tressler does not believe that appellant suffered from borderline personality, because that usually manifests itself in women. (Vol. XXXV, 1799-1800) Dr. Tressler did admit that upon his arrest, appellant did exhibit signs of bipolar disorder but was still clearly under the influence of drugs at the time. (Vol. XXXV, 1801) Since then, Dr. Tressler found no signs of bipolar disorder. (Vol. XXXV, 1801) Dr. Tressler did admit that as a child, that appellant indeed exhibited symptoms of someone who may have had bipolar disorder. (Vol. XXXV, 1803) In fact, if appellant presented today with the symptoms he did as a child, Dr. Tressler admitted that he would probably be diagnosed as bipolar. (Vol. XXXV, 1816) However, Dr. Tressler ruled out bipolar disorder "because I was unable to rule it in." (Vol. XXXV, 1805) Appellant is not legally insane and does not suffer from extreme emotional mental disturbance. (Vol. XXXV, 1807)

SUMMARY OF THE ARGUMENTS

Point I

The instant case is not appropriate for the application of the cold calculated premeditated aggravating factor. The evidence showed little if any advance planning or cold reflection on the part of appellant.

Point II

The instant case is not appropriate for the application of the heinous atrocious and cruel aggravating circumstance where the evidence does not show that appellant acted with the intent to unnecessarily torture the victim.

Point III

The trial court misinterpreted the evidence of mitigation and consequently misapplied the law with regard to that mitigation so as to undermine the validity of the sentencing order.

Point IV

When compared to other first degree murder convictions, the death penalty is not warranted in the instant case.

Point V

A person convicted of first degree murder in Florida cannot lawfully be sentenced to death unless the jury determines the facts upon which imposition

of the sentence depends. Further, due process requires an indictment, and a twelve person jury, and unanimity.

POINT I

IN VIOLATION OF THE EIGHTH AND FOURTEENTH TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT IMPOSED THE DEATH PENALTY UPON AN ERRONEOUS FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

In sentencing appellant to death, Judge Morgan found that the murder was committed in a cold calculated and premeditated manner without any pretense of moral or legal justification. In support of this finding the trial court stated:

> The defendant went to Ms. Robinson's house on the day of the murder to borrow money. Ms. Robinson gave the defendant the money he requested and the defendant left. The evidence established that, during the course of his contact with Ms. Robinson, the defendant felt that Ms. Robinson recognized him as the person she had witnesses steal a boat.
>
> After getting the gas money from Ms. Robinson, there was no reason for the defendant to return to her house. The defendant, having left, however, formed an intent to kill Ms. Robinson and returned to her house, savagely beat her and murdered her with deliberate ruthlessness.
>
> While the murder was not particularly well planned, it was not the product of emotional frenzy, panic or a fit of rage. The defendant left the victim's residence, had time to calmly reflect upon his course of action, decided what he was going to do and returned to carry out his purpose. During the course of committing the murder, the defendant twice left the room in which the attack took place, went to other areas of the house and obtained another weapon with which to continue his brutal assault upon Ms. Robinson.
>
> The murder of Ms. Robinson was calculated in that after the defendant decided that Ms. Robinson recognized him as the thief who had stolen a boat, he decided to kill her in order to avoid being arrested and prosecuted for the theft, and to make the killing look like a robbery.
>
> There was no evidence of any legal or moral justification for the killing

of Ms. Robinson. To the contrary, the sole motive for the killing was to eliminate Ms. Robinson as a possible witness in a criminal prosecution against the defendant.

The court finds that the state has proved this aggravating circumstance beyond a reasonable doubt. While some aspects of the proof of this aggravating circumstance overlap with the proof that the murder was committed in order to eliminate a witness, the court finds that they are distinct aggravating circumstances and both, individually, merit great weight.

(Vol. XIII 1866)

At least one commentator has exposed the inconsistency with which this Court has reviewed this aggravating circumstance. ***Kennedy,*** "Florida's Cold, Calculated and Premeditated Aggravating Circumstance in Death Penalty Cases", 17 Stetson L. rev. 47 (1987). It does appear, however, that the "cold, calculated, and premeditated" aggravating factor "is frequently and appropriately applied in cases of contract murder or execution style killings and 'emphasizes cold calculation before the murder itself'." ***Perry v. State***, 522 So.2d 817 (Fla. 1988). ***See also Garron v. State***, 528 So.2d 353 (Fla. 1988)(heightened premeditation aggravating factor was intended to apply to execution or contract-style killings). This Court has held that this factor requires proof of "a careful plan or prearranged design." ***Mitchell v. State***, 527 So.2d 129 (Fla. 1988). While the heinous, atrocious and cruel factor focusing primarily on the suffering of the victim and the nature of the crime itself, the cold, calculated, and premeditated factor focuses on the state of mind of the

perpetrator. ***Mason v. State***, 438 So.2d 374 (Fla. 1983); ***Michael v. State***, 437 So.2d 138 (Fla. 1983) As stated in ***Preston v. State***, 444 So.2d 939, 946 (Fla. 1984):

> [the cold, calculated, and premeditated] aggravating circumstance has been found when the facts show a particularly lengthy, methodic, or involved series of atrocious events where a substantial period of reflection and thought by the perpetrator. ***See, e.g., Jent v. State***, (eyewitness related a particularly lengthy series of events which included beating, transporting, raping, and setting victim on fire); ***Middleton v. State***, 426 So.2d 548 (Fla. 1982)(defendant confessed he sat with a shotgun in his hand for an hour, looking at the victim as she slept and thinking about killing her);***Bolender v. State***, 522 So.2d 833 (Fla. 1982), ***cert. denied***, ___ U.S. ___, 103 Sup.Ct. 2111, 77 L.Ed. 2d 315 (1983)(defendant held the victims at gunpoint for hours and ordered them to strip and then beat and tortured them before they died).

An intentional or deliberate killing during the commission of another felony does not necessarily qualify for the premeditation aggravating circumstance. ***Maxwell v. State***, 443 So.2d 967 (Fla. 1983). However, where additional facts show greater planning prior to or during the killing, the homicide becomes "execution style." ***E.g., Routly v. State***, 447 So.2d 1257 (Fla. 1983)(burglary victim bound and transported to a remote area before he was killed with a gunshot); ***Rose v. State***, 472 So.2d 1155 (Fla. 1985)(defendant had to search for a concrete block, walked to the victim, and asked the victim to sit up and struck him six to eight times). In sum, the cold calculated and premeditated aggravating factor applies to the manner of killing characterized

by a heightened premeditation beyond that required to establish premeditated murder. ***Caruthers v. State***, 465 So.2d 496 (Fla. 1985).

This Court has noted that with regard to the CCP aggravator, four factors must be established: 1.) The killing was the product of cruel and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage; 2.) The defendant had a careful plan or pre-arranged design to commit murder before the fatal incident; 3.) exhibited heightened premeditation; and 4.) Had no pretense of moral or legal justification. ***Chamberlain v. State***, 881 So.2d 1087 (Fla. 2004).

Applying the law to the instant case, it is clear that the murder of Lois Corrine Robinson was not cold, calculated and premeditated. Even the trial court's findings reflect something less than this aggravating circumstance. There really is no evidence in the record to determine at what point appellant actually formed an intent to kill Ms. Robinson. Certainly, appellant gave conflicting statements concerning his actions that day. It is possible that appellant returned to Ms. Robinson's home without any intent to kill her. The evidence certainly suggest this as there is consistency between the physical evidence and the testimony given by appellant. For instance, appellant testified that he returned to Ms. Robinson's house because he was high and needed to

talk to someone. He testified that Ms. Robinson admitted him to the house and they indeed carried on a conversation and then Ms. Robinson started to show him some of her prized possessions. It was at this point that appellant grabbed the musical instrument and hit Ms. Robinson in the head. To be sure, appellant did not return to Ms. Robinson's house with any weapons. In fact, all the weapons he used came from Ms. Robinson's house. The trial judge even noted that the murder was "not particularly well planned." The lack of a careful or prearranged design to commit the murder before the actual incident precludes the finding of CCP. Also militating against a finding of CCP is the fact that after the murder, appellant returned to Ms. Robinson's house to make it look as though a robbery/burglary had occurred. One would think that if there was a careful prearranged design or plan, the circumstances would have immediately presented themselves for appellant to take the steps necessary to cover up the offense thereby not risking being seen returning to the house. The finding of the trial court cannot be sustained.

POINT II

IN VIOLATION OF THE EIGHTH AND FOURTEENTH TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT IMPOSED THE DEATH PENALTY UPON AN ERRONEOUS FINDING THAT THE MURDER WAS COMMITTED IN A HEINOUS, ATROCIOUS AND CRUEL MANNER.

In sentencing appellant to death, Judge Morgan found that the murder was committed in a heinous, atrocious and cruel manner without any pretense of moral or legal justification. In support of this finding the trial court stated:

> In order for a killing to be one that is especially heinous, atrocious or cruel, it must be one that evinces extreme and outrageous depravity as exemplified by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. ***Cheshire v. State***, 568 So.2d 908 (Fla. 1990). The killing must be both conscienceless or pitiless and unnecessarily tortuous to the victim. ***Richardson v. State***, 604 So.2d 1107(Fla. 1992). In determining whether a killing is committed in a heinous, atrocious or cruel manner, the focus is on the victim's perceptions of the circumstances rather than the defendant's. ***Lynch v. State***, 841 So. 2d 362 (Fla. 2003); ***Guzman v. State***, 721 So.2d 1155 (Fla. 1998).
>
> The testimony in this case establishes beyond a reasonable doubt that there was a prolonged, pitiless attack upon Ms. Robinson, and that she was conscious during at least most of the attack up until the time defendant slit her throat. The medical examiner, Dr. Irrgang, testified that Ms. Robinson would have been conscious when the defendant was hitting her in the head, as she had wounds on both sides of her head that indicated movement of her head during the attack. She testified that it was likely that Ms. Robinson struggled with her attacker.
>
> The defendant testified at trial that it took a "period of time" for him to kill Ms. Robinson and that "the time frame isn't as short as people are...are making it seem. It-it was a distance in between..." He testified that he hit her with the wooden instrument until it broke into pieces and that he then hit her with the hurricane lamp, after which she seemed knocked out. He left the room, obtained the computer mouse cord, returned and attempted to strangle Ms.

Robinson with the mouse cord, but was unsuccessful.

While the defendant testified at trial that he was unsuccessful in strangling Ms. Robinson with the cord because his hands slipped off the cord, he told Matthew Druckenmiller that the victim was able to get her fingers under the cord around her neck and that he couldn't strangle her because he was prevented by her resistance.

After failing to kill Ms. Robinson by strangulation, the defendant again left the room and went to the bathroom where he urinated. Upon returning to the living room, the defendant testified that Ms. Robinson was moving around and moaning. The defendant then got on top a chair and stepped on her head and kicked her in the fact. Then he testified she was "flopping around" and every time I kicked her, she'd move to one spot and I'd kick her and I'd get in the other - - I think I kicked her twice."

It was then that the defendant went to the kitchen, and got himself something to drink out of Ms. Robinson's refrigerator. While in the kitchen, the defendant saw a block of knives in the [sic] and decided to get a knife and return to continue his attack on Ms. Robinson. Upon returning once more to the living room, the defendant straddled Ms. Robinson's prostrate body, lifted her head by her hair and sliced her throat several times, causing her almost immediate death.

While slitting the throat of a conscious victim has been held to be heinous, atrocious or cruel, it is unclear from the evidence in this case that Ms. Robinson was, in fact, conscious at the time her throat was slit. Dr. Irrgang, the medical examiner who performed the autopsy on Ms. Robinson, was unable to testify with certainty that was the case, although she testified it was certainly possible.

Nonetheless, the evidence clearly establishes that the victim was conscious during most of the prolonged attack. The court finds from the evidence that the killing of Ms. Robinson was indeed conscienceless, pitiless and unnecessarily tortuous. [sic] It is certain that Ms. Robinson was conscious and feeling pain during the brutal beating by the defendant who was verbally taunting her during the attack. The prolonged, brutal beating of Ms. Robinson, standing alone is sufficient to make this murder heinous, atrocious and cruel.

In addition, however, Ms. Robinson would have felt a foreknowledge of impending death as she was being strangled by the mouse cord. If the attempted strangulation caused her to lose consciousness, her last thoughts would have been the anxiety and fear of struggling to breath and being unable to overcome the defendant's attempt to strangle her. If the strangulation

attempt did not cause Ms. Robinson to lose consciousness, her last perceptions would have been of having her head pulled up by her hair and the knife being brought up to her throat by the defendant before he effected her death. Either possible circumstance would be one that would cause extreme anxiety and fear with foreknowledge of death.

The state has proved this aggravating circumstance beyond any reasonable doubt and the court gives it great weight.

(Vol. XIII, 1866-1868)

It is well established that aggravating circumstances must be proven beyond a reasonable doubt by competent, substantial evidence. ***Martin v. State***, 420 So.2d 583 (Fla. 1982); ***State v. Dixon***, 283 So.2d 1, 9 (Fla. 1973). The state has failed in this burden with regard to the aggravating circumstance found by the trial court, that of heinous, atrocious, or cruel. The court's finding of HAC for this murder, is based on matters not proven by substantial, competent evidence beyond a reasonable doubt, and on erroneous findings, and thus does not support this circumstance and cannot provide the basis for the sentence of death.

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 (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 killing of Robinson happened quickly with no substantial suggestion that the defendant *intended* to inflict a high degree of pain or otherwise torture the victim. The evidence indicated the struggle between Zommer and Robinson was not excessively long, did not involve a great deal of fighting and torture, and that the onset of unconsciousness would have been relatively quick. The only evidence here of any type of resistance was the presence

of a single defensive wound on each hand of the victim consistent with trying to deflect the blow by the hurricane lamp.

In ***Tompkins v. State***, 502 So.2d 415, 421 (Fla.1986), affirming the HAC finding, the medical examiner testified that death by strangulation was not instantaneous and the evidence supported a finding that the victim was not only conscious but engaged in a desperate, lengthy struggle for life, fighting violently to get away. Contrasting the evidence in the instant case with that of ***Tompkins*** and ***Conde v. State***, 860 So.2d 930, 955 (Fla. 2003), shows that this factor is not applicable here.

In ***Conde***, the medical examiner testified that the victim's *numerous* defensive wounds, which included bruised knees and elbows, a fractured tooth, torn fingernails, and a bruise around the sensitive ear area, indicated a violent struggle and that the victim was alive and conscious for some period of time while Conde was strangling her. The medical examiner also found brain swelling, indicating sustained pressure on the neck, and air hunger, which usually involves longer consciousness than those instances when the blood is completely cut off. Lastly, the examiner testified that the victim suffered a broken hyoid bone in her neck, which may have led to neck swelling even after Conde released his grip, causing the victim to experience air hunger longer than the twenty to thirty seconds

Conde stated it had taken him to strangle her. The totality of this evidence provided competent, substantial evidence that the victim was conscious for a period of time during which she struggled with Conde, sustained numerous bodily injuries, and likely knew her death was imminent. ***Id***.

In contrast, the state failed to meet its burden in this case, however. Much of the trial court's findings with regard to this aggravator presupposes that the victim was conscious throughout most of the events. However, the evidence simply did not support that finding. Without question, with the first blows to the victim, she was conscious. However, Dr. Irrgang testified that these would have been stunning blows and could have rendered her unconscious. (Vol. XXVIV, 1179) The trial court also mentioned appellant's statements to other witnesses concerning the victim yet it must be remembered that appellant gave conflicting statements regarding what happened. No one could actually quantify the amount of time that this incident took. There was evidence that it was a "period of time" but that could be a matter of seconds, minutes, or hours. While appellant may have moved to other rooms to procure additional weapons, there is simply no way to conclude that this took a prolonged period of time. Much of the findings by the trial court rest on mere speculation which should not and cannot provide the basis for the aggravator.

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's 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 and the absence of a struggle or defensive wounds.

The facts of the instant case reveal that there was no intentional torture of the victim. There was no factual, non-speculative evidence to suggest that the infliction of this strangulation was so prolonged as to amount to lengthy, deliberate torture, as that term is rationally and legally understood.

This circumstance is proper only in "torturous murders," such as that found in the contrasting case of ***Brown v. State***, 721 So.2d 274 (Fla. 1998), where the victim was stabbed nine or ten times, and received additional blunt trauma injuries. Expert testimony showed there that the victim was alive and conscious during the attack. ***Id***. at 278. By contrast, here, the medical examiner's testimony reveals that

consciousness could have been lost within a relatively brief period of time. Thus there is no additional evidence to elevate the Robinson killing to heinous, atrocious, and cruel.

The contrast between those cases involving torture or depravity and the instant case should be clear. ***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. As such, in the instant case, the state has failed to prove this factor of torture or depravity beyond a reasonable doubt regarding the Robinson killing. The conclusion of the trial court should be rejected.

POINT III

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT IMPERMISSIBLY SENTENCED APPELLANT TO DEATH BY MISINTERPRETING THE VALID MITIGATING EVIDENCE AND MISAPPLYING THE LAW WITH REGARD TO THE MITIGATION.

In imposing the death sentence, the trial court rejected both of the statutory mental mitigators and discussed sixty-eight non-statutory mitigating factors rejecting most and according various degrees of weight to others. The close examination of the record reveals that the trial court misinterpreted the testimony of the experts presented during the penalty phase and consequently misapplied the law with regard to the mitigating factors.

In ***Campbell v. State***, 571 So.2d 415 (Fla. 1990), this Court reiterated the correct standard and analysis which the trial court must apply in considering mitigating circumstances presented by the defendant. The court quoted from prior federal and Florida decisions to remind trial courts that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. ***See Eddings v. Oklahoma***, 455 U.S. 104, 114-115(1982); ***Rogers v. State***, 511 So.2d 526 (Fla. 1987). Where evidence exist to reasonably support a mitigating factor

(either statutory or non statutory), the court must find this a mitigating factor. This Court summarized the ***Campbell*** standards of review for mitigating circumstances:

> (1) whether a particular circumstance is truly mitigating in nature is a question of law and subject to *de novo* review by this Court;
>
> (2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to competent substantial evidence standards;
>
> (3) the weight assigned to a mitigating circumstance is within the a trial court's discretion and subject to the abuse of discretion standard.

Blanco v. State, 706 So.2d 7(Fla. 1997) ***See also Cave v. State***, 727 So.2d 227(Fla. 1998). In ***Nibert v. State***, 574 So.2d 1059 (Fla. 1990), this Court reiterated that a mitigating circumstance must be reasonably established by the greater weight of the evidence. Where uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established. Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance presented, the trial court must find that the mitigating circumstance has been proved. ***Id. at 1062***. In the instant case with regard to the statutory mitigating factors, the trial court made the following findings:

> The capital felony was committed while the defendant

was under the influence of extreme mental or emotional disturbance.

* * *

Three experts who evaluated the defendant testified in the penalty proceeding: Dr. Jethro Toomer, a board certified psychologist, Dr. Jeffrey A. Danziger, a board certified psychiatrist, and Dr. Daniel Tressler, a psychologist who specializes in forensic psychology.

Dr. Toomer testified that in his opinion the defendant suffers from a borderline personality disorder and psychoactive substance abuse with a possible adjustment disorder with anxiety. Dr. Danziger diagnosed the defendant with bipolar disorder, exacerbated by polysubstance abuse, and antisocial personality disorder. Dr. Tressler testified that the defendant has an antisocial personality disorder, a polysubstance dependence and attention deficit disorder.

Both Dr. Tressler and Dr. Danziger testified that they disagreed with Dr. Toomer's diagnosis of borderline personality disorder. Dr. Tressler testified that those suffering from borderline personalities are more commonly women and tend to harm themselves, not others, when they feel abandoned.

Neither Dr. Toomer nor Dr. Tressler agreed with Dr. Danziger that the defendant has bipolar disorder. Dr. Tressler testified that his opinion that the defendant was not bipolar was supported by his evaluation of the defendant and the jail records of the defendant's conduct in the two years following his arrest - there was no evidence during that period of the mania or hypomania associated with bipolar disorder. Dr. Danziger admitted that the defendant did not exhibit some of the classic symptoms associated with someone suffering from bipolar disorder in a manic episode and that in examining the records from the defendant's incarceration he was unable to find any record suggestive of active mental

illness. Dr. Danziger further stated that the jail psychiatrists at the Osceola County Jail and the Florida Department of Corrections during previous incarcerations had diagnosed the defendant with antisocial personality disorder and had not found him to be suffering from any major mental illness.

Dr. Tressler and Dr. Danziger both testified that the defendant has an antisocial personality disorder. As noted, the jail psychiatrists, whose records the experts relied upon, in part, also had diagnosed the defendant with antisocial personality disorder. While Dr. Toomer agreed that the defendant meets all seven criteria specified for such a diagnosis and, additionally, had been diagnosed as a youth with conduct disorder, another factor in support of a diagnosis of antisocial personality disorder, based on a "clinical perspective" rather than a "cookbook perspective" the defendant does not have an antisocial personality disorder.

Dr. Toomer testified that it is his opinion that the defendant was under the influence of extreme mental or emotional disturbance at the time of the killing. According to Dr. Danziger, the defendant was suffering from a mental illness, bipolar disorder, when he committed the murder. Opinions of experts are different from factual evidence in that, even if uncontroverted, expert opinion is not necessarily binding on the fact finder. ***Walls v. State***, 641 So.2d 381(Fla. 1994). Here, there was no unanimity of opinion among the experts.

The court, considering all of the expert testimony, and the other evidence in the case is not reasonably convinced that the defendant was under the influence of extreme mental or emotional disturbance at the time of the murder or that he was suffering from borderline personality disorder or bipolar disorder. The evidence convinces the court that the defendant has an antisocial personality disorder and a dependence on multiple substances, but the drug dependence did not cause or substantially contribute to his killing of Ms. Robinson.

As Dr. Tressler testified, antisocial personality disorder is not a major mental illness, but a characterological disorder under which it is presumed that a person's behavior at any given point in time is under the person's control and is not being driven by a mental illness that causes them to misperceive reality. ***See Elledge v. State***, 706 So.2d 1340 (Fla. 1997).

The Court rejects the existence of this mitigator.

The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

Dr. Tressler and Dr. Danziger both were of the opinion that the defendant's capacity to conform his conduct to the requirements of the law was not substantially impaired when he killed Ms. Robinson. Dr. Toomer disagreed, based upon his diagnosis of borderline personality disorder in combination with drug use. As noted above, the court does not find that the defendant has a borderline personality disorder.

The evidence regarding drug use at the time of the crime is inconsistent. The defendant gave statements after the murder, both to law enforcement and the news media, that he was not high on drugs when he murdered Ms. Robinson. He later told the mental health experts, and testified at trial, that he was. The defendant has a history of being untruthful when he feels it will be to his benefit. In his trial testimony, the defendant admitted that he has told lies to a lot of people to get what he wanted, that he lied to the detective in this case, that he lied to the news reporter, that he lied in order to get a psychological evaluation, that he made things up after the arrest to "seem like a psycho" and that he has habitually lied to get money or drugs. In the psychological evaluations, the defendant described two suicide attempts in detail to Dr. Danziger; when evaluated by Dr. Tressler, he denied that he had ever attempted suicide.

> The only evidence of drug use by the defendant on the day of the murder consists of the self-serving statements of the defendant himself, which are contradicted by other statements he made that he had not used drugs that morning.
>
> The circumstances of the crime show a person who is demonstrably capable appreciating the criminality of his conduct and taking steps to cover up his crime to avoid detection. While the court has little doubt that the defendant, as he claims, is a long-term drug abuser, the court does not find that he was impaired by the use of drugs at the time the murder was committed.
>
> All three experts agreed that the defendant is of normal intelligence, was not insane at the time of the murder and knew the difference between right and wrong. There is no evidence that the defendant was unable to fully appreciate the criminality of his conduct. The facts of the case clearly establish that the defendant knew what he was doing was wrong and took steps to try to cover up his crime. The court finds that this mitigator has not been established.

(Vol. XIII, 1868-1871) In examining the findings by the trial court, it is clear that the trial court misinterpreted the evidence that was presented at the penalty phase. It is true that there was not complete unanimity of opinion among the experts, however the trial court failed to properly analyze the reasons for the lack of unanimity. Both Dr. Toomer and Dr. Danziger testified that appellant suffered from a major mental illness. Dr. Toomer diagnosed borderline personality disorder while Dr. Danziger diagnosed it as bipolar disorder. Both diagnoses basically stem from the same findings concerning appellant's mental health history. In cannot be

questioned but that appellant at a very early age was treated with anti psychotic drugs which would not have been prescribed for mere conduct or behavioral problems. The prescription of these anti psychotic drugs is a clear indication that appellant was suffering from a major mental illness *albeit* undiagnosed at the time. Even Dr. Tressler who refused to find that appellant suffered from a mental illness had to admit that if appellant presented the same symptoms he did as a child he would undoubtedly be diagnosed with bipolar disorder. Dr. Tressler's "diagnosis" of antisocial personality disorder must be questioned in light of his admitted lack of sufficient information upon which to base a valid diagnosis. Dr. Tressler stated that it would certainly be very important to evaluate appellant's results from psychological testing in order to arrive at a valid diagnosis. However, appellant refused to submit to these tests because he had already submitted to them before. There is no indication that Dr. Tressler sought out the results of the prior testing. Instead, Dr. Tressler just proceeded to act without the necessary information. Dr. Tressler also testified that when he immediately saw appellant he did exhibit signs of a bipolar disorder. However, Dr. Tressler discounted these findings as being the result of still being under the influence of drugs. Dr. Tressler ultimately ruled out biopolar disorder simply because he "could not rule it in." So, while a trial court is certainly free to accept or reject expert opinion, there should be a valid basis in the

evidence for doing so. Certainly basing one's decision to reject a mitigator based on misinterpreted evidence certainly questions the validity of any sentence imposed.

With regard to the second statutory mitigator, once again the trial court misinterpreted the evidence. The trial court stated that the only evidence of drug use by the defendant on the day of the murder consisted of the self-serving statements of the defendant himself, which are contradicted by other statements he made that he had not used drugs that morning. However, there was other evidence. Upon his arrest, appellant was clearly under the influence of drugs as testified to by numerous persons. Thirteen days later he tested positive for cocaine metabolites which indicated that he was under severely excessive drug intoxication. The state own witnesses, the Vellas, testified for five solid days they and appellant consumed an inordinate amount of drugs including crystal meth, crack cocaine, and marijuana. According to the state's witnesses, appellant was virtually constantly high on drugs. There was evidence that a crack pipe was found by Laura Schmid when she returned home, which crack pipe had not been there previously. This is certainly an indication that drugs had been used on the day of the murder. One also questions whether the trial court could properly reject the evidence of drug usage based on appellant's self serving statements only to accept

the converse based on the same statements. All three experts clearly testified that appellant suffers from severe substance abuse. It is simply incredible to believe that the drugs had no effect whatsoever on appellant.

The rejection of this mitigating factor violates the dictates of ***Campbell*** and its progeny.

POINT IV

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE IMPOSITION OF THE DEATH PENALTY IS PROPORTIONATELY UNWARRANTED IN THIS CASE.

In reviewing a death sentence, this Court must consider and compare the circumstances of the case at issue with the circumstances of other decisions to determine if the death penalty is appropriate. ***Livingston v. State***, 565 So.2d 1288 (Fla. 1988). In the instant case, the trial court found four aggravating factors, that the capital murder was committed for the purpose of avoiding arrest, that appellant had a prior conviction for a violent felony, that the murder was committed in a cold, calculated and premeditated manner, and that the murder was heinous atrocious and cruel.[1] The trial court found several mitigating factors.[2] This Court has noted that the death penalty, unique in its finality and total rejection of the possibility of rehabilitation, was intended by the legislature to be applied "to only the most aggravated and unmitigated of most serious crimes." ***State v. Dixon***, 283 So.2d 1, 7 (Fla. 1973); ***Holsworth v. State***, 522 So.2d 348(Fla. 1988).

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[1] Appellant is contending that there was insufficient evidence to support the CCP and HAC factors. ***See Points I and II, supra***.

[2] Appellant is contending that the trial court misinterpreted the evidence and

This Court has described the "proportionality review" performed in every capital death case as follows: Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances. ***Porter v. State***, 564 So.2d 1060, 1064 (Fla.1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991). ***Accord Hudson v. State***, 538 So.2d 829 at 831 (Fla.1989); ***Menendez v. State***, 419 So.2d 312, 315 (Fla.1982). Proportionality review "requires a discrete analysis of the facts," ***Terry v. State***, 668 So.2d 954, 965 (Fla.1996), entailing a ***qualitative*** review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis.

The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. Art. I, Sec. 17, Fla. Const. It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. ***Tillman v. State***, 591 So.2d 167 (Fla.1991). Moreover, proportionality review in death cases rests at least in part on the recognition that

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misapplied the law regarding several mitigators. ***See Point III, supra.***

death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Art. I, Sec. 9, Fla. Const.; ***Porter***.

Proportionality review also arises in part by necessary implication from the mandatory, exclusive jurisdiction this Court has over death appeals. Art. V, Sec. 3(b)(1), Fla. Const. The obvious purpose of this special grant of jurisdiction is to ensure the uniformity of death-penalty law. Thus, proportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death penalty law. ***See Tillman*** at 169.

A comparison of the instant case to other cases decided by this Court leads to the conclusion that the death penalty is not proportionately warranted in this case. ***Blakley v. State***, 561 So.2d 560 (Fla. 1990)(death sentence was disproportionate despite finding two aggravating circumstances: heinous atrocious and cruel and cold, calculated and premeditated); ***Livingston v. State,*** 565 So.2d 1288 (Fla. 1988)(death penalty disproportionate despite finding two aggravating circumstances: previous conviction of a violent felony and commission of the murder during an armed robbery); ***Farinas v. State***, 569 So.2d 1425 (Fla. 1990)(death sentence not proportionate where defendant convicted of first degree murder of girlfriend even though trial court properly found two aggravating circumstances: capital felony was committed while defendant was engaged in the

commission of a kidnaping, and the capital felony was especially heinous, atrocious and cruel); ***Fitzpatrick v. State***, 527 So.2d 809(Fla. 1988)(death penalty not proportionate despite finding of five aggravating circumstances and three mitigating circumstances); ***Wilson v. State***, 493 So.2d 1019(Fla. 1986)(death sentence not proportionately warranted despite trial court's proper findings of two aggravating circumstances and no mitigating circumstances).

In ***Kramer v. State***, 619 So.2d 274 (Fla. 1993) this Court held that the death penalty was disproportionate despite findings by the trial court that the murder was heinous, atrocious and cruel and that the defendant had a prior conviction for a violent felony. In that case, the evidence demonstrated that Kramer systematically pulverized the victim as he tried to get away and fend off the blows. Kramer delivered a minimum of nine to ten blows; none but the final two would have been fatal. The evidence showed that the attack began in an upper portion of an embankment and proceeded down approximately fifteen feet to the culvert, and then further down the culvert to the final resting place of the victim. The final blows which were delivered with a concrete block were inflicted while the victim's head was lying against the cement. Additionally, the prior violent felony that Kramer had was a near identical attack on a previous victim with a concrete block. Despite these facts, this Court had no problem reducing the penalty to life where

these two aggravating factors were offset by the mitigation including Kramer's alcoholism, mental stress, severe loss of emotional control, and potential for productive functioning in the structured environment of prison.

In the instant case, appellant is contending that two of the aggravating factors (CCP and HAC) have not been proven. The aggravating factor of the prior violent felony has arguably been proven but must be placed in proper context to understand the importance of it. The crime occurred after the murder and the victim of that crime while undoubtedly shaken, received very little if any injury. Under these circumstances the significance of this aggravating factor is lessened. The remaining aggravating factor, witness elimination, must also be placed in proper context. An officer testified that although he received a call concerning a possible stolen boat, he could find no evidence that in fact the boat was stolen. Thus, it is conceivable that appellant would never have been prosecuted for this offense. The recognition of appellant as the perpetrator of the theft is questionable given that Laura Schmid testified that Robinson believed it was the owner and his brother who took the boat and in any case could not identify the people. Thus, while appellant may have believed that the victim witnessed this offense, this belief was unfortunately misplaced. Thus, this Court is left with two valid aggravating factors which should be accorded some weight which must be

balanced against the overwhelming evidence of mitigation. That appellant suffered an incredibly deprived childhood is beyond question. He grew up in a home deprived of love. He was placed in institutions from a very early age and placed on antipsychotic medications. The doctors who examined appellant all agreed that these were significant factors in his upbringing. The one doctor, Tressler, who found appellant only to be an antisocial personality, must be severely questioned since by his own admission, he was unable to complete testing which he thought was essential in developing the proper diagnosis. Additionally, in ruling out bipolar disorder he incredibly stated he did so "because I was unable to rule it in." Additionally, the expert Tressler conceded that if the defendant presented today with the symptoms he did as a child he would undoubtedly be diagnosed as bipolar. (Vol. XXXV, 1805, 1816) The instant case is surely not one of the most aggravated and least mitigated cases. This Court must vacate appellant's death sentence and remand the cause with instructions to resentence him to life.

POINT V

ZOMMER'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONS BECAUSE THE FACTS THAT MUST BE FOUND TO IMPOSE IT WERE NOT ALLEGED IN THE CHARGING DOCUMENT NOR WERE THEY UNANIMOUSLY FOUND TO EXIST BEYOND A REASONABLE DOUBT BY A 12-PERSON JURY.

Apprendi v. New Jersey, 530 U.S. 466 (2000) was firmly established long before this trial judge was asked to follow the law. A court is required to provide fundamental due process rights mandated by the United States Constitution. Authorization to do so does not come from the Legislature. It instead emanates from the Constitution itself. This trial judge was asked to provide basic due process rights guaranteed by the Florida Constitution and by Florida law. The judge refused because he believed he did not have the power to follow the law. Such continued delay in the administration of justice is wrong and it unnecessarily risks the efficacy of death sentences imposed after the expenditure of time, finite public resources and human emotion. It is time to correct this problem.[3]

Eight years ago, ***Apprendi*** held that "Other than the fact of a prior

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[3] Matters of statutory construction and constitutional challenges are subject to *de novo* review on appeal since they are decisions of law. ***City of Jacksonville v. Cook***, 765 So.2d 289 (Fla. 1st DCA 2000).

conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." ***Apprendi***, 530 U.S., at 490. In the ***Apprendi***-related case that followed[4] the United States Supreme Court (hereinafter "COURT" to distinguish from this Honorable Court) analyzed the particular statutory scheme to determine whether procedural Due Process was provided when a judge imposed a particular sentence under that particular statutory scheme. Courts are supposed to require that statutes be enforced in accordance with the Constitution. ***Apprendi*** held nothing more. Other courts may do nothing less.

It is first here stressed that the minimal procedural due process requirements explained in ***Apprendi*** do *not* involve the Eighth Amendment because ***Apprendi*** expressly excluded capital sentencing schemes (and thus the Eighth Amendment) from its analysis. "***Apprendi***, 530 U.S. 466, 496 (2000) ("For reasons we have explained, the capital cases are not controlling[.]"). This distinction was not missed

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[4] The precursor to ***Apprendi*** involved a federal statute. See ***Jones v. United States***, 526 U.S. 227, 243 n.6 (1999) ("under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt." ***Apprendi*** quoted the foregoing language and recognized that "The Fourteenth Amendment commands the same answer in this case involving *a state statute*." ***Apprendi***, 520 U.S. at 476 (emphasis added). Thus its holding includes Due Process under the Fifth Amendment as also applied by the Fourteenth

when Florida first declined to apply ***Apprendi*** to capital cases. See ***Mills v. Moore***, 786 So.2d 532, 537 (Fla. 2001) ("No court has extended ***Apprendi*** to capital sentencing schemes, and *the plain language of Apprendi indicates that the case is not intended to apply to capital schemes*.") (Emphasis added); ***Mills v. State***, 786 So.2d 547, 548 (Fla. 2001) ("We held that ***Apprendi*** is not applicable to this case *since the majority opinion in Apprendi indicates that Apprendi does not affect capital sentencing schemes*.") (Emphasis added); ***Mann v. Moore***, 794 So.2d 595, 599 (Fla. 2001); ***Card v. State***, 803 So.2d 613, 628 fn.13 (Fla. 2001).

Ring v. Arizona, 536 U.S. 584 (2002), however, makes these Florida decisions moot and any reasoning that precedes ***Ring*** wholly inapposite. ***Ring*** is neither a confusing nor a complex decision. It first extended the due process analysis contained in ***Apprendi*** to capital cases by expressly overruling that portion of ***Walton v. Arizona***, 497 U.S. 639 (1990) that allowed a death sentence to be imposed based on facts not found by a jury:

> ***Apprendi's*** reasoning is irreconcilable with ***Walton's*** holding in this regard, and today we overrule ***Walton*** in relevant part. *Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment*.

Amendment.

Ring v. Arizona, 536 U.S. at 588 (Emphasis added). ***Ring*** next observed that "*Under Arizona law*, Ring could not be sentenced to death, the maximum penalty for first-degree murder, unless further findings were made." ***Ring***, 536 U.S. at 592 (Emphasis added). The COURT then applied the ***Apprendi*** analysis to *Arizona* law and concluded that the additional finding of fact (the existence of "at least one" aggravating factor) upon which a death sentence is based in Arizona must be made by a jury beyond a reasonable doubt:

> Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment. See 200 Ariz., at 279, 25 P.3d, at 1151 (citing §13-703). This was so because, *in Arizona, a "death sentence may not legally be imposed . . . unless at least one aggravating factor is found to exist beyond a reasonable doubt*." 200 Ariz., at 279, 25 P.3d, at 1151 (*citing §13-703*). The question presented is whether *that* aggravating factor may be found by the judge, *as Arizona law specifies*, or whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury.

Ring, 536 U.S. at 597 (Emphasis added) (footnotes omitted).

Obviously, the specific analysis of the Arizona capital sentencing scheme cannot control what jury findings are required in other states unless the statutory schemes are identical. Simply said, the ***Apprendi*** analysis focuses on what factual findings are required to impose a particular sanction within a particular statutory

scheme. ***Ring*** addressed Arizona's statutory scheme. Florida courts cannot look at Arizona's statutes to determine what findings must be made by the jury because Florida's statutory scheme is materially different than Arizona's.

Apprendi makes clear that courts may no longer blindly accept the notion that a legislature controls the entitlement to constitutional due process rights by labeling a crime to be a "capital" offense, a "life" felony, a "Class B" felony or a bologna sandwich. Such blindness by a court today is not deference to separation of powers – it is an abdication of duty and authority. Stated simply, legislatures enact laws. Courts enforce them consistent with the state and federal constitutions. The COURT has repeatedly made very clear that courts are not following the law if they uphold a sentence that is based on factual findings not made by a jury beyond a reasonable doubt. It is time for Florida to follow the law.

Specifically, in ***Blakely v. Washington***, 542 U.S 296 (2004), the COURT invalidated a 53-month sentence because the factual finding required to impose it was not made in accordance with Due Process. The State argued that Blakely's 53-month sentence was permissible because Blakely had been convicted of a class "B" felony that was punishable by 10 years. The COURT disagreed because a factual finding by the judge after the jury verdict issued was yet required to deviate from the standard sentence. "The 'maximum sentence' is no more 10 years here

than it was 20 years in ***Apprendi*** (because that is what the judge could have imposed upon finding a hate crime) or death in ***Ring*** (because that is what the judge could have imposed upon finding an aggravator)." ***Blakely***, 542 U.S. at 304. The COURT in ***Blakely*** explained this fully and unequivocally:

> In this case, petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The State nevertheless contends that there was no ***Apprendi*** violation because the relevant "statutory maximum" is not 53 months, but the 10-year maximum for class B felonies in §9A.20.021(1)(b). Our precedents make clear, however, that the "statutory maximum" for ***Apprendi*** purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* See ***Ring***, ***supra***, at 602 ("The maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (quoting ***Apprendi***, ***supra***, at 483)); ***Harris v. United States***, 536 U.S. 545, 563 (2002) (plurality opinion) (same); cf. ***Apprendi, supra***, at 488 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," ***Bishop, supra***, §87, at 55, and the judge exceeds his proper authority.

Blakely, 542 U.S. at 303-304 (Emphasis in original).

The COURT next applied ***Apprendi*** to the federal sentencing guidelines in

United States v. Booker, 543 U.S. 220 (2005), where sentences being imposed were obviously less than the maximum specified by the United States Code yet they were based on additional factual findings that followed a conviction. The COURT reaffirmed the holding set forth in ***Apprendi*** and again very clearly explained what due process requires:

> Accordingly, we reaffirm our holding in ***Apprendi***:
> Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

United States v. Booker, 543 U.S. 220, 244 (2005). The COURT avoided holding the entire federal sentencing guidelines unconstitutional by striking only the portion of the statute that made the guidelines mandatory, pointing out that, "Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long term, the sentencing system, *compatible with the Constitution*, that Congress judges best for the federal system of justice." ***Booker***, 543 U.S. at 265 (emphasis added). Again, the Legislature was responsible for enacting laws. The COURT's concern was its duty to enforce the Constitution.

More recently, in ***Cunningham v. California***, 549 U.S. 270 (2007), the COURT invalidated California's determinate sentencing statutes. That opinion is

unequivocal: "This Court has repeatedly held that, under the Sixth Amendment, *any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence*." ***Cunningham***, 549 U.S. at 281 (2007) (Emphasis added) (citations omitted). These cases leave no room for discussion.

Zommer cited the foregoing cases from the highest court in America and repeatedly asked that they be followed. (Vol. I, 74-152; Vol. II, 311-338; 215-218; 252-260) By refusing, "the judge exceed[ed] his proper authority." ***Blakely***, 542 U.S. at 304. In short, reversal of Zommer's death sentence and imposition of a life sentence are required for each and all of the following violations of basic due process that occurred over timely objection:

A: DENIAL OF ZOMMER'S MOTION TO PRECLUDE THE DEATH PENALTY DUE TO THE FAILURE OF THE INDICTMENT TO ALLEGE A CRIME PUNISHABLE BY THE DEATH PENALTY -

Article I, section 15(a) of the Florida Constitution guarantees the right to indictment for a capital crime. Florida law requires that the charging document contain allegations of all facts necessary to impose a particular punishment. This is true even as to a mandatory sentence that is less than the "statutory maximum" sanction for the offense of which the defendant stands convicted. E.g., ***Lane v. State***, 33 996 So.2d 226 (Fla. 4th DCA 2008) (due process is violated where a

person receives a mandatory sentence for discharging a firearm when the information alleges only that he "carried" it); ***Jackson v. State***, 852 So.2d 941, 944-45 (Fla. 4th DCA 2003) (same); ***McEachern v. State***, 388 So.2d 244, 246-48 (Fla. 5th DCA 1980) (though supported by evidence, conviction must be reversed "[s]ince he was not so charged, [and] we can only assume that the State did not intend to charge him with the higher degree of the crime, though we fail to understand why it was done."); ***State v. Dye***, 346 So.2d 538, 541 (Fla. 1977) (An information must allege each essential element of a crime and no essential element should be left to inference).

Count I of Zommer's indictment charged the crime of premeditated murder as follows:

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the County of Osceola, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Osceola, upon their oaths do present that Todd Zommer did, on the 9th day of April, 2005, in Osceola County, Florida, in violation of Florida Statute 782.04(1)(a), from a premeditated design to effect the death of Lois Corrine Robinson, a human being, unlawfully kill Lois Corrine Robinson, by use of a cutting instrument to the neck.

(Vol. 1, 19-20) Zommer's indictment failed to contain any language that tracked or otherwise referred to §775.082 and §921.141, Florida Statutes and there is no indication that the grand jury considered and applied that legislation.

A premeditated murder is deemed to be first-degree murder and a capital[5] felony by §782.04, Florida Statutes, but it is not punishable by death because imposition of capital punishment under Florida's capital sentencing scheme requires that additional findings of fact be made *after* a defendant is convicted of premeditated murder. Specifically, §775.082, Florida Statutes (with emphasis added in pertinent parts) states:

> **775.082. Penalties; applicability of sentencing structures; mandatory, minimum sentences for certain reoffenders previously released from prison.**
>
> (1) A person *who has been convicted* of a capital felony shall be punished by death *if the proceeding held to determine sentence according to the procedure set forth in s. 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* and shall be ineligible for parole.

The plain language of §775.082 thus requires that, for a death sentence to be authorized, findings of fact must be made under §921.141 for "a person *who has been convicted*" of a capital felony. By the statute's own terms the death penalty requires additional findings to be made in accordance with "the procedure set forth in §921.141." It could not be clearer that ***Apprendi*** and ***Ring*** apply because further

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[5] In Florida, an offense that the Legislature labels a "capital" offense is not if imposition of the death penalty is not a possibility. See ***Rusaw v. State***, 451 U.S. 469, 470 (Fla. 1984) ("This Court has long held that a capital crime is one where death is a possible penalty.") (citing ***Donaldson v. Sack***, 265 So.2d 499 (Fla. 1972)).

findings of fact are required for imposition of a death sentence for "a person who has been convicted" of first degree murder.

The ***Apprendi*** analysis therefore turns to the statute that specifies what precise findings must be made. The answer is found in Section 921.141(3), Florida Statutes, which in pertinent part (with emphasis added) plainly states without ambiguity the following:

§ 921.141(3).

> Notwithstanding 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, *but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:*
>
> *(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and*
>
> *(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances*.
>
> In *each* case in which the court imposes the death sentence, the determination of the court *shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings*. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

The statute says that there are only two sentences that may be imposed on a person found guilty of a capital felony. If no findings are made, a life sentence without possibility of parole must be imposed. If a death sentence is to be imposed,

the statute patently and plainly requires "specific written findings of fact" (plural) to support a death sentence. It plainly requires that "findings" (plural) be made that "a" and "b" exist. Those are the findings required by ***Apprendi***.

Not only does §921.141(3) require that both "a" and "b" be found, §921.141(3)(a) requires that *at least two* aggravating circumstances be found to exist. This necessarily follows because the statute requires that "sufficient aggravating circumstances (plural) exist." This language is not ambiguous and it is not susceptible to being interpreted to mean "one or more" circumstance. For the State to allege the existence of a crime that is punishable by the death penalty under §§775.082 and 921.141(3), Florida Statutes, it must contain those factual allegations required by these two statutes, that is, that "sufficient aggravating circumstances exist as enumerated in subsection (5)" and that "insufficient mitigating circumstances exist to outweigh the aggravating circumstances.

Florida requires that the charging document contain an allegation of "every essential element" of the crime to be punished:

> The first issue in this case is whether the information charging Price with the crime of sexual battery on a physically incapacitated person was fatally defective. Due process of law requires the State to allege every essential element when charging a violation of law to provide the accused with sufficient notice of the allegations against him. Art, I, §9, Fla. Const.; ***M.F. v. State***, 583 So.2d 1383,l 1386-87 (Fla. 1991). There is a

> denial of due process when there is a conviction on a charge not made in the information or indictment. ***See Gray v. State***, 435 So.2d at 818; ***see also, Thornville v. Alabama,*** 310 U.S. 88, 60 L..Ed.2d 735, 84 L.Ed.2d 1093 (1940); ***De Jonge v. Oregon***, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1937). For an information to sufficiently charge a crime it must follow the statute, clearly charge each of the essential elements, and sufficiently advise the accused of the specific crime with which he is charged. ***See Rosin v. Anderson***, 155 Fla. 673, 21 So.2d 143, 144 (Fla. 1945). Generally the test for granting relief based on a defect in the information is actual prejudice to the fairness of the trial. *See* Gray, 435 So.2d 818 (citing ***Lackos v. State***, 339 So.2d 217 (Fla. 1976).

Price v. State, 995 So.2d 401, 404 (Fla. 2008). Any argument that "sentencing factors" do not have to be alleged in the charging document ignores ***Apprendi***, ***Jones***, ***Blakely***, and Florida cases such as ***Insko v. State***, 969 So.2d 992 (Fla. 2007), ***Lane***, ***supra***, ***Price***, ***supra*** and ***Jackson***, ***supra***.

Zommer was here charged in Count I with premeditated murder. The absence of any language in the indictment that qualified Zommer for the death penalty was timely and specifically pointed out to the judge. That defect could easily have been timely corrected. Indeed, that is stated rationale for requiring specific objections to be timely made to a trial court. See ***Harrell v. State***, 894 So.2d 935, 940 (Fla. 2005); ***Castor v. State***, 365 So.2d 701, 703 (Fla. 1978). This judge was expressly shown controlling authority that facts required to be proved

under ***Apprendi*** must also be properly charged:

> As we noted earlier, ***Apprendi*** renders moot most discussions of whether a particular fact is an element of the crime or a potential sentencing enhancement. Both must now be submitted to the jury and found beyond a reasonable doubt. Whether a fact is an element, however, remains important to whether it must be alleged in indictments and informations.

Insko v. State, 969 So.2d 992, 997 (Fla. 2007). The judge ruled, however, that he had no authority to follow the law plainly stated in ***Insko***. In doing so, he committed reversible error.

Insko ultimately held that the defendant waived the ***Apprendi*** issue by failing to timely object to it. That same result applies to all now convicted of a capital crime who failed to timely object and specifically argue that she was not eligible for the death penalty because their indictment failed to allege the specific criteria required by §775.082 and §921.141(3), Florida Statutes. In addition to allegations that track §782.04, the charging document must also allege that "sufficient aggravating circumstances exist as enumerated in§921.141(5)" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." The precise argument is not that the indictment failed to allege particular aggravating circumstances. Here, Zommer timely objected and sought to have that error corrected. The error could have and should have been timely

corrected if the grand jury agreed with the State's contention. The preserved error now requires reversal of the death sentence and imposition of a life sentence, for not only were those statutory factual findings not alleged, they were not found in accordance with due process and the law over timely and specific objection.

B: FLORIDA'S DEATH PENALTY IS APPLIED IN VIOLATION OF DUE PROCESS, EQUAL PROTECTION AND THE SEPARATION OF POWERS PROSCRIPTION UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTIONS 2, 9, 15(a), 16 AND 22 OF THE FLORIDA CONSTITUTION AND ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION –

The holding in ***Apprendi*** is clear. Respectfully, Florida's scattershot adherence to ***Apprendi*** is not. Remarkably, eight years after ***Apprendi*** and six years after ***Ring***, Florida has yet to expressly require that death penalty trials provide the Due Process protections guaranteed under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Assuming that politeness to the United States Supreme Court trumps the constitutional right to have a jury find eligibility for the death penalty in accordance with the procedures unequivocally required by the federal Constitution, Florida could yet, but has not, provided those same procedural due process rights under article I, sections 2, 9, 15(a), 16 and 22 of the Florida Constitution.

Zommer argued that Florida's capital sentencing scheme requires findings of

"sufficient aggravating circumstances" and "insufficient mitigating circumstances" and that those facts must be alleged in his indictment and unanimously found to exist beyond a reasonable doubt by a 12-person jury. The denial of these basic guarantees, Zommer submits, denied him Due Process under the Fifth, Sixth and Fourteenth Amendment to the United States Constitution. Zommer pointed out to the trial judge that Florida affirmatively prohibits[6] trial judges from using a special verdict form that details juror findings concerning aggravating circumstances but stressed that did not interfere with the findings that must be made concerning "sufficient aggravating circumstances" and "insufficient mitigating circumstances." (Vol. II, 252-260). He pointed out that, by requiring only "one or more" aggravating circumstances to support a death sentence Florida is interpreting an unambiguous statute in violation of the separation of powers proscription contained in article II, section 3 of the Florida Constitution. He further argued that the denial of these rights denies Due Process violates under the Fourteenth Amendment to the United States Constitution, and also denies Equal Protection under the Fourteenth Amendment because Florida *does* provide those same due process rights recognized in ***Apprendi*** to criminal defendants who are

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[6] ***State v. Steele***, 921 So.2d 538, 548 (Fla. 2005) ("We hold that a trial court departs from the essential requirements of law in a death penalty case by using a penalty phase special verdict form that details the jurors' determination concerning

not charged with first-degree murder. E.g., ***Galindez v. State***, 955 So.2d 517 (Fla. 2007) ("we hold that harmless error analysis applies to *Apprendi* and *Blakely* error.**"**); ***Insko***, ***supra***. (same). Failing to timely apply ***Apprendi*** at the trial court level in capital cases only to then hold the error to be "harmless" is a distortion of Florida statutory law that also violates those Constitutional rights.

More specifically, Florida does not apply ***Apprendi*** to death penalty cases and instead prohibits trial judges from using special verdict forms to demonstrate the jury's findings as to *individual* aggravating circumstances. ***Steele***, ***supra***. The Court then refuses to grant meaningful relief on appeal by ruling that ***Ring*** [sic] "is satisfied" if the jury found the existence of a contemporaneous violent felony that is treated under Florida law as a *prior* violent felony ***e.g***. ***Deparvine v. State***, 33 So. 2d 351 (Fla. 2008) ("Deparvine's claim is without merit since it is undisputed that he has prior felony convictions and this Court has held that the existence of such convictions as aggravating factors moots any claim under ***Ring***."); ***Salazar v. State***, 991 So.2d 364 (Fla. 2008) ("***Ring*** is satisfied in this case because the trial court applied the prior violent felony conviction aggravator based on Salazar's conviction for the contemporaneous attempted murder of Ronze Cummings."). ***See also***, ***Duest v. State***, 855 So.2d 33, 49 (Fla. 2003) ("We have previously rejected

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aggravating factors found by the jury.")

claims under *Apprendi* and *Ring* in cases involving the aggravating factor of a previous conviction of a felony involving violence."); ***Doorbal v. State***, 837 So.2d 940, 963 (Fla. 2003) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions"). ***Ring*** is not the issue. ***Apprendi*** is. Florida statutory law does not authorize the death penalty if "one or more" aggravating circumstances exist. That is a fiction created by appellate decisions in violation of article II, section 3 of the Florida Constitution.

The existence of "one or more" aggravating circumstance(s) is NOT the "specific findings" required by §921.141(3), Florida Statutes. Rather, the statute requires both that "*sufficient* aggravating circumstances" exist and that "*insufficient* mitigating circumstances exist to outweigh the aggravating circumstances." An appellate ruling that due process is satisfied because a jury found a contemporaneous felony elevates one circumstance above all others and effectively renders the other meaningless. The terms "sufficient" and "insufficient" connote a weighing process, not a mere finding of the existence of one factor. That is so basic that it was immediately perceived and affirmatively explained in ***State v. Dixon***, 283 So.2d 1, 10 (Fla. 1973):

> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).

"Sufficient" is synonymous with "adequate, enough and ample. The Unabridged Edition of ***The Random House Dictionary of the English Language***, p.1421 defines "sufficient" as "adequate for the purpose; enough." The commonly-understood meaning of sufficient is not "one or more." That language is contained in Arizona's death penalty statutory scheme. Florida cannot use Arizona law to resolve Florida Due Process issues framed by Florida statutes and if the Florida Legislature had intended for "one or more" aggravating circumstances to justify the death penalty it presumably would have said so. Florida is ignoring the plain language of the controlling statute. Florida is denying the right to due process as to the factors that determine the eligibility of a convicted first-degree murderer to be punished by death. This delay in the administration of justice violates article I, section 21 of the Florida Constitution and denies Due Process under the Fourteenth Amendment to the United States Constitution.

Florida's position that a jury's determination of the existence of one

aggravating circumstance satisfies ***Ring*** is a violation of article II, section 3 of the Florida Constitution. The analysis of Arizona law in ***Ring*** is of no import outside of the State of Arizona unless the statutes of other states are identical. Florida's statute is not identical to the Arizona death penalty statutes. Specifically, the Arizona statute analyzed in ***Ring*** provided:

> In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact **finds one or more** of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.

Ariz.Rev.Stat. Ann, §13.703(E) (emphasis added). The emphasized statutory language was the basis of the COURT'S ***Apprendi*** analysis:

> Under Arizona law, Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made. The State's first-degree murder statute prescribes that the offense "is punishable by death or life imprisonment as provided by § 13-703." Ariz.Rev.Stat. Ann. § 13-1105(C) (West 2001). The cross-referenced section, § 13-703, directs the judge who presided at trial to "conduct a separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances ... for the purpose of determining the sentence to be imposed." § 13-703(C) (West Supp.2001). The statute further instructs: "The hearing shall be conducted before the court alone. The court alone shall make all factual

> determinations required by this section or the constitution of the United States or this state." *Ibid.*
>
> At the conclusion of the sentencing hearing, the judge is to determine the presence or absence of the enumerated "aggravating circumstances" and any "mitigating circumstances." **The State's law authorizes the judge to sentence the defendant to death only if there is at least one aggravating circumstance** and "there are no mitigating circumstances sufficiently substantial to call for leniency." § 13-703(F).

Ring v. Arizona, 536 U.S. 584, 592-593 (2002) (Emphasis added) (footnotes omitted). The "one or more" language in ***Ring*** pertains to the corresponding language contained in the Arizona Revised Statute. It is not a pronouncement of a constitutional litmus test applicable outside of Arizona.

In Florida, to sentence a person who has been convicted of first-degree murder to the death penalty, two additional "findings" must be made under Section 921.141(3), Florida Statutes:

> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Section 921.141(3), Florida Statutes. The statute is not ambiguous and it does not authorize the death penalty if "one or more" factors exist.

Yet, in well over[7] 50 direct appeals of death sentences, Florida has rejected claims that Florida's death penalty is being unconstitutionally applied under ***Apprendi*** and/or ***Ring***. A person such as Franklin whose jury unanimously recommended the death penalty was provided due process under ***Apprendi*** because to make that unanimous recommendation the jury made the statutorily required findings. So, too, the defendants who did not timely raise the issue now presented by Zommer cannot receive relief because the issue was waived by not being specifically presented and because ***Apprendi*** will not be applied retroactively. Simply said, Zommer's death sentence must be reversed and a life sentence without possibility of parole imposed because his jury did not unanimously find beyond a reasonable doubt that sufficient aggravating circumstances exist as enumerated in subsection 5, nor did they unanimously decide that insufficient mitigating circumstances exist to outweigh the aggravating circumstances. These specific things, over timely objection, were neither properly alleged nor proven in accordance with due process. It is time to correct the flaws with Florida's death penalty to the extent that they can be judicially corrected. The Legislature simply does not have to authorize a court to require compliance with the state and federal constitutions. The Constitution itself is all the authorization needed for a court to

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[7] See ***Franklin v. State***, 965 So.2d 79, 101-102 (Fla. 2007) ("In over fifty

require due process.

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cases since ***Ring's*** release, this Court has rejected similar ***Ring*** claims."

CONCLUSION

Based upon the foregoing reasons and authorities cited herein, Appellant respectfully requests this Honorable Court to vacate his death sentence and remand the cause with instructions to impose a life sentence without parole.

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 Bill McCollum, 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. Todd Zommer, #349878, Florida State Prison, 7819 NW 228th St., Raiford, FL. 32026 , this 6th day of April, 2009.

_____
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

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 point.

_____
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