IN THE SUPREME COURT OF FLORIDA

DAVID B. RUSS,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC09-923
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

In this brief, the symbol "R" will designate page numbers of the pleadings in the record on appeal, and the symbol "T" will designate the pages of the transcripts (numbered separately from the pleadings), as renumbered (in certain instances) by the clerk's office. Volumes will be referenced according to the sequential numbers assigned by the clerk's office for the entire record on appeal, and not by the numbering of the court reporters.

STATEMENT OF THE CASE

The State charged the Appellant, David B. Russ, by indictment and amended indictment with the May 7-8, 2007, first-degree murder of Madeleine Leinen (by stabbing), kidnapping with a weapon, carjacking with a deadly weapon, robbery with a deadly weapon, and burglary of a dwelling with an assault or battery. (Vol. 1, R 14.1-14.2, 171) The state filed its Notice to Seek the Death Penalty (Vol. 1, R 34), and the defendant entered a plea of not guilty to the original charges and stood "moot" (sic) to the amended indictment. (Vol. 1, R 33)

The defense unsuccessfully contested the legality of Florida's death penalty. (Vol. 1, R 48-51, 58-59, 60-61, 72-74, 75-76) The defense moved to prohibit victim impact evidence, which the court denied, and later stipulated to the contents of a prepared victim impact statement by the victim's sister. (Vol. 1, R 46-47, 70-71, 162; Vol. 11, T 245-251)

The defendant entered a plea of guilty to first degree murder, kidnapping with a weapon, grand theft auto (as the Count 3 charge was amended by the state), robbery with a deadly weapon, and burglary of a dwelling with an assault or battery. (Vol. 1, R 176-180; Vol. 12, T 426-448) He was found competent to and did waive a sentencing jury and his counsel's presentation of mitigation at the penalty phase. (Vol. 1. R 186-187, 192-193, 194-195, 196-197) As required by

law, the court had the defendant's assistant public defender announce to the court and the defendant the mitigating evidence his office had discovered and was prepared to present on the defendant's part, but for the waiver. (Vol. 12, T 504) Included in the list of mitigating evidence were:

1. Numerous witnesses, including defense expert, Dr. Day, regarding Russ's extreme and genuine remorse;

2. Testimony, including that of jail officials, regarding Russ's volunteering on over fourteen occasions for Operation Right Track Program in jail, speaking to juvenile offenders, and the officials' appreciation and request for continuing involvement (and possibly developing testimony from some of the juveniles involved as to the defendant's impact on them);

3. Witnesses, including his mother, Beth Webster, and his sister, Melissa, to the defendant's "horrific" beatings as a child by his father for no apparent reason, and to the mother's beatings while pregnant with Russ;

4. Evidence of mental illness in the defendant's family, including his father;

5. Evidence of psychological torture from his father, including the testimony of Russ's half-sister, Mickey;

6. Testimony regarding Russ's movement from foster home to foster home;

7. Copies of a psychological evaluation from 1978 when he was sixteen;

8. Family member testimony, including Russ's sisters and his former wife, Amelia Austin;

9. Testimony of the defendant's former youth baseball Coach Thomason from Polk County about Russ's father beating the defendant for playing poorly;

10. Testimony of Russ's two former step-mothers, Marie and Jill;

11. Testimony of the retired professor from Texas where the defendant was enrolled in the Study of Addictions program;

12. Evidence of Russ's efforts at rehabilitation;

13. Witnesses from the Prison Ministry;

14. Presentation of a television broadcast of Russ speaking of the dangers of drug usage at the behest of an Austin, Texas city councilman;

15. Employment accounts that Russ was a good employee at a roofing company until he experienced his drug problems;

16. Testimony regarding his employment at One Source Roofing in Florida just prior to this crime;

17. Georgia prison records indicating head injuries while imprisoned there;

18. Testimony of psychologist Dr. Deborah Day pertaining to the psychological impact of Russ's upbringing and his ability to function into adulthood;

19. Testimony of former girlfriends, Anita Scott (with whom Russ lived about six months prior to the murder) and Kimberly Williams (his fiancee at the time of the killing);

20. Records regarding Russ's injuries and 10-day hospitalization following a car accident in South Dakota.

(Vol. 12, T 504-523, 530)

Russ's public defender also was prepared to present the testimony of Dr. Marraccini, a forensic pathologist, to rebut the potential aggravating circumstances of cold, calculated, and premeditated; and heinous, atrocious, or cruel, and testimony of the state's medical examiner. (Vol. 12, T 525-526) The trial court also ordered an extensive Pre-Sentence Investigation due to the waiver of mitigation. (Vol. 12, T 535-536)

Recognizing the need for the presentation of mitigation evidence for the benefit of the court in determining the appropriate sentence, the court appointed Regional Conflict Counsel to present such evidence on behalf of the court. (Vol. 1, R 196-197, 198) At a status conference on August 7, 2008, it was announced that Russ refused to be interviewed by a defense psychologist, Dr. Charles Golden, and also refused to undergo a PET-Scan. (Vol. 13, T 563-564, 567) When special counsel announced ready for the penalty phase trial and indicated that it would

need only a day to present mitigation, Russ's public defenders voiced some concerns about additional mitigating evidence that would take longer than a day to present and witnesses being available that special counsel had not subpoenaed, and announced to the court that special counsel had not yet spoken with them regarding the evidence they had previously uncovered in mitigation. (Vol. 13, T 566-570)

The penalty phase trial commenced before the Honorable Marlene M. Alva, Judge of the Eighteenth Judicial Circuit of Florida, in and for Seminole County, on January 8, 2009. (Vol. 10-11)[1] Included in the evidence presented by the state was a hand-written letter from the defendant to the judge, announcing again his desire to waive mitigation as "I do not deserve or desire anyone to present mitigating evidence concerning my past. Especially for the sake of the surviving family members and friends of the victim," and concluding, " I am not the victim." (Vol. 2, R 199-200) Feeling compelled to share with the judge the events of his case, and so that "Whatever you decide will be decided by facts, by truth," he outlined in the letter his "actions prior to, the day of, and the days following the murder," the facts he had shared with no one previously. (Vol. 2, R 200, 206) Regional conflict

[1] The state proffered and presented evidence, over special counsel's objections, regarding a burglary committed by the defendant in Texas after the instant murder, which evidence, the trial court later ruled, would not be considered by the court as it was irrelevant. (Vol. 9, R ; Vol. 10, T 16-65)

counsel participated in the presentation of evidence at the penalty phase on behalf of the court, which evidence included the unembellished introduction of prison medical records from previous incarcerations (all for non-violent offenses to pay for his drug habit), cross-examination of state witness, Kimberly Williams (the defendant's former fiancee), and the testimony of three witnesses: a private investigator who collected the prison and college records and merely identified them, the defendant's step-mother from 1974-1981, Marie Jackson, and the defendant's older brother, Aaron. (Vol. 11, T 255-284) Conflict counsel argued against the imposition of the death penalty, presenting no argument as to statutory mitigating circumstances, but noting the defendant's severe cocaine addiction prior to the killing, his severe physical and verbal abuse as a child from his father, his loving relationship with his brother, Russ's multiple attempts to cure his addiction, the defendant's acceptance of responsibility for the crimes, his appropriate courtroom behavior, his obtaining of a GED, his employment as a roofer, Russ's current state of depression, his training in counseling, his father-figure relationship with his fiancee's son and his caring help for her 80-year-old aunt (both prior to his recent relapse into his drug addiction), his lack of any violent criminal history, and the defendant's desire to not have to put anyone through the penalty proceedings. (Vol. 11, T 311-328)

A *Spencer* hearing was held on January 15, 2009, with an additional exhibit being placed into evidence by the special counsel (without elaboration or argument), a letter from a women, Donna Jenkins, regarding her visits with Russ in jail, outlining his remorse, shame, and spiritual ministering to other inmates, including her son, about addiction. (Vol. 9, 1615) David Russ also took the opportunity to personally apologize to the victim's family, asking them to forgive, not for his benefit, "but for their own benefit." (Vol. 13, T 612, 614)

At the sentencing hearing of May 13, 2009, the trial court sentenced the defendant to death for the first degree murder. (Vol. Vol. 13, T 619) In its sentencing order, the court found that the state had proven four aggravating circumstances: that the killing was committed during the commission of a kidnapping [§921.141(5)(d)] (assigning it significant weight); the murder was committed for pecuniary gain [§921.141(5)(f)] (moderate weight); the killing was heinous, atrocious, or cruel [§921.141(5)(h)] (great weight); and it was committed in a cold, calculated, and premeditated manner [§921.141(5)(j)] (great weight). (Vol. 9, R 1640-1648)

With regard to statutory mitigation, the court noted that no evidence of any of the listed circumstances were presented or argued. (Vol. 9, R 1648) The court found as mitigation under §921.141(6)(h)'s "any other factors" that the defendant

had received neglectful treatment from his mother and an abusive childhood at the hands of his father, including routine and severe beatings with pots, pans, a baseball bat, a garden stake, and a garden hose. A beating at age thirteen, finally resulted in a neighbor calling the police and the defendant and his brother being removed from the home and placed in separate foster care homes. (Vol. 9, R 1648) The abusive and neglectful treatment, and the ensuing placement in foster care, "negatively impacted the Defendant," the court concluded, resulting in Russ being "very frightened of his father as a child and increasingly angry and rebellious as he got older." (Vol. 9, R 1649) The court assigned this mitigation "moderate" weight. (Vol. 9, R 1649)

In mitigation, the trial court also specified Russ's "sever, long term addiction to drugs which he has been unable to conquer despite numerous attempts at rehabilitation," noting the defendant's acknowledgment of cocaine use starting at age twenty and, in the defendant's own words, a "progressive pattern of lying, cheating, and stealing, just to get more cocaine." (Vol. 9, R 1649) The court detailed Russ's efforts to address his addiction, including inpatient and outpatient treatment programs both in and out of custody, even attending Texas Tech University's substance abuse counseling program to become a counselor. (Vol. 9, R 1649) While clean from drugs, the court recounted, the defendant was earning a

good income as a roofer, and was "a fully contributing member of the household," until a few months before the crimes here, he relapsed into cocaine use, which escalated to a $500 to $600 per week habit, and continued, during the ten days prior to the murder, with the nonstop smoking of crack cocaine. (Vol. 9, R 1649) The court noted that no evidence had been presented as to what effect the defendant's cocaine usage and binging in the days prior to the murder had on his behavior, other than the fact that it "no doubt motivated the Defendant's actions and behavior on May 7, 2007." (Vol. 9, R 1650) The court concluded this mitigator was present and assigned it "some" weight. (Vol. 9, R 1650)

The sentencing order continued on to analyze various mitigation presented by counsel in the sentencing memorandum, finding that Russ's "expressions of remorse through his words, actions, and demeanor," including his desire to minimize further suffering by the victim's family and friends, "are genuine." (Vol. 9, R 1650) While amplifying the various circumstances of Russ's remorse, including his full acceptance of responsibility for and the consequences of his actions, the court, without further explanation, allocated it "moderate" weight in mitigation. (Vol. 9, R 1650) Also found as nonstatutory mitigation by the trial court were the defendant's multiple medical problems recorded by Texas and local correctional facilities ("very little weight" inasmuch as no evidence was presented

that any of these conditions affected his actions in the murder); Russ's capacity to form and maintain loving and caring relationships with both family and non-family members ("little weight"); the defendant's pursuit of higher education (substance abuse studies) and his labor skills as a roofer ("little weight"); his lack of any violent criminal history ("minimal value" and "little weight" "when viewed in the context of the facts in this case and [his] lengthy criminal history"); the defendant's appropriate courtroom behavior ("little weight'), and Russ's 1997 written expressions of gratitude to his scholarship donors for his college substance abuse education ("very little weight" as it "appears [such letters] were academically mandatory" and "not spontaneously generated"). (Vol. 9, R 1651-1653)

The court concluded that the aggravating circumstances outweighed the mitigating circumstances and sentenced Russ to death for the first-degree murder. (Vol. 9, R 1653) The court further sentenced him to three terms of life and one five-year term of imprisonment for the remaining four counts, all to run concurrently. (Vol. 9, R 1653-1654; 1658-1664)

Notice of appeal was filed. (Vol. 9, R 1669-1670) This appeal follows.

STATEMENT OF THE FACTS

The following facts regarding the crime and penalty considerations are derived from the testimony at the penalty phase trial (Vols. 10 & 11), and from the defendant's handwritten letter to the court dated May 15, 2008, (Vol. 2, R 199-206), which was introduced into evidence by the state at the penalty phase, and upon which the trial court relied extensively in its sentencing order. (Vol. 2, R 1641)

Around 10:30 p.m. on the evening of May 6, 2007, Longwood Police Officer Bradley Tollas observed a Jeep Cherokee in the parking lot of a closed business . (Vol. 10, T 45-46) Investigating, he approached the vehicle, seeing the driver and sole occupant, the defendant, David Russ, asleep inside. (Vol. 10, T 46-47)

Russ, a reformed cocaine addict, had been living in a loving, caring, contributing relationship with his fiancee, Kimberly Williams, her son, and her 80-year-old mother, but had relapsed and had been getting high for the few months previous. (Vol. 2, R 203) The last ten days leading up to the murder, Russ had been "24-7 non-stop getting high, smoking crack. No sleep, no food, no shower," when he had pulled into the parking lot, and fell asleep, with cocaine and a crack pipe in his center console. (Vol. 2, R 203)

Shining his flashlight into the car, Officer Tollas knocked on the window, and Russ responded to the officer's inquiry that he was okay. (Vol. 10, T 47-48; Vol. 2, R 203)[2] Upon the officer's request that he roll down the window, the defendant started his car and took off at a high rate of speed, with Officer Tollas in pursuit. (Vol. 10, T 48-50; Vol. 2 R 204) Russ recounted that he "was willing to do anything at the time to continue getting high." (Vol. 2, R 204) When the defendant was quite some distance from the pursuing office, he turned into the Meadows West subdivision, where the victim lived, slid to a stop, and, abandoning the vehicle, absconded on foot. (Vol. 10, T 50; Vol. 2 R 204)

When police caught up with the car, they observed it rolling slowly, prior to it coming to a complete stop. (Vol. 10, T 50-51) No one was found inside the vehicle and Russ was not located after a search of the immediate area near the car, which was abandoned approximately one block from Madeleine Leinen's home. (Vol. 10, T 51-52)

After fleeing on foot, the defendant spent the night on the rooftop of a house adjacent to the victim's, from which vantage point, he saw police tow his Jeep. (Vol. 2, R 204) Dressed only in shorts, a t-shirt and tennis shoes, with the weather

[2] Russ writes in his letter that he wishes he could tell the court that he did not remember the events, but he admits to remembering "most" of what he did. (Vol. 2, R 204)

cold, windy, and misting on that rooftop, he passed out. (Vol. 2, R 204) Russ awoke at dawn, and observed 58-year-old Madeleine Leinen leave for work. (Vol. 2, R 204) Russ acknowledges in his letter to the court that he chose Leinen for his victim "at that exact moment." (Vol. 2, R 204)[3]

The defendant entered Leinen's home where he ate, showered, laundered his clothes, and went through the house, packing jewelry, cash, and a credit card with what he believed to be a valid PIN. (Vol. 2, R 204) Needing transportation, he then awaited Leinen's return to take her automobile. (Vol. 2, R 205)

Madeleine Leinen returned home shortly after 6:00 p.m. via Sam's Club, where she had purchased both perishable and nonperishable items. (Vol. 10, T 146)[4] Frozen shrimp, which had been purchased at Sam's, had been placed in the freezer and other items purchased were found on a box in the garage and on the kitchen counter. (Vol. 10, T 134-135)

After killing the victim, the defendant took her car and drove to a credit union in Apopka, approximately a 20 minute drive from the Leinen home, where

[3] The defendant does not discuss any details of the murder in his letter (Vol. 2, R 203-205), so it is just as possible that, at this time, the defendant meant her as his victim for simply a nonviolent burglary and theft (his usual crimes to support his severe and expensive drug habit [Vol. 2, R 204-205]), which later escalated into the robbery and murder.

[4] The Sam's receipt, found on the kitchen counter, was printed at 5:35 p.m., and the victim was observed on video surveillance tapes exiting the store and approaching her car at

he was captured by a video surveillance camera at 6:46 p.m. unsuccessfully attempting to withdraw money from her account at the automated teller machine, the failed transaction receipt indicating an invalid PIN. (Vol. 10, T 138, 145, 157, 167-168) Russ next drove straight to a "crack neighborhood," where he purchased more crack cocaine and a pipe. (Vol. 2, R 205) Leaving Florida for Texas, he pawned Leinen's jewelry in various cities, purchasing still more crack cocaine along the way. (Vol. 2, R 205) Some of the jewelry was recovered at a pawn shop in Denton, Texas, where the defendant had pawned them on May 11, 2007. (Vol. 10, T 158-159)

On the morning of May 8, 2007, after being unable to contact her, a family friend went to the victim's home and, after forcibly entering the house by "popping" the door with a tire iron, discovered her body facedown on the floor of a hall bathroom, with her hands and feet bound and a rope ligature around her neck. (Vol. 10, T 104-110, 118-123) The friend had also noticed that Leinen's dog had defecated in the home, which was unusual, and that her car was missing. (Vol. 10, T 122, 124) He phoned 911 from the victim's home and the police responded. (Vol. 10, T 123-124)

5:37-5:38 p.m. (Vol. 10, T 146) The store was approximately 15-20 minutes from Leinen's home. (Vol. 10, T 145)

Police observed that Leinen was fully clothed, she was still wearing a gold chain and a large amount of other jewelry, including bracelets, rings, and a watch, and the home was neat, with no indication of a struggle. (Vol. 10, T 133, 165-166; Addendum to Supplemental Record, R 630) An empty knife slot was observed in the butcher block in the kitchen. (Vol. 10, T 134) There were no signs of blood anywhere in the home, except for the bathroom where the killing occurred and a footprint impression, presumably the defendant's, in the garage. (Vol. 10, T 133, 164-165)

The medical examiner observed injuries to the victim consistent with strangulation from the ligature, three lacerations to her scalp attributed to blunt force trauma, facial bruising, fractured ribs, and a dislocated clavicle, along with four stab wounds, three to the victim's back and one to the head. (Vol. 11, T 208-225) Cause of death was attributed to the multiple injuries, with the blunt force injuries, the stab wounds, and the ligature strangulation all "potentially and subsequently fatal." (Vol. 11, T 228) The injuries all occurred while Leinen was alive and would have been painful if conscious when inflicted, however, the medical examiner was unable to determine the duration of the attack or how soon she lost consciousness, as any of the injuries could have caused unconsciousness. (Vol. 11, T 218, 225, 227, 230, 234, 239) He did opine that the stab wounds likely

occurred quickly and unconsciousness typically would have occurred within 10-13 seconds, but that could have been shorter or longer. (Vol. 11, T 234, 239) No defensive wounds were observed and no foreign matter was found under her fingernails. (Vol. 11, T 232-233, 236-237)

The defendant was arrested in Denton, Texas, where the victim's car was also discovered abandoned. (Vol. 10, T 158-161)

Testimony revealed that Russ was raised by a neglectful mother and an extremely abusive and psychotic father. (Vol. 11, T 269-272, 274, 278-284) When the defendant and his brother, Aaron Russ, lived with their mother, she basically ignored them and "didn't raise us," requiring the young children to fend for themselves since she would sleep all day and stay out all night. (Vol. 11, T 274, 280, 284) When living with their father, they were constantly abused, both physically and mentally, "for as far back as I can remember," Aaron says. (Vol. 11, T 270-272, 278) Their father had a quick fuse and when he got mad at the defendant (often for no apparent reason), he would not just whip him, but "he beat him." (Vol. 11, T 270-272) On one occasion, when Russ and his brother were 4 or 5 years old, they were placed over an ottoman and "whipped . . . pretty good," then made to stand up against a wall from morning til night without moving. (Vol. 11, T 279) Russ's father was "crazy as hell." inventing new ways to whip them – with

switches, baseball bats, pots and pans, and garden hoses. (Vol. 11, T 280-281) These beatings and verbal abuse were not isolated incidents, but continued the whole time the boys were growing up and living with their father. (Vol. 11, T 271-272, 278, 280)

Their father regularly threatened to kill them, a threat they took seriously, living in constant fear of their father. (Vol. 11, T 281-282) David was the recipient of more of their father's abuse, including mental abuse, which clearly had a lasting effect on him. (Vol. 11, T 271-272, 287-288)

> Q: Could you see how the abuse had an effect on the children specifically David?
>
> A: Yes, it did. It really did. It had a real bad effect on him.
>
> Q: And how would you say that that it affected him?
>
> A: Well, he was scared, I mean, all the time.
>
> Q: Couldn't act perhaps like a normal kid could act around his parent?
>
> A: No, he sure couldn't. He made them get up in the morning, like when they wasn't in school, he'd make them go to work, work in bee hives and if they done anything wrong, he was just real mean.
>
> Q: Yes, ma'am. And this was a continuing pattern, not an isolated incident?

A: The whole time I was with him, the kids was with us, yes.

(Vol. 11, T 271) While his brother, Aaron, was able to forgive his father and get past the abuse, David, who feared his father all the time, never was able to do so. (Vol. 11, T 271-272, 287-288)

When David was thirteen years old and his father had him raking leaves, the father felt that David was not holding the rake correctly. This caused the father to jump on top of David wielding a stake and, while sitting on his back, beat him severely. The terror of this final beating before being moved to foster care, and its lasting effect on them, was recounted by brother Aaron:

> Q: Okay. Was there a particular incident when David was thirteen that stands out in your mind involving something to do with a rake and the way he was holding it? Can you tell us what happened there?
>
> A: We were working in the garden. . .
>
> Q: Take your time, Mr. Russ. If I ask for a little break, do you want one?
>
> A: Yeah. I'm all right.
>
> Q: You were working in the garden?
>
> A: He wasn't holding his rake right so daddy jumped on top of him with a stick with one of the bean poles, and sit on his back and started beating him down in the dirt.

I tried to help and daddy told me if I moved, he'd kill me. I just had to stand there and watch. I couldn't do nothing about it. That was the last whipping that I know that we ever took.

Q: What did he beat him with?

A: Stake that we used stake our pole beans in, had little tacks in it. He just . . .

Q: And as this was going on to David, you're standing there and your father is telling you if you move he'll kill you?

A: Yes, sir. I was going to get him with my rake and I just wasn't big enough.

Q: Is it true that --

A: I would have.

Q: Is it true that a neighbor witnessed this and called the police?

A: Yes, sir.

Q: What happened when the police got there?

A: We were removed from the home at that point.

Q: You were taken out?

A: Yes, sir.

Q: Where were you put?

A: I went to a foster home with some friends from high school, and at that point, I pretty much lost contact with David, but

I kept getting reports of him being in different homes, you know, and he would misbehave and that –

Q: So at this point, you guys are what, thirteen and fourteen? Around there?

A: Yes, sir.

Q: The mother's a mess, can't live with her?

A: Never heard from her. Didn't know where she was. She never tried to contact us.

Q: Was there some information that she was a prostitute at some point?

A: No, sir. I don't know. I think she was just very promiscuous.

Q: Can't be with her, you go try to live with your dad, he does what he does again, now you're separated and you're put into separate foster homes?

A: Yes.

(Vol. 11, T 282-284)

David Russ, effected by his father's extreme abuse, his mother's complete neglect and the separation from his brother into multiple foster homes, started exhibiting problems, which led him to his addiction. (Vol. 11, R 271, 274-275; Vol. 2, R 200) In David's words to the judge:

Your Honor,

When I was a young boy I was abused. I went to Foster Care for child abuse. I never adjusted from that point forward. I began

> to rebell (sic) in such a way that I would spend most of my adult life behind bars. I started using cocaine at the age of 20 years old. Yes, I am an addict.

(Vol. 2, R 200)

David Russ, with the help of rehab programs, was, for a time, able to put his addiction behind him, staying clean at one point for five years. (Vol. 11, T 275-277) Russ, after successfully completing one stint of rehabilitation, appeared on a television program in Texas about rehabilitating criminals. (Vol. 11, T 277-278) While sober, he was a good, caring man, a father figure to his fiancee, Kimberly William's son ("He became the father that he's never had . . . and my son fell in love with him"), with whom he spent a lot of time, including helping with his homework. (Vol 10, T 95-96) Not on drugs, Russ was a good provider, giving Williams his entire paycheck, helping with chores, raising her son, and caring for her elderly aunt (Vol. 10, T 94-97):

> Q: Prior to that relapse, had he been giving you all of his money?
>
> A: Yes.
>
> Q: He worked steadily?
>
> A: Yes.
>
> Q: He would come home and give you his paycheck?

A: He gave me his paycheck.

* * *

Q: Before that time [his relapse], was he helping you with the household chores and things of that nature?

A: Oh, yeah. He was -- David was wonderful before this. He helped cook, he cleaned, he did laundry, he helped me with my son, you know, he was, he was good before this.

(Vol. 10, T 95-97)

Russ recounts his struggle with addiction and many attempts, successful for a while, at beating the addiction, but invariably and eventually falling again:

Yes, I am an addict.

I have been given more opportunities than most criminals and addicts ever dreamed of.

I have been in various treatment programs through the years. Inpatient - Outpatient. AA-NA-CA-EA 12 Step Groups. In jails, prisons and out in society. I have been sponsored by incredible people who have recovered. Sponsor money couldn't even buy. I have received one on one counseling, group counseling et-cetra. I even attended Texas Tech University to become a counselor, to no avail.

Your Honor, each time, I chose drug use over the blessings in my life. A progressive pattern of lying, cheating, stealing just to get more cocaine. Self destructive and other destructive behavior.

Each time I would end up in jail and prison. Burglaries were my main source of income when feeding my addiction . . . . Eight prison terms, Judge Alva.

This the final sentencing will be number nine.

There are many men and women in society whom have overcome abuse as a child. Went on to become successful and free. No excuse! Not a victim any longer.

There are legions of men and women who have recovered from addiction. they have years of being clean and sober. No excuse! They wanted sobriety more than I myself did.

Yes, I suffered a head injury when I was younger. That is most certainly no excuse!

I knew what to do to remain sober. I chose cocaine over sobriety. The only huge difference is that this time I murdered an innocent human being. She, Madeleine is the victim. NOT DAVID RUSS.

(Vol. 2, R 201-202)

SUMMARY OF ARGUMENTS

Point I. The court erred in failing to follow the required procedure where a defendant waives the presentation of mitigation, failing to require the presentation and consideration of additional mitigation. Failure to do so renders the death sentence unconstitutional.

Point II. The trial court erred in making its findings of fact in support of the death sentence where the findings were insufficient, where the court failed to consider appropriate mitigating factors, where the court erroneously found inappropriate aggravating circumstances, and where a comparison to other capital cases reveals that the only appropriate sentence in the instant case is a life sentence.

ARGUMENT

POINT I.

THE TRIAL COURT FAILED TO FOLLOW THE REQUIRED PROCEDURE WHERE A DEFENDANT WAIVES THE PRESENTATION OF MITIGATION, AND AFFIRMATIVELY IGNORED VALID MITIGATION, RENDERING RUSS'S DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9, 16, AND 17 OF THE CONSTITUTION OF FLORIDA.

David Russ, fully accepting responsibility for the murder and expressing shock that he was capable of such an act while under the influence of his severe crack cocaine addiction, pleaded guilty to the first degree murder and other attendant charges, and waived a sentencing jury and his counsel's presentation of mitigating evidence. (Vol. 2, R 200-206, 245-247; Vol. 12, T 426-448, 476) *Russ asked the court to review and consider the mitigation*, but he accepted responsibility for his crime and did not wish to put the victim's family through the extra ordeal and emotion of a penalty phase trial. (Vol. 12, T 476)

Recognizing the prerequisite that it consider all possible mitigation and this Court's requirements with regard to that consideration, the trial court held a waiver hearing at which it had defendant's counsel proffer all of the mitigation evidence it had so far uncovered, *see Koon v. Dugger*, 619 So.2d 246, 249-50 (Fla. 1993);

appointed special court counsel for the presentation of all available mitigation evidence, *see Klokoc v. State*, 589 So.2d 219 (Fla.1991) (court may call its own witnesses in mitigation and/or appoint special counsel to do so); and ordered an extensive PSI, *see Muhammad v. State*, 782 So.2d 343, 363-364 (Fla. 2001), including "the issues of the Defendant's family background, any prior mental health or current . . . prior or current mental health problems will be addressed, including any prior hospitalizations, if there are any, any school or military records be included or addressed as part of the PSI." (Vol. 12. T 535-536)

However, having been alerted by those safeguards to the existence of additional mitigation not presented by special counsel, the trial court failed to require the presentation of that additional mitigation to assure consideration of *all* mitigating evidence, as required by case law and the constitutions. In *Muhammad*, *supra*, this Court stated unequivocally that if these safeguards (there, the PSI and accompanying records) "alert the trial court to the probability of significant mitigation," the trial court has the ability to conduct "an independent examination into the possible existence of evidence in mitigation," call the persons with mitigating evidence as its own witnesses, or have special counsel present the additional mitigation. *Muhammad v. State*, 782 So.2d at 364 and fn. 13(citing with approval *Morrison v. State*, 373 S.E.2d 506, 509 (Ga. 1988). *See also*, *Robinson v.*

State, 684 So.2d 180 (Fla. 1996) (failure of trial court to consider additional mitigation suggested by the PSI error).

Here, the PSI suggests that Russ has been diagnosed with and treated for mental illness (Addendum to Supplemental Record, R 638), a fact confirmed by the Texas Prison Medical Records' statement that Russ suffered from "disorganized" thought processes. (Vol. 8, R 1405) The PSI also takes note of statements from the defendant's mother, Beth Webster (not called as a witness by special counsel) of suspected mental health issues stemming from Russ being severely beaten by his father nearly half his life. (Addendum to Supplemental Record, R 638, 639), and a history of head trauma, with loss of consciousness and seizures (Addendum to Supplemental Record, R 638). Further, there exists a proffer in the record regarding a 1978 (when the defendant was sixteen) psychological evaluation and a history of mental illness in his immediate family. (Vol. 12, T 507, 512-513). Yet details and available diagnoses were not presented nor inquired into by the court prior to its minimalization in its sentencing order of any medical history as mitigation.

This Court has long recognized the scientific fact that severe head trauma can produce brain damage that can mitigate a murderer's punishment to life, and the need to inquire into the effects of that trauma during the death penalty

consideration. *See, e.g.*, *Ragsdale v. State*, 798 So.2d 713 (Fla. 2001); *Carter v. State*, 560 So.2d 1166, 1168 (Fla. 1990); *Knowles v. State*, 632 So.2d 62, 67 (Fla. 1993); *Mason v. State*, 489 So. 2d 734, 736 (Fla. 1986). Yet, here was indication of multiple head trauma, which the trial court failed to examine the evidence in any detail, merely stating in its sentencing order that "there was no evidence any of these medical conditions affected the Defendant's actions on May 7, 2007, or played any role in the muder of Madeleine Leinen." (Vol. 9, R 1651)

Nor was there any inquiry by the court as to the mental health issues noted by the PSI and medical records and defense counsel's proffered mitigation, as would be required to "ensure reliability, fairness, and uniformity in the imposition of the death penalty in these rare cases where the defendant waives mitigation." *Muhammad v. State*, 782 So.2d at 363. Of what import is requiring a "comprehensive" PSI, as required by *Muhammad*, if the trial court is free then to ignore the contents of it and not elicit further testimony regarding the probability of this mitigation? *Id.* at 364 (faulting the court for not requiring that the "readily available . . . records from hospitalizations" regarding the mental mitigation be "presented at the penalty phase.")

Further and quite importantly, the trial court had been placed on notice by the defendant's counsel, prior to Russ's waiver of his counsel's presentation of that

evidence, of some twenty areas of mitigation and expert rebuttal of potential aggravators, the vast majority of which were not presented by the court's special counsel, nor inquired into or considered by the court. The court should have been alerted to and inquired further at penalty phase into the probability of significant additional mitigation catalogued by the proffer, to-wit:

1. Numerous witnesses, including defense expert, Dr. Day, regarding Russ's extreme and genuine remorse – *No testimony from Dr. Deborah Day presented or considered*;

2. Testimony, including that of jail officials, regarding Russ's volunteering on over fourteen occasions for Operation Right Track Program in jail, speaking to juvenile offenders, and the officials' appreciation and request for continuing involvement (and possibly developing testimony from some of the juveniles involved as to the defendant's impact on them) – *No testimony, evidence or consideration regarding Russ's considerable involvement in this program*;

3. Witnesses, including his mother, Beth Webster, and his sister, Melissa, to the defendant's "horrific" beatings as a child by his father for no apparent reason, and to the mother's beatings while pregnant with Russ – *Neither Beth Webster nor sister Melissa called to testify, despite their relevant knowledge*;

4. Evidence of mental illness in the defendant's family, including his father – *No evidence presented or considered*;

5. Evidence of psychological torture from his father, including the testimony of Russ's half-sister, Mickey – *This witness not examined*;

6. Testimony regarding Russ's movement from foster home to foster home – *Only brief mention by brother of several foster homes, without details or potential impact on defendant*;

7. Copies of a psychological evaluation from 1978 when he was sixteen – *Not presented or considered*;

8. Family member testimony, including Russ's sisters and his former wife, Amelia Austin – *Witnesses not presented or examined*;

9. Testimony of the defendant's former youth baseball Coach Thomason from Polk County about Russ's father beating the defendant for playing poorly – *Testimony or consideration lacking*;

10. Testimony of Russ's two former step-mothers, Marie and Jill – *While special counsel did call Marie Jackson, no inquiry of Jill*;

11. Testimony of the retired professor from Texas where the defendant was enrolled in the Study of Addictions program – *While some evidence of defendant's enrollment in the program and his thank-you notes to sponsors (which the court*

rejected as "mandatory" and "not spontaneous"), no witness testimony of his progress in the program;

12. Evidence of Russ's efforts at rehabilitation – *Only slight mention was made of repeated attempts at drug rehabilitation by Aaron Russ, with no details as to his successes and remaining clean for nine years or more, or the effects of his drug addiction on the defendant or the crime*;

13. Witnesses from the Prison Ministry – *None presented*;

14. Presentation of a television broadcast of Russ speaking of the dangers of drug usage at the behest of an Austin, Texas city councilman – *Only bare mention made by brother of some unidentified television program on which the defendant was featured regarding rehabilitation*;

15. Employment accounts that Russ was a good employee at a roofing company until he experienced his drug problems – *Only mention from fiancee that Russ was working and contributing income to the household, prior to this final relapse*;

16. Testimony regarding his employment at One Source Roofing in Florida just prior to this crime – *No employer testimony was considered*;

17. Georgia prison records indicating head injuries while imprisoned there – *No records from Georgia presented*;

18. Testimony of psychologist Dr. Deborah Day pertaining to the psychological impact of Russ's upbringing and his ability to function into adulthood – *Dr. Day never presented, examined, or considered by the court*;

19. Testimony of former girlfriends, Anita Scott (with whom Russ lived about six months prior to the murder) and Kimberly Williams (his fiancee at the time of the killing) – *Only cross-examination by special counsel of Williams, who was called by the state; Anita Scott not called or considered*;

20. Records regarding Russ's injuries and 10-day hospitalization following a car accident in South Dakota – *No evidence presented or considered by the court*.

21. Rebuttal of aggravating factors of HAC and CCP by expert witness and forensic pathologist Dr. Marraccini – *Not presented by special counsel*.

(Vol. 12, T 504-523, 525-526, 530)

As outlined above (and by defense counsel's proffer to the trial court), this plethora of evidence of probable mitigation, to which the trial court had been alerted, was not investigated further, presented, or considered by the trial court; evidence highly relevant in determining the appropriateness of a death sentence in Florida, and mandated by our state and federal constitutions. This Court has recently reaffirmed that "the trial court and this Court each has a constitutional obligation to ensure that a capital defendant receives individualized sentencing and

that the death penalty is fairly and constitutionally imposed," *Barnes v. State*, ___ So.3d ___, 2010 WL 375049, 12-13 (Fla. February 4, 2010).

As noted in *Barnes*,

> A plurality of the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153 (1976), instructs us that "[t]here is no question that death as a punishment is unique in its severity and irrevocability." *Id*. at 187. Further, as that Court noted,
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> > [T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.
>
> *Gregg*, 428 U.S. at 195. We also recognize that the death penalty "is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense." *Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part).

Barnes v. State, *supra*. The *Barnes* Court noted that appointment of mitigation counsel in a case where the defendant essentially refuses to provide any mitigation evidence, was intended to provide such a safeguard and thereby ensure that the sentencing judge was apprised of adequate and relevant information upon which

she could make a reasoned decision concerning the applicability of the death penalty. This was proper in order to ensure that the severe and irrevocable penalty of death, if imposed, would be justified and not be imposed in an arbitrary or capricious manner. Noting the requirement of individualized sentencing in capital cases required by the Eighth and Fourteenth Amendments to the United States Constitution, *Barnes* cites to *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Kansas v. Marsh*, 548 U.S. 163 (2006), in reiterating that in order for a trial court to carry out its duty to give each capital defendant the individualized sentencing that the Constitution requires, the court must require presentation of mitigation where a defendant essentially refuses to present any evidence of mitigation. Presentation of mitigation in such a case also allows this Court also to carry out its obligation to determine if the death sentence is proportionate. As this Court explained in *Muhammad v. State*, 782 So.2d at 364-365:

> In all capital cases, this Court is constitutionally required 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." This case provides a perfect example of why the defendant's failure to present mitigating evidence makes it difficult, if not impossible, for this Court to adequately compare the aggravating and mitigating circumstances in this case to those present in other death penalty cases.

However, despite the attendant difficulty, this Court has recognized and accepted the necessity of the trial court and this Court's separate constitutional obligations to ensure that a capital defendant receive that individualized sentencing and that the death penalty is fairly and constitutionally imposed, notwithstanding a defendant's attempts at waiver of presentation of mitigation. *Barnes*, *supra*; *Muhammad*, *supra*, *Robinson*, *supra*.

Because of the safeguards necessary to ensure that the death sentence is a justified response to a given offense, and because the results of those safeguards were ignored by the trial court in determining the appropriate sentence in this case comports with due process and individualized and proportionate sentencing, highly relevant, potential mitigation was not properly considered by the trial court.

> The rights, responsibilities and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence. A defendant cannot be executed unless his guilt and the propriety of his sentence have been established according to law.

Hamblen v. State, 527 So.2d 800, 804 (Fla. 1988). The trial judge failed to adequately fulfill that function on her own by failing to require additional examination into the missing mitigation suggested by defense counsel's proffer, the PSI and the prison records, a requirement constitutionally necessary to thereby

protect society's interest in seeing that the death penalty was not imposed improperly. *Hamblen, supra.*

Thus, the defendant's death sentence must be vacated and the case remanded for a new penalty phase wherein the trial court requires the presentation of *all* potential mitigating evidence with regard to the appropriate and legal sentence suggested by the record. *See also Farr v. State*, 621 So.2d 1368, 1369 (Fla. 1993); *Hauser v. State* 701 So.2d 329, 331 (Fla. 1997) (wherein the trial court fulfilled this obligation by giving full consideration to, *and accepting as proven*, the proffered mitigation).

POINT II.

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL.

Russ's sentence of death must be vacated. The trial court found a improper aggravating circumstances, and abused its discretion by failing to consider (or improperly minimizing the weight given to) highly relevant and appropriate mitigating circumstances and in finding that the aggravating circumstances outweighed the mitigating factors. These errors render the defendant's death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Art. I, §17 of the Florida Constitution.

Aggravating circumstances must be proven beyond a reasonable doubt to exist and review of those factors is by the competent substantial evidence test. Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court must find as mitigating that factor. Review of the weight given to mitigation is subject to the abuse-of-discretion standard. *Merck v. State* 975 So.2d 1054, 1065-1066 (Fla. 2007); *Cole v. State*, 701 So.2d 845, 852 (Fla. 1997). Factual errors in a sentencing order are subject to a harmless error analysis. *See Merck v. State, supra* at 1066 n. 5; *Lawrence v. State*, 846 So.2d 440, 450 (Fla. 2003); *Hartley v. State*, 686 So.2d 1316, 1323 (Fla. 1996). This Court's

proportionality review, being a question of law, must be *de novo*. *See Blanco v. State*, 706 So.2d 7 (Fla. 1997) (whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court); *Harvard v. State*, 375 So.2d 833 (Fla. 1977) ("When the sentence of death has been imposed, it is this Court's responsibility to *evaluate anew* the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." [*citing State v. Dixon*, 283 So.2d 1 (Fla. 1973)]).

A. The Trial Court Considered Inappropriate Aggravating Circumstances

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*, *supra* at 9. The state has failed in this burden with regard to two of the aggravating circumstances found by the trial court, that of CCP and HAC. The court's findings of fact, based in part on matters not proven by substantial, competent evidence beyond a reasonable doubt, do not support these circumstances and cannot provide the bases for the death sentence.

The court erred in finding the aggravating circumstance of Cold, Calculated, and Premeditated. Four elements must be satisfied to support a finding of CCP. The murder must have been the product of cool and calm reflection and *not an act prompted by emotional frenzy or panic*. Furthermore, the ***murder*** must have been

the product of a *careful* plan or *prearranged* design to commit *murder* before the fatal incident. The murder must also have resulted from *heightened* premeditation – i.e., premeditation over and above what is required for unaggravated first-degree murder. And finally, there must not have been any pretense of legal or moral justification for the murder. *See Walls v. State*, 641 So.2d 381, 388-89 (Fla.1994).

CCP focuses on the defendant's state of mind, intent and motivation. *Spano v. State*, 460 So.2d 890 (Fla. 1984); *Hansbrough v. State*, 509 So.2d 1081 (Fla. 1987). Thus, this test must evaluate the mental state of the perpetrator rather than looking merely at the manner of the killing. *Banda v. State*, 536 So.2d 221, 225 (Fla. 1988); *Johnson v. State*, 465 So.2d 499, 507 (Fla. 1985); *Mason v. State*, 438 So.2d 374 (Fla. 1983); *Cannady v. State*, 427 So.2d 723 (Fla. 1983).

This Court has adopted the phrase "heightened premeditation" to distinguish this aggravating circumstance from the premeditation element of first-degree murder. *Porter v. State*, 564 So.2d 1060,1064 (Fla. 1990). The CCP statutory aggravator applies to "murders more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first-degree murder." *Porter v. State*, 564 So.2d 1060, 1064 (Fla. 1990). For example, CCP applies in those murders that are characterized as execution or contract murders or witness-elimination murders. *Mahn v. State*, 714 So.2d 391, 398 (Fla. 1998), citing

to *Herring v. State*, 446 So.2d 1049, 1057 (Fla. 1984) and *Hansbrough v. State*, 509 So.2d 1081, 1086 (Fla. 1987).

Where the evidence as to this aggravator is circumstantial, the evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor." *E.g.*, *Mahn v. State*, 714 So.2d 391, 398 (Fla. 1998) citing to *Geralds v. State*, 601 So.2d 1157 (Fla. 1992), and *Eutzy v. State*, 458 So.2d 755 (Fla. 1984). For this factor to exist, it must be proven beyond a reasonable doubt to be the "product of cool and calm reflection." This aggravating factor does not apply to a situation where the killing was an act prompted by emotional frenzy, panic, or fit of rage. Rather, the killing must be the product of cool and calm reflection prior to the killing. *Richardson v. State*, 604 So.2d 1107 (Fla. 1992).

The murder in the instant case was not the product of a deliberate plan formed through calm and cool reflection. Rather, the evidence is entirely consistent that it was instead prompted by panic or rage.

The only matters cited by the court regarding CCP are based not on facts, but entirely on speculation. First, the trial court incorrectly states that blood droplets were found in the garage, hence "common sense" indicates that he first attacked the victim in the garage and then moved her to the bathroom where he killed her. (Vol. 9, R 1647) However, the testimony of the crime scene

investigator does not support the trial court's finding, in fact, it supports the exact opposite: Robert Jaynes testified that the blood discovered in the garage was not blood droplets from a potential attack of the victim, but rather "a footwear impression" presumably from the defendant's shoes (Vol. 10, T 164-165), and hence made *after* the spill of blood, only found in the bathroom.

The court seems to also conclude that CCP exists because there was no sign of a struggle anywhere in the house. (Vol. 9, R 1647) Rather, that fact makes it more reasonable to conclude that no CCP exists here. The CCP factor has been found based on facts showing that the defendant had ample time to reflect on the planned killing where he held the victim for an extended period of time and moved her from one location to another. *See, e.g., Nelson v. State*, 850 So.2d 514 (Fla. 2003) (defendant drove victim around in the trunk for hours, driving from location to location); *Knight v. State*, 746 So.2d 423, 436 (Fla. 1998) (finding that "[e]ven if Knight did not make the final decision to execute the two victims until sometime during his lengthy journey to his final destination, that journey provided an abundance of time for Knight to coldly and calmly decide to kill"); *see also Connor v. State*, 803 So.2d 598, 611 (Fla. 2001) (affirming CCP where the trial court's finding included the fact that Connor hid victim for one whole day before killing her). Here, on the other hand, there was no evidence of a struggle in any

room other than the bathroom (Vol. 10, T 133, 165-166), where she was killed, it is entirely consistent that she was first encountered there and tied up and killed without any extended time for reflection on the killing. The entire encounter with the victim could only have lasted a rather short period of time as contrasted to these other cases, showing a much lesser time for any reflection about the killing. Testimony indicated that, due to the Sam's receipt and video surveillance and the drive time to her home, the victim could not have arrived until some time after 6:00 p.m. (Vol. 10, T 135-145) And, due to the drive time (20 minutes) from her home to the Credit Union ATM where Russ attempted to use her credit card at 6:46 p.m., he would have had to have left the Leinen home no later than twenty minutes after the victim's arrival there, rather than the hours present in those cases cited above wherein CCP was found based upon the time and movement of the victim involved.

Moreover, the court finds this aggravator on the premise that Russ selected his victim "early that morning" (presumably based entirely on a statement to that effect in his letter to the judge). (Vol. 9, R 1647; Vol. 2, R 204) However, while the defendant admitted that he waited for the victim to return home (in order to procure her car, the evidence shows) and the killing was "premeditated," this does not establish the heightened premeditation required for this factor. His statement

that he selected her as his victim can show that, at that time, he intended her only as the victim of a burglary and theft or robbery; it does not establish conclusively that he contemplated murder at that stage. This circumstance does not apply if the only plan was to commit the underlying felony; the plan would have to also include the commission of the murder for it to apply. *See Guzman v. State*, 721 So.2d 1161 (Fla. 1998); *Pomeranz v State*, 703 So.2d 465 (Fla. 1997); *Barwick v. State*, 660 So.2d 696 (Fla. 1995). The plan for the murder must be before the killing. *Nelson v. State*, 850 So.2d 514 (Fla. 2003); *Jackson v. State*, 648 So.2d 85 (Fla. 1994). That preplanning is simply not shown to exist here, beyond a reasonable doubt. His statement and the evidence is entirely consistent with only a prearranged plan to burgle and steal, and not to include the killing.

Further, the physical evidence shows that the victim still was wearing vast amounts of jewelry, including a gold chain and a watch (Vol. 10, T 165-166), items left behind that indicate that the killing was done in a quick, frenzied manner, devoid of the time for reflection to remove these items of value from the victim. Hence, it does not appear from this evidence that the killing was planned and accomplished in a reflective manner. The murder in the instant case was not the product of a deliberate plan formed through calm and cool reflection. *See Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987). Rather, the evidence is entirely

consistent that it was instead prompted by panic or rage during the theft or robbery. *See Hansbrough v. State*, 509 So.2d 1081 (Fla. 1987) (No CCP, because no heightened premeditation or calm reflection, where a robbery got out of hand; frenzied stabbing of the victim does not demonstrate the cold and calculated premeditation).

Moreover, the uncontroverted evidence is that the defendant was high on crack cocaine, having binged "24-7 non-stop" on the drug, without sleep or food for the previous ten days, facts which militate against the finding of this factor, preventing the calm, cool, reflection necessary for a CCP killing. In *Almeida v. State*, 748 So.2d 922 (Fla. 1999), this Court rejected the finding of CCP where the defendant was drunk. The Court concluded the killing was impulsive and not planned or prearranged. A defendant under the influence of excessive drugs or alcohol use may be deemed incapable of forming the degree of premeditation required for the CCP factor. *White v. State*, 616 So.2d. 21 (Fla. 1993). The "coldness" or the "calm and cool reflection" element is not present in these cases where the defendant cannot form the requisite intent. *Richardson v. State*, *supra*.

Hence, the aggravating circumstance of CCP must be stricken.

So, too, for the factor of heinous, atrocious, or cruel. This Court first 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. The present killing of Leinen happened too quickly, with unconsciousness surely occurring

within seconds of the first blow to the victim; there is no substantial suggestion that the defendant *intended* to inflict a high degree of pain or otherwise torture the victim *Contrast, e.g., Douglas v. State,* 575 So.2d 165, 166 (Fla. 1991) (torture-murder involving heinous acts *extending over four hours*). As indicated above with regard to CCP, the entire encounter with the victim was proven to occur only in the hall bathroom and, including the complex series of knots binding of the victim (as recounted by the trial court) was quite brief (as opposed to the four-hour time frame in *Douglas*).

Where a victim experiences the torturous anxiety and fear of impending death, it has been held that HAC may focus on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death. *Barnhill v. State,* 834 So.2d 836, 849-50 (Fla. 2002). The level of anxiety or fear required for a finding of HAC has been termed "aggravated terror." *See Rimmer v. State*, 825 So.2d 304, 328, n. 22 (Fla. 2002). The evidence of anxiety and fear of impending death must be more than speculation: *e.g., Ferrell v. State*, 686 So.2d 1324, 1330 (Fla. 1996), where the court declared that speculation that the victim may have realized that the defendants intended more than a robbery when forcing the victim to drive to the field is not sufficient to support HAC. Similarly, HAC was not found where the two robbery victims' hands were bound, and they were

told to lie on the floor. Both victims were shot in the head, before the defendant left the scene. The court concluded that while the victims no doubt experienced fear during this criminal episode, it was not the type of fear, pain, and prolonged suffering that this Court has found to be sufficient to support this aggravating circumstance. *Rimmer v. State*, 825 So.2d 304, 328 (Fla. 2002).

Telling here to this lack of foreknowledge is the total absence of defensive wounds or of a struggle, factors normally found to show the suffering and knowledge of death. 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*. *See also Brown v. State*, 721 So.2d 274, 277 (Fla. 1998) (while *Brown* involved a knife attack that only lasted a few minutes; particularly important to the finding of HAC was the fact that the victim had defensive wounds evidencing the suffering and fear of death).

Without signs of a struggle or defensive wounds, HAC and the victim's prolonged suffering or foreknowledge of death is based entirely on speculation and, as a result, cannot be upheld. A finding of HAC will always depend on whether the victim was conscious and aware of what was occurring during and/or leading up to the homicide episode. When the victim becomes unconscious, the circumstances of further acts contributing to his death, even if those acts would have been painful had the victim been conscious, cannot support a finding of HAC.

Herzog v. State, 439 So.2d 1372 (Fla. 1983). Hence, HAC was not found in a strangulation murder where evidence supported the defendant's "statement that the victim may have been semiconscious at the time of her death." *Rhodes v. State*, 547 So.2d 1201 (Fla. 1989). In contrast with *Rhodes* and the instant case, the Court in *Reynolds v. State* 934 So.2d 1128, 1155 (Fla. 2006), found HAC appropriate because the existence of a struggle and defensive wounds showed suffering and a foreknowledge of death, where testimony of the medical examiner established that both of the victims exhibited defensive wounds, indicating that they were conscious during some part of the attack and attempting to ward off their attacker. Additionally, in *Reynolds* the medical examiner testified that the evidence indicated that there had been a "violent struggle" during the attacks, again establishing that the victims were aware of the attack and attempting to defend themselves. Moreover, the medical examiner testified that the wounds to the victim's torso were consistent with being "torment wounds"-wounds that are intended to cause aggravation and to scare the victim.

Such factors are not present here, just as they were not in *Rhodes*, *supra.* The lack of defensive wounds and the absence of any signs of a struggle support the rapid loss of consciousness of the victim, which could have occurred almost immediately upon the first blow being struck. (Vol. 11, T 225, 230, 234, 239-240)

See Elam v. State, 636 So.2d 1312 (Fla. 1996) (HAC not found where victim was repeatedly struck in the head with a brick, but the victim was rendered unconscious in a very short period of time.)

Additionally, any heinousness in the actions causing the victim's death obviously were the result of the extreme effects of the defendant's crack cocaine binge. This Court has reversed a death sentence where the heinousness of the murder resulted from drug and alcohol intoxication, preventing the defendant from intending to cause or enjoyment of pain and suffering. *Holsworth v. State*, 522 So.2d 348 (Fla. 1988). The ten-day, non-stop crack cocaine binge here surely compares to that in *Holsworth*, preventing it applicability here.

The state has not proven HAC beyond a reasonable doubt and this aggravating factor, too, must be stricken.

B. Mitigating Factors Are Present Which Outweigh Any Appropriate Aggravating Factors; The Death Sentence Is Disproportionate.

In *Campbell v. State*, 571 So.2d 415 (Fla. 1990), this Court reiterated the correct standard and analysis which a trial court must apply in considering mitigating circumstances presented by the defendant, reminding 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 exists to reasonably support a mitigating factor (either statutory or non-statutory), the court *must* find it as mitigating. In *Trease v. State*, 768 So.2d 1050 (Fla. 2000), though, this Court recognized that there are some circumstances where a mitigating circumstance may be found to be supported by the record for additional reasons or circumstances unique to that case, but be entitled to no weight. However, it still must be considered by the sentencer.

For a trial court's weighing process and its sentencing order to be sustained, that weighing process must be detailed in the findings of fact and must be supported by the evidence. The trial judge should expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. The court *must* find as a mitigating circumstance each proposed factor that is mitigating in nature. This is a question of law. *Campbell v. State*, *supra*. 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 the competent substantial evidence standard;

> (3) The weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard.

Blanco v. State, 706 So.2d 7 (Fla. 1997); *Cave v. State*, 727 So.2d 227 (Fla.1998).

The trial court's sentencing order here totally fails to meet this standard necessitated by the capital sentencing scheme. The trial court glossed over the mitigating factors and improperly abused its discretion in giving them little weight, with no explanations why. Such an explanation appears to be crucial in upholding lesser weight given to clear mitigation. For example, in *Merck v. State* 975 So.2d 1054, 1065 (Fla. 2007), the Court found the trial judge's assignments of weight to the established mitigating factors did not appear unreasonable or arbitrary given the entirety of the evidence presented and the trial court's detailed explanation of his reasons for finding that the mitigating circumstance of Merck's alcoholism and his alcohol consumption on the night of the murder merited only little weight.

Here, however, the trial court found that the defendant clearly suffered extreme physical and mental child abuse at the hands of his father, beatings with pots, pans, a baseball bat, a garden stake, and a hose, with clear uncontroverted testimony that it affected the rest of his life. The court also found, based on uncontroverted evidence, that Russ suffered from severe, long-term addiction, smoking crack cocaine non-stop prior to the crimes. When the defendant was not

under the influence of his addition, when he was able to beat his addiction for an extended period of time, Russ was not a cold-blooded killer; rather, he was a loving, caring, family man, kind to his fiancee's ailing elderly aunt and son, a contributing member of the household, holding a roofing job and performing chores at home, giving his entire paycheck to his fiancee for household bills. In short, Russ is a much different human being than that exhibited during this crack cocaine crime spree, when the drugs control him. He is incapable of this type of crime when sober; here, it clearly was the drugs controlling his actions. He expressed genuine remorse for the killings, shock at being able to engage in such a killing while on drugs, and a desire to not put the victim's family through a prolonged trial.

Here, unlike *Merck*, the court did not explain at all why, findings these mitigating circumstances, it had not given it more weight to them than "moderate" (abusive childhood), "some" (addiction to drugs), "moderate" (remorse), "little" (head trauma), "little" (loving and caring individual when not under his addiction), and "little" (hardworking when able to maintain a drug-free life). As a result, the trial court's weighing of this mitigation appears unreasonable or arbitrary given the entirety of the evidence presented. *See, e.g., Offord v. State*, 959 So.2d 187 (Fla. 2007), where despite the trial court only giving "some weight" and "moderate

weight" to the mental mitigation evidence presented (*see Initial Brief of Appellant, Offord v. State*, SC05-1611, p. 2), this Court vacated the death sentence finding Offord's mental issues underlying the impaired capacity and extreme mental disturbance factors to be quite compelling and thus entitled to much greater weight.

Russ's will was so overborne by his drug abuse as to render the death penalty disproportionate. Mitigating considerations that have consistently and historically been deemed to be "significant" exist here. For instance, in *Mahn v. State*, 714 So.2d 391 (Fla. 1998), this Court reversed two death sentences and remanded where the trial judge applied the wrong legal standard in concluding that the defendant was not under the influence of drugs or alcohol when murders were committed. Citing *Ross v. State*, 474 So.2d 1170, 1174 (Fla. 1985), the court noted that a defendant's past drug and alcohol abuse problems are "collectively . . . a significant mitigating factor" even though the defendant testified he was "cold sober" on the night of the murder." *Mahn*, 714 So.2d at 401. The evidence here shows that, rather than being cold sober, David Russ was in the acute stage of craving for crack cocaine, and that his actions were motivated solely by his addiction to that controlled substance.

This mitigating circumstance has been found to justify a life sentence. *See Kramer v. State*, 619 So.2d 274 (Fla. 1993) (death sentence disproportionate where

suffered from alcoholism and under influence of mental or emotional stress – held to be substantial); *Nibert v. State*, 574 So.2d 1059 (Fla. 1990) (drinking heavily at time of murder part of basis for substantial mental mitigation). *See also Jackson v. State*, 704 So.2d 500 (Fla. 1997) (wherein the Court reversed a death sentence where the trial court had merely found expert testimony "non-credible," without explaining why it had rejected the expert testimony); *Ferrell v. State*, 653 So.2d 367, 371 (Fla. 1995) (wherein the Court remanded for resentencing, emphasizing that a trial judge must expressly evaluate all of the mitigators proposed in light of the evidence and must detail the results of his weighing process).

Proportionality review of death sentences derives in part from due process considerations that flow from the nature of this "uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties . . . . 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." *Urbin v. State*, 714 So.2d 411, 417 (Fla.1998) (quoting *Tillman v. State*, 591 So.2d 167, 169 (Fla.1991)). "In conducting its proportionality review, this Court must compare the totality of the circumstances in a particular case with other capital cases to determine whether death is warranted in the instant case." *Rimmer v. State*, 825 So.2d 304, 331 (Fla.2002) (citing *Bates v. State*, 750 So.2d 6 (Fla.1999);

Urbin, 714 So.2d at 416). This entails "a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." *Urbin*, 714 So.2d at 416; *Deparvine v. State* 995 So.2d 351, 381 (Fla. 2008).

In the comparable case of *Robertson v. State*, 699 So.2d 1343 (Fla.1997), the Court held that the death sentence was disproportionate where Robertson committed an unplanned murder by strangling a young woman he believed had befriended him. Although two weighty aggravators applied (that the murder was committed during the course of a burglary and HAC), the Court noted that substantial mitigation was presented in the case, including the fact was under the influence of alcohol and drugs at the and had an abused and deprived childhood. *Id.* at 1347.

In *Livingston v. State*, 565 So.2d 1288 (Fla.1988), this Court held that a death sentence was disproportionate where the trial court found three aggravators (i.e., prior violent felony, committed during armed robbery, and committed to avoid or prevent arrest) and two mitigators (i.e., Livingston's age of seventeen and his "unfortunate home life and rearing"). *Id.* at 1292. This Court explained that Livingston suffered "severe beatings by his mother's boyfriend who took great

pleasure in abusing him while his mother neglected him." *Id.* Additionally, there was evidence that Livingston extensively used cocaine and marijuana. *Id.*

Similar facts in other cases have resulted in a strong finding of this mitigating factor of long-term alcohol or drug abuse, especially at the time of the murder. *See Carter v. State*, 560 So.2d 1166 (Fla. 1990) (extensive drug abuse, and possibility of substantial intoxication at time of the offense); *Amazon v. State*, 487 So.2d 8 (Fla. 1986) (long history of drug abuse and drug use on night of crime); *Hawk v. State*, 718 So.2d 159, 162 (Fla.1998) (intoxication at the time of crime constituted strong mitigation requiring reversal of death sentence); *Kramer v. State*, 619 So.2d 274 (Fla. 1993) (death sentence disproportionate where suffered from alcoholism and under influence of mental or emotional stress); *Spencer v. State*, 645 So.2d 377 (Fla. 1994) (chronic alcohol and substance abuse and biochemical intoxication). This mitigating circumstance clearly present, obviously contributed to his actions in this murder, and cries out for a life sentence.

Also present here are other powerful nonstatutory mitigation, which, in other cases have been found to be substantial. The defendant had an abusive and deprived childhood, wherein his mother abandoned and neglected him and his father severely abused him which affected him throughout his life and was the cause for his addiction. Further, Russ expressed genuine remorse, as recognized

by the trial court. *See Almeida v. State*, 748 So.2d 922, 933 (Fla. 1999); *Livingston v. State*, 565 So.2d 1288 (Fla.1988) (severely beaten as a child by his mother's boyfriend; his mother neglected him); *Campbell v. State*, *supra*; *Nibert v. State*, 574 So.2d 1059 (Fla. 1990); *Cooper v. State*, 581 So.2d 49, 52 (Fla. 1991) (model prisoner, disadvantaged childhood); *Fitzpatrick v. State*, 527 So.2d 809 (Fla. 1988) (a disadvantaged youth and an abusive childhood); *Crook v. State*, 908 So.2d 350, 358 (Fla. 2005) (aggravating circumstances present here, though substantial, found not to outweigh the combination of unrefuted and overwhelming mitigation, that were determined in other cases requires a life sentence, including Crook's abusive childhood and a disadvantaged home life); *Songer v. State*, 544 So.2d 1010 (Fla. 1989) (chronic alcohol abuse, caused by and in response to mental illness; sincere and heartfelt remorse); *Snipes v. State*, 733 So.2d 1000 (Fla. 1999) (remorse); *Morris v. State*, 557 So.2d 27 (Fla. 1990) (remorse); *Pope v. State*, 441 So.2d 1073 (Fla. 1984) (remorse); *Livingston v. State*, *supra* (severe beatings as a child, extensive use of cocaine and marijuana).

Despite the aggravating factors, all of these mitigating circumstances, call for a sentence of life imprisonment; the death penalty in this instance is disproportionate. This Court is asked to vacate the death sentence and remand for imposition of another life sentence.

CONCLUSION

BASED UPON the cases, authorities and policies herein, the Appellant requests that this Court vacate his death sentence, and, as to Point I, remand for a new penalty phase, and as to Point II, vacate the death sentence and remand for the imposition of a life sentence.

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 Hon. Bill McCollum, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, and mailed to Mr. David B. Russ, Inmate # 358986, Florida State Prison, 7819 N.W. 228th Street, Raiford, FL 32026, this 29th day of March, 2010.

CERTIFICATE OF FONT

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

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JAMES R. WULCHAK