FILED
SID J. WHITE
AUG 28 1989
CLERK, SUPREME COURT
By ______ Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

DARRELL WAYNE HALLMAN, :

Appellant, :

vs. Case No. 70,761

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The state's brief will be referred to herein as "SB". Other references are as denoted in appellant's initial brief.

STATEMENT OF THE FACTS

Fla.R.App.P. 9.210(c) provides that, in an answer brief, the statement of the case and of the facts "shall be omitted unless there are areas of disagreement, which should be clearly specified." See Dania Jai-Alai Palace, Inc, v. Sykes, 450 So.2d 1114, 1122 (Fla. 1984); Trolinger v. State, 296 So.2d 87, 88 (Fla. 2d DCA 1974); Overfelt v. State, 434 So.2d 945, 949 (Fla. 4th DCA 1983). As the First District Court of Appeal has observed "This simple, concise statement plainly means that the appellee's answer brief shall not contain a reiteration of the statement of the case and ... facts stated in appellant's brief, but shall only state wherein appellee disagrees with appellant's statement and supplement that statement to the extent necessary to correct any material misstatements and omissions in appellant's statement." Metropolitan Life and Travelers Ins. Co. v. Antonucci, 469 So.2d 952, 954 (Fla. 1st DCA 1985).

In its brief in the present case, the state has not indicated any disagreement with appellant's statement of the facts. See Trolinger. Virtually every piece of evidence mentioned in the state's statement was also discussed (in context) in appellant's statement. What the state has done is to

take one or two "bytes" of testimony from each witness, and repeat them in isolation and out of context. The result is a distorted and misleading picture of the circumstances of the shooting incident. With regard to the penalty phase evidence, the omissions and distortions are even more glaring.

If the state's statement of the facts is merely intended as a list of those random pieces of testimony which the state wishes to emphasize[1], then appellant would note that that is not in accordance with the rules, but he will refrain from moving to strike the state's brief. See Antonucci, 469 So.2d at 954. If, however, the state is offering its statement of the facts as an alternative to appellant's statement, and is representing it as a summary of the evidence presented at trial and in the penalty phase, then appellant wishes to make it clear that the state has presented a grossly distorted picture, which fails to accurately describe the circumstances of the crime, and which omits or trivializes all of the evidence favorable to appellant in this "life override" case.[2]

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[1] As a supplement to appellant's complete statement of the facts, the accuracy of which the state has not disputed.

[2] For example, with regard to the penalty phase, compare the state's statement of the facts, p. 3-5, with appellant's statement, p. 21-35.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN FINDING THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE, AND IN STATING (IN ATTEMPTING TO JUSTIFY HIS OVERRIDE OF THE JURY'S RECOMMENDATION) THAT "VIRTUALLY NO REASONABLE PERSON WOULD DIFFER" FROM HIS FINDING OF THIS AGGRAVATING FACTOR.

The cases cited by the state (SB10) do not even remotely support the trial court's finding of the "especially heinous, atrocious, or cruel" aggravating factor in the present case. The "h.a.c." factor cannot constitutionally be applied unless "the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Smalley v. State, ___ So.2d ___ (Fla. 1989) (case no. 72,785, opinion filed July 6, 1989) (14 FLW 342); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); see Maynard v. Cartwright, ___ U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). The cases cited by the state (like the ones discussed in appellant's brief, p. 41, n.12, second paragraph) all involve acts of physical and/or mental torture which set the killing apart from the norm. In Melendez v. State, 498 So.2d 1258 (Fla. 1986), the victim's throat was cut. When he begged his assailants to take him to the hospital, they told him that could not be done because he would tell the

police. He was then executed by a gunshot to the head. In Scott v. State, 494 So.2d 1134 (Fla. 1986), the victim was accosted, beaten into a state of unconsciousness, abducted, and driven to a deserted area. At the murder site, the victim (who had regained consciousness) struggled with his captors "and was again mercilessly beaten into submission." The defendant then intentionally ran over the victim with an automobile. In Cooper v. State, 492 So.2d 1059 (Fla. 1986), the victims were awakened from their sleep, and were forced to lie down on the floor, with their hands bound behind their backs with duct tape. The victims were then executed, because one of them had recognized one of the assailants. A gun pointed at the head of one of the victims misfired three times before he was killed. One of the victims (Fridella) pleaded in vain for his life. In Francis v. State, 473 So.2d 672 (Fla. 1985), the victim was forced to crawl on his hands and knees and beg for his life; he was placed on a toilet stool with his hands taped behind his back for a period in excess of two hours, he was threatened with the injection of Drano and other foreign substances into his body; and he was gagged and taunted before being shot to death. In Harvey v. State, 529 So.2d 1083 (Fla. 1988), the victims, a husband and wife, were accosted in their home and robbed. The assailants decided to kill the victims, who tried, unsuccessfully, to run. The defendant shot both victims, and, after hearing the injured woman moaning in pain, shot her again in the head at point blank range. In Mendyk v. State, ___ So.2d ___ (Fla. 1989) (case no. 71,507,

opinion filed June 15, 1989) (14 FLW 303), a case which is a textbook example of what is meant by "especially heinous, atrocious, or cruel" (and which could hardly be more dissimilar to the instant case), the defendant and his accomplice abducted a woman from a convenience store, drove her to a secluded area, removed her clothing, tied her legs to a sawhorse, and sexually tortured her with various objects including a broom handle and a billy club. The victim was then led to a new location, where she was gagged and tied with a wire between two trees, with her back arched. The defendant and his accomplice then attempted to leave the scene, but their truck got stuck along the side of the dirt road. The defendant then went back to where he had left the woman, and strangled her to death.

The cases relied on by the state, therefore, provide a good illustration of the types of pitiless, conscienceless murders, accompanied by acts of physical and/or emotional torture, which can properly be considered "especially heinous, atrocious, or cruel" within the meaning of Florida's death penalty law. Those cases also provide a good illustration, by way of contrast, of why the "h.a.c." aggravating factor is totally inapplicable under the facts of the instant case.[3]

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[3] The facts of this case, as they relate to the "h.a.c." issue, are discussed at p. 42-44 and 49-50 of appellant's initial brief.

The state's suggestion that this Court should write off the improper finding of the especially heinous, atrocious, or cruel aggravating factor as "harmless error" is unsupported and (under the circumstances of this case) unsupportable. Clark v. State, 443 So.2d 973 (Fla. 1983), relied on by the state, was a death recommendation case with no mitigating factors. The instant case is a life recommendation case, with substantial mitigating evidence on which the jury could reasonably have based its penalty verdict. See appellant's initial brief, p. 22-35, 35-36, 67-78. Among the valid non-statutory mitigating factors[4] established by the evidence were (1) appellant's traumatic and deprived childhood, dominated by an abusive, alcoholic father [Holsworth, McCampbell, Hansborouah, Burch, Brown], (2) his character traits of kindness, gentleness and generosity, as testified to by his four sisters, his brother-in-law, his ex-wife, and his priest [Roaers, Washinaton, Fead, Masterson, Perry]; (3) his lifelong exemplary employment record [McCampbell, Fead, Holsworth, Cooper v. Dugger], (4) his lack of educational opportunity, his low average IQ, and his less than third-grade

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[4] See Holsworth v. State, 522 So.2d 348 (Fla. 1988); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Hansborouah v. State, 509 So.2d 1081 (Fla. 1987); Burch v. State, 522 So.2d 810 (Fla. 1988); Brown v. State, 526 So.2d 903 (Fla. 1988); Rouers v. State, 511 So.2d 526 (Fla. 1987); Washinuton v. State, 432 So.2d 44 (Fla. 1983); Fead v. State, 512 So.2d 176 (Fla. 1987); Masterson v. State, 516 So.2d 256 (Fla. 1987); Perry v. State, 522 So.2d 817 (Fla. 1988); Cooper v. Duaaer, 526 So.2d 900 (Fla. 1988); Valle v. State, 502 So.2d 1225 (Fla. 1987); Huddleston v. State, 475 So.2d 204 (Fla. 1985); Norris v. State, 429 So.2d 688 (Fla. 1983); Cannady v. State, 427 So.2d 723 (Fla. 1983).

reading ability; (5) his sincere efforts to learn about the Catholic religion, in order to adopt the religion of his new family; (6) his consistently good conduct and his productivity during his prior imprisonment, and the likelihood that he would be a model prisoner if sentenced to life imprisonment [Valle, Cooper v. Dugger, Fead, Holsworth, Brown]; (7) his three and a half years of outstanding conduct on parole [Fead]; (8) the emotional stress he was under for about a month prior to the crime, including his divorce, the loss (through the divorce) of his stepson, the death of his father-in-law, the loss of his job, and his fear of returning to prison because of the DWI which he got on the eve of his father-in-law's funeral [Huddleston, Perry]; and (9) and the fact that this was not an intentional or predatory type of murder, but rather a killing which occurred in the course of a robbery, and in which the actual shooting of the guard was done out of the instinct for self-preservation, after appellant had been shot at and wounded [Norris, Cannady, Brown].

Not only were there more than ample mitigating factors to support the jury's life recommendation, it is also the case that the trial judge evidently found the mitigating factors which had been offered into evidence by appellant. (R1706-07, see R1688) The trial judge's sentencing order specifically delineates which aggravating factors he found (including the two invalid ones of "especially heinous, atrocious, or cruel" and

"great risk of death to many persons")[5], but fails to specifically state which mitigating factors he found.[6] The judge did say, however, that he had "reviewed" the mitigating factors, and expressed his view that "[t]hese do not outweigh the aggravating circumstances in this case." (R1706-07, see R1688) See Elledae v. State, 346 So.2d 998, 1003 (Fla. 1977). Since the evidence established many significant mitigating circumstances, concerning both appellant's character and background, and the circumstances of the crime, upon which the jury reasonably could have based its life recommendation, it clearly cannot be said that the trial court's use of two invalid aggravating factors to reach his faulty conclusion that no reasonable person could differ from the imposition of a death sentence in this case was mere "harmless error."

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[5] With regard to the harmful impact of the trial judge's use of the two improper aggravators on his decision to reject the jury's life recommendation, it should also be noted that the judge stated in his sentencing order that the facts supporting his findings on each of the aggravating circumstances (including, presumably, "h.a.c." and "great risk of death") "are so clear and convincing that no reasonable person would differ." (R1706) To the contrary, the evidence in this case does not support a finding of either of these aggravating factors, and the jury could therefore reasonably have declined to find them. It was the judge, not the jury, whose weighing process was compromised by error.

[6] As appellant contends in Issue V of his initial brief, the trial court's sentencing order does not meet the standard set forth in Mann v. State, 420 So.2d 578, 581 (Fla. 1982) that the "trial judge's findings in regard to the death sentence should be of unmistakable clarity so that [the Supreme Court] can properly review them and not speculate as to what he found." The judge's order in the instant case is legally insufficient to support a death sentence, especially in the context of a jury override. See also VanRoyal v. State, 497 So.2d 625, 628 (Fla. 1986); Hall v. State, 381 So.2d 683, 684 (Fla. 1979).

ISSUE II

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT APPELLANT "KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS", AND IN STATING (IN ATTEMPTING TO JUSTIFY HIS OVERRIDE OF THE JURY'S LIFE RECOMMENDATION) THAT "VIRTUALLY NO REASONABLE PERSON WOULD DIFFER" FROM HIS FINDING OF THIS AGGRAVATING FACTOR.

Regarding the state's "harmless error" argument (SB15), appellant's reply is the same as in Issue I. See p. 6-8 of this reply brief.

Regarding the merits, the state quotes what it terms the prosecutor's "cogent" argument to the jury on this factor. (SB12-13) That argument (with emphasis added by appellant) was as follows:

> He put the people in the bank, there were I think testimony seven or eight people that were in the bank that were scurrying for cover. Now, obviously none of them were shot but they didn't know that. The people in the bank certainly felt they were in danger when they were ducking behind counters and going into the back rooms. But there was no way for them to know <u>a stray shot's</u> not going to come through the window and hit one of them.
>
> Mr. Fox who was driving through the parking lot certainly felt he was in danger because he decided to get out of there fast enough that he didn't even see the end result he was so concerned for his well-being.
>
> We have two young men who were mowing the lawn across the road

> that were in danger of being hit by stray shots.
>
> We had Mrs. Harrell and her daughter who were driving down the road next door to the bank who were in danger.
>
> We had untold people driving down Highway 98, a very heavily traveled, busy road in the north part of Lakeland. Any of them could have had one of these bullets going through their car window.
>
> So, Mr. Hallman's actions put a great many people in danaer of possible iniurv, and that was considered by the legislature to be an aggravating circumstance. Whether he killed his victim out in a remote area where nobody else was around, where nobody else was in any harm of danger or whether he did it in a circumstance like this where other people conceivably could have been hurt, injured, or even killed.

(R1578-79)

The prosecutor's argument - now the state's argument on appeal - amply demonstrates its own incorrectness. Contrary to the state's argument, the legislature did not authorize danger of "possible" injury or "conceivable" injury or death as an aggravating circumstance. Kampff v. State, 371 So.2d 1007, 1009 (Fla. 1979); Lewis v. State, 377 So.2d 640, 646 (Fla. 1979); Barclay v. State, 470 So.2d 691, 694-95 (Fla. 1985); Scull v. State, 533 So.2d 1137, 1141 (Fla. 1988); Bello v. State, ___ So.2d ___ (Fla. 1989) (case no. 70,552, opinion filed July 6, 1989) (14 FLW 339, 341). Rather, as the statutory language makes

clear, "great risk" means a' likelihood or a high probability of death to many persons. Kampff; Lewis; Barclay; Scull; Bello.

In the recently decided case of Bello v. State, supra, this Court held that the "great risk of death to many persons" aggravating factor was improperly found under the following facts: Bello and four accomplices met with an undercover police officer to transact a narcotics sale. The undercover officer (Peterson) activated an electronic signal, whereupon police officers wearing "raid" jackets which identified them as Tampa police and shouting their identities entered the residence. A detective (Ulriksen) kicked open the door to the northeast bedroom and entered. Bello came from behind a dresser and began firing. Ulriksen (who survived) was shot three times; one of those shots passed through him and struck one of the accomplices (Rodriguez, who also survived) in the head. The door to the bedroom closed, at least partially. Then, as more officers converged on the residence, two of them (Rauft and Mock) pushed against the door. Bello fired two shots through the door, mortally wounding Rauft, but missing Mock. On appeal, this Court held:

> ... [W]e find that application of the aggravating circumstance of knowingly created a great risk of death to many persons is not warranted in this case. As we stated in Kampff v. State, 371 So.2d 1007, 1099-10 (Fla. 1979):
>
>> When the legislature chose the words with which to establish this aggravating circumstance, it indicated clearly that more was contemplated than a showing of some

> degree of risk of bodily harm to a few persons. "Great risk" means not a mere possibility but a likelihood or high possibility. The great risk of death created by the capital felon's actions must be to "many" persons. By using the word "many," the legislature indicated that a great risk of death to a small number of people would not establish this aggravating circumstance.
>
> In this case, Bello's actions created a high probability of death to at most only three people besides the victim. The other people considered by the trial court to have been put at risk were too far away, separated by several walls, or out of the line of fire so that there was only a possibility of their being killed by Bello's actions in shooting through the bedroom door. As this Court has previously noted, "[t]hree people simply do not constitute 'many persons"' within the meaning of this statutory aggravating factor. Lucas v. State, 490 So.2d 943, 946 (Fla. 1986). We therefore find that it was error to find this aggravating factor in this case.

In Bello, there was a high probability of death to at most only three persons besides the victim. In the present case, there was a high probability of death to, at most, only one person besides the victim; Malcomb Fox, and even he was already at the parking lot exit, about to turn onto the highway, when he heard the gunshots coming from the vicinity of the taxicab. The shooting was done with pistols at close range [see Jacobs v. State, 396 So.2d 713 (Fla. 1981)], and it all occurred in the immediate area of the cab, with no one but the participants in the line of fire. The bank guard fired the first shot, which blew out the cab windows; appellant then fired two quick shots,

one of which struck the guard. After appellant saw that the guard had been hit, and turned to run away, the guard fired the remaining shots, one of which hit appellant in the lower back and others of which lodged in the taxicab.

The people inside the bank were already at the back of the building at the point in time - well before the shooting began - when appellant came back to the door (to try to retrieve the cab keys) and found it locked. Mark Harrell and Claude Williams were riding lawn mowers in the field north of the bowling alley some **80** yards (nearly the length of a football field) **away.**[7] **(R810)** Pamela Harrell and her mother-in-law were in their car on highway **98,** all the way across the parking lot and front lawn of the bank. See Bello v. State, supra ("The

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[7] The state, in its effort to manufacture an aggravating circumstance where none exists, has played somewhat fast and loose with the facts on this point. The state says "Mark Harrell was mowing grass at a nearby bowling lane and heard gunshots. **(R801)** He saw the guard laying on the ground. **(R807)** He was not closer than **25-30** yards away." **(R809)**

In actuality, Harrell testified that when he heard the gunshots he was roughly ***80* yards** from the bank parking lot. **(R810)** Then Harrell saw appellant "stutter-stepping'' back and forth like he didn't know which way to go or what to do. **(R803)** Harrell had not yet seen the guard at that point. **(R804)** Then appellant walked toward the highway, stumbled in the median, and began walking in the direction of the Acura dealer. (R804) Meanwhile, Harrell and his mowing partner Claude Williams had gone over in front of the Foxfire, and then Harrell crossed the road to the Acura dealer, to tell them to call the police. **(R806,** see **R815-16)** That was when Harrell saw appellant get into Vernon Warren's car. **(R806)** The prosecutor asked Harrell if he had gotten a good look at the person he saw leaving (appellant), and Harrell replied "No sir, **I** never got closer then **25** or 30 yards at any time and **I** never got a good look at him. **All** I could see was, you know, what he was wearing." **(R807)**

other people considered by the trial court to have been put at risk were too far away, separated by several walls, or out of the line of fire so that there was only a possibility of them being killed by Bello's actions in shooting through the bedroom door)."

The trial court's improper finding of the "great risk of death to many persons" aggravating factor, like his finding of the "h.a.c." factor, clearly contributed to his erroneous rejection of the jury's entirely reasonable life recommendation.

ISSUE IV

THE TRIAL JUDGE IMPROPERLY OVERRODE THE JURY'S LIFE RECOMMENDATION, WHERE (A) THE JUDGE CONSIDERED INVALID AGGRAVATING FACTORS AND (B) THE RECORD CONTAINS MORE THAN AMPLE MITIGATING EVIDENCE TO SUPPORT THE JURY'S RECOMMENDATION.

As previously discussed, the record is replete with mitigating evidence upon which the jury could reasonably have based its life recommendation. Appellant will, therefore, rely mainly on his initial brief[8] on this Point on Appeal. However, appellant will respond to several comments made in the state's brief.

1. The state makes its usual shopworn argument that this Court should abandon the Tedder standard of review in "life override'' cases[9], and should instead look only to the four corners of the trial court's sentencing order, as if this were a

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[8] See especially pages 22-35, 35-37, 64-78.

[9] Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).

death recommendation case (see SB18-19). In the fourteen years since Tedder was decided, this Court has reaffirmed in scores of subsequent decisions - most recently in Cochran v. State, ___ So.2d ____ (Fla. 1989) (case no. 67,972, opinion filed July 27, 1989) (14 FLW 406) and Freeman v. State, ___ So.2d ___ (Fla. 1989) (case no. 71,756, opinion filed July 27, 1989) (14 FLW 400) - that a trial judge may not impose a sentence of death following a jury recommendation of life unless the facts are such that virtually no reasonable person could differ from the view that death is the appropriate sentence. See e.g. Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988); McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982). Only when there is no reasonable basis in the record for a jury's life recommendation - i.e., "cases where the jury can be said to have acted unreasonably" [Brown v. State, 526 So.2d 903, 907 (Fla. 1988)] - can this Court uphold a death sentence imposed by means of override. See, most recently, Freeman v. State, supra, 14 FLW at 401. The state's argument that this Court should limit its review to the four corners of the sentencing order (i.e., review it as if it were a death recommendation) has been soundly rejected:

> According to the state's theory, this Court should view a trial court's sentencing order with a presumption of correctness and, when the order is reasonable, this Court should uphold the trial court's sentence of death. We reject the state's suggestion. Under the state's theory there would be little or no need for a jury's advisory recommendation since this Court would need to

> focus only on whether the sentence imposed by the trial court was reasonable. This is not the law. Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper.

Ferry v. State, 507 So.2d 1373, 1376-77 (Fla. 1987)[10]

2. The state asserts that the trial judge "found no mitigating factors." (SB19) That assertion is false.[11] The evidence in this case established substantial mitigating factors relevant to appellant's background and character and the circumstances of the offense. The trial court did not state with unmistakable clarity that he found these mitigating factors [see Issue V], but he did purport to have weighed them against the

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[10] Appellant would also note, parenthetically, that even if the state's argument concerning the standard of review were correct, and that review of a jury override were limited to review of the correctness of the trial court's sentencing order, the sentencing order in the present case is clearly incorrect. See Issues I ("h.a.c."), II ("great risk of death"), V (failure to make clear findings as to mitigating factors).

[11] Even if the trial court **had** found no mitigating factors, that is not the focus of the inquiry in a life override case. See Welty v. State, 402 So.2d 1159 (Fla. 1981) ("Under the circumstances of this case, we believe that reasonable persons could differ. Although the trial court found no mitigating factors, there was evidence introduced by Welty relative to nonstatutory mitigating factors which could have influenced the jury to return a life recommendation"); see also Gilvin v. State, supra, 418 So.2d 996, 999 (Fla. 1982) (Death sentence reduced to life even though trial court found no mitigating factors; "There was evidence of nonstatutory mitigating factors, however, upon which the jury could have based its life recommendation, even though the trial court, in its judgment, was not necessarily compelled to find them.")

aggravators. See Elledae v. State, **346** So.2d **998** (Fla. **1977)** ("In order to have weiahed the aggravating circumstances against the mitigating circumstances, the court must have found some of the latter") (emphasis in opinion). This conclusion is buttressed by the fact that, applying the standard set forth in Rouers v. State, 511 So.2d 526, **534** (Fla. **1987),** the non-statutory mitigating factors in this case were (a) supported by the evidence, and (b) of a kind capable of mitigating punishment.[12] Thus, assuming aruuendo that the state were correct in saying the judge found no mitigating factors in this case, then that would be yet another error in his already

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[12] To recapitulate, the mitigating evidence in this case which supported the jury's life recommendation included (1) appellant's traumatic and deprived childhood, dominated by an abusive, alcoholic father [Holsworth, McCampbell, Hansborouah, Burch, Brown]: **(2)** his character traits of kindness, gentleness and generosity, as testified to by his four sisters, his brother-in-law, his ex-wife, and his priest [Roaers, Washinaton, Fead, Masterson, Perry]; **(3)** his lifelong exemplary employment record [McCampbell, Fead, Holsworth, Cooper v. Duaaer]; **(4)** his lack of educational opportunity, his low average IQ, and his less than third-grade reading ability; ***(5)*** his sincere efforts to learn about the Catholic religion, in order to adopt the religion of his new family; **(6)** his consistently good conduct and his productivity during his prior imprisonment, and the likelihood that he would be a model prisoner if sentenced if sentenced to life imprisonment [Valle, Cooper v. Duacrer, Fead, Holsworth, Brown]; (7) his three and a half years of outstanding conduct on parole [Fead]; ***(8)*** the emotional stress he was under for about a month prior to the crime, including his divorce, the loss (through the divorce) of his stepson, the death of his father-in-law, the loss of his job, and his fear of returning to prison because of the DWI which he got on the eve of his father-in-law's funeral [Huddleston, Perry]; and **(9)** and the fact that this was not an intentional or predatory type of murder, but rather a killing which occurred in the course of a robbery, and in which the actual shooting of the guard was done out of the instinct for self-preservation, after appellant had been shot at and wounded [Norris, Cannady, Brown].

defective sentencing order. Rogers; Lockett v. Ohio, 438 U.S. 586 (1978); Skipper v. South Carolina, 476 U.S. 1 (1986). The more accurate interpretation of the trial court's sentencing order, however, is that he found the multiple mitigating circumstances which were established by the evidence, and merely disagreed with the jury's assessment of the relative weight to be accorded the aggravating and mitigating factors. And, as this Court has repeatedly held, where the trial judge, in overriding a life recommendation, "merely substituted his view of the evidence and the weight to be given it for that of the jury", the override is improper. Holsworth v. State, supra, 522 So.2d at 353; see also Gilvin v. State, supra, 418 So.2d 996, 999 (Fla. 1982); Rivers v. State, 458 So.2d 762, 765 (Fla. 1984); Burch v. State, 522 So.2d 810, 813 (Fla. 1988).

3. The state attempts to trivialize the mitigating evidence by ignoring about 95 percent of it, and tossing out the other 5 percent in out-of-context snippets. See p. 1-2 of this reply brief (Statement of the Facts). To put it bluntly, the state's answer brief (p. 3-5, 19-22) does not fairly or accurately reflect the evidence before the jury.

4. Regarding the evidence of appellant's traumatic childhood, the state's brief appears to suggest that appellant was raised by his foster parents, who were "kind and mean 'at the same time'." (SB19) For the sake of clarity, appellant would point out that his childhood was spent with his natural parents. (See appellant's initial brief, p. 23-26, 66-69 for an accurate

summary of the evidence concerning appellant's childhood environment). He was not put in the foster home until he was eleven years old, at which time he was placed in a special education class. (R1512, see R1445-46, 1513-15) Some time later, he ran away from the foster home. (R1514-15) He began working at age 14. (R1446)

5. The state makes the absurd suggestion that an abused childhood is a mitigating factor for a defendant who comes in through the back window of a residence and deliberately attacks two women with a knife (stabbing and slashing one of them to death and severely injuring the other) [Holsworth v. State, supra], but is **not** a mitigating factor for appellant, who robbed a savings and loan (after suffering a great deal of personal loss and emotional **anguish)**[13] and, while attempting to flee, shot and killed a security guard who had fired at him. (See SB20) Roaers v. State, supra, 511 So.2d at 526, relied on by the state for this nonsensical proposition, actually says this:

> The effects produced by childhood traumas, on the other hand, indeed would have mitigating weight if relevant to the defendant's character, record, or the circumstances of the offense. See Eddinas, U.S. at 112-13, 102 S.Ct. at 875-76. However, in the

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13 The evidence concerning the emotional stress which appellant was under during the weeks leading up to the crime, including his divorce, the loss (through the divorce) of his stepson, the death of his father-in-law, the loss of his job, and his fear of returning to prison because of the **DWI** which he got on the eve of his father-in-law's funeral, is discussed at p. 26-27, 29-31, 74-77 of appellant's initial brief. **As** this Court recognized in Perry **v.** State, 522 So.2d at 821, and Huddleston **v.** State, 475 So.2d at 206, the jury could reasonably have based its life recommendation in part on these factors.

present case Rogers' alleged childhood trauma does not meet this standard of relevance. **No** testimony on this auestion was presented durina the penalty phase, and Roaers raised the issue for the first time on appeal. Indeed, the only evidence of such a trauma in the record is the followina notation in the presentence investiaation:

> [Rogers] was raised under the impression that his mother was dead but found out that she was not dead when he went in the service.... As far as his mental health, [Rogers says] "I'd say I'm in pretty good shape considering the stress I've been under. The strain, worrying about my family."

We thus find that the record factually does not support a conclusion that Rogers' childhood traumas produced any effect upon him relevant to his character, record or the circumstances of the offense *so* as to afford some basis for reducing a sentence of death.

The record in the present case, in contrast, is replete with evidence of appellant's traumatic childhood, and the abuse which he (and his siblings) suffered at the hands of their brutal, lazy, alcoholic father. Moreover, unlike Roaers, this is a life recommendation case.

6. The state, citing Torres-Arboledo v. State, 524 So.2d 403, 413 (Fla. 1988) tries to characterize the evidence regarding appellant's consistently good conduct and productivity during his prior incarceration, and the likelihood that he would

be a model prisoner if sentenced to life imprisonment[14], as "weak." (SB22, see SB21) In Torres-Arboledo, however, there was no evidence of any prior good conduct or character (in prison or out); only that in the opinion of a clinical psychologist, the defendant was "very intelligent" and an excellent candidate for rehabilitation. In the present case, in contrast, there was evidence before the jury (the testimony of D.O.C. official Joseph Crawford, supported by documentary exhibits) that during the entire period (nearly four years) of his prior imprisonment, appellant had a spotless disciplinary record - no DRs, and not even any corrective consultations (or "speed tickets"), which are given for minor infractions of the rules. Appellant's attitude and adjustment toward other inmates and toward corrections personnel was consistently rated good or (more often) very good. In the Vocational Welding Program, his work progress was above average, his effort maximal to the level of his ability, and his behavior excellent. After graduating from the program, he was used as a teaching aide in welding, and he received outstanding reports. During the last year of his imprisonment, he worked on the forestry squad, where he again earned outstanding reports from his supervisors. Crawford testified that vocational, educational and peer counseling programs are available in prison

[14] Decisions recognizing the validity of this mitigating circumstance include Valle v. State, 502 So.2d at 1226; Cooper v. Duaaer, 526 So.2d at 902; Fead v. State, 512 So.2d at 179; Holsworth v. State, 522 So.2d 353; and Brown v. State, 526 So.2d at 908. See also Skipper v. South Carolina, 476 U.S. 1 (1986).

for inmates serving lengthy sentences, and that appellant could participate in such programs if he were sentenced to life imprisonment. Based on this testimony, and on appellant's prison records, the jury could reasonably have concluded that appellant would be a model prisoner if sentenced to life. Fead; Holsworth; Brown. The state's counter-argument is a non-sequitur; it complains:

> The claim that appellant exhibited good conduct and would be an exemplary prisoner based on his prior prison experience is belied by the undeniable truth that upon his early release from prison Hallman chose to resume his practice of armed robbery, on this occasion with fatal consequence. **(SB21)**

The state's argument might make some sense if this were a guidelines case and if appellant was arguing that he ought to get probation or community control. The issue here, however, is not whether appellant would be a good candidate for rehabilitation in the community, but whether the jury could reasonably find that he would be a model prisoner if he were sentenced to life imprisonment, with a mandatory minimum twenty-five years before he could even be considered for parole.

7. Contrary to the state's closing comment **(SB22),** this is a case where reasonable persons could differ as to whether death or life imprisonment is the appropriate penalty. The trial court's override of the jury's life recommendation cannot be upheld.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his init al brie , appellant respectfully requests that this Court reverse his death sentence, and remand for imposition of a sentence of life imprisonment, without possibility of parole for twenty-five years, in accordance with the jury's recommendation.

On the non-capital counts, appellant requests that this Court vacate the departure sentence and remand for imposition of a sentence within the guidelines range. Appellant further requests that the retention of jurisdiction be stricken.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Rober Bu ter-worth, Room 804, 1313 Tampa St., Tampa, FL 33602, (813) 272-2670, on this 25th day of August, 1989.

Respectfully submitted,

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