IN THE SUPREME COURT OF FLORIDA

HAROLD GENE LUCAS,

Appellant,

v.

Case No. 78,118

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

OF COUNSEL FOR APPELLEE

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SUMMARY OF THE ARGUMENT

As to Issue I: No constitutional rights were denied appellant by the refusal of the trial judge to permit additional evidence of mitigating circumstances. This Honorable Court specifically remanded this case to the trial judge for reconsideration and rewriting of the findings of fact. The mandate of this Court did not permit appellant a further opportunity to submit evidence to the trial court.

As to Issue 11: The trial court did not err by reading a pre-prepared sentencing order at the hearing where such sentence was orally pronounced. Nothing prevents a trial judge from considering the findings prior to a hearing, especially where both parties have provided the court with detailed memoranda as to the aggravating and mitigating circumstances existing in a particular case. The record of this case reveals that the trial court considered all matters propounded by appellant and, therefore, appellant's constitutional rights were not infringed.

As to Issue 111: Appellant's Booth claim is totally without merit, especially where appellant was the party who adduced the allegedly improper matters. In any event, the trial court's order reflects that no consideration was given to any of the Booth-type statements and, therefore, the death sentence imposed was not done so in part upon impermissible aggravating factors.

As to Issue IV: The evidence adduced in the instant case amply justifies the trial court's finding that the homicide of Jill Piper was especially heinous, atrocious and cruel. The

evidence revealed that the victim was shot and beaten prior to the rendering of the fatal gunshot. In addition, the evidence clearly showed that the victim was pleading and begging for her life prior to her demise.

As to Issue V: This Honorable Court has previously and consistently rejected appellant's claim that the heinous, atrocious or cruel aggravating circumstance is unconstitutionally vague. The same result should obtain in the instant case.

As to Issue VI: The trial court's sentencing order reflects that due consideration was given to all mitigation propounded by appellant. Merely because appellant wishes that the trial judge had accorded more weight to the mitigation does not render the death sentence improperly imposed. The Court's sentencing order is sufficiently clear to permit appellate review by this Court.

As to Issue VII: As previously determined by this Honorable Court, the death sentence imposed in the instant case is proportionally warranted. The homicide of Jill Piper was not the result of a heated, domestic confrontation which might render the penalty imposed disproportionate. Rather, the circumstances of this case indicate that death was the proper punishment.

ARGUMENT

ISSUE I

WHETHER THE TRIAL JUDGE ACTED IN ACCORDANCE WITH THE MANDATE OF THIS HONORABLE COURT WHEN HE DENIED APPELLANT'S MOTION TO PRESENT ADDITIONAL WITNESSES IN MITIGATION.

As his first point on appeal, appellant contends that he had the right to present additional witnesses and evidence in mitigation upon remand. The trial judge denied a motion made by appellant which sought to permit the introduction of additional evidence in mitigation (R 1020 - 1021). In Lucas v. State, 568 So.2d 18 (Fla. 1990), this Honorable Court held that the trial judge's findings were not of "unmistakable clarity" sufficient to enable appellate review. Thus, this Court decided to:

> . . . remand ~~to the~~ trial court for consideration and rewriting of the findings of fact. Lucas should inform the court of the specific nonstatutory mitigating circumstances he wants the court to consider, and the court may permit both sides to present argument regarding those circumstances. There is no need to empanel a new jury. (text at page 24; emphasis added)

A plain reading of this Honorable Court's opinion precludes the possibility of permitting additional evidence in mitigation. The trial judge recognized that " . . . [i]t is the direction of the Supreme Court that we work on the record as it presently exi[s]ts." (R 122). The trial judge acted in accordance with the direction of this Court when he denied appellant's motion to present additional evidence.

In Lucas v. State, 490 So.2d 943 (Fla. 1986), a previous decision in this matter, this Court relied upon Mann v. State, 453 So.2d 784, 786 (Fla. 1984), cert. denied, 469 U.S. 1181 (1985), in discussing whether additional evidence may be presented upon a remand. The opinion in Mann directed a new sentencing proceeding where both parties were permitted to present additional evidence. In the instant case, however, this Court remanded so that the trial judge could provide findings of fact which were sufficiently clear to enable this Court to engage in meaningful appellate review. Appellant's contention that the remand called for a "sentencing" proceeding which would have permitted the presentation of additional evidence is particularly unavailing. Appellant opines that because he was required to delineate those nonstatutory mitigating circumstances he wanted the court to consider and because argument of counsel was permitted pertaining to those circumstances, additional evidence should have been permitted. The presentation of evidence is not a condition precedent to argument of counsel in a particular matter. Of course, many, if not most, of the hearings conducted at the trial level are non-evidentiary hearings wherein argument is presented by counsel and a ruling is made by the trial judge. For example, this Court is quite familiar with collateral proceedings in capital cases which are appealed following the summary denial of collateral relief, In these cases, the lack of an evidentiary hearing does not obviate heated adversarial argument by counsel for the state and the defendant.

Appellant's reliance upon Scull v. State, 533 So.2d 1137 (Fla. 1988), and Scull v. State, 569 So.2d 1251 (Fla. 1990), is misplaced. In Scull I, this Court directed the trial judge to "conduct proceedings", a term which could be equated with the "new sentencing proceeding" described in Mann, supra. In Scull II, this Court specifically, on a petition for clarification, directed that new evidence could be presented by either party at the new penalty phase on remand. The direction of this Honorable Court in the instant case is materially different. This Court has remanded so that the trial judge can reconsider and rewrite the findings of fact. This Court's order that appellant had to inform the trial judge of the specific nonstatutory mitigating circumstances to be considered is not an open-ended invitation to present additional evidence but, rather, is a direction to appellant to share the burden in complying with Campbell v. State, 571 So.2d 415 (Fla. 1990). See Lucas v. State, 568 So.2d 18 (Fla. 1990) (Shaw, C.J., concurring). Compare Songer v. State, 365 So.2d 696 (Fla. 1978), wherein this Court held that a remand was necessary only to ensure compliance with Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and that no additional evidence in mitigation should have been permitted. The instant case was remanded solely for the purpose of having the trial judge comply with the requirements of Florida law insofar as they pertain to the clarity required of a written order imposing a death sentence.

In Milton v. Keith, 503 So.2d 1312 (Fla. 3d DCA 1987), the Court relied on the decision of this Court in State ex rel. Budd v. Williams, 152 Fla. 189, 11 So.2d 341 (Fla. 1943), and held that:

> , , . Once a mandate issues to the trial court, and the order appealed becomes the appellate court's order or decree, the trial court's role becomes purely ministerial; its function is limited to implementing and effectuating the appellate court's order or decree. (text at 1314)

In the instant case, the trial judge effectuated the order of this Honorable Court by reconsidering and rewriting the findings of fact in light of appellant's identification of the specific nonstatutory mitigating circumstances he wanted considered. Thus, appellant's first point is without merit and must fail.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY ANNOUNCING HIS SENTENCING DECISION AT THE TIME OF THE HEARING.

As his next paint on appeal, appellant contends that the trial judge, by announcing his sentencing decision at the time of the hearing, failed to accord appellant his right to due process. The gist of appellant's complaint is that the trial judge pre-prepared his findings and did not give consideration to those matters which were advanced by appellant at the hearing. This contention is wholly without merit and, consequently, appellant's second point must fail.

The instant case is not one such as Ree v. State, 565 So.2d 1329 (Fla. 1990), wherein this Court stated that a sentencing guidelines departure sentence might be vulnerable to attack if there is an indication that the trial judge failed to consider the argument and evidence presented at a sentencing hearing. To the contrary, the record in the instant case clearly shows that the trial caurt gave much consideration to all matters propounded by appellant (and the state) prior to imposing sentence upon appellant. Significantly, appellant filed a memorandum in support of a life sentence on March 15, 1991, and the sentence was not imposed upon appellant until May 14, 1991. The trial judge had extensive memoranda dealing with the aggravating and mitigating circumstances in this case from both appellant and the state prior to the conduct of the hearing which resulted in a sentence of death (R 171 - 189, 190 - 199). The trial judge also

advised the parties that he had reread every page of appellant's trial and sentencing proceedings (R 4). Thus, contrary to the warnings expressed in Ree, there is simply no indication that the trial judge failed to give due consideration to any argument propounded by appellant. The instant case is not one where a trial judge, without deliberation, hastily proceeds to sentence a defendant without a sufficient underlying basis. Similarly, appellant's reliance upon Scull v. State, 569 So.2d 1251 (Fla. 1990), is totally misplaced, In Scull, this Court was confronted with a situation where a defendant was not given adequate opportunity to prepare for a hastily convened capital sentencing hearing. In the instant case, however, the trial judge had for several months appellant's memorandum and there is no justiciable claim that appellant was denied his right to due process.

In the instant case, the trial judge also considered the 11 - 1 jury recommendation of a death sentence. In an analogous situation, this Honorable Court has held that it is not error for a trial judge to impose sentence immediately after the return of a jury recommendation. In King v. State, 390 So.2d 315, 321 (Fla. 1980), cert. denied, 450 U.S. 989 (1981), this Court held that "[t]here is no legal principle which bars the trial judge from considering the aggravating and mitigating circumstances while the jury similarly deliberates." See also, Randolph v. State, 463 So.2d 186, 192 (Fla. 1984); Thompson v. State, 456 So.2d 444, 447 (Fla. 1984). The trial judge in the instant case had several months after submission of appellant's memorandum in

which to consider the mitigating circumstances propounded by appellant. Here, as in King, the trial judge did not make a summary decision in imposing the death sentence.

Appellant correctly cites to Palmes v. State, 397 So.2d 648 (Fla. 1981), for the proposition that it is not error for a trial judge to have a pre-prepared order when imposing a death sentence. In Palmes, this Court opined:

> . . . The recitation and the filing of the sentencing findings merely indicate that the court concluded that nothing presented by the defense at the hearing required her to add to or change her pre-prepared findings.

Palmes v. State, 397 So.2d at 656. The same is true in the instant case. The trial judge, who had several months to consider the mitigation propounded by appellant, heard nothing in the argument presented at the hearing which caused him to change his pre-prepared findings. There is no due process violation where it is apparent from this record that the trial judge considered all matters put forth by both appellant and state with respect to the aggravating and mitigating circumstances which exist in this case. Appellant's second point is without merit.

ISSUE III

WHETHER THE TRIAL COURT WAS IMPROPERLY INFLUENCED BY THE VICTIM IMPACT STATEMENTS FOUND IN A POST-SENTENCE INVESTIGATION WHICH WAS PROPOUNDED BY APPELLANT.

As his third point on appeal, appellant complains of statements made by various persons familiar with this case which were included in a post-sentence investigation prepared by the Department of Corrections. However, appellant's complaint is totally unfounded where it is he who propounded the post-sentence investigation (R 4, R 1026 - 1028). To suggest on appeal that the trial court had before it impermissible victim impact statements which were propounded by appellant himself is akin to a "gotcha" maneuver which is criticized by many courts. See, e.g., McKinnon v. State, 547 So.2d 1254, 1257 (Fla. 4th DCA 1989) (Garrett, J., concurring in part and dissenting in part); Brown v. State, 483 So.2d 743, 746, n. 3 (Fla. 5th DCA 1986); Pollock v. Bryson, 450 So.2d 1183, 1186 (Fla. 2d DCA 1984); State v. Belien, 379 So.2d 446 (Fla. 3d DCA 1980). Apparently, appellant seeks appellate relief based upon a matter that was before the court only at the insistence of appellant and this "invited error" should not be condoned by this Court. Cf. McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971).

Alternatively, your appellee submits that the claim raised by appellant pursuant to Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), is without merit. Booth has been overruled by Payne v. Tennessee, 501 U.S. ___, 111 S.Ct.

2597, 115 L.Ed.2d 720 (1991), insofar as Booth held that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing.[1] The instant case must be contrasted with Booth and Payne where victim impact evidence was introduced by the prosecution. Here, however, these matters were propounded by the defense and, in any event, it does not appear from this record that the "victim impact" statements were considered by the trial judge when imposing a sentence of **death** upon appellant.

Your appellee submits that disposition of this issue is controlled by this Honorable Court's decision in Grossman v. State, 525 So.2d **833** (Fla. 1988). In Grossman, this Court **held** that it was harmless error for the trial judge to hear victim impact evidence. In the instant case, as was the case in Grossman, the trial court's order does not indicate that he improperly weighed the purportedly improper contents of the post-sentence investigation in assessing whether to impose the death penalty (R 965 - 982). Here, as in Grossman, "the written findings [ ] show that there was no reliance or even a hint of reliance" on the victim impact statements contained in the post-sentence investigation. Grossman, id. at 845. Also as in

[1] The opinion in Payne leaves open the question as to whether the admission of a victim's family member's characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of this nature was presented at trial in Payne and, thus, the court did not reach this question in its holding.

Grossman, the jury in the instant case did not have any knowledge of the contents of the post-sentence investigation, but recommended death by a substantial majority (11 - 1). As this Court noted in Grossman, the jury recommendation of death is entitled to great weight and, based on that recommendation and the finding of the trial judge of three valid aggravating circumstances, "the trial judge's actual discretion here was relatively narrow." Grossman, id. at 846. It is clear from this record that death was the appropriate penalty in this case and the statements contained within the post-sentence investigation played no part in arriving at the decision to impose the death penalty.

This Honorable Court observed in Grossman, in footnote 9, that "judges are routinely exposed to inadmissible or irrelevant evidence, but are disciplined by the demands of the office to block out information which is not relevant to the matter at hand." See also, Harris v. Rivera, 545 U.S. 339, 102 S.Ct. 460, 70 L.Ed.2d 530 (1981) (Judges are capable of disregarding that which should be disregarded). It appears from the record of this case that the trial judge did just this and did not consider any purportedly improper victim impact statements when he imposed the sentence of death.

Inasmuch as the statements appearing in the post-sentence investigation complained-of by appellant were not weighed in the process of imposing the death sentence, and where any impermissible matters were introduced at the behest of appellant, appellant's third point must fail.

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY FINDING THAT THE HOMICIDE OF JILL PIPER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL,

As his next point on appeal, appellant presents a claim which has been raised at various stages in this case. Indeed, appellant neglects to observe that this Honorable Court has previously approved the finding of the especially heinous, atrocious or cruel aggravating circumstance as applied to appellant. In Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979), this Court opined:

> We find that the record in this case supports the finding of the trial judge. The evidence shows (at least by one witness's version) that appellant shot the victim, pursued her into the house, struggled with her, hit her, dragged her from the house, and finally shot her to death while she begged for her life.

Appellant suggests that the evidence in the most recent proceedings may have differed from that presented in the previous sentencing proceeding which might warrant reconsideration. However, appellant does recognize in his Statement of the Facts the testimony of Richard Byrd, testimony which amply supports a finding of the presence of the aggravating factor at issue. According to Mr. Byrd, the victim, Jill Piper, fell to the floor complaining that "the son of a bitch has shot me" (PR 419).[2] Additionally, as set forth at pages 9 - 10 of appellant's brief:

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[2] Page references to the record on appeal in the instant case, No. 78,118, have been and will be designated by the symbol "R" followed by the appropriate page number. Page references to the record on appeal in Case No. 70,653 (the most recent prior appeal

> . . . [Byrd] could hear a fight going on. (PR 422) He "could hear a man's voice at times cussing," and he heard Piper screaming and begging for her life, saying, "Dear God, don't kill me," and "Dear God, make him leave me alone." (PR 422) He also heard "what sounded like blows passed," or "very hard hitting." (PR 422) Then Byrd heard more shots and it got quiet. (PR 423) . . .

Appellant's attempt to discredit on appeal the testimony of Richard Byrd is particularly unavailing. Appellant speculates that Byrd must have been mistaken when he heard the sounds of heavy hitting because the medical examiner never testified as to any bruises or other injuries on his face or elsewhere, yet the victim did have wounds to her hands which were certainly suggestive of defensive wounds (PR 470 - 471). Appellant further states that the testimony of Terri Rice was materially inconsistent with the testimony of Mr. Byrd where she only heard one series of shots being fired and where she did not hear any hitting or yelling and screaming that Mr. Byrd heard (Appellant's brief at page 39). However, Terri Rice did not remain in the immediate proximity of appellant and the victim after the first shots were fired. She went into a bedroom and called the Sheriff's Department (PR 273). Thus, because she was not in as close proximity to appellant and the victim as was Mr. Byrd, Terri Rice did not hear what Mr. Byrd was able to hear.

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of appellant's death sentence) are designated by the symbol "PR" followed by the appropriate page number.

Appellant also asserts that because the victim had a blood alcohol level of 0.12 percent she possibly had a lessened awareness of what was occurring and less sensitivity to pain than if she had not consumed alcohol (Appellant's brief at page 37). Appellant then compares the instant case with Herzog v. State, 439 So.2d 1372 (Fla. 1983), for the purported proposition that the heinous, atrocious or cruel aggravating factor may be inapplicable where the victim is under the influence of an intoxicant. This contention is wholly withaut merit. In Herzog, this Court observed that the evidence indicated that the victim was under heavy influence of methaqualone and had apparently inflicted self-injury. The evidence did not show the amount of injury inflicted by defendant vis-a-vis the victim's own hand. The evidence was also not clear as to when the victim may have become unconscious. Herzog, Id, at 1380. In the instant case, however, we do know that the victim did not inflict injury upon herself and we know that all wounds were inflicted by appellant, The evidence also clearly indicates that the victim was aware of appellant's threats and had taken steps to protect herself by associating with friends and by arming herself. The evidence also shows that when confronted by appellant during the murderous attack, the victim pleaded for her life and knew that death was impending.

Your appellee submits that the trial court properly found the existence of the heinous, atrocious or cruel aggravating factor, Appellant has set forth in his brief the trial court's

findings with respect to this factor (Appellant's brief at pages 34 - 36; R 967 - 970), and these findings will not be repeated herein. However, a review of that portion of the trial court's order supplies ample justification for finding this aggravating factor. Indeed, prior cases decided by this Court with respect to this aggravating factor illustrate that the trial judge in the instant case applied the proper criteria to find this aggravator to exist. ***See*** e.g., Bruno v. State, 574 So.2d 76, 82 (Fla. 1991); Floyd v. State, 569 So.2d 1225, 1232 (Fla. 1990); Rivera v. State, 561 So.2d 536, 540 (Fla. 1990); Jackson v. State, 522 So.2d 802 (Fla. 1988); Koon v. State, 513 So.2d 1253, 1257 (Fla. 1987); Melendez v. State, 498 So.2d 1258 (Fla. 1986); Cooper v. State, 492 So.2d 1059 (Fla. 1986). In Rivera, supra, this Court cited Adams v. State, 412 So.2d **850**, 857 (Fla.), cert. denied, 459 U.S. 882 (1982), and observed that:

> . . . We have found that "fear and emotional strain preceding a victim's almost instantaneous death may be considered as contributing to the heinous nature of the capital felony."

Measured by the standards established in the precedent of this Court, the homicide of the Jill Piper was especially heinous, atrocious or cruel. Appellant carried out his prior threats, stalked his victim, and mercilessly executed Jill Piper where she was attempting to defend herself and was begging for her life to be spared. This aggravating factor was established beyond a reasonable doubt and appellant's point must fail.

ISSUE V

WHETHER FLORIDA STATUTE 921.141(5)(h) (ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL) IS UNCONSTITUTIONALLY VAGUE.

As his fifth point on appeal, appellant presents a claim which has been rejected by this Honorable Court on numerous occasions. He asserts that our heinous, atrocious or cruel aggravating factor is unconstitutionally vague and cannot be properly applied to appellant. In Smalley **v.** State, 546 So.2d 720 (Fla. 1989), this Court, observing that there had been **repeated** assertions that the aggravating circumstance of heinous, atrocious or cruel was unconstitutionally vague, addressed the claim "in order to set the issue at rest," This Court held:

> It is true that both the Florida and Oklahoma sentencing laws use the phrase "especially heinous, atrocious or cruel". However, there are substantial differences between Florida's capital sentencing scheme and Oklahoma's. In Oklahoma, the jury is the sentencer, while in Florida, the jury gives an advisory opinion to the trial judge, who then passes sentence. The trial judge must make findings that support the determination of all aggravating and mitigating circumstances. Thus, it is possible to discern upon what facts a sentencer relied in deciding that a certain killing was heinous, atrocious or cruel.
>
> This Court ha5 narrowly construed the phrase "especially heinous, atrocious or cruel" so that it has a more precise meaning than the same phrase had in Oklahoma. In *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973), *cert. denied*, **416** U.S. **943**, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), we said:
>
> > 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. 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 consciousless or pitiless crime which is unnecessarily torturous to the victim.
>
> It was because of this narrowing construction that the Supreme Court of the United States upheld the aggravating circumstance of heinous, atrocious or cruel against a specific Eighth Amendment vagueness challenge in ***Proffit v. Florida,*** 428 ***U.S.*** 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious or cruel to those consciousless or pitiless crimes which are unnecessarily torturous to the victim. (citations omitted) That ***Proffit*** continues to be good law today is evident from *Maynard v.* ***Cartwright*** , wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. ***See, Maynard v. Cartwright,*** 108 S.Ct. at 1859.

Smalley v. State, 546 So.2d at 722. Notwithstanding the clear rejection of this claim by this Court in Smalley, appellant contends that this Court should reconsider its previous rulings in light of Shell v. Mississippi, 498 U.S. ___, **111 S.Ct. 313,** 112 L.Ed.2d 1 (1990). Once again, however, a capital defendant seeks aid from a recent decision of our nation's High Court and attempts to apply it where it will not be applied. Shell arose in a state which, like Oklahoma, provides that the jury is the sentencer, unlike Florida where the jury merely renders an

advisory recommendation. Thus, this Court's decision in Smalley is controlling precedent and appellant's fifth point must fail.

ISSUE VI

WHETHER THE TRIAL COURT FOLLOWED THE DICTATES OF CAMPBELL V. STATE, 571 SO.2D 415 (FLA. 1990), AND PROPERLY IMPOSED A SENTENCE OF DEATH UPON APPELLANT.

Appellant next contends that the trial court's sentencing findings are not sufficiently clear and do not show that the trial judge gave due consideration to all the mitigating evidence propounded by appellant and, therefore, the imposition of a sentence of death was improper. Your appellee contends otherwise and, as will be demonstrated below, the sentence of death imposed upon appellant is proper and warranted,

A. Aggravating Factors:

Your appellee submits that the trial court's finding of two aggravating circumstances and giving great weight thereto is supported by the record in this case. Appellant points to several passages in the trial court's oral pronouncement and shows how they vary from the written findings of the trial judge. It is apparent that the trial judge merely misread his pre-prepared findings into the record at the time of the oral pronouncement. This Court reviews the written findings pursuant to statute and those written findings are clear and unambiguous. The trial judge in his written findings gave great weight to the previously convicted of a violent felony aggravating factor based upon the circumstances of this case (R 966 - 967). The trial judge correctly determined that he was permitted to consider the facts of the attempted first degree murders of Richard Byrd and

Terri Rice which were committed by appellant. In Brown v. State, 473 So.2d 1260, 1266 (Fla. 1985), this Honorable Court determined that the appellant therein had misread this Court's holding in Mann v. State, 420 So.2d 578 (Fla. 1982). This Court specifically held that "evidence of the circumstances of the previous offense may be considered", citing Mann v. State, 453 So.2d 784 (Fla. 1984). See also, Stewart v. State, 558 So.2d 416, 419 (Fla. 1990). Thus, in the instant case, the trial judge, based upon the precedent established in this Court, validly considered the circumstances of the other felonies committed by appellant. Consideration of those circumstances led the trial court to give great weight to the aggravating circumstance set forth in *Florida Statute 921.141(5)(b)*.

As discussed under Issue IV, supra, the trial court properly found the heinous, atrocious or cruel aggravating factor applicable in appellant's case. The murder of sixteen-year-old Jill Piper occurred only after she had been terrorized and stalked by appellant, after she had sought protection by arming herself and seeking the company of friends, and after she had been shot and beaten by appellant while she begged for her life (R 967 - 970). The trial court did not err in giving great weight to this aggravating factor.

There is also no inconsistency with respect to the trial court's treatment of the cold, calculated and premeditated aggravating factor. This aggravating circumstance was not found by the court (R 974, 982). Discussion of the cold and calculated

nature of this homicide only pertained to the negation of a mitigating circumstance propounded by appellant, to-wit: the killing was done for an emotional or passionate reason rather than from mere cold calculation.

Thus, the trial judge validly found two aggravating factors and accorded them great weight. Based upon the facts of this case, the trial judge did not err in so finding.

B. Mitigating Factors:

With respect to the mitigation propounded by appellant and considered by the trial judge, appellant first expresses concern that the trial judge's written order does not mention several alleged mitigating factors. None of the factors now mentioned by appellant, appellant's age of twenty-four-years, the alleged intoxication of the victim **and** a prior threat against appellant by the victim, were propounded by appellant in his memorandum in support of a life sentence (R 186 - 187). Additionally, no evidence was ever adduced by appellant to support these alleged factors in mitigation. Appellant's age of twenty-four is not a mitigating factor absent some evidence showing that the emotional age is significantly lower than the chronological age. See, e.g., Garcia v. State, 492 So.2d 360 (Fla.), cert. denied, 479 U.S. 1022, 107 S.Ct. 680, **93** L.Ed.2d 730 (1986); Mills v. State, 476 So.2d 172 (Fla. 1985), cert. denied, 475 U.S. 1031, **106** S.Ct. 1241, 89 L.Ed.2d 349 (1986). There was never any evidence presented which would demonstrate that appellant's age was a mitigating factor. Thus, this aggravator **was** not at issue. With

respect to the alleged intoxication of the victim, there is no evidence in the record to show that, even if true, the victim's intoxication contributed to the offense or otherwise ameliorated the enormity of appellant's guilt. Appellant's reliance upon Rhodes v. State, 547 So.2d 1201 (Fla. 1989), and Herzog v. State, 439 So.2d 1372 (Fla. 1983), is totally misplaced. In those cases, the "intoxication" of the victims was cited by this Court to negate the heinous, atrocious or cruel aggravating factor. In no way is intoxication of the victim a mitigating factor where it did not contribute somewhat to the homicide. With respect to the fact that the victim made a prior threat against appellant, this arose as a result of the victim's desire to "break up" with appellant. The victim had stated that if appellant kept messing with her she would blow his head off (PR 569). This "threat" by the victim is simply not mitigating insofar as appellant's case is concerned. There is simply no evidence in the record to support the proposition that appellant committed the homicide upon Jill Piper because he was afraid for his life. Rather, the evidence is clear that appellant carefully planned this murder, stalked his victim, and took the life of Jill Piper.

Appellant also takes issue with the findings of the trial judge set forth in the written order as they pertain to mitigation. Your appellee submits that the trial judge followed the following standards enunciated by this Court in Campbell v. State, 571 So.2d 415, 419 - 420 (Fla. 1990):

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant (footnote omitted) to determine whether it is supported by the evidence and whether in the case of nonstatutory factors, it is truly of a mitigating nature. (citation omitted) The court must find as a mitigating circumstance each proposed factor that is mitigating in nature (footnote omitted) and has been reasonably established by the greater weight of the evidence. . . . (footnote omitted) The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record.'' (citation omitted)

A review of the sentencing order entered by the trial judge in the instant case reveals that, in accordance with Campbell, the death sentence was validly imposed upon appellant.

Appellant contends that the trial court's discussion of the proposed mitigating factor that the homicide was committed while appellant was under the influence of extreme mental and emotional disturbance is confusing. Contrary to appellant's assertions, the trial judge did not reject this statutory mitigating circumstance, but rather accorded very little weight to it (R 971 - 972). Pursuant to Campbell, the trial judge evaluated this factor because evidence had been presented by the defense through the testimony of Dr. Daniel Sprehe, a forensic psychiatrist,

where he opined that this factor was in existence. However, the trial court observed that appellant's actions as demonstrated by the evidence shed much doubt upon Dr. Sprehe's conclusion. Indeed, the trial judge determined that rather than supporting the existence of extreme mental and emotional disturbance, appellant's voluntary ingestion of intoxicants diminished his inhibitions, but did not destroy appellant's cognitive functions (R 972). Thus, the trial judge, based upon all evidence introduced at penalty phase, validly concluded that this mitigating factor was to be accorded very little weight. The trial judge did not abuse his discretion in this finding.

Appellant next contends that the trial court's rejection of the proposed mitigating factor that appellant acted under extreme duress is also confusing. Merely because the trial judge used the term "no meaningful weight may be accorded the circumstance" does not indicate that appellant acted under duress. The trial court correctly found that based upon the evidence that these is no support for the proposition that appellant's will was overborne by some factor or other person which would support this type of mitigating circumstance. In an abundance of caution based upon the Campbell decision, because Dr. Sprehe made a conclusory statement that the defendant acted under duress, the trial judge felt compelled to discuss that factor in his order (R 972). However, the order of the trial judge is clear in that duress was not a factor in this case, mitigating or otherwise.

Appellant next takes issue with the trial court's according little weight to the statutory mitigating factor that appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Once again in accordance with Campbell, the trial judge expressly evaluated this factor because it was "reasonably established" by the evidence in that there was testimony adduced from Dr. Sprehe which supported this factor. However, because there was substantial evidence in the record which tended to negate this factor, the trial judge accorded it little weight. The trial court correctly observed that although appellant voluntarily ingested intoxicating substances, the evidence showed that appellant was still able to appreciate the criminality of his actions and was able to conform his conduct to the requirements of law, but that his inhibitions were lowered and his impulsiveness was increased (R 972 - 974). Thus, the actions of appellant demonstrated that the mitigating factor, even if existing pursuant to testimony adduced by defense, was entitled to very little weight. In essence, this mitigating factor was negated by appellant's actions. Appellant's characterization of the trial court's "judicial foray into amateur psychiatry'' (appellant's brief at page 57) is an unwarranted attack upon the trial judge. Although appellant's mental health expert may have testified that he was substantially impaired, the trial court properly rejected these findings. The trial court, as finder of fact in determining the existence of mitigating factors, is

entitled to draw this conclusion. "Expert testimony . . . is not binding on the trier of fact even when that testimony is uncontradicted." Cronin v. State, 470 So.2d 802, 804 (Fla. 4th DCA 1985). The trial court thoroughly analyzed the circumstances surrounding appellant's conduct and determined that appellant exhibited such behavior as to warrant a rejection of Dr. Sprehe's conclusions. The trial court's analysis is well-supported by the record and should not be disturbed by this Honorable Court on appeal. The trial court correctly accorded that weight due this mitigating factor, namely, little.

Appellant next attacks the trial judge's fifth paragraph regarding mitigation which appears in the record at R 974 - 976. He contends that the trial court mistakenly combined "several proposed mitigating factors (good conduct in prison, potential for rehabilitation, genuine remorse, caring deeply for victim) into one" (appellant's brief at page 59). The trial court's treatment of this mitigation was wholly proper and appellant apparently misreads Campbell by asserting that the trial judge erred. In Campbell, at 419, n. 4, 3), this Court observed that remorse, potential for rehabilitation, and a good prison record are a single mitigating circumstance. Appellant's attempt to divide these factors to presumably have them accorded more weight than he is entitled was correctly rejected by the trial judge. The trial judge found that the evidence supported this mitigating factor, but because of the circumstances of the case and the demeanor of appellant in his appearance before the court, this

factor should be accorded very little weight, The relative weight given a mitigating factor is within the province of the trial judge and where, as here, the record supports the trial court's reasons, it is not error to accord little weight to a particular mitigating factor.

Appellant misreads the next finding of the trial judge. Appellant contends that the court rejected as a mitigating factor that appellant had no significant history of prior criminal activity. This is simply incorrect. The trial court found this factor to exist but, in the weighing process, determined that it did not warrant a sentence less than death. The trial court did not, therefore, arbitrarily discount this factor, but determined that it was of insufficient weight to counterbalance the aggravating factors.

Contrary to appellant's assertions, the trial court validly rejected the proposed mitigation of physical and psychological abuse. The trial court correctly observed that there was no evidence in the record to support this factor. Merely because the trial court rendered an alternative view of this factor, that is, that even if it were established it would not have affected the balance between aggravating and mitigating circumstances, there is no indication that the trial court erred with respect to its treatment of this proposed mitigator. This mitigator was simply not supported by the evidence and, therefore, pursuant to Campbell, the trial court's rejection of this factor was proper.

Finally, appellant attacks three of the trial court's mitigating findings, paragraphs 12, 13 and 14 of the sentencing order (R 978 - 980) as if they should have been treated as separate mitigating factors. Once again, appellant on appeal, as he did before the lower court, is attempting to have the same mitigating factor considered as separate ones in an attempt to have them accorded more weight than which they are entitled. The fact that appellant may have abused intoxicants in the past and may have voluntarily ingested illegal substances prior to the commission of the homicide were considered as mitigating factors by the trial court. Appellant's complaint appears to be that the trial court failed to accord this mitigation sufficient weight in mitigation (appellant's brief at 66). Appellant's reliance upon cases such as Nibert v. State, 574 So.2d 1059 (Fla. 1990), Wright v. State, 586 So.2d 1024 (Fla. 1991), Carter v. State, 560 So.2d 1166 (Fla. 1990), Pentecast v. State, 545 So.2d 861 (Fla. 1989), and Amazon v. State, 487 So.2d 8 (Fla. 1986), is totally misplaced. In each of those cases, a judicial override of a jury's recommendation of life sentence was not sustained by this Court because there was evidence in the record which may have established mitigation. The instant case, however, comes before this Court after the trial judge followed an 11 - 1 jury recommendation of a death sentence. The trial court's findings (R 978 - 980), reflect consideration of appellant's proposed mitigation but reveal that these matters were given little weight by the trial judge. Appellant's complaint that the trial judge

failed to accord great weight to appellant's use of intoxicants as a mitigating factor is particularly unavailing where the weight given a particular mitigating factor is within the province of the trial judge. Campbell v. State, supra at 420. The trial judge correctly determined that appellant's actions showed that this mitigator was not to be given great weight. The court's findings are supported by sufficient competent evidence in the record.

C. Conclusion:

A review of the trial court's sentencing order in the instant case reveals that valid aggravating factors were weighed against the mitigation found by the trial judge and the resulting imposition of a death sentence was warranted. The trial judge complied with the dictates of Campbell v. State and considered, and expressly evaluated, all mitigation propounded by appellant. Appellant's complaint that the trial court failed to accord sufficient weight to the proposed mitigation is belied by the evidence presented and the trial court did not err by imposing a death sentence.

ISSUE VII

WHETHER THE DEATH SENTENCE AS IMPOSED IN THE INSTANT CASE IS PROPORTIONALLY WARRANTED.

As his final point on appeal, appellant contends that the death sentence imposed in the instant case is disproportionate to the crime committed. For the reasons expressed below, appellant's point must fail.

In his brief, appellant neglects to discuss the fact that this Honorable Court in the most recent opinion in appellant's case rejected the disproportionally claim. In Lucas v. State, 568 So.2d 18, 23 (Fla. 1990), this Court held that, "On the facts of this case we do not agree that death is necessarily disproportionate for this killing." Your appellee submits that this Court's prior holding should be reaffirmed.

Basically, appellant contends that death is inappropriate in this case because the mitigation outweighed the aggravating factors. However, as discussed above, the trial judge acted within his province to accord such weight as he deemed sufficient to the mitigation propounded by appellant. The trial court's deliberative order reflects the proper application of Florida capital sentencing law and is supported by substantial competent evidence.

Appellant also contends that the instant case is merely a "domestic dispute" not warranting a sentence of death. Appellant's reliance on cases such as Garron v. State, 528 So.2d 353 (Fla. 1988), Irizarry v. State, 496 So.2d 822 (Fla. 1986),

and Wilson v. State, 493 So.2d 1019 (Fla. 1986), is misplaced. In each of those cases, this Honorable Court found that the killings were the result of heated, domestic confrontation and, although premeditated, were most likely committed upon reflection of a short duration. The murder in the instant case, however, was not the result of a sudden reflection, but was the result of a cold and calculated plan formulated over a period of time sufficient to accord reflection and contemplation of the defendant's actions. Here, the defendant stalked and terrorized his victim prior to the killing. In addition, your appellee would not characterize the instant case as a "domestic" style case where there is continuing and ongoing relationship between the victim and her assailant. Rather, the instant case is one in which a sixteen-year-old girl had ceased her relationship with the defendant prior to the murder. Even should this Honorable Court disagree and find that the instant case is, indeed, domestic in nature, not all "domestic" cases have been reversed on the grounds of proportionality. See, e.g., Brown v. State, 565 So.2d 304 (Fla. 1990); Porter v. State, 564 So.2d 1060 (Fla. 1990). In any event, as previously determined by this Honorable Court, the sentence of death is not disproportionate for the killing in the instant case.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General
Florida Bar ID#: 0238538
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 21st day of April, 1992.

OF COUNSEL FOR APPELLEE.