IN THE SUPREME COURT OF FLORIDA

DONN A. DUNCAN,

Appellant,

v. CASE NO. 78,630

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE/ INITIAL BRIEF OF CROSS APPELLANT

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STATEMENT OF THE CASE AND FACTS

The state adds the following fact:

After stabbing Debbie Bauer, Duncan said, "I hope you die bitch" and "I did it on purpose"; after committing his prior murder, Duncan said "I hope he dies, I meant to kill him" (R 540, 896-97).

SUMMARY OF ARGUMENT

POINT 1: The death sentence is proportionate. Duncan previously murdered another person and committed an aggravated assault in the course of the instant crime, and contrary to Duncan's allegations, as is demonstrated in the state's cross appeal, the mitigation is far from compelling. This court has affirmed the death sentence where only one aggravating factor was present, and has affirmed the death sentence under express proportionality review where the defendant has been convicted of a prior similar violent offense.

POINT 2: The trial court did not abuse its discretion in admitting a photograph during the penalty phase. Duncan's propensity to commit violent crimes was a valid consideration for the jury and it was relevant and proper for the jury to see the force and extent of that violence. Error, if any, was harmless.

POINT 3: The jury was properly instructed at the penalty phase. This court has consistently held that the standard jury instructions are sufficient to apprise the jury of the applicable law.

POINT 1 ON CROSS APPEAL: The trial court abused its discretion in finding that Duncan was under the influence of alcohol at the

time of the murder, was under the influence of extreme mental or emotional disturbance at the time of the murder, and that Duncan's ability to conform his conduct to the requirements of the law was impaired. The trial court cited to no evidence or facts in support of these factors, and specifically found that all of the witnesses testified that Duncan appeared sober. There is no evidence, much less a reasonable quantum of competent proof to support the finding of these factors. As such, they should not be considered in reviewing Duncan's sentence.

ARGUMENT

POINT 1

THE DEATH SENTENCE IS PROPORTIONATE.

> Appellant is a good man, except that sometimes he kills people.

Fead v. State, 512 So.2d 176, 180 (Fla. 1987) (Grimes, J., concurring in part and dissenting in part).

Duncan contends that the death penalty is disproportionate to his crime and constitutes cruel and unusual punishment. Duncan argues that this court has never affirmed a death sentence that has been imposed by a trial judge based on the aggravating factor prior violent felony, and when "compelling mitigating" such as that in the instant case exists, the death penalty is simply inappropriate. The fact that the death sentence may not previously have been imposed in Florida when prior violent felony is the only aggravating factor does not mean that this court is precluded from upholding such sentence. Duncan previously murdered another person and committed an aggravated assault in

the course of the instant crime, and contrary to Duncan's allegations, the mitigation is far from compelling. *See,* Cross Appeal.

Death may be the appropriate penalty if at least one statutory aggravating factor is established. *Dougan v. State,* **595** So.2d **1** (Fla. **1992).** As Duncan recognizes, this court has affirmed death sentences where only one aggravating circumstance has been found. Although all but one[1] of the cases cited by Duncan involve the heinous, atrocious or cruel aggravating factor, this does not mean that a death sentence cannot be upheld where the single aggravating factor is prior violent felony conviction, particularly where one of those convictions is for murder. This court has affirmed the death sentence under express proportionality review where the defendant has been convicted of a prior "similar violent offense". ***Lemon v. State,*** **456** So.2d **885, 888** (Fla. **1984)** (death sentence "is not comparatively disproportionate" for stabbing death of girlfriend where defendant had prior conviction for assault with intent to commit first degree murder for stabbing another female victim); ***King v. State,*** **436** So.2d **50, 55** (Fla. **1983)** (death penalty affirmed as comparable where defendant had prior manslaughter conviction for axe-slaying of woman victim). ***See*** *also, Harvard v.* ***State,*** **414** So.2d **1032** (Fla. **1982).** Similarly, this court has affirmed a death sentence in cases where the only aggravator in addition to prior

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[1] In Armstrong v. State, **399** So.2d **953** (Fla. 1981), which involved a double murder, this court struck two aggravating factors and affirmed on the basis that the murders were committed during the course of a robbery and there was nothing in mitigation.

violent felony is during the course of a felony. *See, Hamblen v. State,* 527 So.2d 800 (Fla. 1988); *Rogers v. State,* 511 So.2d 526 (Fla. 1987); *Jackson v. State,* 502 So.2d 409 (Fla. 1986).

The cases where this court has affirmed the death sentence where only one aggravating factor was present also demonstrate that Duncan's sentence is proportionate. These cases involved the shooting of a friend, a crime of passion in a marital setting, a man shooting his former female companion's husband, and the rape and murder of a child. In *Arango v. State,* 411 So.2d 172 (Fla. 1982), the victim was beaten and shot in the head in his bedroom. The sole aggravating factor was heinous atrocious or cruel, and the mitigation was no prior criminal history. This court stated the death penalty does not contemplate a tabulation of aggravating and mitigating factors to arrive at a sum, but places upon the trial judge the task of weighing all of these factors. *Gardner v. State,* 313 So.2d 676 (Fla. 1975), an override case, involved a "crime of passion in a marital setting in which the excessive use of alcohol was a material factor resulting in the homicide." *Id.* at 679 (Ervin, J., dissenting). The sole aggravating factor was heinous, atrocious or cruel, and the trial court found no mitigation, but as the dissent noted, mitigation existed. Justice Ervin stated that in his opinion, a "drunken spree" does not warrant the death penalty, but if there had been a calculated design and premeditation to rid one of his spouse, death would be warranted. In *Douglas v. State,* 328 So.2d 18 (Fla. 1976), another override case, this court affirmed the death sentence solely on the basis of one aggravating factor (heinous,

atrocious or cruel), where the victim was the husband of the defendant's former companion. In *LeDuc v. State,* **365** So.2d **149** (Fla. **1978),** the defendant raped and murdered a young girl, and while a substantial amount of mental mitigation was proffered, the death sentence was affirmed on the basis of one aggravating factor and nothing in mitigation.

Duncan claims that "heinous, atrocious or cruel" and "cold, calculated and premeditated" are Florida's most serious aggravating factors, and that it would be fundamentally incongruous to affirm when the only extant aggravating circumstances does not reflect an additional bad part of the actual killing, but instead reflects a condition or status of the defendant (IB **16,** n. **6).** The fact that Duncan previously murdered another person certainly reflects more than his "status" or "a condition", and is entitled to great weight. This court has stated that the purpose of considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant, *Elledge v. State,* **346** So.2d **998** (Fla. **1977),** and the fact that a defendant has previously committed a murder does not weigh heavily towards good character. *See, e.g., Demps v. State,* **395** So.2d **501** (Fla. **1981)** (nothing prohibits trial judge from taking into consideration the quality of aggravating circumstances, and defendant had "loathsome distinction" of having previously been convicted of murder and attempted murder). Appellee submits that when the prior violent felony is a prior murder, this the most serious and weightiest aggravating factor.

In this respect, appellee would point out that one of the reasons death is a unique punishment is its total rejection of the possibility of rehabilitation of the convict as a basic purpose of the criminal justice system. *State v. Dixon,* 283 So.2d 1 (Fla. 1973); *Furman v. Georgia,* 408 U.S. 238 (1972). Duncan murdered one person in prison and another person outside of prison, which certainly indicates his own rejection of rehabilitation. In addition, there was nothing proffered in mitigation to lessen the weight of this factor, such as a causal relationship or extensive brain damage. *See, e.g., Fitzpatrick v. State,* 527 So.2d 809 (Fla. 1988); *Huckaby v. State,* 343 So.2d 29 (Fla. 1977).

Likewise, there was nothing proffered in mitigation to outweigh this aggravating factor. As Duncan notes, this court, in reversing on proportionality grounds, has placed heavy emphasis on mitigation due to the offender's addiction to and/or intoxication from drugs or alcohol. *See, Livingston v. State,* 565 So.2d 1288 (Fla. 1988); *Proffitt v. State,* 510 So.2d 896 (Fla. 1987). However, contrary to Duncan's assertions, this "overriding factor" is *not* present in the instant case, despite some confusing language in the sentencing order which might indicate differently. In its discussion of mitigating factors, the trial court stated:

> Circumstances in mitigation that the Defendants (sic) ability to conform his conduct to the law was substantially impaired at the time of the crime, that he was under the influence of extreme mental or emotional disturbance at the time of the killing and that the

> defendant was under the influence of alcohol at the time of the killing, are based on testimony from the guilt phase of the trial. The Court has reviewed and weighed this testimony and circumstances.

(R 1343). However, in its factual findings the trial court stated:

> All witnesses testified that the defendant appeared sober and that no one observed him drink any alcoholic beverages the night before.

(R 1341). The record is completely in accordance with the trial court's factual findings, and there is no evidence whatsoever to provide a reasonable basis that Duncan was under the influence of alcohol when he murdered Debbie Bauer. *See,* Cross Appeal.

Likewise, there was no evidence that Duncan was under the influence of extreme mental or emotional disturbance at the time of the killing or that his ability to conform his conduct to the requirements of the law was substantially impaired. Duncan presented no expert psychiatric or psychological testimony, nor did he testify as to his state of mind at the time of the killing. Appellee contends that in the absence of any testimony that Duncan has brain damage resulting in an extremely delicate psyche or some mental disturbance, this is not a sufficient basis for these two statutory mental mitigating factors. *See,* Cross Appeal.

The remaining mitigating evidence simply does not render the death sentence disproportionate in this case. Duncan's childhood and upbringing, which the trial court weighed in mitigation, was just not that bad, and is not entitled to much

weight. There was no evidence of either physical or sexual abuse. *Compare Liuingston v. State, 565* So.2d **1288** (Fla. **1988)** (childhood marked by severe beatings resulting in minimal intellectual functioning). The next five factors proffered by Duncan[2] were properly found to carry little or no weight. The fact that Duncan was a good, dependable, and capable employee is likewise entitled to little weight, as it does nothing to extenuate or reduce his moral culpability for this murder. *See, Rogers v. State,* 511 So.2d 526 (Fla. **1987)** (fact that defendant intelligent and articulate would not be used in mitigation inasmuch as such qualities established only that defendant was capable of understanding criminality of conduct and did not reduce moral culpability). Further, this factor is generally found in terms of demonstrating potential for rehabilitation, *Holsworth v. State,* 522 So.2d **348** (Fla. **1988),** and the fact that Duncan had already murdered somebody while in prison seriously detracts from this. Duncan also asserted that he was a good listener and supportive friend, which may have been true unless one was engaged to him or "pushed him too far". This factor is at odds with this type of crime. Duncan also asserts in mitigation that he successfully completed his parole. While technically this may be true, the fact that Duncan later committed another murder certainly indicates that he was not successful in terms of the purposes of parole. Duncan also

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[2] Killing was not for financial gain; killing did not create a great risk of death to many persons; killing did not occur while he was committing another crime; victim was not a stranger; victim is not a child.

asserts in mitigation that the killing came as a result of and subsequent to a domestic dispute. Appellee would point out that there was no evidence that this killing occurred during a heated confrontation, and even if Duncan was angry or "inflamed" over what had occurred the evening before, there was plenty of time for him to cool off and become a "good listener and supportive friend" instead of a second time murderer. The fact that the victim was engaged to Duncan was properly given little or no weight by the trial court.

The cases relied upon by Duncan for reversal on proportionality grounds are readily distinguishable. In *Fitzpatrick, supra,* the record was replete with evidence of substantially impaired capacity, extreme emotional disturbance, and low emotional age. The defendant had an emotional age between nine and twelve years, had extensive brain damage, had been described as "crazy as a loon", and his actions were those of a "seriously disturbed man-child" *Id.* at **810-11.** None of those factors are present in the instant case. In *Livingston, supra,* this court found that the mitigating factors of severe childhood beatings; youth, inexperience, and immaturity; minimal intellectual functioning as a result of the beatings; and extensive use of cocaine and marijuana, outweighed the remaining aggravating factors of prior violent felony and during the course of a robbery. In *Proffitt v. **State,*** 510 So.2d **896** (Fla. 1987), this court specifically noted that not only was there no prior violent felony aggravator, but the defendant's lack of significant criminal history was mitigating. The court also stated that

affirming the sentence in that case would mean that every murder committed during the course of a burglary would require the death penalty. In addition, as with all of the other cases relied upon by Duncan, there was evidence that the defendant had been drinking, which as was demonstrated, is not a factor in the instant case. Similarly, in *Penn v. State,* 574 So.2d 1079 (Fla. 1991), the defendant had no significant history of prior criminal activity, and was also acting under the influence of extreme mental or emotional disturbance. In *Songer v. State,* 544 So.2d 1010 (Fla. 1989), the defendant's reasoning abilities were substantially impaired by addiction to hard drugs, his remorse was genuine, and he had exhibited a positive change while in prison. There was no evidence that Duncan's reasoning abilities were impaired, he stabbed the victim on purpose and hoped she would die, and while previously in prison he had murdered someone.

As stated, the procedure to be followed by the jury and judge is not a mere counting process of aggravating and mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances presented. *Dixon, supra* at 10. On review of a death sentence, this court's role is not to cast aside careful deliberation which the matter of sentence has already received by the jury and trial judge, unless there has been a material departure by either of them from their proper prescribed functions, or unless it appears that, in view of other decisions

concerning imposition of the death penalty, punishment is too great. *Hargrave v. State*, 366 So.2d 1 (Fla. 1978). The jury weighed the aggravating factor against the proffered mitigation and unanimously recommended the death penalty, and that recommendation is entitled to great weight. *Grossman v. State*, 525 So.2d 833 (Fla. 1988). The trial court likewise weighed the evidence, and determined, in accordance with the jury's recommendation, that death was the appropriate penalty. Death is not too great a punishment in this case. As the trial court judge in *Fead, supra*, stated, "If the death penalty is not for one who repeatedly commits murder...then for whom can it be said that it is reserved?" *Id.* at 180.

POINT 2

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING A PHOTOGRAPH DURING THE PENALTY PHASE.

Duncan contends that he was denied due process of law when the state was permitted to introduce into evidence a photograph of his prior murder victim, claiming that this evidence had no relevance to any issue and was highly prejudicial. In admitting the photograph, the trial court stated:

> THE COURT: Well, this is a discretionary issue for the Court. And I'm going to, there's not been any testimony as to the force that would be required to inflict the injuries that did occur.
>
> There's also no direct testimony as to the, as to the actual position of the victim at the time, other than the statements by the defendant to the officer, for purpose of indicating force to demonstrate the actions of the

> defendant when this particular crime occurred; also the possible position and situation of the victim when the crime occurred.
>
> I will admit the photograph.

(R 902). Appellee contends that the trial court did not abuse its discretion in admitting the photograph.

During the penalty phase, evidence may be presented as to any matter the court deems relevant to the nature of the crime and the character of the accused, and shall include matters relating to any of the aggravating circumstances. §921.141(1), Fla. Stat. (1991). "If a defendant was previously convicted of any violent felony, *any evidence* showing the use or threat of violence to a person during the commission of such felony would be relevant in a sentence proceeding." *Delap v. State,* 440 So.2d 1242, 1255 (Fla. 1983) (emphasis supplied). A jury cannot be expected to make a decision in a vacuum and must be aware of the underlying facts, so it is appropriate to introduce the details of a prior violent felony conviction. *Lucas v. State,* 568 So.2d 18 (Fla. 1991). Propensity to commit violent crimes is a valid consideration for the jury and the judge. *Elledge v. State,* 346 So.2d 998 (Fla. 1977). The test of admissibility of photographs is relevancy rather than necessity. *Nixon v. State,* 572 So.2d 1336 (Fla. 1991). The trial court has discretion, absent abuse, to admit photographic evidence so long as it is relevant, and the gruesome nature of the photographs does not render the decision to admit them into evidence an abuse of discretion. *Thompson v. State, 565* So.2d 1311, 1314 (Fla. 1990).

The trial court admitted a 3 1/2" x 5" photograph which depicted the head injuries Duncan inflicted on Willie Davis, which resulted in his death. Duncan pled guilty to second degree murder (R 917). This is not a case where the condition of the body was the result of the length of time it had been dead and the work of extraneous factors. *See, Czubak v. State,* 570 So.2d 925 (Fla. 1990). Duncan should not be heard to complain that the injuries *he inflicted* were gruesome and therefore irrelevant. *See, Henderson v. State,* 463 So.2d 196, 200 (Fla. 1985) ("Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments"). Since Duncan's propensity to commit violent crimes was a valid consideration for the jury, *Elledge supra,* it was relevant and proper for the jury to see the force and extent of that violence. *Delap, supra.* The photograph was the best way to show the jury the "underlying facts", and its relevance was not outweighed by prejudice.

Even if the trial court abused its discretion in admitting the photograph, any error was harmless at worst as neither the jury recommendation nor sentence would have been affected. *State v. Diguilio,* 491 So.2d 1129 (Fla. 1986). The facts depicted in the photograph were admissible in any event, so nothing extraneous was put before the jury for its consideration. The photograph was neither utilized nor referred to by the prosecutor in closing argument nor was it ever urged as a basis for a death recommendation in this case. The jury recommendation for death was unanimous. The bottom line is that Duncan previously

murdered another human being, and along with his conviction for aggravated assault in the instant case, this aggravating factor is entitled to the greatest possible weight, and the fact that the jurors saw a picture of the previous victim could not have affected this.

POINT 3

THE JURY WAS PROPERLY INSTRUCTED AT THE PENALTY PHASE.

Duncan claims that the trial court erred in denying his special requested jury instructions 2, 3, 4, 5, 6, 8, 10, and 25-30. While the trial court denied giving instructions 2 and 3 as "specially requested instructions", appellee would point out that these instructions are not simply "covered" in the standard instructions, but are included verbatim as to number 3 and almost verbatim as to number 2, and were given in the instant case (R 1027, 1028). Defense counsel withdrew requested instruction 10 (R 979). Requested instructions 4 and 8 are inaccurate, since they essentially instruct the jurors they do not have to follow the law but can rely on their "reasoned judgment" or "afford an individual defendant mercy", and this court has held that it is not error to give such instructions. ***Robinson v. State,*** 574 So.2d 108 (Fla. 1991); *Mendyk* ***v. State,*** 545 So.2d 846, 849-50 (Fla. 1989). This court has also held it is not an abuse of discretion to not give instruction 6. ***Stewart v. State,*** 549 So.2d 171 (Fla. 1989). This court has consistently held that the standard jury instructions are sufficient to apprise the jury of the applicable law, and has consistently rejected claims that a trial court

should give additional instructions at the penalty phase. *Dougan v. State*, 595 So.2d 1 (Fla. 1992), so appellee submits the trial court did not abuse its discretion in failing to give instruction 5. The remaining instructions involve specific nonstatutory mitigating factors, and this court has held that there is no error in refusing to instruct the jury on such matters. *Randolph v. State*, 562 So.2d 331 (Fla. 1990); *Jackson v. State*, 530 So.2d 269 (Fla. 1988).

CROSS APPEAL

POINT 1

THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT DUNCAN WAS UNDER THE INFLUENCE OF ALCOHOL AT THE TIME OF THE MURDER, WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE AT THE TIME OF THE KILLING, AND THAT HIS ABILITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED AT THE TIME OF THE CRIME WHERE THERE WAS NO EVIDENCE TO SUPPORT THESE FACTORS; SUCH FACTORS SHOULD PLAY NO PART IN REVIEW OF DUNCAN'S SENTENCE.

In its sentencing order, the trial court stated:

> Circumstances in mitigation that the Defendants (sic) ability to conform his conduct to the law was substantially impaired at the time of the crime, that he was under the influence of extreme mental or emotional disturbance at the time of the killing and that the defendant was under the influence of alcohol at the time of the killing, are based on testimony from the guilt phase of the trial. The Court has reviewed and weighed this testimony and circumstances.

(R **1343**). It is apparent that the trial court found that these factors were entitled to little weight, as it found that Duncan's prior violent felonies outweighed the mitigating evidence. The state contends that such factors should not have been weighed at all, as there is no evidence in the record to support them, so they should not be considered in reviewing Duncan's sentence.

The proper standard for determining that a mitigating circumstance is invalid is whether the judge abused his discretion in finding that circumstance. *Scull v. State,* **533** So.2d **1137, 1143** (Fla. **1988).** The court must find as a mitigating

circumstance each proposed factor that was mitigating in nature and has been reasonably established by the evidence. *Campbell v. State,* 571 So.2d 415 (Fla. 1990). This is a factual question and a trial court's findings will be presumed correct and upheld on review if supported by "sufficient competent evidence in the record". *Id.* at 419 n. 5. As this court has also stated, "...a reasonable quantum of competent proof is required before the circumstance can be said to have been established." *Nibert v. State,* 574 So.2d 1059, 1062 (Fla. 1990). Appellee contends that there is *no* evidence, much less "a reasonable quantum of competent proof" to support these mitigating factors.

The state would first point out that the trial court cited to no evidence or facts in support of these factors, but simply stated they are "based on evidence from the guilt phase" (R 1343). Significantly, in its factual findings in the same order, the trial court stated:

> All witnesses testified that the Defendant appeared sober and that no one observed him drink any alcoholic beverages since the night before.

(R 1341). The record fully supports this factual finding, which must be presumed correct, *Campbell, supra,* and as such intoxication should play no part in review of Duncan's sentence.

According to the testimony of Carrieanne Bauer and Antoinette Blakely, the victim's daughter and mother, Duncan had left the house twice the evening preceding the murder, the first time for around thirty minutes and the second time for around an hour (R 522, 578-79). Duncan told Ms. Blakely that the victim

would be home around 12:00 or 12:30, that he did not want any argument and would be leaving in the morning, and went to his room (R 579). Duncan also told Ms. Blakely that the victim had gone with Little Mark because Duncan would not buy her a can of beer (R 599). Ms. Blakely did not see Duncan drink anything that night or the morning of the murder, and she testified that Duncan had not appeared to be drinking the previous evening (R 580). The deputies at the scene testified that Duncan was in good condition, coherent, cooperative, and there was no evidence of intoxication (R 618-19, 640). Deputy Stenkamp was close enough to Duncan to be able to smell alcohol on his breath, but there was no such odor (R 629-30). The crime scene technician did not remember seeing any beer cans in Duncan's room, nor did he remember smelling any alcohol (R 702). Duncan presented no evidence at the guilt phase and no evidence concerning his mental state at the time of the murder at the penalty phase. This record does not even contain a "mere implication" or self-serving hearsay statement that Duncan consumed alcohol, was under the influence of alcohol, or that his capacity was impaired in any way, which this court has determined is insufficient to establish existence of intoxication as a mitigating circumstance. ***Hardwick v. State,*** 521 So.2d 1071 (Fla. 1988); ***Robinson v. State,*** 574 So.2d 108 (Fla. 1991).

As to the two statutory mental mitigating factors, under the influence of extreme mental or emotional disturbance and substantial impairment of ability to conform conduct to the requirements of the law, the state would first point out that

Duncan presented *no* evidence on his mental state at the time of the murder. There were no expert psychiatric or psychological experts, no lay witnesses, and Duncan himself did not testify. As stated, the trial court recited no facts in support of these factors. In addition, these are not the type of factors that could be supported by factors observed by the trial court, as they relate solely to Duncan's mental state at the time of the murder. *Compare, Scull, supra* (factors observable by trial judge during trial and sentencing proceeding support finding that emotional age was low enough to sustain finding age as mitigating circumstance).

The only evidence which can possibly be said to reflect Duncan's mental state is his actions prior to the murder and his statements after the murder. Duncan had not returned home the prior evening ranting and raving that he was going to kill the victim; he simply stated that he was going to leave. The victim returned home around 10:30 p.m., and Duncan knew she had returned home because they had a brief discussion about his leaving when she went into his room to get cigarettes (R 583). Neither Ms. Bauer nor Ms. Blakely heard any fighting that evening, and they were sleeping in the room right next to Duncan's.

Duncan and the victim did not argue the next morning. Neither Ms. Bauer nor Ms. Blakely saw Duncan with a knife, though Ms. Bauer saw him doing something with his hand before he went outside where the victim was sitting and smoking a cigarette (R 531-32). Duncan said nothing to the victim before he murdered her, but simply walked up behind her, stared at her for several

seconds, and did not go into a frenzy but deliberately stabbed her in the back and chest (R **715-16).** Duncan asked **Ms.** Bauer if she wanted it too, although he did not attack her, then walked out to the front yard, started laughing, looked at his victim and said "I hope you die bitch. I did it on purpose" (R 540). Duncan then stated that he would wait for the police.

These statements are very informative of Duncan's mental state when compared with the circumstances of his prior murder. In that case, while Duncan was in prison, he was allegedly threatened by another inmate and made up his mind that evening to kill the man (R 895). Duncan obtained a bush axe, waited until the victim was sitting on the toilet reading the next day, and slashed him three times across the head with the axe (R **896).** Duncan went to the control room, informed the guards that he had killed somebody, stated that "I hope he dies, I meant to kill him", and also told other inmates "let that be a lesson to you- you can only push a man so far" (R **896-97, 903).** As in the instant case, there had been no altercation between Duncan and the victim the morning of the murder (R **904).** At best, the evidence demonstrates that Duncan kills people who "push him too far". But it does not necessarily follow, and certainly cannot be found in the absence of any evidence, that this is a result of an extreme mental or emotional disturbance or an inability to conform one's conduct to the requirements of the law.

After stabbing the victim in the instant case, Duncan spoke to Deputy Hubbard, stating that he was upset because the victim would not talk to him and because she had left with another man

the night before. But Duncan also stated that the victim had returned at 1:00 a.m. and they argued until the murder (R 643, 646). As noted, the other witnesses testified that the victim had returned home at 10:30 the previous evening and they had heard no fighting. Ms. Blakely also testified that the victim had told her that Duncan had been invited to go along with her and Little Mark the previous evening but he did not want to go (R 606). At best, this evidence indicates that Duncan was upset with the victim, but falls far short of "a reasonable quantum of competent proof" that Duncan was under the influence of extreme mental or emotional disturbance or that his ability to conform his conduct to the requirements of the law was substantially impaired.

Simply put, on the basis of this record, the trial court's findings reflect the following: the fact that one's fiancee has a beer with another man, after one declines the invitation to go along with them, causes extreme mental or emotional disturbance and significantly impairs one's ability to conform his conduct to the requirements of the law. Clearly this "finding" does not comport with logic, reason or precedent. Extreme mental or emotional disturbance is interpreted as less than insanity, but more than the emotions of an average man, however inflamed. *State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973). Mental disturbance which interferes with but does not obviate knowledge of right and wrong is provided to protect the person who, while legally responsible for his actions, may be deserving of some mitigation of sentence because of his mental state. *Id.* There was no testimony to

indicate that Duncan suffered from any mental disturbance or that he was anything other than an "average man", and in fact the evidence presented at the penalty phase seemed intended to demonstrate "average" traits such as a good friend and dependable employee. There was no evidence of any long standing domestic dispute[3] or that Duncan was obsessed with the victim. *Compare, Farinas v. State,* **569** So.2d **425** (Fla. **1990).**

The state contends that in the absence of testimony that Duncan has brain damage resulting in an extremely delicate psyche, some other objectively demonstrated mental disturbance, or any direct evidence on Duncan's mental state and a causal connection between it and the murder, these mitigating factors cannot be found to exist. *See, e.g., Pardo v. State, 563* So.2d *77* (Fla. **1990)** (there was no testimony that the defendant's ability to conform his conduct was impaired or that he did not know that killing the victims was wrong so trial court was not required to find these factors on the basis of defendant's self-serving testimony). A holding to the contrary would require a finding, as a matter of fact and law, in any case where the inference can be drawn, solely from the circumstances of the killing, that it was committed because the killer was upset about something, however minor, that the victim had done, that the killer was under the influence of extreme emotional disturbance and his ability to conform his conduct to the requirements of the law was significantly impaired. Such a holding would be totally

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[3] Ms. Blakely did testify that the victim and Duncan had fought before but there is nothing to indicate that it was anything out of the ordinary (R **604).**

inconsistent with this courts prior holdings that mitigating factors must be supported by sufficient competent evidence in the record.

CONCLUSION

Based on the foregoing arguments and authorities, appellee/cross appellant requests this court find that the trial court's findings that Duncan was under the influence of alcohol, under the influence of extreme mental or emotional disturbance, and his ability to conform his conduct to the requirements of the law was substantially impaired are not supported by the evidence, and affirm Duncan's conviction and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by hand delivery to Michael S. Becker, Assistant Public Defender, at the Public Defender's box at the Fifth District Court of Appeal, this 21st day of May, 1992.

Kellie A. Nielan
Of Counsel