IN THE SUPREME COURT OF FLORIDA

DUSTY RAY SPENCER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 80,987

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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SEVENTH JUDICIAL CIRCUIT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

The defendant was charged by amended information with four offenses: Count I - first degree murder of Karen Spencer (the defendant's wife) on January 18, 1992, by blunt force trauma and/or by stabbing with a knife; Count II - aggravated assault on Timothy Johnson (the defendant's wife's son) on January 18, 1992, with a knife; Count III - attempted first degree murder of Karen Spencer on January 4, 1992, by application of blunt force with a deadly weapon, an iron; Count IV - aggravated battery on January 4, 1992, by causing great bodily harm or by using a deadly weapon, an iron. (R 602-604) The defendant was arraigned on the charges and entered a plea of not guilty to them. (R 608-609)

A jury trial commenced on November 2, 1992, before the Honorable Belvin Perry, Jr., Judge of the Circuit Court of the Ninth Judicial Circuit of Florida, in and for Orange County. (R 901-904) During the trial, the defendant objected on relevancy grounds to the admission of painters' gloves found in the defendant's car which were allegedly similar to gloves which the defendant was wearing on January 18th. (T 967-969)

The defense successfully objected to irrelevant and improper evidence concerning the fact that the victim was armed the night before the murder as she was afraid of the defendant. (T 851-869) However, the state attorney argued this matter to the jury, despite there being no evidence of it presented to the jury. (T 1040-1041) The court sustained the defendant's objection to this improper argument, but denied his motion for mistrial. (T 1041, 1088-1089)

The trial court denied the defendant's motions for judgment of acquittal. (T 1008-1009, 1014, 1017) The trial court also denied the defendant's objections to the standard jury instructions on premeditation and reasonable doubt, and refused to give requested special instructions on these matters as requested by the defendant. (R 669-710, 731-742, 1329-1330; T 415, 1017, 1089) The jury found the defendant guilty of first degree murder, aggravated assault, attempted second degree murder, and aggravated battery. (R 1081-1084) The trial court denied the defendant's motion for new trial. (R 1089, 1101)

The penalty phase of the trial was held on December 8,

1992. During the penalty phase, the state introduced, over the defendant's relevancy objections, statements of the victim concerning a fight she had had with her husband, the defendant, on December 10, 1991, and of alleged threats he had made to her on that date and again on December 11, 1991. (R 90-95, 124-125)

The court denied a requested defense instruction that the jury was permitted to consider mercy in its penalty recommendation. (R 778-781, 1396-1397) The court also denied the defendant's motion to declare the death penalty unconstitutional because of the vague aggravating circumstances of heinous, atrocious, and cruel, and cold, calculated, and premeditated, and the jury instructions thereon. (R 628-650, 657-676, 1331-1332) The court did give a modified jury instruction on the aggravating factor of cold, calculated, and premeditated, defining those terms for the jury. (R 424) The jury recommended by a vote of seven to five that the defendant be sentenced to death for the first degree murder. (R 1148)

Following the denial of the defendant's motion for a new penalty phase, and additional argument, the court sentenced the defendant to death. In so doing, the court found the existence of three aggravating circumstances: (b) previous convictions of felonies involving the use or threat of violence, to-wit: the contemporaneous convictions of attempted second degree murder and aggravated battery stemming from the January 4th incident, and aggravated assault to the victim's son on January 18th; (h) heinous, atrocious, and cruel; and (i) cold, calculat-

ed, or premeditated, although the court did find that reasonable jurists could differ on the finding of this circumstance. (R 1231-1236, 1243) The court rejected all of the statutory mitigating factors, including circumstance (b) that the defendant suffered from extreme mental or emotion disturbance, and mitigator (f) that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, despite recognizing that the expert testimony was undisputed regarding the existence of these mitigating factors. (R 1237-1241) The court rejected these factors, finding that the defendant knew right from wrong. (R 1239, 1241) The court did find the existence of a single non-statutory mitigating factor, listing the defendant's alcohol and drug abuse, his paranoid personality disorder, the fact that the defendant was sexually abused as a child by his father, the defendant's honorable military service record, his good employment record and reputation with his painting company, and the fact that the defendant could live in a structured prison environment, that does not contain women, without being dangerous. (R 1242) The court found "this [singular] mitigating factor to be present, but [gave] it very little weight." (R 1242) The court ruled that the aggravating factors it had found greatly outweighed the one non-statutory mitigating factor, ruling that death was the appropriate sentence (even without the aggravator of CCP). (R 1242-1243)

The court also sentenced the defendant on the remaining

counts to five years on Count II (aggravated assault), fifteen years on Count III (attempted second degree murder), and fifteen years on Count IV (aggravated battery), all of the sentences to run consecutively for a total of thirty-five years. (R 1243, 1252-1257) As his reason for the guidelines departure from a recommended sentence of twelve to seventeen years (or a permitted range of seven to twenty-two years), the court listed the unscored capital crime of first degree murder. (R 1243, 1248-1249)

A notice of appeal was timely filed. (R 1261) This appeal follows.

STATEMENT OF THE FACTS

Dusty Ray Spencer and Karen Johnson fell in love and were married. (T 452) For Dusty, it was his second marriage; his first ending in divorce and bankruptcy for Dusty. (R 231) Karen Spencer became a partner in Dusty's painting business, handling most of the financial aspects of the business. (T 902-903, 920) Working together, the business thrived and the couple purchased a boat which they named "Dusty's Dream" and which they kept moored in Daytona Beach. (T 553) They would often go to Daytona on weekends and go out boating together. (T 553)

Then, in early December 1991, Karen went to Daytona by herself for the weekend. When she returned, she told Dusty their marriage was over and kicked him out of the house. (T 453, 552) The state introduced evidence in the penalty phase of the trial, over the defendant's objections on hearsay and relevancy grounds and because of the remoteness of time, that on December 10, 1991, the defendant confronted Karen over $3300 which she had withdrawn from the business account. (R 125, 183) The couple got in a fight over the money, which culminated in Dusty choking Karen and making her promise to replace the money or he would kill her. (R 125-127) After Karen reported the incident to the police, Dusty was arrested and jailed. (R 127) On December 11, 1991, Karen Spencer telephoned the police and reported that she had received a phone call from her husband in jail, who reportedly told her that when he got out of jail, he would finish what he started. (R 128, 132, 133-134)

When the holiday season approached, Karen asked Dusty to return home. (T 453, 552) [It appears that Karen's parents were to visit over Christmas, and she did not want them to know that she and Dusty were separated. (R 552)] Dusty, thinking his marital problems were over, moved back home, purchased Christmas presents for his wife and her teenage son, Tim, and had Christmas dinner with his in-laws. (T 453, 552-553) Then, after Christmas was over and Karen's parents left town, Karen again kicked Dusty out of the house. (T 453, 552-553)

Dusty again was heart-broken and feared that Karen would do what his first wife had done, take his business away from him and ruin him financially. (R 179, 231) While drinking with his friends on New Year's Day, Dusty reportedly said that he should take his wife out on their boat and throw her overboard. (T 913-915, 925-926) The friends who heard this statement, including a friend of Karen's, did not take this statement seriously at all and, hence, did not report it to Karen or to the police. (T 915, 926)

According to psychologists, Dusty became extremely paranoid and stressed out over his failed relationship. (R 163-164, 167-169, 177, 179, 189-191, 245-247, 344, 377) He returned home on January 4, 1992, and got into a fight with Karen in her bedroom. (T 462) He struck Karen several times with his hands as they struggled. (T 462) Tim was awakened by the noise and went into his mother's room, where he saw the defendant on top of his mother, hitting her with his hands. (T 462-463) When he told

Dusty to stop, Dusty picked up a clothes iron from Karen's shelf and struck Tim in the head with it. (T 463, 539, 560) Tim retreated to his own bedroom where he was followed by Dusty, who struck him several more times with the iron. (T 464-465, 539) Dusty dropped the iron and returned to his wife's bedroom, but she had already fled the house to a neighbor's. (T 466, 540-541)

At the neighbor's house, Karen requested help, saying that Dusty had beaten her up and was beating Tim with an iron; she did not indicate that Dusty had ever hit her with the iron. (T 569-571, 586, 599) The neighbor called the police and went to the Spencer house, only to see Dusty leaving and that Tim was left alone. (T 467-468, 572-575, 587)

Tim and Karen were taken to the hospital where they were treated for their injuries. (T 469, 641-642) The treating physician testified, over a hearsay objection, that Karen had told him that she had been beaten with the iron. (T 648) (This is the only testimony about Karen being hit with an iron.)

Dusty left town after the incident, to return only on January 17th or 18th. (R 364-365, 368) A neighbor testified that he observed the defendant on the morning of January 17th, parked down the street from the Spencer house, watching his house. (T 775-777) The neighbor indicated that the defendant appeared to have an angry look on his face, "like something had went wrong." (T 777; R 217-218) The defendant stayed there for a short while, then drove off. (T 778-781)

On the morning of January 18, 1992, shortly before the

painters were scheduled to arrive at the Spencer house to get their paints and assignments for the day, Dusty Spencer went to his house to procure the title to his automobile. (T 456, 903, 917-918, 921-922; R 207-208) Even though he had lived in the house for almost three years, Dusty wore disposable painter's gloves in case his wife was not home and he had to break into the house to obtain his car title. (T 501-502; R 212, 369)

Dusty's wife was home, though, and the kitchen area showed signs of a struggle. (T 665-666; R 208) Tim, hearing the commotion, awoke, grabbed Dusty's rifle from his mother's bedroom, and found his mother and Dusty in the back yard. (T 472, 478-479, 542) He testified that he saw the defendant striking Karen Spencer with a brick (although the medical examiner testified that there were no signs of any injuries caused by a brick) and observed a lot of blood on Karen's face. (T 479-481, 483, 750) Tim tried to shoot the defendant. (T 497, 542) When the rifle misfired, Tim turned it around and struck the defendant three times in the head with the rifle butt with such force as to cause the stock to shatter. (T 481, 497, 542-543)

When the defendant regained his composure from being struck, Tim then observed the defendant push Karen's head into the concrete wall of the house. (T 481-482, 543-544) Tim testified that the defendant then pulled up his mother's nightgown and told Karen to show your child "your pussy." (T 481) Tim then ran to his mother's side, who was unconscious, and attempted to carry her off. (T 492, 547) Tim testified that Dusty pulled a knife

from his pocket and pointed it at Tim. (T 484, 492) Tim never saw Dusty stab his mother with the knife. (T 548) Tim then ran to neighbors' houses to summon aid and attempt to find another gun. (T 498-500, 502-504, 589-590, 595-596)

When the police arrived they found Karen Spencer dead, having been stabbed three times, cut on the face and arms (defensive wounds, in the medical examiner's opinion), and having blunt trauma to the back of her head. (T 659-662, 678-681, 726-739) The medical examiner testified that the stab wounds to the chest and the blunt force trauma to the back of the head both would have caused death. (T 742-743) He opined that the victim would have lost consciousness very quickly after the trauma to the head. (T 749, 754) He also testified that he could not be sure of the sequence of the injuries, but that if, as Tim had testified, there was a lot of blood on the victim's face when Tim first saw her, the knife injuries to the face must already have occurred since there were no other injuries to the face and head that would have caused the bleeding on her face as Tim had recounted. (T 726-730, 749-750; R 104-105)

During the penalty phase of the trial, the psychologists revealed what Dusty had told them he remembered about the event. Dusty went to his former home to find the car title and he and his wife got into an argument and a struggle ensued. (R 207-208, 369-370) The struggle continued out into the back yard, where Karen grabbed a landscaping brick and started hitting Dusty. (R 208, 370-371) Dusty wrestled the brick from Karen,

when Tim appeared on the scene and struck him repeatedly with the rifle stock. (R 371) After being struck, the defendant did not recall any further events until seeing Karen laying on the ground, apparently dead. (R 208-209, 356, 371) The psychologists believed that Dusty's amnesia concerning the event was genuine. (R 378-381)

The psychologists also opined that the defendant suffered from alcohol and drug abuse which definitely contributed to the crime and the method of the crime, was normally a very controlled and emotionally isolated person, who, after experiencing great stress, such as the breakup of his marriage, could lose control of his bottled up emotions and go into a violent rage. (R 163-164, 167-169, 173, 175, 177, 192, 197, 213-215, 246-247, 340-344, 346-355, 360, 372) The psychologists offered the unrefuted opinion that Dusty Spencer was under the influence of extreme mental or emotional disturbance at the time of the murder, and was unable, because of the severe stress and alcohol abuse, to "appreciate the wrongfulness of his actions, which occurred in a disassociative state," and was unable to conform his conduct to the requirements of the law. (R 177-179, 204-205, 355-356)

Regarding the prior incidents of threats of harm on December 10-11, 1991, and January 1, 1992, a psychologist stated that this was indicative of his uncontrolled state, wherein Dusty did not understand the impact of his threats; they were not meant to be taken seriously, but were mere fantasizing and just expressions of the defendant's displeasure. (R 360-364) Concerning the

acts of bringing gloves to the scene and parking his car away from the house, the doctors stated that this was not indicative of a heightened plan, because the defendant was not able to think out his actions rationally. (R 209, 373-374) As one doctor put it, "This boy is confused." (R 373) Concerning the brutality of the injuries, the doctor again opined that this was due to the defendant's mental impairment, that he lost control and the ability to control his actions. (R 205) The doctors testified that the defendant would be able to function well in the controlled environment of a prison, since his emotional problems and stress only surrounded his failed relationships with women. (R 218, 231)

Evidence presented in the penalty phase of the trial also revealed that the defendant had a troubled childhood, being emotionally abused and forced to wear a dress because he was not toilet trained, and being masturbated by his father. (R 172-174, 283-284, 288) The defendant also had a severe alcohol and drug problem starting when he was thirteen years old. (R 293-295, 299-300, 302-307, 310-311, 315-316, 345-355) While not being legally intoxicated at the time of the offense, the continuing effect of the alcoholism would have led to his loss of control. (R 348-355)

The defendant served his country in the Marines, and performed admirably as a leader of his squad in rescue operations. (R 313-315) On another occasion, Dusty assisted in saving an acquaintance's life when there was an accident which caused the friend severe life-threatening head injuries. (R 327-331)

Evidence also revealed that the defendant was a hard worker and extremely conscientious about his painting business, which had an excellent reputation, and feared that Karen was trying to take his business away from him. (R 190-191, 318-319, 324-325)

SUMMARY OF ARGUMENT

Point I. The state failed to present testimony establishing beyond a reasonable doubt that the killing here was premeditated. Rather, the evidence shows that the killing resulted from a domestic dispute, whereby the defendant, in a fit of rage and passion, killed his wife. Thus, the evidence, as a matter of law, only establishes second degree murder. The trial court should have granted the defendant's motions for judgment of acquittal.

Point II. The charges contained in the first two counts were completely separate from the charges contained in the second two counts. The trial court erred in denying the motion to sever those counts.

Point III. The trial court committed reversible error by refusing the defendant's requested instruction on premeditation and by giving the erroneous standard instruction on reasonable doubt. The standard instruction on premeditation was inadequate in the instant case and the requested instruction was a correct statement of the law which would have correctly guided the jury in its deliberations on Count I.

Point IV. The state attorney improperly commented, during argument to the jury, on matters not in evidence (which had been correctly excluded by the trial court), which matters were irrelevant as relating to the victim's state of mind and were highly inflammatory.

Point V. The trial court erroneously allowed the state

to introduce evidence at the penalty phase of the trial of hearsay statements of the victim to police regarding a December 10 and 11, 1991, incident. The hearsay statements deprived the defendant of his right to confrontation. Further, the alleged incident was too remote in time to be relevant to the aggravating factor of cold, calculated, and premeditated, especially since the victim invited the defendant back to live in their marital home between December 10th and the killing.

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

Point VII. Section 921.141, Florida Statutes (1991), is unconstitutional for a variety of reasons.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE SURROUNDING THE DOMESTIC KILLING WAS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH PREMEDITATION.

According to the undisputed facts in the case, the killing resulted from domestic difficulties between the defendant and his wife, who had kicked him out of the house, following her weekend alone on their boat in Daytona Beach. The defendant went to the marital home at a time when other painters were scheduled to be arriving, and there were signs of a struggle in the kitchen which ultimately led outside the house to the back yard, where the victim's son tried to intervene by striking the defendant repeatedly with a rifle. The injuries to the victim are consistent with an attack while in a violent rage. The evidence fails to establish premeditation beyond a reasonable doubt.

Premeditation is the essential element which distinguishes first-degree murder from second-degree murder. Hoefert v. State, 617 So.2d 1046 (Fla. 1993); Wilson v. State, 493 So.2d 1019 (Fla. 1986). Premeditation is more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act, but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act. Sireci v. State, 399 So.2d 964, 967 (Fla. 1981). While premeditation may be proven by circumstantial evidence, id.,

"[w]here the element of premeditation is sought to be established by circumstantial evidence, the evidence relied upon by the state must be inconsistent with every other reasonable inference." Cochran v. State, 547 So.2d 928, 930 (Fla. 1989). See also McArthur v. State, 351 So.2d 972, 976 n. 12 (Fla. 1977); Jaramillo v. State, 417 So.2d 257 (Fla. 1982). Where the state's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained. Hoefert v. State, supra; Hall v. State, 403 So.2d 1319 (Fla. 1981).

The evidence here fails to exclude a "heat of passion" killing and therefore would support, at most, a second-degree murder conviction. See Wilson v. State, 493 So.2d at 1022; Forehand v. State, 126 Fla. 464, 171 So. 241 (1936) (first-degree murder conviction reduced to second-degree where evidence supported conclusion that murder was the result of a "blind and unreasoning" response to being hit by victim with a blackjack). As in Forehand, the evidence clearly supports the conclusion that the murder was the result of a spontaneous, blind and unreasoning reaction to the circumstances leading up to the murder, to-wit: the domestic problems and arguments the husband and wife were having over their marriage and their business, and the quarrel and struggle which obviously occurred as evidenced by the mess in the kitchen, and the defendant being hit in the head with the rifle butt repeatedly by the victim's son.

"Evidence from which premeditation may be inferred

includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted." Hoeffert v. State, supra at 1048, **quoting** Holton v. State, 573 So.2d 284, 289 (Fla. 1990). In Williams v. State, 437 So.2d 133, 135 (Fla. 1983), this Court affirmed the first-degree murder conviction on the basis that the evidence did not show any signs of a "struggle or commotion or any acts which might suggest a confrontation of any physical or violent nature between the victim and [the defendant]." Here, we do have signs of a confrontation in the kitchen which continued into the back yard. The victim's son saw the defendant holding a brick, which he believed the defendant had used on the victim. However, the medical examiner stated that there were no wounds from the brick on the victim. Thus, it appears that the victim had armed herself with the brick and that the defendant was merely wrestling it away from her. The physical evidence of injuries is entirely consistent with a violent rage brought on by the confrontation and domestic difficulties between the parties.

This evidence then certainly creates a reasonable doubt that the defendant is guilty of the premeditated first-degree murder of Karen Spencer. The trial court should have granted the motion for judgment of acquittal on first-degree murder for failure to prove premeditation. Spencer's conviction and resultant death sentence are constitutionally infirm. Amend. V, VI,

VIII, XIV, U.S. Const.; Art. I, §§9, 16, 17, Fla. Const.

POINT II.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SEVER CHARGES IN VIOLATION OF THE RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTIONS, AND ARTICLE I, SECTIONS 9 AND 16, OF THE FLORIDA CONSTITUTION.

The defendant moved pre-trial to sever Counts I and II from Counts III and IV, since those counts involved a completely separate incident two weeks prior to the second incident which resulted in the death of Karen Spencer. Florida Rule of Criminal Procedure 3.150(a) provides:

> (a) Joinder of Offenses. Two or more offenses which are triable in the same court may be charged in the same indictment or information in a separate count for each offense, when the offenses, whether felonies or misdemeanors, or both, are based on the same act or transaction or on two or more connected acts or transactions.

(Emphasis added.) Rule 3.152(a), Florida Rules of Criminal Procedure, provides:

> (a) Severance of Offenses.
>
> (1) In case two or more offenses are improperly charged in a single indictment or information, the defendant shall have a right to a severance of the charges upon timely motion thereof.
>
> (2) In case two or more charges of related offenses are joined in a single indictment or information, the court nevertheless shall grant a severance of charges on motion of the State or of a defendant.

> (i) before trial upon a showing that such severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense, or
>
> (ii) during trial, only with defendant's consent, upon a showing that such severance is necessary to achieve a fair determination of the defendant's guilt or innocence of each offense.

In Garcia v. State, 568 So.2d 896, 899 (Fla. 1990), this Court summarized the well-settled law as providing that the

> "connected acts or transactions" requirement of rule 3.150 means that the acts joined for trial must be considered "in an episodic sense[.] [T]he rules do not warrant joinder or consolidation of criminal charges based on similar but separate episodes, separated in time, which are 'connected' only by similar circumstances and the accused's alleged guilt in both or all instances." Paul [v. State, 365 So.2d 1063, 1065-66 (Fla. 1st DCA 1979) (Smith, J., dissenting), adopted in part, 385 So.2d 1371, 1372 (Fla. 1980)]. Courts may consider "the temporal and geographical association, the nature of the crimes, and the manner in which they were committed." Bundy [v. State, 455 So.2d 330, 345 (Fla. 1984), cert. denied, 476 U.S. 1109, 106 S.Ct. 1958, 90 L.Ed.2d 366 (1986)]. However, interests in practicality, efficiency, expense, convenience, and judicial economy, do not outweigh the defendant's right to a fair determination of guilt or innocence. [State v.] Williams, 453 So.2d [824, 825 (Fla. 1984)].

See also Wright v. State, 586 So.2d 1024, 1029-1030 (Fla. 1991).

Wright, Garcia and the cases on which they rely require reversal here because the charges of attempted murder and aggravated battery from January 4, 1992, were not episodically con-

nected with the other charges in this case. The episode involving those two charges was wholly distinct from the episode involving murder and aggravated assault. Each episode involved different offenses, different dates, and different weapons and circumstances. The mere fact that the other charges also involved the defendant's wife and her son is irrelevant to the issue of severance. See Wright v. State, supra; and Garcia v. State, supra.

Hence, the trial court must sever the charges of first-degree murder and aggravated assault from the charges of attempted murder and aggravated battery.

POINT III.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S OBJECTION TO THE STANDARD JURY INSTRUCTIONS ON PREMEDITATION AND REASONABLE DOUBT IN VIOLATION OF THE RIGHTS TO A FAIR TRIAL BY JURY AND DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTIONS, AND ARTICLE I, SECTIONS 9 AND 16, OF THE FLORIDA CONSTITUTION.

A. General law governing jury instructions.

The trial court judge has a duty to instruct the jury on the law. Rule 3.390(a), Florida Rules of Criminal Procedure, provides in pertinent part: "The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel." Due process requires instructions as to what the state must prove in order to obtain a conviction. See Screws v. United States, 325 U.S. 91 (1945) (willfully depriving person of civil rights; jury not instructed as to meaning of "willfully": "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial.") It is fundamental error to fail to instruct the jury correctly as to what the state must prove in order to obtain a conviction. State v. Delva, 575 So.2d 643 (1991); Sochor v. State, 580 So.2d 595 (1991).

The federal and state constitutional rights to trial by

jury carry with them the right to accurate instructions as to the elements of the offense. In Motley v. State, 155 Fla. 545, 20 So.2d 798, 800 (1945), the court wrote in reversing a conviction where there was an incorrect instruction on self-defense:

> There is much at stake and the right of trial by jury contemplates trial by due course of law. See Section 12, Declaration of Rights, Florida Constitution. . . . We have said that where the court attempts to define the crime, for which the accused is being tried, it is the duty of the court to define each and every element, and failure to do so, the charge is necessarily prejudicial to the accused and misleading. [citation omitted] The same would necessarily be true when the same character of error is committed while charging on the law relative to the defense.

As one court has written: "Amid a sea of facts and inferences, instructions are the jury's only compass." United States v. Walters, 913 F.2d 388, 392 (7th Cir. 1990) (refusal to give theory of defense instruction required reversal of conviction). Arguments of counsel cannot substitute for instructions by the court. Taylor v. Kentucky, 436 U.S. 478, 488-489 (1978).

B. The inadequate instruction on premeditation.

Section 782.04(1)(a), Florida Statutes (1991), defines first degree murder. It provides for two forms of the offense. One is murder from a premeditated design, and the other is felony murder. The statute defines murder from premeditated design as follows:

> The unlawful killing of a human being:

> 1. When perpetrated from a premeditated design to effect the death of a person killed or any human being.

In McCutchen v. State, 96 So.2d 152, 153 (Fla. 1957), the Supreme Court defined the "premeditated design" element (emphasis supplied):

> A premeditated design to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection **and deliberation**, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time which must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a few moments and yet be premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit of some reflection **and deliberation** on the part of the party entertaining it, and the party at the time of execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequences of carrying such purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formation of the intent.

See also Littles v. State, 384 So.2d 744 (Fla. 1st DCA 1980) (**quoting** McCutchen).

In Owen v. State, 441 So.2d 1111, 1113 n.4 (Fla. 3rd DCA 1983), the court wrote (emphasis supplied):

> "Premeditation" and "deliberation" are synonymous terms, which, as elements of first-degree murder, mean simply that the accused, before he committed the fatal act, intended that he would commit the act at the time that he did, and

> that death would be the result of the act. [citation omitted] Deliberation is the element which distinguishes first and second degree murder. [citation omitted] **It is defined as a prolonged premeditation and so is even stronger than premeditation.** [citation omitted]

Similarly, the revised fourth edition of Black's Law Dictionary defines "deliberation" as follows at page 514:

> **DELIBERATION.** The act or process of deliberating. The act of weighing and examining the reasons for and against a contemplated act or course of conduct or a choice of acts of means. See Deliberate.

As argued below, the standard jury instruction on first degree murder does not explicitly state that "a premeditated design" is an element of first degree murder. It provides:

> There are two ways in which a person may be convicted of first degree murder. One is known as premeditated murder and the other is known as felony murder.
>
> Before you can find the defendant guilty of First Degree Premeditated Murder, the State must prove the following three elements beyond a reasonable doubt:
>
> 1. **(Victim)** is dead.
>
> 2. The death was caused by the criminal act or agency of **(defendant)**.
>
> 3. There was a premeditated killing of **(victim)**.
>
> "Killing with premeditation" is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the

> defendant. The premeditated intent to kill must be formed before the killing. The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the premeditation at the time of the killing.
>
> If a person had a premeditated design to kill one person and in attempting to kill that person actually kills another person, the killing is premeditated.

The defendant objected below to the use of the standard instruction in that it is unconstitutional and misstates Florida law. The standard instruction unconstitutionally relieves the state of its burdens of proof and persuasion as to the statutory element of premeditated design. The only attempt in defining the premeditation element is: " 'Killing with premeditation' is killing after consciously deciding to do so." There is no mention of the requirement, under McCutchen, that the state prove "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation," and that "the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequence of carrying such purpose into execution." Additionally, the standard instruction relieves the state of the burdens of proof and persuasion as to the requirement that the premeditated design be fully formed before the killing. Finally, it does not instruct the jury that the premeditated design element carries with it the element of deliberation.

Thus, the trial court erred in failing to fully inform the jury of the element of premeditation, which was really the only issue during the guilt phase of the trial concerning the murder charge. The court should have granted the defendant's request for a special jury instruction on the full definition of premeditation as contained in McCutchen, supra, and Owen v. State, supra. Failure to do so deprived the defendant of his constitutional rights to a fair trial by a jury and due process of law.

C. The standard jury instruction on reasonable doubt is erroneous.

The source of the standard jury instruction on reasonable doubt is unclear. Decisions of the Florida Supreme Court preceding the promulgation of the standard instructions are contradictory and confusing. In Haager v. State, 82 Fla. 41, 90 So. 812, 816 (1922), the court disapproved of an instruction that a reasonable doubt could not be "a mere shadowy, flimsy doubt," writing:

> Attempts to explain and define what is meant by "reasonable doubt" often leave the subject more confused and involved than if no explanation were attempted. The instruction may be given in such a manner, and with such an inflection of voice, as to incline the jury to believe that there is sufficient doubt to almost require an acquittal, and, in other instances, may be so given as to make the jury feel that they would be guilty of a dereliction of duty if they entertained any doubt of the prisoner's guilt.

> In the charge complained of, the court undertook to differentiate between "a mere shadowy, flimsy doubt" and "a substantial doubt." The jury may have understood the distinction, but we are unable to grasp its significance. Every doubt, whether it be reasonable or not, is "shadowy" and "flimsy," and it would be better if judges would give the usual charge on the subject of reasonable doubt without attempting to define, explain, modify, or qualify the words "reasonable doubt."

But in Smith v. State, 135 Fla. 737, 186 So. 203, 206 (1939), the Court approved of an instruction using the "shadowy, flimsy doubt" **versus** "substantial doubt" phraseology without analysis and without any mention of Haager. In any event, as shown below, definition as a "reasonable doubt" as "a substantial doubt" (and thus not a "shadowy, flimsy doubt") is unconstitutional.[1]

In Dunn v. Perrin, 570 F.2d 21 (1st Cir. 1978), the court, in reversing the petitioners' state court convictions, condemned the following jury instruction defining "reasonable doubt":

> It does not mean a trivial or a frivolous or a fanciful doubt nor one which can be readily or easily explained away, but rather such a strong and abiding conviction as still remains after careful consideration of all the facts and arguments...

The court wrote that the instruction "was the exact inverse of what it should have been." Id. at 24. Although it is proper to

---

[1] The Florida Supreme Court upheld the standard instruction without analysis in Brown v. State, 565 So.2d 304 (Fla. 1990). The cases cited in Brown are also lacking in analysis. The court has never directly addressed the issues raised in this case.

instruct the jury that a reasonable doubt cannot be "purely speculative," a court is "playing with fire" when it goes beyond that. United States v. Cruz, 603 F.2d 673, 675 (7th Cir. 1979). It is improper to instruct that the government need not prove guilt "beyond all possible doubt." United States v. Shaffner, 524 F.2d 1021 (7th Cir. 1975). Further, an instruction equating a reasonable doubt with "a real possibility" has been condemned because it may "be misinterpreted by jurors as unwarrantedly shifting the burden of proof to the defense." United States v. McBride, 786 F.2d 45, 51-52 (2nd Cir. 1986).

Jury instructions equating reasonable doubt with substantial doubt have been "uniformly criticized." Monk v. Zelez, 901 F.2d 885, 889 (10th Cir. 1990). It is improper to define a reasonable doubt as "substantial rather than speculative." United States v. Rodriguez, 585 F.2d 1234, 1240-1242 (5th Cir. 1978) (affirming conviction, but noting that a trial court using such an instruction "can reasonably expect a reversal.") An instruction that a reasonable doubt is a "substantial doubt, a real doubt" has been condemned as confusing by the Supreme Court. Taylor v. Kentucky, 436 U.S. 478, 488 (1978).

In view of the foregoing, and as specifically argued below, the definition of "reasonable doubt" in the standard instructions is unconstitutional. Although negative in its terms, it essentially equates the word "reasonable" with such condemned terms as "substantial" and "real." (What else can "not a possible doubt" mean? It is obvious from cases such as United

States v. Rodriguez, supra, that "not speculative" is equivalent to "substantial.") All doubts, whether reasonable or unreasonable, are necessarily founded on speculation and possibility. See Haager v. State, supra. As the Court pointed out in In re Winship, 397 U.S. 358 (1970), the Constitution requires "a subjective state of certitude" before the defendant can be convicted. The absence of such a degree of certitude necessarily involves a degree of speculation and consideration of possibilities. The standard instruction forbids a not guilty verdict on the basis of a "possible" or "speculative" doubt, although possibilities and speculation can be reasonable and prevent the "subjective state of certitude" required by Winship.

Further, the sentence "Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt," could reasonably be taken by jurors to mean that they should convict even where a reasonable doubt is found, so long as they have "an abiding conviction of guilt." Where a jury instruction is challenged, the question is not what the court thinks the instruction means "but rather what a reasonable juror **could** have understood the charge as meaning." Francis v. Franklin, 471 U.S. 307, 315-316 (1985) (emphasis supplied). Since the jury could have taken the "abiding conviction of guilt" standard as eliminating the requirement of proof beyond a reasonable doubt, the standard instruction is improper on that ground also. Cf. Dunn v. Perrin, 570 F.2d at 24, n.3 (court will not expect jury to "intuit a more sensible meaning, at least not when

so crucial a concept as reasonable doubt is our focus").

This is a capital case in which the prosecution sought and obtained the death penalty. Accordingly, heightened standards of due process apply. See Elledge v. State, 346 So.2d 998 (Fla. 1977) ("heightened" standard of review); Mills v. Maryland, 108 S.C.t 1860, 1866 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."); Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir. 1982) ("Reliability in the factfinding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions."; and Beck v. Alabama, 447 U.S. 625, 638 (1988) (same principles apply to guilt determination). "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion).

Denial of this written objection would violate the defendant's rights under Article I, Sections 9 (due process), 16 (rights of accused; notice; right to present defense), 17 (cruel or unusual punishment), 21 (access to courts), and 22 (trial by jury) of the Florida Constitution, and the Fifth (due process), Sixth (notice; right to present defense; jury trial), Eighth (cruel and unusual punishment), and Fourteenth (due process and incorporation) Amendments to the United States Constitution. The trial court therefore erred in giving this erroneous instruction. Reversal for a new trial is required.

POINT IV.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL FOLLOWING THE PROSECUTOR'S IMPROPER ARGUMENT TO THE JURY REGARDING MATTERS NOT IN EVIDENCE IN VIOLATION OF THE RIGHTS TO A FAIR TRIAL BY JURY AND DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTIONS, AND ARTICLE I, SECTIONS 9 AND 16, OF THE FLORIDA CONSTITUTION.

During the trial, the trial court sustained the defendant's objection to hearsay testimony concerning the victim's state of mind (that she was carrying a rifle around her house because she was afraid of the defendant) because said evidence was irrelevant to any issue at the trial. (T 851-869) See, e.g., Downs v. State, 574 So.2d 1095, 1098 (Fla. 1991). Despite this ruling and despite the fact that no testimony was allowed to be presented on it, the prosecutor argued this matter to the jury. (T 1040-1041) The trial court sustained the defendant's objection to this improper argument, but denied his motion for mistrial. (T 1041, 1088-1089) This improper argument was highly inflammatory and its presentation to the jury deprived the defendant of his right to a fair trial, an impartial jury, and due process of law. A reversal for a new trial is required.

In Huff v. State, 437 So.2d 1087 (Fla. 1983), this Court reversed a first-degree murder conviction where the prosecutor had improperly argued matters to the jury which were not in evidence. The Court, in reversing, held that the state's injec-

tion of matters not in evidence into its closing argument "violates the rule that argument of counsel be channeled by the evidence produced at trial." Id. at 1090-1091. See also Glassman v. State, 377 So.2d 208 (Fla. 3d DCA 1979). The Court noted that, to do so, was not only improper, but "foolish" on the part of the prosecutor, resulting in a denial of the defendant's right to a fair trial, which the defense was unable to rebut.

So, here, too, the argument of the prosecutor regarding the irrelevant matters of state of mind of the victim, evidence of which had been excluded by the trial judge, was foolish and prejudicial and must result in a new trial.

POINT V.

THE STATE'S USE OF HEARSAY TESTIMONY VIOLATED THE CONSTITUTIONAL RIGHTS TO DUE PROCESS, CONFRONTATION AND CROSS-EXAMINATION OF ADVERSE WITNESSES.

During the penalty phase of the trial, the prosecution was permitted, over the defendant's objections on hearsay and relevancy grounds (too remote in time), to introduce hearsay testimony by a police officer that Karen Spencer had made a complaint to the police and had the defendant arrested for an altercation and threats to her on December 10 and 11, 1991. (R 90-95, 125-134) The introduction of the hearsay testimony here constitutes reversible error, in that it was a prejudicial denial of Spencer's rights to confrontation of witnesses and due process under Article I, Sections 9, 16, and 22 of the Florida Constitution and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Further, because imposition of the death penalty rests on facts established solely by hearsay, the death sentence is unreliable under the Eighth and Fourteenth Amendments, of the United States Constitution, and Article I, Section 17, of the Florida Constitution.

The language of Section 921.141(1), Florida Statutes (1991), notwithstanding, it is clear that a defendant has the right to cross-examine and to confront witnesses during the penalty phase of a capital trial. It goes without saying that a statute cannot divest a citizen of constitutional rights. In Engle v. State, 438 So.2d 803 (Fla. 1983), this Court clarified

any doubt as to whether the Sixth Amendment applies to the penalty phase of a capital trial:

> The requirements of due process of law apply to all three phases of a capital case in the trial court: 1) The trial in which the guilt or innocence of the defendant is determined; 2) the penalty phase before the jury; and 3) the final sentencing process by the judge. Although defendant has no substantive right to a particular sentence within the range authorized by statute, sentencing is a critical stage of trial of the criminal proceeding.

Engle, 438 So.2d at 813-814.

Contrary to the trial court's ruling, it is clear that Section 921.141(1), Florida Statutes (1991) does not provide carte blanche authority for the State to present hearsay testimony from police officers in a manner that totally defeats the state and federal constitutional rights to confrontation and meaningful cross-examination. See Walton v. State, 481 So.2d 1197, 1200 (Fla. 1986) ("The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is applicable not only in the guilt phase, but in the penalty and sentencing phases as well."). Even the statute puts clear restrictions on the use of hearsay evidence.

> Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. . . .

§ 921.141(1), Fla. Stat. (1991) (emphasis supplied).

The introduction of the hearsay cannot be said to be

harmless error in this case. The trial court's sentencing order recites facts that are supported solely by hearsay. The portion of the sentencing order that expounds on the finding of cold, calculated, and premeditated only comes from the hearsay testimony of Officer Hughley.

Furthermore, the defense was correct in its argument that the evidence concerning the December 10th and 11th, 1991, fight between the defendant and his wife and the resultant threats was totally irrelevant to the aggravating factors since it was too remote in time. The state sought to introduce the evidence of the December 10-11, 1991, incident to show the defendant's mental state and heightened premeditation for the aggravating circumstance of cold, calculated, and premeditated. However, case law indicates that evidence of the defendant's mental state is not admissible if it is too remote in time from the instant offense. Blaylock v. State, 537 So.2d 1103, 1107 (Fla. 3d DCA 1989); Talley v. State, 36 So.2d 201 (Fla. 1948). See also Garron v. State, 528 So.2d 353, 357 (Fla. 1988); A.McD. v. State, 422 So.2d 336, 338 (Fla. 3d DCA 1982). The December incident is too remote in time to be relevant to the defendant's heightened premeditation to kill Karen Spencer, especially when considering the fact that the victim invited the defendant back home in the intervening period between the December incident and the crimes here.

The introduction and use of hearsay and irrelevant testimony over Spencer's objection gives pause concerning the

reliability of the facts upon which imposition of the death sentence has been imposed. Because the death penalty hearing was rendered constitutionally infirm by the introduction of this testimony over objection, the death sentence must be vacated and the matter remanded for a new penalty phase.

POINT VI.

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES, EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, AND FAILED TO PROPERLY FIND THAT THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL.

The sentence of death imposed upon Dusty Spencer must be vacated. The trial court found improper aggravating circumstances, failed to consider (or gave only little weight to) highly relevant and appropriate mitigating circumstances, and improperly found that the aggravating circumstances outweighed the mitigating factors. These errors render Spencer's death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments, and Article I, Sections 9, 16, and 17, of the Florida Constitution.

A. The Trial Judge Considered Inappropriate Aggravating Circumstances.

It is well established that aggravating circumstances must be proven beyond a reasonable doubt by competent, substantial evidence. Martin v. State, 420 So.2d 583 (Fla. 1982); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). The state has failed in this burden with regard to at least two of the aggravating circumstances found by the trial court. The court's findings of fact, based in part on matters not proven by substantial, compe-

tent evidence beyond a reasonable doubt, do not support these circumstances and cannot provide the basis for the sentences of death.

1. Cold, Calculated, and Premeditated Manner Without Any Pretense of Moral or Legal Justification

The trial court found that this aggravating circumstance was present, but also noted that reasonable jurors could differ with its conclusion. (R 1243) Therefore, it is submitted, on this basis alone, the aggravating factor of CCP has not been established beyond a reasonable doubt.

As noted in Point VII, infra, this aggravating circumstance has been applied inconsistently. It appears that the current state of the law looks at the mental state of the defendant and whether (1) the killing took place following a "careful plan or prearranged design," and (2) whether there was a "pretense" of moral or legal justification. Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). This test must thus evaluate the mental state of the perpetrator rather than looking merely at the manner of the killing. Banda v. State, 536 So.2d 221, 225 (Fla. 1988); Johnson v. State, 465 So.2d 499, 507 (Fla. 1985); Mason v. State, 438 So.2d 374 (Fla. 1983); Cannady v. State, 427 So.2d 723 (Fla. 1983).

Looking to the facts of the instant case, we find that the trial court, in finding heightened premeditation, totally ignored the evidence presented by the expert witnesses that the

defendant was suffering from extreme mental or emotional disturbance and that he was unable to conform his conduct to the requirements of the law. (See Point VI, §B, infra) In fact, the doctors specifically negated the factor of cold, calculated, and premeditated by stating that the defendant, in his mental state, was unable to formulate any coherent, reasonable plan. (R 209, 373-374) When questioned about the defendant's prior threats to the victim, a factor on which the trial judge placed great weight in finding this circumstance, one doctor stated:

> [Dr. Jonathan Lipmann]: What it means is that he is emotionally overreactive. I'm sure you never personally have done it, but said something that you didn't mean, like I'll kill you for that. People sometimes do it when they lose control of their emotional stability. Because of Dusty's chronic alcoholic condition, and because of his borderline personality disorder, he was at that edge of discontrol, in terms of emotional stability. He was unstable. His disequilibrium rendered him vulnerable, rendered him uncontrolled, in a verbal sense.
>
> Q [prosecutor]: And you are talking about December 11th, 1991, in the jail? Is that right?
>
> A: Then, and on the other three occasions, he will have been in a condition, due to his chronic alcoholism, of extreme emotional instability.
>
> * * *
>
> He may not have understood the impact it had on her. . . . It may have just been an expression of displeasure.
>
> * * *
>
> I'm confident that his emotional

state at that time [while in jail on December 11, 1991] is consistent with the kind of emotionality and exaggeration that would have led him to say such a thing.

* * *

His paranoid personality structure, coupled with his overemotionality due to his condition may well in fact have led him to believe that this was some kind of unfair thing that was happening to him. You and I may think well, I'm in jail, and it's just and right that I am here. I should suffer here. But to a person in Dusty's condition, he may feel very, very insulted, indeed. So, to answer your question, indeed he may not have known what it means, in his condition.

* * *

That kind of ideation, though, is very typical, even for people not in his condition, when they are dealing with what is obviously divorce, separation, an unfaithful wife, and since you mentioned that she called the police, let me put that in context from his history point of view. See, when you review, as I have, couple's histories, you generally find that before the end, before the piecework, before the final stroke, there is a chain, a chain of assault, beatings, that got more and more out of control, and the couple is usually hard-pressed to say how any one of them started. They just push each other's buttons. In his case, however, there was no such history in this marriage. Something happened that he didn't know about. He wasn't as up to speed as Karen. He couldn't believe that she would call the police. Usually, when the police are called, it's because there has been a series of these assaultive altercations. This was the first. And she called the police. Something else was going on in his paranoid mind, and perhaps even in reality, so that he

was caught unawares. He wasn't ready for it suddenly to move into the end zone. Which helps explain his disequilibrium a little bit, I think.

(R 360-364) When questioned by the prosecutor about the defendant's planning the incident by donning rubber gloves and parking away from the scene as a careful plan to commit the crimes, one doctor opined:

> Q [prosecutor]: . . . Based upon your computations at the time of this murder, that in your opinion, he was experiencing cognitive confusion and disorientation, as a result of his chronic alcohol use?
>
> A [Dr. Jonathan Lipmann]: Right.
>
> * * *
>
> Q: When would that cognitive confusion and disorientation have begun before the time of the murder?
>
> A: It would have been at a constant and low level, and observable to someone trained to observe it. All the time, actually. However, when confronted with stress, when the borderline syndrome triggers active emotional instability, basically when she screamed, in fact, that's when it became profound, obviously.
>
> * * *
>
> That explanation on where he parked the car was part of the putting on the rubber gloves episode. When he thought that he will be going into the house and stealing it [the car title].
>
> Q: At that point in time, when he was parking the car away from the house, was that parking of the car away from the house part of his cognitive confusion, and disorientation?

A: Yes, actually. His stimuli being this was part of his confusion and disorientation.

* * *

Let me explain why. The answer is yes, but let me explain why. Doesn't really matter where he parks his car. His wife and his stepson are going to have to deal with him when he walks in. He can put it in the driveway, put it on the road. This boy is confused. He is fooling no one. Do I make myself clear?

Q: Okay. Are you presuming that he parked the car away from the house with a specific purpose?

A: I think at the time he thought he had a specific purpose, but that specific purpose doesn't make any sense to us. . . . Being covert.

* * *

The fact that he was going into an occupied house, that was going to be receiving numerous men in fifteen minutes, painters, and that he knew that, because that was a routine at that time, and the fact that the vehicles were outside, and that there was nothing secret about going into the house, indicates that to me, whatever reason he had, and I know he did have a reason, a sort of a covert reason, a secretive reason, for hiding the car around the side of the -- out of the sight of the house, was in actual fact meaningless, and therefore, indicative of his confusion, hiding the car around the side of the street, was a symptom of his confusion.

(R 372-374)

This uncontroverted evidence firmly establishes that Dusty was suffering from a severe mental illness which would preclude him from the type of "careful plan or prearranged

design" necessary for this aggravating circumstance.

The cases are legion from this Court where the aggravating factor of cold, calculated, and premeditated has been stricken where, as here, there was a domestic situation which caused the defendants to act or react from jealousy, heated passion, or violent emotions. In Santos v. State, 591 So.2d 160 (Fla. 1991), for example, Santos killed his ex-girlfriend, Irma, and their daughter. Two days before the murder, Santos had gone to Irma's home and threatened to kill her. Later, Santos acquired a gun. Id. at 161. On the day of the murder, Santos traveled by taxi to Irma's parents' home, where she was staying. Santos saw Irma and her child walking down the street and proceeded toward them. When Irma saw Santos coming, she attempted to flee. Santos, however, gave chase, caught her, spun her around, and shot Irma and her daughter, killing them both. Id.

This Court reversed the finding that Santos had acted in a cold, calculated, and premeditated manner. Id. at 162. While the Court acknowledged that the evidence showed that Santos had acquired a gun in advance and had made death threats, it stated that "the fact that the present killing arose from a domestic dispute tends to negate cold, calculated premeditation." Id.

Similarly, in Douglas v. State, 575 So.2d 165 (Fla. 1991), the Court rejected a finding of cold, calculated premeditation in a domestic setting. In Douglas, the assailant obtained a rifle, tracked down his ex-girlfriend, torturously abused her

by forcing her to have sex with her newlywed husband, and then murdered the husband while the woman watched. Id. at 168. In another context, these facts might have led to a finding of cold, calculated premeditation. In a domestic setting, however, where the circumstances evidenced heated passion and violent emotions arising from hatred and jealousy associated with the relationships between the parties, the Court could not characterize the murder as cold even though it may have appeared to be calculated. See Santos, 591 So.2d at 160.

Santos and Douglas are clearly applicable here. The murders in the instant case were not the product of a deliberate plan formed through calm and cool reflection. See Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). They were "mad acts prompted by wild emotion." Santos, 591 So.2d at 163.

Similarly, in Maulden v. State, 617 So.2d 298 (Fla. 1993), Maulden's emotional distress grew continuously from the time he and his ex-wife separated. The case reflects that the stress of his separation, Tammy Maulden's involvement with Duvall, and Maulden's perception that Duvall was replacing him as "father figure" to the Maulden children were worsened by Maulden's chronic schizophrenia which was then going untreated.

> At the time of the murder, Maulden was under extreme emotional stress. A psychiatrist testified that Maulden was overwhelmed by his emotions and unconsciously split off from them into a dissociated, or depersonalized, state. Under these circumstances, we cannot characterize the murders of Tammy Maulden and Duvall as "cold." Therefore, we hold that the trial judge erred

> in finding that the facts in the instant case support the cold, calculated, and premeditated aggravating factor.

Maulden v. State, supra at 303. The exact same testimony was forthcoming from the psychologists here and was unrebutted by the state. The defendant was dissociated and was overwhelmed by his emotions and stress.

Additionally, this Court has held, in Thompson v. State, 565 So.2d 1311, 1318 (Fla. 1990), that a defendant's highly emotional mental state negates this factor's requirement for a contemplative or reflective state of mind. In Thompson, the defendant confessed to having an argument with his girlfriend at night because Thompson had decided to go back to his wife. Place (the girlfriend) objected and threatened to blow up the house. When the defendant awoke the next morning, his confession stated, he decided to kill Place and commit suicide. Despite this evidence, this Court rejected the aggravating factor of cold, calculated, and premeditated.

> The state relies heavily on the fact that Thompson awoke at 8 a.m. and killed the victim at 8:30 a.m., arguing that Thompson had thirty minutes to think about what he was doing before he killed Place. But there is no evidence in the record to show that Thompson contemplated the killing for those thirty minutes. To the contrary, the evidence indicates that Thompson's mental state was highly emotional rather than contemplative or reflective. **It is an equally reasonable hypothesis** that Thompson hit his breaking point close to 8:30 a.m., reached for his gun and knife, and killed Place instantly in a deranged fit of rage. "Rage is inconsistent with the premeditated intent to kill someone," unless there is other evidence to prove heightened premedi-

> tation beyond a reasonable doubt. Mitchell v. State, 527 So.2d 179, 182 (Fla.), **cert. denied**, 109 S.Ct. 404 (1988). Thus, the evidence does not support beyond a reasonable doubt a finding that this aggravating circumstance exists.

Thompson v. State, supra at 1318. See also Richardson v. State, 604 So.2d 1107 (Fla. 1992); Farinas v. State, 569 So.2d 425 (Fla. 1990); Blakely v. State, 561 So.2d 560 (Fla. 1990); Amoros v. State, 531 So.2d 1256 (Fla. 1988); Garron v. State, 528 So.2d 353 (Fla. 1988). Cf. Herzog v. State, 439 So.2d 1372, 1380 (Fla. 1983) (while prior threats and arguments may go to the issue of premeditation, "however, it is not sufficient to establish the requirement that the murder be 'cold, calculated ... and without any pretense of moral or legal justification.'")

As in the above-cited cases, there is no support for this aggravating factor. Rather, as supported by the uncontroverted testimony, and as held in Thompson, it is equally plausible (indeed it is extremely likely given the testimony concerning Spencer's mental problems) that the defendant's mental state was highly emotional and that he killed his wife in a deranged fit of rage.

This factor must fall.

2. Heinous, Atrocious, Or Cruel

The trial court found this factor based upon the method of the killing. However, for the same reasons that the factor of cold, calculated, and premeditated fails [see Point V, §A (1)],

so, too, must this factor fall. Because of the defendant's mental impairment and state of stress and rage, there can be no showing that the defendant intended for the victim to suffer or even intended the method for the killing.

This Court has defined the aggravating circumstance of heinous, atrocious, or cruel in State v. Dixon, supra at 9:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court further defined its interpretation of the legislature's intent that the aggravating circumstance only apply to crime **especially** heinous, atrocious, or cruel.

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

State v. Dixon, supra at 9.

As this Court has stated in Santos v. State, 591 So.2d at 163, and Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990), this factor is appropriate only in torturous murders which exhibit a **desire** to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. See, e.g., Douglas v. State, 575 So.2d 165, 166 (Fla. 1991) (torture-

murder involving heinous acts extending over four hours). The present murder happened too quickly with no suggestion that Spencer **intended** to inflict a high degree of pain or otherwise torture the victim.

In Clark v. State, 609 So.2d 513 (Fla. 1992), the victim was shot in the chest from a distance of ten feet with a single-shot, sawed-off shotgun. Clark reloaded the weapon, walked to the victim and killed him with a shot to the head. This Court rejected the trial court's improper application of the HAC factor, explaining that simply because the victim was aware of his impending death and remained conscious for some period of time before being killed does not make the murder unnecessarily torturous to the victim. Clark, supra. The same basis for application of the HAC factor here is likewise erroneous.

Though this factor has been approved in diverse factual situations, a consistent thread has been that the victim was **intentionally** made to suffer prior to being killed. See Omelus v. State, 584 So.2d 563, 566 (Fla. 1991) ("we find that the heinous, atrocious or cruel aggravating factor cannot be applied vicariously."); Teffeteller v. State, 439 So.2d 843 (Fla. 1983) ("The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies."). See also, Amoros v. State, 531 So.2d 1256, 1260-61 (Fla. 1988).

In Porter v. State, 564 So.2d 1060, 1063 (Fla. 1990),

this Court rejected the trial court's application of the HAC factor where the evidence was "consistent with the hypothesis that Porter's was **a crime of passion, not a crime that was meant to be deliberately and extraordinarily painful.**" (Emphasis in original). The facts here are comparable.

"It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). There is no logical reason to apply a statutory aggravating factor in "strict liability" fashion simply because the way it occurred was an unintended consequence. If it can be shown that a particular person intended that a victim suffer, a rational basis exists for application of the HAC factor. See Cochran v. State, 547 So.2d 928, 931 (Fla. 1989)("Our cases make clear that where, as here, death results from a single gunshot and there are no additional acts of torture or harm, this aggravating circumstances does not apply.").

There is no proof that Dusty Spencer intended that his wife suffer unnecessarily, especially where the evidence shows that Dusty's actions were not intentionally brutal, but he was merely reacting to his mental condition, that he was unable to control his actions.

> Q [prosecutor]: . . . Is it important how he did the murder when you consider whether his ability to conform his conduct to the requirements of law was impaired? You consider that important to look at?

> A [Dr. Catherine Burch]: It is very important to consider his behavior on that morning. And the irrationality of his actions. And it is important to consider the brutality and the extremeness of the act. I mean, he killed her about five or six times, probably. It is very important in understanding his loss of control and inability to control.
>
> * * *
>
> The part that refers to his inability to conform his conduct to the requirements of law refers to that part of his personality, the overcontrolled hostility part, when he is controlled and controlled and controlled, and then when he is threatened directly, he loses it. He went into a state where he committed this murder, and he wasn't even able to remember it. He wasn't aware of what he was doing at the time he was doing it.

(R 205, 209) This uncontroverted testimony shows the relationship between the aggravating factor of heinousness and the mental mitigation presented here: the defendant's mental condition specifically negates any showing of the aggravator since he was incapable of consciously intending to inflict pain, suffering, and torture on the victim, his wife.

The facts here are woefully short of establishing beyond a reasonable doubt that Karen's murder was **intended** to be unnecessarily torturous, that is, that it was especially heinous, atrocious or cruel as that statutory aggravating factor has been consistently applied by this Court. Because the judge based the death penalty on this improper consideration, and because the jury was permitted to consider it, that sentence must be vacated.

B. Mitigating Factors, Both Statutory and Non-Statutory, Are Present Which Outweigh Any Appropriate Aggravating Factors

In Campbell v. State, 571 So.2d 415 (Fla. 1991), this Court set out the proper formula for addressing the weighing of mitigating and aggravating circumstances. In Campbell, the Florida Supreme Court held that a trial court "must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence". Id., citing Lockett v. Ohio, 438 U.S. 586, 604 (1978); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Where there is uncontroverted evidence of a mitigating circumstance, the trial court must find that the mitigating circumstance has been proven. See Nibert v. State, 574 So.2d 1059 (Fla. 1990); Kight v. State, 512 So.2d 522 (Fla. 1987); Cook v. State, 542 So.2d 954 (Fla. 1989); Pardo v. State, 563 So.2d 77 (Fla. 1990). In Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), this Court enunciated a three-part test for weighing evidence:

> [T]he trial court's first task . . . is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether thy are of sufficient weight to counterbalance the aggravating factors.

The record here shows clearly that the trial court

below failed to adhere to the procedure required by Rogers and Campbell, supra, and reaffirmed by the United States Supreme Court in Parker v. Dugger, ___ U.S. ___, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). The trial court inexplicably rejected without explanation unrebutted evidence of statutory mitigating factors and gave merely little or very little weight to extremely significant factors that, "in fairness or in the totality of the defendant's life or character, may be considered as extenuating or reducing the degree of moral culpability for the crime committed." Rogers v. State, supra. See also Santos v. State, 591 So.2d at 163-164.

It also appears that this specific trial judge has engaged in a pattern and practice of rejecting unrebutted mental mitigating evidence. In the only other capital case counsel is aware of that this trial judge handled, Elmer Carroll v. State, Fla. Sup. Ct. Case No. 79,829 (pending review), the judge did the identical thing as in this case: he rejected the statutory mental mitigating factors (listing that the defendant knew right from wrong), finding that the unrebutted testimony may still be rejected by the trial court, finding that he was not reasonably convinced of the existence of the statutory factor, then finding it to be a non-statutory factor which is entitled to little weight. (See Elmer Carroll v. State, Fla. Sup. Ct. Case No. 79,829, record pages 1312 and 1313)

Because of the failure on the trial court's part to apply the correct standard, the sentences must be reversed and

the case remanded for resentencing. Santos, supra. In this case, it is clear that the evidence of mitigating factors far outweighs any aggravating circumstance that could be proposed by the state. Clearly, under the formula set out in Campbell v. State, the trial court was mandated to find in favor of the defendant. There is significant evidence of the following mitigating factors:

1. Under Extreme Mental or Emotional Disturbance.

   and

2. The Capacity of the Defendant to Appreciate the Criminality of His Conduct or to Conform His Conduct to the Requirements of the Law Was Substantially Impaired

Section 921.141(6)(b), Florida Statutes, provides for a mitigating factor if the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. Section 921.141(6)(f), Florida Statutes (1991), provides as a mitigating factor the defendant's "impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Theses factors were improperly rejected by the trial court. The trial court rejected these factors, in part, because it noted that the defendant knew right from wrong. In doing so, the court clearly applied the wrong standard. In Ferguson v. State, 417 So.2d 631 (Fla. 1982), this Court remanded the case for resentencing because the trial judge had applied the wrong standard in determining the applicability of the mental mitigating factors. This Court noted:

> The sentencing judge here, just as in Mines

> [v. State, 390 So.2d 332 (Fla. 1980)], misconceived the standard to be applied in assessing the existence of mitigating factors (b) and (f). From reading his sentencing order we can draw no other conclusion but that the judge applied the test for insanity. He then referred to the M'Naughten Rule which is the traditional rule in this state for determination of sanity at the time of the offense. It is clear from Mines that the classic insanity test is not the appropriate standard for judging the applicability of mitigating circumstances under section 921.141 (6), Florida Statutes.

Ferguson, supra at 638.

It is clear that all of the mental health experts agreed that the defendant had a severe mental illness, which specifically caused the crimes occurring here. The details of that illness and the specific testimony of the substantial control and effect it had on the defendant in causing the crimes to occur has been recounted throughout this brief. The doctors both opined that the defendant was acting under extreme mental or emotional distress and that he was unable to conform his conduct to the requirements of the law. The defendant was normally a very controlled and emotionally isolated person, who, after experiencing great stress, such as the breakup of his marriage and his paranoia that his wife was attempting to steal his business, could lose control of his bottled up emotions and go into a violent rage. (R 163-164, 167-169, 173, 175, 177, 192, 197, 213-215, 246-247, 340-344, 346-355, 360, 372) The defendant's alcohol and drug abuse specifically contributed to the defendant's loss of control.

This testimony is unrefuted. It caused the crimes to occur; it caused the nature of the defendant's actions; Dusty was unable to control his actions; it cannot be discounted. See Thompson v. State, 565 So.2d 1311 (Fla. 1990), (where this factor was present as shown by the defendant's domestic problems). **Compare with** Maulden v. State, 617 So.2d at 302; White v. State, 616 So.2d 21, 25 (Fla. 1993); Richardson v. State, 604 So.2d at 1109; Santos v. State, 591 So.2d at 162-163; Wright v. State, 586 So.2d at 1031; Rivera v. State, 561 So.2d 536 (Fla. 1990); Izarry v. State, 496 So.2d 822 (Fla. 1986). As this Court held in Farinas v. State, 569 So.2d at 431:

> On review of the record, we conclude that there was evidence which tended to establish that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. Sec. 921.141(6), Fla. Stat. (1985). During the two-month period after the victim moved out of Farinas' home, he continuously called or came to the home of the victim's parents where she was living and would become very upset when not allowed to speak with the victim. He was obsessed with the idea of having the victim return to live with him and was intensely jealous, suspecting that the victim was becoming romantically involved with another man. See Kampff v. State, 371 So.2d 1007 (Fla. 1979). We find it significant, also, that the record reflects that the murder was the result of a heated, domestic confrontation. Wilson v. State, 493 So.2d 1019 (Fla. 1986). Therefore, although we sustain the conviction for the first-degree murder of Elsidia Landin and recognize that the trial court properly found two aggravating circumstances to be applicable, we conclude that the death sentence is not proportionately warranted in this case.

Wilson; Ross v. State, 474 So.2d 1170 (Fla. 1985).

So, too, here, the Court must find these mental mitigating factors to be established here and to have great weight. This was a heated domestic confrontation. The defendant suspected his wife was being unfaithful, that she was out to steal his business. Under the stress of the confrontation with his wife, Dusty lost control.

Additionally, intoxication and alcoholism have been accepted as a basis for the statutory mitigating circumstance of extreme emotional or mental disturbance. See Kampff v. State, 371 So.2d 1007 (Fla. 1979). When coupled with his mental problems, the drug use and alcoholism did, in fact cause extreme mental or emotional disturbance. (R 293-295, 299-300, 302-307, 310-311, 315-316, 345-355, 360-364, 371-380) In this case, clearly there is sufficient evidence to establish that Dusty Spencer acted under extreme mental or emotional disturbance and was unable to conform his conduct to the requirements of the law. See also Nibert v. State, 574 So.2d 1059 (Fla. 1990) (wherein the Court specifically held that the defendant's alcoholism and drinking at the time of the killing support a finding of extreme disturbance and substantial impairment, which requires a life sentence). See also Stewart v. State, 558 So.2d 416 (Fla. 1990); Carter v. State, 560 So.2d 1166 (Fla. 1990); Campbell v. State, 571 So.2d 415 (Fla. 1991); Amazon v. State, 487 So.2d 8 (Fla. 1986).

These statutory mitigating factors have clearly been

established; they are entitled to great weight. They cry out for a reduced sentence of life imprisonment.

Nonstatutory Mitigating Circumstances.

The trial court correctly listed as non-statutory mitigation, several aspects of the defendant's character and background which should serve as mitigation. However, the trial court only listed them and did not give them appropriate weight. Additionally, the court considered these multiple aspects as only one factor, rather than giving them separate weight. (R 1242) These factors all have been used to justify the imposition of a life sentences capital murders.

The defendant served honorably in the Marine Corps and, in fact, was a squad leader in search and rescue missions. (R 313-315) See Masterson v. State, 516 So.2d 256 (Fla. 1987); Rogers v. State, 511 So.2d 526 (Fla. 1987); Pope v. State, 441 So.2d 1073 (Fla. 1983); Halliwell v. State, 323 So.2d 557 (Fla. 1975).

The fact that the defendant has a good employment record is a mitigating factor. See Wright v. State, 586 So.2d 1024 (Fla. 1991); Dolinsky v. State, 576 So.2d 271 (Fla. 1991); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Smalley v. State, 546 So.2d 720 (Fla. 1989); White v. State, 446 So.2d 1031 (Fla. 1984); Wilson v. State, 436 So.2d 908 (Fla. 1983). The record is undisputed on this point that the defendant was a very conscientious businessman with his painting business, was a good

worker, and a caring employer.

Evidence was uncontroverted that the defendant's problems stemmed from his failed relationships with women and that, therefore, he would be able to function in a structured prison environment with no problems. See McCrae v. State, 582 So.2d 613 (Fla. 1991); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Brown v. State, 526 So.2d 903 (Fla. 1988); Frances v. Dugger, 514 So.2d 1097 (Fla. 1987); Menendez v. State, 419 So.2d 312 (Fla. 1982); Simmons v. State, 419 So.2d 316 (Fla. 1982).

Additionally, the defendant's alcoholism and substance abuse is, in and of itself, a non-statutory mitigating factor. See Smalley v. State, supra; Masterson v. State, 516 So.2d 256 (Fla. 1987); Feud v. State, 512 So.2d 176 (Fla. 1976); Nibert v. State, supra; Ross v. State, 474 So.2d 1170 (Fla. 1989); Norris v State, 429 So.2d 688 (Fla. 1983). See also argument concerning extreme emotional distress and inability to conform his conduct to the requirements of the law.

Additionally, there was unrefuted evidence, including testimony of the defendant's father, that Dusty was sexually abused as a child by his father, which fact has been held to be a valid mitigator. See Nibert v. State, supra; Campbell v. State, supra; Freeman v. State, 547 So.2d 125 (Fla. 1989).

Moreover, the trial court completely omitted from consideration the specific good act of the defendant in saving a man from certain death following an accident. (R 327-331) Specific good deeds or characteristics are mitigating factors

which should be considered. Lockett v. Ohio, supra; Bedford v. State, 589 So.2d 245 (Fla. 1991); McCrae v. State, 582 So.2d 613 (Fla. 1991); Hooper v. State, 476 So.2d 1253 (Fla. 1985).

Reviewing the mitigating evidence presented in this Point of the brief, as compared to the aggravating factors (which the defendant additionally submits are unsupported), clearly shows that a life sentence is the only sentence which is proportionally warranted. This Court is specifically referred to the aggravating and mitigating portion of this brief for further argument and case support. Comparing the facts of this case with those cited in this point, renders the conclusion inescapable: the death sentence must be vacated and a life sentence imposed.

When this Court follows the formula set out in Campbell v. State, supra, it is without doubt that the only possible conclusion is that the state cannot support a sentence of death. The proper mitigating factors clearly outweigh the appropriate aggravating factors, if any. The punishment must be reduced to life imprisonment.

POINT VII

SECTION 921.141, FLORIDA STATUTES IS UNCONSTITUTIONAL.

1. The Jury

a. Standard Jury Instructions

The jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict.

i. Heinous, Atrocious, or Cruel

The instruction does not limit and define the "heinous, atrocious, or cruel" circumstance. This assures its arbitrary application in violation of the dictates of Maynard v. Cartwright, 486 U.S. 356 (1988); Shell v. Mississippi, 498 U.S. 1 (1990); and Espinosa v. Florida, 112 S.Ct. 2926 (1992). The "new" instruction in the present case (T882) violates the Eighth Amendment and Due Process. The HAC circumstance is constitutional where limited to only the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Espinosa, supra. Instructions defining "heinous," "atrocious," or "cruel" in terms of the instruction given in this case are unconstitutionally vague. Shell, supra. While the instruction given in this case states that the "conscienceless or pitiless crime which is unnecessarily torturous" is "intended to be included," it does not limit the circumstance only to such crimes. Thus, there is the likelihood that juries, given little discretion by the

instruction, will apply this factor arbitrarily and freakishly.

The instruction also violates Due Process. The instruction relieves the state of its burden of proving the elements of the circumstances as developed in the case law.[2]

b. Majority Verdicts

The Florida sentencing scheme is also infirm because it places great weight on margins for death as slim as a bare majority. A verdict by a bare majority violates the Due Process and the Cruel and Unusual Punishment Clauses. A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate Due Process. See Johnson v. Louisiana, 406 U.S. 356 (1972), and Burch v. Louisiana, 441 U.S. 130 (1979). It stands to reason that the same principle applies to capital sentencing. Our statute is unconstitutional, because it authorizes a death verdict on the basis of a bare majority vote.

In Burch, in deciding that a verdict by a jury of six must be unanimous, the Court looked to the practice in the various states in determining whether the statute was constitutional, indicating that an anomalous practice violates Due Process. Similarly, in deciding Cruel and Unusual Punishment claims, the Court will look to the practice of the various states. Only Florida allows a death penalty verdict by a bare majority.

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[2] For example, the instruction fails to inform the jury that torturous intent is required. See McKinney v. State, 579 So.2d 80, 84 (Fla. 1991) ("The evidence in the record does not show that the defendant intended to torture the victim").

c. Florida Allows an Element of the Crime to be Found by a Majority of the Jury.

Our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible. See State v. Dixon, 283 So.2d 1 (Fla. 1973). The lack of unanimous verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution. See Adamson v. Rickets, 865 F.2d 1011 (9th Cir. 1988) (en banc); contra Hildwin v. Florida, 490 U.S. 638 (1989).

d. Advisory Role

The standard instructions do not inform the jury of the great importance of its penalty verdict. The jury is told that their recommendation is given "great weight." But in violation of the teachings of Caldwell v. Mississippi, 472 U.S. 320 (1985) the jury is told that its "recommendation" is just "advisory."

2. Counsel

Almost every capital defendant has a court-appointed attorney. The choice of the attorney is the judge's -- the defendant has no say in the matter. The defendant becomes the victim of the ever-defaulting capital defense attorney.

Ignorance of the law and ineffectiveness have been the hallmarks of counsel in Florida capital cases from the 1970's through the present. See, e.g., Elledge v. State, 346 So.2d 998 (Fla. 1977) (no objection to evidence of nonstatutory aggravating circumstance).

Failure of the courts to supply adequate counsel in

capital cases, and use of judge-created inadequacy of counsel as a procedural bar to review the merits of capital claims, cause freakish and uneven application of the death penalty.

Notwithstanding this history, our law makes no provision assuring adequate counsel in capital cases. The failure to provide adequate counsel assures uneven application of the death penalty in violation of the Constitution.

3. The Trial Judge

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penalty verdict under, e.g., Tedder v. State, 322 So.2d 908 (Fla. 1975). On the other, it has at times been considered the ultimate sentencer so that constitutional errors in reaching the penalty verdict can be ignored. This ambiguity and like problems prevent evenhanded application of the death penalty.

4. Appellate review

a. Proffitt

In Proffitt v. Florida, 428 U.S. 242 (1976), the plurality upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review. See 428 U.S. at 250-251, 252-253, 258-259.

Appellant submits that what was true in 1976 is no longer true today. History shows that intractable ambiguities in our statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Hence the statute is unconstitutional.

b. Aggravating Circumstances

Great care is needed in construing capital aggravating factors. See Maynard v. Cartwright, 486 U.S. 356 (1988) (Eighth Amendment requires greater care in defining aggravating circumstances than does due process). The rule of lenity (criminal laws must be strictly construed in favor of accused), which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, 447 U.S. 381 (1980), is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112 (1979). Cases construing our aggravating factors have not complied with this principle.

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death-eligible persons, or channel discretion as required by Lowenfield v. Phelps, 484 U.S. 231, 241-46 (1988). The aggravators mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to CCP, compare Herring with Rogers v. State, 511 So.2d 526 (Fla. 1987) (overruling Herring) with Swafford v. State, 533 So.2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So.2d 988 (Fla. 1989) (reinterring Her-

ring).

As to HAC, compare Raulerson v. State, 358 So.2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So.2d 567 (Fla. 1982) (rejecting HAC on same facts).[3]

The "felony murder" aggravating circumstance has been liberally construed in favor of the state by cases holding that it applies even where the murder was not premeditated. See Swafford v. State, 533 So.2d 270 (Fla. 1988).

Although the original purpose of the "hinder government function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,[4] it has been broadly interpreted to cover witness elimination. See White v. State, 415 So.2d 719 (Fla. 1982).

c. Appellate Reweighing

Florida does not have the independent appellate re-weighing of aggravating and mitigating circumstances required by Proffitt, 428 U.S. at 252-53. Such matters are left to the trial court. See Smith v. State, 407 So.2d 894, 901 (Fla. 1981) ("the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the

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[3] For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L.Rev. 47 (1987), and Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller, 13 Stetson L.Rev. 523 (1984).

[4] See Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L.Rev. 907, 926 (1989).

judge and jury") and Atkins v. State, 497 So.2d 1200 (Fla. 1986).

d. Procedural Technicalities

Through use of the contemporaneous objection rule, Florida has institutionalized disparate application of the law in capital sentencing.[5] See, e.g., Rutherford v. State, 545 So.2d 853 (Fla. 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v. State, 525 So.2d 833 (Fla. 1988) (absence of objection barred review of use of victim impact information in violation of Eighth Amendment); and Smalley v. State, 546 So.2d 720 (Fla. 1989) (absence of objection barred review of penalty phase jury instruction which violated Eighth Amendment). Capricious use of retroactivity principles works similar mischief. In this regard, compare Gilliam v. State, 582 So.2d 610 (Fla. 1991) (Campbell not retroactive) with Nibert v. State, 574 So.2d 1059 (Fla. 1990) (applying Campbell retroactively), Maxwell v. State, 603 So.2d 490 (Fla. 1992) (applying Campbell principles retroactively to post-conviction case, and Dailey v. State, 594 So.2d 254 (Fla. 1991) (requirement of considering all the mitigation in the record arises from much earlier decisions of the United States Supreme Court).

e. Tedder

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[5] In Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977), this Court held that consideration of evidence of a nonstatutory aggravating circumstance is error subject to appellate review without objection below because of the "special scope of review" in capital cases. Appellant contends that a retreat from the special scope of review violates the Eighth Amendment under Proffitt.

The failure of the Florida appellate review process is highlighted by the Tedder[6] cases. As this Court admitted in Cochran v. State, 547 So.2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

6. Other Problems With the Statute

a. Lack of Special Verdicts

Our law provides for trial court review of the penalty verdict. Yet the trial court is in no position to know what aggravating and mitigating circumstances the jury found, because the law does not provide for special verdicts. Worse yet, it does not know whether the jury acquitted the defendant of felony murder or murder by premeditated design so that a finding of the felony murder or premeditation factor would violate double jeopardy under Delap v. Dugger, 890 F.2d 285, 306-319 (11th Cir. 1989). This necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating factor but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the Eighth Amendment.

In effect, our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-

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[6] Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (life verdict to be overridden only where "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.")

eligible. Hence, the lack of a unanimous jury verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). But see Hildwin v. Florida, 490 U.S. 638 (1989) (rejecting a similar Sixth Amendment argument).

b. No Power to Mitigate

Unlike any other case, a condemned inmate cannot ask the trial judge to mitigate his sentence because Rule 3.800(b), Florida Rules of Criminal Procedure, forbids the mitigation of a death sentence. This violates the constitutional presumption against capital punishment and disfavors mitigation in violation of Article I, Sections 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. It also violates Equal Protection of the laws as an irrational distinction trenching on the fundamental right to live.

c. Florida Creates a Presumption of Death

Florida law creates a presumption of death where, but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstance) and every premeditated murder case (depending on which of several definitions of the premeditation

aggravating circumstance is applied to the case).[7] In addition, HAC applies to any murder. By finding an aggravating circumstance always occurs in first-degree murders, Florida imposes a presumption of death which is to be overcome only by mitigating evidence so strong as to be reasonably convincing and so substantial as to constitute one or more mitigating circumstances sufficient to outweigh the presumption.[8] This systematic presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the Eighth Amendment to the United States Constitution. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988); Adamson, 865 F.2d at 1043. It also creates an unreliable and arbitrary sentencing result contrary to Due Process and the heightened Due Process requirements in a death-sentencing proceeding. The Federal Constitution and Article I, Sections 9 and 17 of the Florida Constitution require striking the statute.

d. Florida Unconstitutionally Instructs Juries Not To Consider Sympathy.

In Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988), reversed on procedural grounds sub nom. Saffle v. Parks, 494 U.S. 484 (1990), the Tenth Circuit held that jury instructions which emphasize that sympathy should play no role violate the Lockett principle. The Tenth Circuit distinguished California v.

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[7] See Justice Ehrlich's dissent in Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984).

[8] The presumption for death appears in §§ 921.141(2)(b) and (3)(b) which require the mitigating circumstances outweigh the aggravating.

Brown, 479 U.S. 538 (1987) (upholding constitutional instruction prohibiting consideration of mere sympathy), writing that sympathy unconnected with mitigating evidence cannot play a role, prohibiting sympathy from any part in the proceeding restricts proper mitigating factors. Parks, 860 F.2d at 1553. The instruction given in this case also states that sympathy should play no role in the process. The defense specifically requested that the jury be instructed that they could consider mercy in making their sentencing recommendation, which requested instruction was denied. A jury thus could have believed in reasonable likelihood that much of the weight of the early life experiences of Appellant should be ignored. The standard instructions then violated the Lockett principle. Inasmuch as it reflects the law in Florida, that law is unconstitutional for restricting consideration of mitigating evidence.

e. Electrocution is Cruel and Unusual.

Electrocution is cruel and unusual punishment in light of evolving standards of decency and the availability of less cruel, but equally effective methods of execution. It violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. Many experts argue that electrocution amounts to excruciating torture. See Gardner, Executions and Indignities -- An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment, 39 Ohio State L.J. 96, 125 n.217 (1978) (hereinafter cited, "Gardner"). Malfunctions in the electric chair cause unspeakable

torture. See Louisiana ex rel. Frances v. Resweber, 329 U.S. 459, 480 n.2 (1947); Buenoano v. State, 565 So.2d 309 (Fla. 1990). It offends human dignity because it mutilates the body. Knowledge that a malfunctioning chair could cause the inmate enormous pain increases the mental anguish.

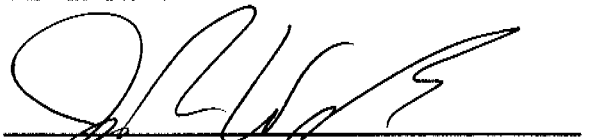
This unnecessary pain and anguish shows that electrocution violates the Eighth Amendment. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Coker v. Georgia, 433 U.S. 584, 592-96 (1977).

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the appellant requests that this Honorable Court reverse the judgment and sentence of death and, as to Point I, reduce the conviction to second degree murder, as to Points II, III and IV, reverse the judgments and sentences and remand for a new trial, as to Point V, vacate the death sentence and remand for a new penalty phase before a new jury, and, as to Points VI and VII, vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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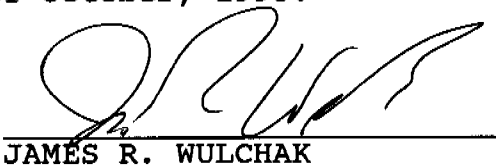
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, FL 32114, via his basket at the Fifth District Court of Appeal; and mailed to: Mr. Dusty Ray Spencer, No. 321031 (45-1264-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 19th day of October, 1993.



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