IN THE SUPREME COURT OF FLORIDA

DUSTY RAY SPENCER,

Appellant,

v. CASE NO. 85,119

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARGENE A. ROPER
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0302015
444 Seabreeze Blvd.
5th FL
Daytona Beach, FL 32118

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATEMENT OF THE CASE AND FACTS

In early December 1991, Karen Spencer asked her husband Dusty Ray Spencer to move out of the house. Karen was also Spencer's partner in a painting business.

On December 10, 1991, Spencer confronted Karen about money that she had withdrawn from the business account. They were in the kitchen. He said he wanted her to get some money or else he was going to kill her (R 125). She went to her bedroom. He was right behind her. He choked, hit and threatened to kill her. He put his right hand around her throat, choking her. He put his left hand over her mouth and nose so she could not breathe. Spencer told her this is only a sample of what she was going to get. He threatened he would kill her if she did not get money from the account. Karen got her breath and told him she could get the money. He let her go. When she got outside the door he said "If you scream, I'll kill you. You have one hour to go to the bank and get the money, or I'm going to do more than thirty-three hundred dollars' damage to the house." (R 126) Spencer was arrested after Karen reported the incident to the police.

Spencer called Karen from jail the next day and threatened that he was going to finish what he had started when he was released from jail.

Karen asked Spencer to return home during the holidays but she asked him to leave again after Christmas was over.

Spencer drank with friends on New Year's Day. He told one friend that he should take Karen out on their boat and throw her overboard. Two days later he told that friend that Karen refused to go out on the boat anymore.

On January 4, 1992, Spencer returned to Karen's home. Karen had been on the phone talking with her mother. He mother and her son Rodney were planning on coming over to her house and they were going to go out shopping. She was getting dressed in her bedroom. She heard the front door knob turn and she yelled out "Rodney?" Spencer retorted "No, it's not Rodney. Your have messed up my life. I'm going to kill you." She met Spencer coming into her bedroom at the door. He struck her on the back and knocked her to the floor (R 137). He got into a fight with her in her bedroom. Karen's teenaged son Timothy Johnson was awakened by this fight. When he entered his mother's bedroom, he saw Spencer on top of Karen, hitting her. When he tried to intervene, Spencer struck him on the head with a clothes iron. Spencer followed Timothy back to his bedroom and struck him several more times with the iron. Spencer told him "You're next; I don't want any witnesses." Karen fled the house and sought help from a neighbour. Timothy attempted to

summon help on the telephone but Spencer yanked the phone cord from the wall. Spencer then fled the house and left town.

Timothy and Karen were treated at the hospital for their injuries. Karen told the treating physician that Spencer had hit her with an iron. At trial, the physician stated that Karen's wounds were consistent with having been inflicted with an iron.

Spencer again returned to Karen's house on the morning of January 18, 1992. Timothy was again awakened by a commotion, grabbed a rifle from his mother's bedroom, and found Karen and Spencer in the backyard. Spencer was hitting Karen in the head with a brick. There was a lot of blood on her face. Timothy tried to shoot Spencer but the rifle misfired. He then struck Spencer on the head with the butt of the rifle but it shattered on impact. Spencer pulled up Karen's nightgown and told her to "show your boy your pussy." He then slammed Karen's head into the concrete wall of the house. Karen told him to "stop." When Timothy tried to carry his mother away, Spencer threatened him with a knife. Timothy ran to a neighbour's house to summon aid.

When the police arrived at the scene, they found Karen dead. She had been stabbed four of five times in the chest, cut on the face and arms, and had suffered blunt force trauma to the back of the head. The medical examiner testified that cuts on Karen's

right hand and arm were defensive wounds and that death was caused by blood loss from two penetrating stab wounds to the heart and lung. The medical examiner also testified that all of the wounds occurred while Karen was alive and that she probably lived for ten to fifteen minutes after receiving the stab wounds in the chest. According to the medical examiner, Karen suffered three impacts to the back of the head that were consistent with her head being hit against a concrete wall. Because this impact would have caused Karen to lose consciousness, the medical examiner testified that the defensive wounds had to have occurred before the head trauma.

Spencer was charged with four counts: first-degree premeditated murder and aggravated assault for the January 18 incident and attempted first-degree murder and aggravated battery for the January 4 incident.

Spencer was convicted on the counts of aggravated assault and aggravated battery and the lesser-included offense of attempted second-degree murder. He was sentenced to five years for aggravated assault, fifteen years for attempted second-degree murder, and fifteen years for aggravated battery, with the sentences to run consecutively for a total of thirty-five years. The jury also convicted Spencer of first-degree murder.

In the penalty phase clinical psychologist Kathleen J. Burch

testified that she conducted a neuropsychological and a psychological evaluation of Spencer (R 156). She first took a personal history and conducted a mental status examination (R 171).

Spencer's self-related personal history indicates that he was not toilet trained at an appropriate age and was shamed at school; was made to wear a dress and home movies were taken of him in it; would cry louder and louder to get out of punishment; had a serious alcohol abuse problem at an early age, fourteen, not addressed by his parents, although he did not want them to know; there was a pattern of not getting adequate supervision or discipline, being able to do things, then getting punished in a big way; Spencer was sexually molested between the ages of twelve and fourteen by his father who would come into his bedroom at night when his mother was gone and masturbate him, which made him feel sexually inadequate and caused him to worry about being homosexual (R 172-174). Spencer also related an incident when he first went into the Marine Corps in which a drill sergeant, in Spencer's view, encouraged Spencer and some soldiers to drink but when they went back to the base they were arrested for being drunk. Ms. Burch felt that this was reflective of his paranoid thinking, to some degree, and a pattern of not being able to trust authority (R 174-75). She related that Spencer admitted to longstanding, heavy abuse of

alcohol, drinking every day to great excess with no significant period of sobriety from the time he was a teenager and abuse of a variety of drugs, not injectables but hallucinogenics, speed, and a lot of marijuana (R 175).

Ms. Burch did not speak with Spencer's boyhood or military friends until after she had come to her conclusion and was in Florida (R 176).

The neuropsychological test battery did not provide evidence of any kind of significant problem in the brain (R 159). Ms. Burch stated "Overall, he was really less impaired than many people with his long history of drug and alcohol abuse and I did not find evidence of neuropsychological impairments that would seem to significantly affect his behaviour." (R 160).

Spencer was found by Ms. Burch to have a "personality" disorder. She described the essence of a personality disorder as follows.

> Now, a personality disorder refers to a constellation of traits, and behaviours, that are enduring. You know, that are characteristic of the person that caused the problems. That either cause problems for other people, primarily, or for the person himself or herself, primarily. But different from an acute psychiatric or a mental illness. And it's not like a person having depression or a

> person having an anxiety disorder or schizophrenic or something like that. This is the person's character, defect in character, or developmental test.

(R 166)

Personality tests indicated that Spencer was not malingering (R 162) The MMPI indicated that Spencer was a person with a high likelihood of being a drug or alcohol abuser; (R 163) would probably not have achieved his potential; would have had a poor work history; has a rebellious streak; has difficulty accepting responsibility for things that he did and has a tendency to blame other people; is emotionally isolated from other people; does not have good quality, deep, meaningful relationships;(R 163) tends to be suspicious and believes people are not treating him right, is shy, and would tend to be overcontrolled in his activities and his life; has a lot of anger and hostility inside; and has a vulnerability under extreme stress to just explode (R 164). The Rorschach test was consistent with the MMPI and reflected Spencer is a person who is uncomfortable with his feelings; has not learned very well throughout his life to understand himself or other people and doesn't figure out relationships very well (R 167-68). He is vulnerable to being manipulated by other people then gets angry about it although he doesn't show it unless things get out of

control and he is emotionally stimulated and then gets explosive (R 169). When he is emotionally stimulated his thinking gets very strange but he is obviously not someone who is chronically psychotic or acutely psychotic (R 168). Ms. Burch doesn't score the Thematic Apperception Test, in which the person is shown a series of pictures of people involved in situations and asked to tell a story about each picture, because she has not had people take the test and be really productive enough on it to make use of it (R 169). Nevertheless, she opined that the story Spencer gave her was also an indication of his passivity, suspiciousness and social alienation (R 169-170). It also indicated to her that he would have dreams of achievement but not follow through. There were also concerns about his sexual functioning and possibly sexual identity (R 170).

Ms. Burch concluded that Spencer suffers from chronic alcohol and marijuana abuse, which would affect a person's ability to control emotions and behaviours, and paranoid personality disorder which can include, at times, brief psychotic episodes of irrational thinking, impaired ability to perceive and interpret reality, or perceptual inaccuracies. Ms. Burch opined that at the time of the murder Spencer was really suffering some impairment of his ability to think rationally. She further opined that at the time of the

murder he was under the influence of extreme mental or emotional disturbance based on the fact that in his view his wife was attempting to steal his business from him which was a recapitulation of a similar situation with his first wife. Spencer told her that he went to Karen's house on January 18 to get title to his car (R 179). She also opined that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. She clarified her opinion and stated that although she felt Spencer was able to appreciate the difference between right and wrong at the time, because of the severe stress and alcohol abuse he was deficient in his ability to conform his conduct to the law (R 177-178).

Ms. Burch further testified that a person suffering from this type of disorder would not be a danger to himself or others in prison as she saw no evidence of suicidal intent and in prison he would not be in intimate relationships with women in which he has come under such extreme stress (R 178-79).

On cross-examination Ms. Burch indicated that she had spent only three hours actually talking to Spencer (R 180). She did not review any trial testimony (R 181). Spencer only told her that on December 10 he went to Karen's house to get thirty-three hundred

dollars she had withdrawn from the bank account and was rifling through her purse, they got into a "struggle" and she called the police. She did not recall reviewing a police report containing a sworn statement by Karen that Spencer had threatened to kill her or that he grabbed her throat with his right hand and choked her while covering her mouth and nose with his left hand so she could not breathe and saying he was going to kill her if she did not get him money. In formulating her opinion she did not take the December 10 threat into account but opined it wouldn't make that much difference because similar circumstances applied (R 184). She conceded that personality testing indicated Spencer was an ideational character and it is possible he could have been contemplating or fantasizing murdering Karen as early as December 10 (R 185). She was also not given information that a police report was done on December 11 in which Karen indicated that Spencer had called her from the jail and told her that when he got out he would finish what he had started. She would want to take that information into account (R 187). Ms. Burch admitted that she did not require corroboration as to the truth of the history Spencer had given her and presumed it was true because it was consistent with the personality tests (R 188). Ms. Burch supposed that being put in jail would have made Spencer think about the wrongfulness of

his violent actions toward Karen and given him a message that his conduct was wrong and there were consequences for being violent to her (R 190). She saw no evidence in Spencer's military record that the character disorder prevented him from operating in the military as any other person. A paranoid personality disorder would not prevent his being able to operate in the military. Ms. Burch further indicated that she had done an "interpretation" of Spencer's answers on the Rorschach in determining if his answers were abnormal and based on such answers and other testing concluded he had a character disorder (R 193). At the time she gave him the Rorschach he was aware that she was an expert being consulted to testify at his death penalty sentencing hearing (R 194). The interpretation of the MMPI was done according to the Medgargee classification for criminal offenders (R 194). Spencer matched the profile of the type D of the Medgargee typology which suggests impulsiveness and insisting on his own way regardless of the law or feelings of other people (R 195). Such finding matched the report made by James Butcher, PH.D. (R 198). Results from other tests suggest, however, that he is not impulsive (R 196). Spencer would have had his basic character or personal profile since he was a young adult, before he met Karen (R 197). Ms. Burch reiterated that she did not believe that Spencer's ability to appreciate the

criminality of his conduct was impaired at the time he committed the murder (R 203). He knew that to murder Karen was wrong and he would have understood the possible consequences (R 204). In formulating the opinion that Spencer's ability to conform his conduct to the requirements of the law was impaired at the time of the murder Ms. Burch relied on the factual scenario of Spencer going to the house to talk to Karen about the auto title or if she was not there taking the auto title, wearing a camouflage jacket and jeans, parking some distance from the house, walking up to the house, realizing that the vehicles were there and it was likely she and her son would be home, going into the house, Karen being in the kitchen yelling at him, a struggle ensuing, falling out into the yard, Karen picking up a brick and hitting him, Spencer starting to hit her with a brick, her son finding them, Spencer hitting her with the brick, and remembering from that point only her son saying "You have killed her," and leaving (R 208). Burch remembered on further questioning that Spencer had told her he parked away from the house to avoid detection, which would indicate to some extent a mental state enabling him to think and plan ahead and protect his own interest, although she found other aspects of his behaviour bizarre (R 209). Ms. Burch indicated she had found the inability to conform his conduct to the requirements of law mitigator based on

his overcontrolled hostility, which when he was threatened directly he lost it, went into a state in which he wasn't aware of what he was doing at the time, and wasn't able to remember it (R 209). Spencer told her Karen hit him with the brick and "that was the truth as he presented it to me, now I wasn't there." She opined it would be consistent with his personality pattern to have responded to a threat in that manner (R 210). When asked if blaming Karen for hitting him with a brick would be consistent with the MMPI pattern of denying culpability and blaming others the expert stated "No, no. Again, you're construing that to mean lying, and it's a different thing." (R 211). She did not think Karen let him in the house and she could not remember how Spencer got in (R 211). Spencer told her he put on gloves before he went in the house so that if Karen was not there and he had to look for the title he would not leave fingerprints. Ms. Burch considered that "bizarre thinking" because Spencer lived in that house. She felt such forethought, however stupid, in trying to protect himself was not inconsistent with an impaired ability to conform his conduct to the requirements of the law because such impairment relates to loss of control (R 212). She believed that his history of alcohol or drug abuse, as Spencer related to her, affected his behaviour that morning to a great extent, since such abusers, even if they have

not had a drink for some time will behave in ways that are uncontrolled and irrational. But she admitted it did not make him less intelligent or knowledgeable concerning the potential consequences of his acts. At the time of the murder she related that he had been drinking daily. She admitted, however, that on the morning of the murder he had not had anything to drink and would not have had a blood alcohol level (R 214). But she opined that his thinking would be impaired under the influence of alcohol even though his blood alcohol was zero. The last time Spencer related to her that he had been drinking was the day before in the early evening. His performance I.Q. was 111, low high average, and the rest of his I.Q. scores average (R 215-216). The murder was not the result of him having such a low I.Q. he could not think out alternative behaviours (R 216). Ms. Burch took into account in formulating her opinion that the day before the murder a neighbour saw Spencer driving the Grand Prix and waiting at the corner, looking in disgust at the house (R 217). She took into account the report done by James Butcher, PH.D., which was in disagreement with her opinion, and indicated that the therapist should be aware of the possibility that Spencer may act aggressively toward other inmates or individuals in authority (R 219-220). But she indicated that a psychological evaluation is never done on the basis of one

test (R 220). Ms. Burch further opined that Spencer most fits into the characteristics of a paranoid personality disorder (R 245). He has an expectation, without sufficient basis, of being exploited or harmed by others. This has occurred primarily in relationships with women but there is evidence he has that kind of paranoia in other instances, as well (R 245). His history has shown, however, that he is not quick to react and not an impulsive person (R 246).

Jonathan Lipman, a neuropharmacologist testified that he conducted a clinical interview of Spencer (R 338). The results of the CAQ 16PF profile administered to Spencer reflected a somewhat schizoid, withdrawn, timid, and threat-sensitive individual (R 340). His profile was "quite conforming and conscious." Spencer's reality testing was extremely good and there were no indications of any underlying psychotic disorders. "He clearly had a personality problem." (R 341). Dr. Lipman also conducted an addiction severity index. Spencer scored a 5.34 for alcohol (R 343). He indicated that the basic result of the testing done by both he and Ms. Burch was to show that Spencer was an individual who, under stress, and as a result of it, is going to become paranoid when stressed (R 344). Based on a history obtained from Spencer, Dr. Lipman determined that Spencer wasn't sober at all in the ten to fourteen days prior to the killing (R 349). Spencer drank a case of beer a

day, and a half a litre of liquor or more, sometimes sharing it, every day up until the day before the killing (R 350). Spencer's blood alcohol at the time of the killing was zero (R 351). But because Spencer drinks all the time he is subject to constant disequilibrium of his biochemistry (R 352). Such a person "perhaps shouldn't be in charge of machine." Such person may also suffer a mild withdrawal syndrome (R 353). The paranoid personality disorder would help symptomatically. It is why Spencer became an alcoholic. Alcohol is very tranquilizing to people that are paranoid, anxious, shy, timid and threat-sensitive. It provides what they need, "a missing key, and gives them what, hopefully, we have and they lack, the ability to deal with everyday anxiety." But having borderline traits Spencer is unable to deal with sudden shocks and stresses and manifests emotional instability when confronted with them (R 354). The combination of the paranoid personality structure and being an alcoholic without alcohol rendered him impaired to an abnormal, intense degree. Dr. Lipman opined that Spencer was under the influence of extreme emotional or mental disturbance at the time of the killing and, although he knew the difference between right and wrong, did not appreciate the wrongfulness of his actions which occurred in a disassociative state, and was not able to control his actions (R 356).

On cross-examination Dr. Lipman admitted he had no corroboration of Spencer's self-reporting as to the amount of alcohol he had consumed in the days preceding the murder (R 357). He did not have sufficient information to calculate his blood alcohol concentration on December 10, 1992, when Spencer attacked and threatened Karen (R 358). Dr. Lipman testified, nevertheless, that Spencer would have been impaired then as a chronic alcoholic (R 359). He opined that Spencer was impaired, as well, when he called Karen the next day and told her that when he got out he would finish what he had started (R 359). Spencer did not have a blood alcohol level while in jail (R 362). Because of his chronic alcoholic condition and his borderline personality disorder he was at the edge of discontrol, unstable (R 360). Then, and on the other three occasions he would have been in a condition of extreme emotional instability due to his chronic alcoholism. He was not so impaired he did not know what he was saying (R 361). He opined further that the threat may have been just an expression of displeasure and he may not have understood the impact it had on Karen (R 361). Spencer may have been insulted by being in jail (R 362). Dr. Lipman did not take into account in formulating his opinion that on New Year's Day Spencer told a friend that he wanted to go out on a boat with Karen and throw her overboard. He

indicated that type of ideation would be very typical for people dealing with separation and divorce and he was caught unaware by her calling the police since this was the first assaultive altercation and he wasn't ready for it to move into the end zone (R 363).. After Spencer's returned from his trip out of state the morning of the murder, he dropped Zane Zink off at his brother's house and slept in the car then went to his wife's house (R 364). So the morning of the murder was the first time Spencer would have gone back and experienced the emotions flowing from the confrontation (R 365). He did not have information that a neighbour, Walt Smith, saw Spencer the morning before the murder in his Grand Prix stop and stare at Karen's house with an angry, disgusted look on his face (R 365). On the addiction severity scale zero is healthy. The scale runs from zero to ten. Spencer rated in the middle (R 367). He never interviewed anyone who had lived with Spencer who would have had an opportunity to see his behaviour day after day (R 367). The history Spencer gave Dr. Lipman indicates that Spencer left the state and went to Indiana with Zane Zink, drinking all the way, because he thought he was wanted for attempted murder of his wife. She told him she had gone to the police and he was wanted for attempted murder. After two weeks of heavy drinking he decided he needed to leave Florida and

Indiana and set up somewhere new. To do this he would need the title to his car and would have to go to his wife's house (R 368). He came back, dropped Zane off, slept a short time in his car and went to his wife's house. If Karen wasn't home he was going to steal the title and wore painter's gloves. If she was home he was going to get her to sign it (R 369). The wife and her son's vehicles were outside. He went through the glass sliding door. Karen was standing near the coffee pot and started screaming. Spencer further related to Dr. Lipman that:

> I held her mouth to silence her screams. She struggled and pushed me and I held her by the mouth and the back of the head, and the two of us fell down outside the door. She continued struggling on the ground and picked up a brick and she hit me. I reacted. She's screaming and I'm frightened.

(R 371)

Spencer indicated to Lipman that he gained control of the brick and hit her with it. The next thing he knew Timothy was standing over him with a gun butt. Spencer indicated further:

> I'm astride her and wham, Tim comes up behind me and hits me over the head with the butt of the gun. I only recollect him hitting me once, but his statement said he hit me with the stock of the rifle three

> times, but I don't remember. Then I got up. Tim said "You killed her" and he is pulling her away from me by the armpit. In my hand, there where the brick was, is the knife, and it's all over and I don't remember how it got there.

(R 371).

Asked where he stabbed Karen, Spencer stated "I don't remember" and continued:

> I saw blood coming out of her mouth, as Tim picked her up and drug her away, and said 'Man, you killed her.' And I started to come back from an unconsciousness or a blackout, coming out of a fog, and Tim took off and ran down the road and I left and went to the woods. I don't remember stabbing her. I just remember coming out of the fog and the knife was in my hands. They said I stabbed her but I don't remember

(R 371).

Dr. Lipman further testified that the cognitive confusion and disorientation would have been at a constant and low level observable to someone trained to observe it. "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." (R 372). Spencer indicated in the history that he had parked his car away from the house in a place

where it would not been seen near the house (R 372). He did so for a specific purpose, to be covert (R 373). Dr. Lipman interpreted this as a sign of confusion since he would be going into an occupied house and the painters would be coming in fifteen minutes (R 374). Dr. Lipman described Spencer as being in a disassociative state from the time Tim whacked him to the point where Tim pulled her away and Spencer realized she had been stabbed (R 378). It is not in Spencer's memory that Karen was stabbed before Tim left and when Tim was not present. Spencer does not remember pulling up her gown and telling her to show her body to her son (R 379). When Dr. Lipman interviewed Spencer he told him "I may or may not be able to interact with the processes" and that he was there to do an interview. For purposes of his opinion he believed that Spencer believed the things he had told him (R 380). On redirect Dr. Lipman indicated that if a witness had testified that Spencer came back earlier than the night before the killing it may impact upon his opinion in that it would influence his idea of how many amnesic episodes Spencer was having and would be more consistent with Spencer being in a confused state (R 381).

Spencer's mother was called to the stand in the penalty phase and numerous pictures of Spencer from the time he was a baby were published to the jury (R 281). She testified Spencer quit high

school in his senior year and went into the Marines but that he did get a high school diploma (R 277). His hobbies were hunting and fishing (R 278).

Spencer's sister testified that she has absolutely no relationship with their father (R 283). She was sexually molested by the father from age eight to fourteen, was approached by him as an adult about six years ago, and it broke off four years ago when she moved away (R 283). She had no knowledge of Spencer being molested while he was growing up and only learned of this from a letter Spencer sent her a couple of months ago (R 284). Spencer and their father used to go hunting and fishing together (R 285). Their was no family discussion about their not getting along and she did not believe there were any problems between the father and Spencer that were out of the ordinary (R 286). She has allowed her father to be alone with her son throughout the son's life (R 287).

Spencer's father testified that he had fondled his son's privates on three occasions and had sexually molested his daughter (R 288). On cross-examination he indicated the relationship with Spencer was normal, that they hunted and fished together, and he took Spencer to church, up until the time Spencer left home at age eighteen (R 289). He never noticed Spencer behave in a way that would indicate emotional or psychological illness or personality

disorder and there was no family discussion about his behaviour (R 290). He never noticed any behaviour that could have resulted from the fondling (R 291). Spencer visited him five years ago with his first wife Beverly Spain and he noticed no behaviour that would make him think Spencer was suffering from any kind of emotional or psychological illness (R 291).

John Marancek and Dennis Worrell testified that they and Spencer drank every day from age thirteen on (R 293-300). In junior high school Spencer used alcohol and marijuana and in high school he took a lot of diet pills (R 295). Marancek could not conclude that Spencer was emotionally or psychologically disturbed (R 296). Spencer knew it was unlawful for him to be drinking but everyone did it because it was fun (R 297). Police officer Hank Petrilli picked Spencer up when he was intoxicated a few times and brought him home (R 311). Ted Kafalas joined the Marine Corps with Spencer and was stationed briefly with him in Paris Island. After getting out of the service they were both living in Florida and drank excessively (R 240). He believed Spencer was ingesting marijuana. Kafalas returned to Pennsylvania then moved back to Florida, moving in with Spencer in 1976 (R 241-42). He believed they both drank excessively. Spencer ingested a lot of marijuana, some acid, Thai stick, and a little cocaine now and then (R 306).

They both knew it was against the law (R 309).

Paul Faber was stationed with Spencer in the Marine Corps in Guam for almost fifteen months (R 249). They were part of a sea rescue team. They rescued Japanese tourists who had fallen off cliffs by repelling off the cliffs. Spencer was second in command (R 314). Faber lived in the same barracks with Spencer. They all took drugs. They smoked pot on a daily basis and took whatever drugs were available such as Purple Haze, mescaline, and microdot acid (R 315). Timmy Myers attended a birthday party at Spencer's house. Someone was interested in buying Myers' truck so Myers raised the hood with the motor running. The water pump shaft flew off and the fan hit Myers in the head, just about taking off the top of his head and shattering his jaw (R 331) If Spencer and two others had not intervened by clearing his throat and getting him breathing and hauling him to the interstate for the helicopter to pick him up Myers would have died (R 328-329;331).

Spencer hired Benjamin Abrams as a painter (R 317). Abrams testified Spencer ran a successful business in interior and exterior painting of residential homes (R 318). According to Abrams Spencer treated his employees better than he has seen any employer treat his employees (R 319). Spencer was almost always on the job (R 320). He never saw Spencer act in any way that would make him

think Spencer was emotionally ill (R 321). Spencer was drunk sometimes when he was working but he thought Spencer still did a great job and treated his employees well (R 321). He did not think the drinking affected him at all in the way he worked or treated people (R 322). Foreman Joseph Cleaves never saw Spencer intoxicated during the day (R 326).

The jury recommended a death sentence by seven-to-five votes. The trial judge followed the jury's recommendation and imposed death. The judge found three aggravating circumstances: (1) previous conviction of another felony involving violence based upon the contemporaneous convictions; (2) that the murder was especially heinous, atrocious, or cruel; and (3) that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The sentencing judge found no statutory mitigating circumstances, and one nonstatutory mitigating circumstance, Spencer's history and background. *Spencer v. State*, 645 So.2d 377, 379-380 (Fla. 1994).

On direct appeal this court found that there was sufficient evidence from which the jury could have inferred premeditation and rejected Spencer's contention that this was a "heat of passion" killing. The nature and extent of Karen's injuries and the manner in which the homicide was committed support the jury's conclusion

that Spencer formed a premeditated design to kill Karen. Karen died of multiple stab wounds to her face and defensive wounds on her hand and arm. Timothy Johnson testified that his mother asked Spencer to stop his attack, but he persisted by smashing her head against the concrete wall of the house three times. The evidence also showed that Spencer parked his car away from Karen's house on the day of the killing, wore plastic gloves during the attack, and carried a steak knife in his pocket. The court also found that Spencer's previous attacks on Karen and the threats that he made to both Karen and her son is also proper evidence of premeditation. *Id.* at 381.

Finding no error as to the guilt phase of the proceedings below, this court affirmed Spencer's convictions. *Id.* at 383.

This court agreed with the trial court that the murder was especially heinous, atrocious, or cruel. *Id.* at 384.

This court further found, however, that the evidence did not support the trial court's finding of the cold, calculated, and premeditated aggravating factor. The court found that although there is evidence that Spencer contemplated this murder in advance the evidence offered in support of the mental mitigating circumstances also negates the cold component of the CCP aggravator. During the penalty phase, a clinical psychologist

testified that Spencer thought that Karen was trying to steal the painting business, which was a repetition of a similar situation with his first wife. The psychologist also testified that Spencer's ability to handle his emotions is severely impaired when he is under such stress. A neuropharmacologist agreed that Spencer has "very limited coping capability," "manifests emotional instability when he is confronted with sudden shocks and stresses," and "is going to become paranoid when stressed." This expert opined that Spencer's personality structure and chronic alcoholism rendered him "impaired to an abnormal, intense degree." Considering this evidence, the court found that the sentencing court erred in finding that the murder was CCP. *Id.* at 384.

The court also found that the trial court improperly rejected the statutory mitigating circumstances. During the penalty phase, the two experts testified that Spencer suffered from chronic alcohol and substance abuse, a paranoid personality disorder, and biochemical intoxication. Based upon their testing, interviews, and evaluations, both experts concluded that Spencer was under the influence of extreme mental or emotional disturbance at the time the murder was committed and that his capacity to conform his conduct to the requirements of law was impaired. The sentencing order found that neither of these mitigating factors was present.

The court indicated that the evidence of these mitigating circumstances that was submitted by Spencer was uncontroverted. The trial judge rejected the experts' opinions as speculative and conclusory. This court found, however, that the experts based their opinions on a battery of psychological and personality tests administered to Spencer, clinical interviews with Spencer, examination of evidence in this case, and a review of Spencer's life history, school records, and military records. The court, thus, concluded that the trial judge erred in not finding and weighing these statutory mental mitigating circumstances. *Id.* at 385.

Based upon the court's rejection of the CCP aggravating factor and the trial court's failure to consider the statutory mental mitigating circumstances of extreme disturbance and impaired capacity, this court was not certain whether the trial court would find that the aggravation outweighed the mitigation and, accordingly, the court vacated Spencer's death sentence and remanded the case for reconsideration of the death sentence by the judge. *Id.* at 385.

Only three justices of the six-member panel joined in the majority opinion. Justices Shaw, Harding, and McDonald concurred in the opinion.

Justice Grimes concurred in part and dissented in part.

> Rather than a crime of passion, this was a cold, calculated, and premeditated murder. On December 10, 1991, Spencer choked his wife and told her that he would kill her if she did not give him some money. The following day he called her from jail and said he would finish what he started when he got out. On January 1, 1992, he told a friend that he would like to take his wife out on a boat and throw her overboard. Two days later he reported that she wouldn't go out in the boat anymore. The following day, he beat his wife with an iron, requiring eleven stitches to her face. Finally, early in the morning of January 18, 1992, he parked his car away from her home and approached the house wearing surgical gloves. He might have remained undetected except that his wife's son was awakened by her screams from being hit in the head with a brick. After chasing the son away, Spencer stabbed his wife to death and fled. The fact that a killer's conduct may be motivated in part by emotion does not preclude a finding that the murder was cold, calculated, and premeditated.

Justice Grimes further found no error in the trial judge's treatment of mitigating circumstances.

> It is evident from a five-page discussion of the subject in the sentencing order that he carefully considered mental mitigation. The

> judge acknowledged Spencer's long-time abuse of alcohol and drugs and recognized that he suffered from a paranoid personality disorder. He simply concluded that Spencer's mental state did not rise to the level of statutory mitigation. As he had a right to do, he rejected the doctor's opinions to the contrary, primarily because there was no evidence of any type of alcohol or drug impairment at the time of the murder. As noted in the sentencing order, "despite suffering from a paranoid personality disorder, chronic substance abuse and biochemical intoxication the Defendant ran a very successful business and was a great employer according to the testimony of Mr. Abrams." I would affirm both the conviction and the sentence of death.

Justice Overton concurred with Judge Grimes. *Spencer v. State*, 645 So.2d 377, 385-386 (Fla. 1994).

Justice Kogan continued to believe that the sentence should have been reduced to life imprisonment but concurred with the result reached by the majority opinion to remand the case for reconsideration of the death sentence by the judge. *Id.* at 385-386.

Spencer was resentenced before the Honorable Belvin Perry, Jr. on January 18, 1995.

Judge Perry summarized the aggravating factors found: (1) the

defendant was previously convicted of another capital felony or a felony involving the use or the threat of violence to the person and (2) the capital felony was especially heinous atrocious and cruel. The judge stated that the defense had proved the mitigating circumstances that (1) the capital felony was committed while the defendant was under the influence of an extreme mental or emotional disturbance (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, and (3) the existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty, commonly known as nonstatutory mitigating circumstances. The judge also noted that under this nonstatutory category he had found that (1) the defendant was an abuser of drugs and alcohol (2) had been sexually abused as a child (3) suffered from a paranoid personality disorder (4) had an honorable military service record (5) had a good employment record (6) had a good reputation as a painter and (7) that he could function in an environment that does not contain women without being a danger to himself or others (R 59-60).

Judge Perry stated that pursuant to the opinion of this court he had carefully reweighed the aggravating and mitigating circumstances (R 60).

The lower court indicated that a summary of the testimony of Dr. Burch and Dr. Lipmann established that (1) the defendant was a long-time abuser of drugs and alcohol (2) that he was less impaired than many people with his long history of drug and alcohol abuse (3) that he suffered from personality disorders (4) that he suffered from the stress of his relationship with Karen Spencer, i.e. the alleged attempt by her to steal his business (5) neuropsychological testing did not provide any evidence of significant problems in Spencer's brain (6) there was no evidence of neuropsychological impairment that would significantly affect his behaviour (7) that at the time of the murder he was suffering some impairment of his ability to think rationally (8) at the time of the murder he was able to appreciate the difference between right and wrong but was deficient in his ability to conform his conduct to the law (9) he did not have anything to drink of an alcoholic nature the morning of the murder and his last reported drinking was the day before in the early evening hours (10) that Spencer had an I.Q. of 102, which is average, and performance I.Q. of 111, which is between average and high average (11) Dr. Burch could not rule out that Spencer thought about and fantasized about killing the victim (12) both experts depended upon Spencer's self-report concerning the events surrounding the murder (13) that

Spencer was suffering from biochemical intoxication at the time of the murder and (14) Spencer rated a 5.34 on the addiction severity index test (R 61-62).

The sentencing judge noted that the facts surrounding the murder of Karen revealed that Spencer, on numerous occasions, prior to the murder openly expressed his desire to murder her. He told a friend, Benjamin Abrams, while drinking on New Year's Day, that he would take Karen out on their boat and throw her overboard. Two days later he reported to Abrams that she would not go out on the boat with him anymore. In December 1991, Karen asked Spencer to move out of the house. On December 10, 1991, Spencer told Karen if she did not get him some money that he was going to kill her. He choked her and informed her that this was only a sample of what she was going to get. He was arrested after this incident. On December 11, 1991, Spencer called from the jail and informed Karen that he was going to finish what he had started, as soon as he got out of jail. On January 4, 1992, Spencer attacked and beat Karen with a clothes iron in her home. She suffered lacerations and bruises to her body and required eleven stitches to her face. Timothy Johnson, Karen's teenage son, was awakened by this fight. When Timothy entered the room, he saw Spencer on top of his mother, hitting her. When he tried to intervene, Spencer struck him in the

head with the iron. Spencer followed him back to his room and struck him several more times with the iron. During this incident Spencer told Timothy that his mother had fucked up his life and now he was going to fuck hers up. On January 18, 1992, Spencer returned to Karen's home, where he murdered her. He parked his vehicle away from Karen's home. Timothy was awakened by the screams of his mother. He retrieved the rifle, went out to look for his mother, and observed Spencer, who was wearing gloves, striking his mother in the head and face with a brick. Timothy struck Spencer with the butt of the rifle, shattering the butt. Spencer stood up and said "Your mother fucked my life up." Spencer than lifted up her nightgown and said various words while Karen was saying "stop." Spencer slammed Karen's head into the concrete wall of the house. Spencer, at some point, stopped his attack, which permitted Timothy to pick his mother up. While he was attempting to carry his mother away Spencer threatened him with a knife. He left to find help (R 62-64).

Judge Perry stated that in weighing the mitigating circumstances, the court must examine what connection they had to the murder of Karen. He indicated that both experts felt that, due to Spencer's long history of drug and alcohol abuse and his personality disorder, he committed the crime while he was under the

influence of an extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law, was substantially impaired (R 64). The judge noted, however, that from the testimony, although Spencer had a long history of drug and alcohol abuse, starting at a young age, he was less impaired than most people with a long history of drug and alcohol abuse. He rated 5.34 on the addiction severity index test which has a scale of zero to ten, zero being healthy. Testimony also established that at the time of the murder Spencer's blood alcohol level was zero. Dr. Lipmann noted at the time of the murder that Spencer was biologically chemically intoxicated, which is described as a hangover. The court also noted that despite suffering from a paranoid personality disorder, chronic substance abuse, and biochemical intoxication Spencer ran a very successful business and was a great employer according to the testimony of Mr. Abrams. Judge Perry also noted that while Spencer abused drugs and alcohol in the military he was able to perform a heroic deed in rescuing someone while stationed in the Philippine Islands (R 64-65).

Judge Perry then stated on the record the following.

> The evidence in this case shows that the defendant, Dusty Ray Spencer, expressed his desire to murder his

> wife, and that he carried out his intention. The experts said that the murder occurred because the defendant thought the victim was trying to take his money or steal his business. It is to be noted that the defendant told the expert that he went to the house to get the title to his vehicle but he had clearly indicated his intention when he was in jail i.e., he was going to fuck her up, and finish what he started if she did not get him some money. The facts leading up to the killing and the nature of the killing are indicative of a deliberate thought process by the defendant to kill Karen Spencer if she did not comply with his wishes. The acts of the defendant clearly show that he knew what he was doing, and knew it was wrong.

(R 65-66).

After carefully reviewing the records and taking all of the mitigating circumstances in the light most favorable to the defendant, Judge Perry found that those factors had a very small, if any, connection to the murder of Karen Spencer. While the court gave the mitigating circumstances of extreme mental and emotional disturbance and impaired capacity to conform his conduct to the requirements of the law some weight, the court could not give them overwhelming, great weight (R 66). The court gave the nonstatutory mitigating factors very little weight (R 67).

Judge Perry rejected defense argument that the homicide was a result of a domestic dispute and the death penalty is inappropriate. The court was aware of case law in which the death penalty was imposed and upheld on appeal where the defendants had killed women with whom they had relationships after a previous conviction for a similar violent offense. Judge Perry indicated that while this case does not involve a previous conviction for a prior violent offense, it does, like the other cases, involve acts of violence prior to the murder. While the murder of Karen occurred on January 18, 1992, the attempted second degree murder of Karen and the aggravated battery upon Timothy Johnson occurred on January 4, 1992 (R 67-68).

Spencer and counsel approached the podium and the court addressed the defendant indicating as follows.

> The court has carefully weighed and considered each statutory aggravating and mitigating circumstance in attempting to determine an appropriate sentence to impose, in light of all the evidence presented at trial, advisory sentencing hearing, arguments of counsel and the jury's recommendation. The court also viewed and considered the credibility of each witness that testified in this matter. The court, being ever so mindful a human life is at stake in the balance, finds, after careful assessment and

> evaluation of the aggravating and mitigating circumstances, that the aggravating circumstances outweigh all mitigating circumstances.

(R 68).

The sentencing judge concluded that death, as recommended by the jury, is the appropriate sentence in this case and sentenced Spencer to death (R 68). The sentence is to run consecutive to the other counts in the indictment, and the other counts are to run consecutive to each other, based on the unscored crime of murder in the first degree (R 69).

SUMMARY OF THE ARGUMENT

1. There is no single, correct method for balancing aggravators and mitigators. The Constitution does not require any specific weight be given to particular factors. The weight to be given a mitigator is entirely within the sentencing judge's discretion.

2. This Court determined in a binding decision on direct appeal that the heinousness factor was properly found by the sentencing judge and the issue should not be entertained again upon appeal from resentencing. In determining whether the HAC factor should be applied, it is the effect upon the victim that must be considered.

3. Appellant has not demonstrated that the sentencing judge again considered the stricken CCP factor on resentencing and the order indicates to the contrary.

4. Whether a defendant had the ability to differentiate between right and wrong is relevant in determining the applicability of the mental health statutory mitigators.

5. The sentencing judge found no nonstatutory aggravation.

6. In the face of a finding of extreme mental or emotional disturbance and impaired capacity to conform one's conduct to the law it would be logically inconsistent to credit a defendant at the

same time for attributes or acts that demonstrate an abilty to function well in society. The sentencing judge did, in any event, consider nonstatutory mitigation of running a successful business and honorable service in the military.

7. The sentencing judge did not limit his consideration of mitigation and considered the totality of the Appellant's life and character in mitigation.

8. The sentencing judge did find the statutory mental health factors in mitigation. He properly exercised his discretion in refusing to give such factors "great" weight where Spencer's portrayal of himself to the mental experts as one who lost his head in a domestic dispute was blindly accepted whereas the facts reveal a pattern of threats and demands for money and that his anger was subsidiary to his plan to keep his money and any emotional disturbance, character defect and alcoholism had no causal connection to the murder.

9. The weight to be accorded nonstatutory mitigation is also in the judge's discretion.

10. Death is the appropriate, proportional sentence in this case as there was no history of domestic problems and no lashing out because of emotional wounding but simply a desire to do away with someone about to relieve Spencer of his money and anger at

finding himself in such circumstance.

11. The claim that the trial court improperly admitted hearsay testimony during the penalty phase was raised and decided against Appellant on direct appeal and is not cognizable on appeal from resentencing.

ARGUMENT

I. THE SENTENCING COURT DID NOT FIND IMPROPER AGGRAVATING CIRCUMSTANCES, PROPERLY CONSIDERED THE MITIGATING CIRCUMSTANCES, AND APPROPRIATELY FOUND THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGHED THE MITIGATING FACTORS.

A. THE SENTENCING COURT'S ORDER IS NOT INSUFFICIENT IN ITS FACTUAL BASIS AND RATIONALE TO SUPPORT THE DEATH SENTENCES.

Appellant complains that the sentencing order is "fraught with misspellings and grammar [sic] errors, showing clearly that the trial court did not carefully review his [sic] sentencing order and engage in a reasoned, thorough, and intelligent analysis." Appellant concludes that "such a careless order is an embarrassment to Florida justice [sic] and should not be countenanced." Initial Brief of Appellant p. 19. He argues that upholding the sentence on the basis of such order would deny him his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

Suffice it to say, that the eminent jurist below is hardly an embarrassment to Florida's judiciary. Having been a prosecutor for quite some time, and having handled the most complex of capital cases, *see, Buenoano v. State*, 527 So.2d 194 (Fla. 1988), Judge Perry has more than a passing acquaintance with the nuances of capital sentencing and has the requisite skill, which was applied

in this case, to engage in a reasoned, thorough, and intelligent sentencing analysis, as reflected in the sentencing order.

Appellant specifically complains that the order lacks the requisite "unmistakable clarity" required by *Mann v. State*, 420 So.2d 578, 581 (Fla. 1982), and the judge did not fulfill his responsibility of weighing the aggravating circumstances against the mitigating factors calling for life. According to Appellant, the findings "provide no clue as to what standard the court used in weighing the factors, why it found some aggravating factors despite substantial evidence to the contrary, why it summarily rejected mitigators which had been unrefuted, and why it gave some mitigating circumstances only little or very little weight when the evidence of those factors was substantial and where those factors have been used to justify a reduction of a death sentence to life." Appellant argues that the death sentence must be reversed on this basis alone. IBA p. 21 Appellant cites *Campbell v. State*, 571 So.2d 415, 419-20 (Fla. 1990), and *Nibert v. State*, 574 So.2d 1059, 1062 (Fla. 1990), for the proposition that where uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. Appellant also advises that the recent trend of trial courts to attach no real weight to uncontested mitigating evidence violates

the dictates of *Lockett v. Ohio*, 438 U.S. 586 (1978), and results in a *de facto* return to the "mere presentation" practice condemned in *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

These particular complaints are addressed below in detail. Appellant cites no authority for the proposition that there is a weighing standard and that such must be enunciated by the sentencing judge. In fact, the Supreme Court has already decided that not only is there no single, correct method for balancing capital aggravators and mitigators, *see Franklin v. Lynaugh*, 487 U.S. 164 (1988), but that the Constitution does not require any specific weight to be given to particular factors. *Blystone v. Pennsylvania*, 494 U.S. 299 (1990). It is clear, in fact, under Florida law that the weight to be given a mitigator is left to the trial judge's discretion. *Mann v. State*, 603 So. 2d 1141 (Fla. 1992). Since *Lockett v. Ohio*, 438 U.S. 586 (1978), sentencing judges have felt constrained to entertain the most tenuous evidence offered in mitigation. The fact that no real weight is often attached to it, harkens, not a return to the "mere presentation" standard condemned in *Hitchcock* but simply an era in which common sense is not exercised in determining what is mitigating and offering it to the courts. Evidence is only " mitigating" if, in fairness or the totality of a defendant's life or character, it may

be considered as extenuating or reducing the degree of moral culpability for the crime committed. *Wickham v. State*, 593 So.2d 191 (Fla. 1991). The decrease in weight of the evidence is relatively proportional to its inability to extenuate.

B. THE SENTENCING JUDGE DID NOT CONSIDER INAPPROPRIATE AGGRAVATING CIRCUMSTANCES

1. HAC

Appellant argues that for the same reason the CCP factor "fell" ,so too, must the heinous, atrocious or cruel aggravating circumstance i.e., because of the defendant's uncontroverted and extreme mental impairment and state of stress and rage there can be no showing that he intended for the victim to suffer or even intended to employ the method used to kill. According to Appellant, the HAC 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." IBA p.27. Appellant contends that the murder happened too quickly and during a highly emotional confrontation with no suggestion that he consciously intended to inflict a high degree of pain or otherwise torture the victim. He points out that he blacked out after repeatedly being struck on the head with a rifle butt and has no recollection of the actual killing. Thus, Appellant concludes

that there was no intentional infliction of pain and no utter indifference to or enjoyment of the suffering of another. Appellant claims that the fact that the victim may have remained conscious, suffered, and was aware of her impending death is not enough to make the murder unnecessarily torturous to the victim and references several decisions of this court in support of the proposition that it must be shown that the victim was intentionally made to suffer prior to being killed. Appellant analogizes his case to the factual scenario of *Porter v. State*, 564 So.2d 1060, 1063 (Fla. 1990), where 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. Appellant reiterates that a rational basis for the application of the HAC factor exists only where it can be shown that a particular person intended that a victim suffer. He claims that there is no proof that he intended that his wife suffer unnecessarily and the evidence shows that his actions were not intentionally brutal and he was merely reacting to his mental condition and was unable to control his actions. Appellant essentially hypothesizes a relationship between the HAC factor and mental mitigation. Appellant relies on this court's previous

opinion in which it rejected the coldness factor because Spencer's mental impairment negated his ability to handle and control his emotions in stressful confrontation. He argues that the HAC factor is likewise negated since he was not in control of his actions and emotions and was unable to consciously and intentionally inflict pain and suffering or to torture the victim. Appellant hopes that the HAC factor will simply go the way of the CCP factor based on the same reasons. Appellant argues that because the judge based the death penalty on this improper consideration and the jury was allowed to consider it, the sentence must be vacated.

In regard to the HAC factor this court found as follows on direct appeal.

> We agree with the trial court that the murder here was especially heinous, atrocious, or cruel. The testimony indicated that the victim suffered three different injury patterns: blunt force injuries, stabbing injuries with a sharp instrument, and slashing injuries with a sharp instrument. There were four separate wounds to the victim's face. The most extensive of these wounds slashed the forehead, cut the nasal cartilage, cut both the upper and lower lip, and extended into the posterior jaw and chin. Spencer also stabbed Karen five times in the chest, including two penetrating wounds to the atrium of the heart and the right lung. These stab

> wounds resulted in extensive bleeding, which caused Karen's death. Karen also had several defensive wounds on her right hand and arm. Spencer slammed Karen's head against a concrete wall three times. The medical examiner testified that Karen was alive when she received all of these injuries, as evidenced by the massive bleeding and bruising. In a final act of humiliation, Spencer lifted Karen's nightgown, exposed her genitals to her teenaged son, and admonished her to "show your boy your pussy." Karen was still conscious at this point because she told Spencer to "stop." This Court has consistently upheld HAC findings under similar circumstances.

Spencer v. State, 645 So.2d 377, 384 (Fla. 1994).

Appellant is not free to again raise this issue on appeal from resentencing. In remanding this case back to the sentencing court, this court did so based only upon its rejection of the CCP aggravating factor and the trial court's failure to consider the statutory mental mitigating circumstances of extreme disturbance and impaired capacity and expressed uncertainty "whether the trial court would find that the aggravation outweighs the mitigation." By that statement the court could only have been referring to the *remaining, valid* aggravation which had withstood appellate challenge. *Id.* at 385.

Under the Florida Constitution, both a binding decision and a binding precedential opinion are created to the extent that at least four members of the Court have joined in an opinion and decision. *See* art. V, section 3(a), Fla. Const. As was the case in the plurality decision in *Santos v. State*, 629 So.2d 838, 840 (Fla. 1994), at least four members of this court joined in the *conclusion* in this case that the HAC factor was properly applied. *Spencer*, 645 So.2d at 385 (plurality opinion joined by three members), 385 (Grimes, C.J., concurring in part and dissenting in part with an opinion, in which Overton, J., concurs, joined by Overton, J.; Kogan, J., concurring in part and dissenting in part). The court in the case at bar remanded the case for a reweighing not only absent the CCP factor but with the HAC factor intact, to be part and parcel of such reweighing. Plainly, the sentencing judge was not free to ignore the clear instructions of this court's decision. *Cf. Ellis v. State*, 622 So.2d 991, 1000 (Fla. 1993).

Foster v. State, 654 So.2d 112 (Fla. 1995), cited by Appellant is wholly distinguishable. This court had granted Foster's habeas petition and remanded for a *new* sentencing proceeding before a *jury* based on *Hitchcock v. Dugger*, 481 U.S. 393 (1987), error. Any prior findings were, thus, obliterated and what would be examined on appeal from resentencing before a jury were entirely new

findings. Although on direct appeal of resentencing this court did vacate the death sentence and remand the case to the trial court to enter a new sentencing order consistent with *Rogers v. State,* 511 So.2d 526, 534 (Fla. 1987), and *Campbell v. State,* 571 So.2d 415, 419 (Fla. 1990), footnote 6 of this court's opinion, cited by Appellant, would appear to only stand for the proposition that the change in law articulated in *Jackson v. State,* 648 So.2d 85 (Fla. 1994), would now become applicable on direct appeal from resentencing. The opinion contains no analysis relative to the issue at bar. It speaks not to closure by virtue of finality of judgment or *res judicata* effect but to ripeness due to change of law.

Proffitt v. State, 510 So.2d 896 (Fla. 1987), also relied upon by Appellant, does not support his argument for reconsideration of the HAC factor. This court always undertakes a proportionality analysis on direct appeal, whether from sentencing or resentencing, and that was the basis for relief in *Proffitt.* As Justice Ehrlich aptly noted:

> As I read the majority opinion, the death sentence is vacated based solely on the conclusion that its imposition would be disproportionate in this case. Although in its proportionality analysis the majority refers to the aggravating factor of

> cold, calculated and premeditated, it is my understanding that the majority opinion does not speak to the issue of whether this aggravating circumstance was properly found in this case and should not be read as an analysis of the applicability of this aggravating factor

510 So.2d at 898.

Section 921.141(5)(h), Florida Statutes (1976), authorizes the imposition of the death penalty if the crime is "especially heinous, atrocious, or cruel." This court has recognized that while it is arguable "that all killings are atrocious..[s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975). As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973). In *Proffitt v. Florida*, 428 U.S. 242, 256 (1976), the Supreme Court indicated that the provision, as construed, provided adequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.

In *Arave v. Creech*, 113 S.Ct. 1534, 1541 (1993), Justice

O'Connor, in determining that Idaho's limiting construction of its "utter disregard for human life" aggravator met constitutional requirements, compared the limiting language of the "utter disregard" aggravator with generic HAC language and found the terms "especially heinous, atrocious, or cruel" to be not only "pejorative adjectives" but terms that describe a *crime as a whole*, as compared to the terms "cold-blooded" and "pitiless" which she found to describe the defendant's state of mind. *Id.* This court has also noted that it is the CCP factor that focuses more on the perpetrator's state of mind than the method of killing. *Johnson v. State*, 465 So.2d 499 (Fla. 1985). It is interesting to note that in the *Proffitt*-approved language above it is not the perpetrator but the crime itself which is described as "conscienceless" or "pitiless." That which follows can only be definitional, i.e. the conscienceless, pitiless crime is one which is "unnecessarily torturous to the victim." That a "crime" may be described in adjectives (usually applied to the actor rather than the act itself) as being of a certain type does not open up a state of mind inquiry when in the same sentence an actual definition of what constitutes such a crime has been provided. Appellant has provided no support in logic for his novel proposition that the HAC factor contains the same "intent" requirement as the CCP factor for proper

application.

Even if Appellant is correct, his argument fails for as Justice O'Connor noted in *Arave,* "the law has long recognized that a defendant's state of mind is not a 'subjective' matter, but a fact to be *inferred from the surrounding circumstances.*" 113 S.Ct. at 1541 (emphasis added). Thus, from the surrounding circumstances of the murder that is "unnecessarily torturous to the victim" can it not only easily be inferred but must necessarily be inferred under the *Proffitt*-approved language that such handiwork was performed by the conscienceless, pitiless murderer. The manner of killing must be attributed to the defendant. Whether he intended that the murder occur in such a manner is a separate inquiry pertaining to the applicability of the CCP factor. Where there is a lack of intent responsibility may be lessened in terms of the sentencing analysis, but under the HAC inquiry, whether the defendant intended the murder to occur in the manner it did or not is irrelevant as the fact remains that he carried out the murder in that manner and responsibility is not lessened.

A case illustrating this principle is *Hansbrough v. State,* 509 So.2d 1081 (Fla. 1987), in which the HAC factor was found to be applicable where the victim had some thirty defensive stab wounds but Hansbrough's responsibility for the heinous result was lessened

on the basis of his intent vis-a-vis the CCP factor and his override sentence was reduced on appeal to life. This court noted in *Hansbrough* that the CCP factor "goes to the state of mind, intent, and motivation of the perpetrator." 509 So.2d at 1086. While the result, the victim suffering some thirty-some stab wounds, was found to be heinous, in examining the intent that caused such result vis-a-vis the CCP factor this court found that such frenzied stabbing did not demonstrate the cold and calculated premeditation necessary to aggravate Hansbrough's sentence with the CCP factor. Mental and emotional problems were not considered in the context of the HAC factor but the CCP factor, where the court found that the frenzied *nature* of the stabbing indicated mental problems.

In its many decisions determining the proper application of the HAC factor this court has generally looked at what was done to the *victim*. This court has recently stated that " *the heinous, atrocious or cruel aggravator pertains to the nature of the killing itself.*" *Gorby v. State*, 630 So.2d 544 (Fla. 1993). The court had previously held that it is the effect upon the victim herself that must be considered. *Clark v. State*, 443 So.2d 973 (Fla. 1983). The court has indicated that this aggravating circumstance is generally appropriate when the *victim* is tortured, either physically or

emotionally by the killer. *Cook v. State*, 542 So.2d 964 (Fla. 1989). Physical torture may be found where a conscious victim suffers numerous stab wounds, *see, Kight v. Dugger*, 574 So.2d 1066 (Fla. 1990); *Campbell v. State*, 571 So.2d 415 (Fla. 1990) and Hansbrough v. State, 509 So.2d 1081 (Fla. 1987), or where the victim suffers a slow death through smothering, *see, Capehart v. State*, 583 So.2d 1009 (Fla. 1991), or strangulation. *See, Sochor v. Florida*, 112 S.Ct. 2114 (1992). Emotional torture is present where the victim suffered fear and emotional strain, *see, Preston v. State*, 607 So.2d 404 (Fla. 1992), was toyed with, *see Mendyk v. State*, 545 So.2d 846 (Fla. 1989); *Rodriquez v. State*, 609 So.2d 493 (Fla. 1992), tried to defend herself, *see, Nibert v. State*, 508 So.2d 1 (Fla. 1987), pleaded for mercy or had knowledge of his impending doom. *See, Melendez v. State*, 498 So.2d 1258 (Fla. 1986). Although this court has indicated that the HAC factor may only be found in torturous murders and has gone on to describe torturous murders as those that evince extreme and outrageous depravity as exemplified either by a desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another, *see, e.g. Williams v. State*, 574 So.2d 136 (Fla. 1991); *Santos v. State*, 591 So.2d 160 (Fla. 1991), and *Cheshire v. State*, 568 So.2d 908, 912 (Fla. 1990), such cases cannot be read so as to require

the state to prove that a capital defendant "desired" the result or intended his handiwork. Such language only describes what *is* a "torturous" murder. The intent is *apparent*, presumed, and part of the handiwork. Excessive, unnecessary wounding or slowly killing could only be the result of a desire to inflict a high degree of pain or enjoyment of the suffering of another. Appellant cites no case for the actual proposition that a court must look past grave, gruesome injury to determine if the defendant really meant to accomplish what he did. The extraneous pre-*Sochor* language in *Porter v. State*, 564 So.2d 1060, 1063 (Fla. 1990), does not offer support for Appellant's position. The crux of the court's opinion in *Porter* indicates that the murder was a shooting death that simply did not stand apart from the norm of capital felonies.

The cases cited by appellant do not support the contention that the proper application of the HAC factor requires a finding of intent but rather evidence only an unwillingness by this court to *vicariously* apply the HAC factor to one who has not actually committed the murders. *See, Williams v. State*, 622 So.2d 456 (Fla. 1993); *Omelus v. State*, 584 So.2d 563 (Fla. 1991). That is an entirely different consideration mandated by *Enmund v. Florida*, 458 U.S. 782 (1982)

Should appellant be successful in his attempt to transfer the

CCP state of mind requirement to the application of the HAC aggravating factor, then the State would submit that the issue of intent in regard to the CCP factor must also necessarily be reconsidered and for all the same reasons CCP was properly found initially, *see, Spencer v. State,* 645 So.2d 377, 385 (Fla. 1994), (Grimes, Chief Justice, dissenting) so too was HAC. *Cf. Porter v. State,* 564 So.2d 1060 (Fla. 1990)(prior to murders defendant had threatened to kill lover and her daughter, watched lover's house for two days before the murders, and stole gun from friend just to kill lover) As Justice Grimes cogently noted "The fact that a killer's conduct may be motivated in part by emotion does not preclude a finding that the murder was cold, calculated, and premeditated." 645 So.2d at 385. Also, simply because the testimony of the experts may have gone uncontroverted by the state does not mean that the sentencing judge is not free to discount it when it does not comport with logic and common sense, as it often does when testimony results in a fee, or when it is simply contrary to the facts, or where, in this case, it is also based on self-reporting. *See, Wuornos v. State,* 644 So.2d 1000, 1010 (Fla. 1994); *Walls v. State,* 641 So.2d 381, 390 (Fla. 1994).

2. NONSTATUTORY AGGRAVATING CIRCUMSTANCES

Appellant next complains that although the sentencing judge

did not list the CCP aggravator on remand as having been found the sentencing order is replete with this factor as justification for imposing the death sentence. IBA p. 32 Appellant argues that the sentencing court is either still finding what this court has said is an inappropriate aggravator or is using premeditation as a nonstatutory aggravator. Appellant also argues that in continuing to give heightened premeditation extensive weight the court ignored the evidence presented by expert witnesses that Spencer was suffering from extreme mental or emotional disturbance and that he was unable to conform his conduct to the requirements of the law.

On direct appeal this court found that the trial court erred in not finding and weighing the statutory mental mitigating circumstances of extreme mental or emotional disturbance and incapacity to conform one's conduct to the requirements of the law. *Spencer v. State,* 645 So.2d 377,384 (Fla. 1994). Appellant, evidently, takes issue with the fact that Judge Perry did as he was instructed and weighed this mitigation in the balance. Appellant's examples of consideration of an inappropriate nonstatutory aggravator are misleading. Judge Perry stated that "Dr. Burch could not rule out that the Defendant thought about and fantasized about killing the victim" in a summary of the testimony of Dr. Burch and Dr. Lipman (R 115). In weighing the mitigating

circumstances Judge Perry examined what connection they had to the murder of Karen Spencer (R 117). In finding that "the evidence in this case showed that the Defendant, Dusty Ray Spencer, expressed the desire to murder his wife and that he carried out this intention," Judge Perry stated little more than the obvious and certainly no more than this court found on direct appeal. In its opinion this court recounted that (1) Spencer had called Karen from jail and indicated he was going to finish what he had started (2) had told a friend that he should throw her off their boat and later indicated she would no longer go out on it (3) assaulted Karen and told her son "You're next; I don't want any witnesses" and (4) ultimately killed Karen. 645 So.2d at 379-80. This court also found that "Spencer's previous attacks on Karen and the threats that he made to both Karen and her son are also proper evidence of premeditation." 645 So.2d 381. A simple recapitulation of facts previously found by this court is not improper consideration of the CCP factor on resentencing merely because they may touch upon the lesser premeditation supporting the conviction. The sentencing court also did not give weight to the stricken CCP aggravator by finding:

> The experts said that the murder occurred because the Defendant thought the victim was trying to

> take his money or steal his business. It is to be noted that the Defendant told the experts that he went to the house to get the title to his vehicle. But the Defendant had clearly indicated what his intentions were when he was in jail, i.e. he was going to fuck her up and finish what he had started, if she did not get him the money. The facts leading up to the killing and the nature of the killing are indicative of a deliberate thought process by the Defendant to kill Karen Spencer, if she did not comply with his wishes. The acts of the Defendant clearly show that he knew what he was doing and he knew it was wrong. After carefully reviewing the record, and taking all of the mitigating circumstances in the light most favorable to the Defendant, this court finds that they had a very small, if any connection, to the murder of Karen Spencer. Thus, while this Court gives the mitigating circumstances of extreme mental or emotional disturbance and impaired capacity to conform his conduct to the requirements of the law some weight, it is clear that by any reasonable assessment and evaluation of the evidence that I can not give them overwhelmingly great weight. As to the other mitigating factors in the Defendant's background (nonstatutory mitigating factors) the Court gives them very little weight.

(R 117-118).

Again, from the opinion of this court on direct appeal it is

already established that the facts leading up to the killing and the nature of the killing are indicative of a deliberate thought process by Spencer to kill Karen. The sentencing court need not be oblivious to background facts also supporting the conviction. The sentencing order does not reflect use of the term "heightened premeditation" as would an order in which the CCP factor was considered or found. It was also not improper for the court to find that Spencer's acts reflected that he knew what he was doing and that it was wrong. This court recognized in *Ponticelli v. State*, 593 So.2d 483 (Fla. 1991), that whether a defendant had the ability to differentiate between right and wrong and to understand the consequences of his action was relevant in determining, during the penalty phase of a capital murder trial, the applicability of the mitigating circumstances that a defendant was under the influence of extreme mental or emotional disturbance or that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. In the past this court has indicated that knowledge that the act was wrong supported a refusal to even find the mitigator that the capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of the law was substantially impaired. *Provenzano v. State*, 497 So.2d

1177 (Fla. 1986); *see also Pardo v. State*, 563 So.2d 77 (Fla. 1990). If such inquiry is relevant to the actual finding or refusal to find a statutory mitigating factor it must *ipso facto* be relevant to the question of what weight to assign to such mitigating factors. As Judge Perry noted, the impairment must have some direct or causal relationship to the crime. Again, rather than finding nonstatutory aggravators the sentencing court was merely carrying out the directive of this court to weigh the mitigation found to have been proven on appeal. Appellant, in the same vein, further complains that in relying on the December 10 and 11 incident and threat the sentencing court also utilized a nonstatutory aggravating factor, criminal allegations without any convictions.

It is apparently Appellant's position that the sentencing judge should not consider any facts of the crime at all, even if found to have been established on appeal. Appellant cites nothing in support of this concept of blind justice. Appellant also neglects to point out to this court that at the January 11, 1995, hearing appellant argued that the killing was the result of a domestic dispute and the death penalty was inappropriate. The December 10 and 11 incidents were relied on by Judge Perry only to reject the "domestic dispute" theory and not as nonstatutory

aggravation and rightfully so as those incidents "showed Spencer's intention to kill Karen as well as his intention to punish her," were admissible, *see, Spencer v. State*, 645 So.2d 377, 383 (Fla. 1994) and are inconsistent with a spontaneous imbroglio, domestic dispute or heat of passion theory, which has already been rejected by this court. 645 So.2d at 381. *Cf. Straight v. Wainwright*, 772 F.2d 674 (11th Cir. 1985)(judge did not consider nonstatutory aggravating factors in sentencing the defendant to death where the judge meticulously evaluated the evidence in accordance with section 921.141 and considered the defendant's resistance when arrested and the parole officer's opinion that he was a danger to society only to the extent that they negated possible mitigating circumstances) and *Wuornos v. State*, 644 So.2d 1012,1017 (Fla. 1994)(once the defense advances a theory of mitigation during the penalty phase of trial, the state has a right to rebut it through any means permitted by the rules of evidence.)

Appellant complains also that the court used the factors of the defendant's successful business and his heroism in the military, matters Appellant claims should be considered mitigating, to instead diminish or negate the mitigating circumstances of the defendant's mental state and his drug addiction and alcoholism.

In arguing that such "mitigators" should stand on their own

Appellant accepts Justice Grimes dissenting opinion that Judge Perry had a right to reject the doctor's opinions that Spencer's mental state rose to the level of statutory mitigation as there was no evidence of any type of alcohol or drug impairment at the time of the murder and despite suffering from a paranoid personality disorder, chronic substance abuse and biochemical intoxication the defendant ran a very successful business and was a great employer. *Spencer v. State,* 645 So.2d 377, 385-86 (Fla. 1994). Thus, this court's acceptance on appeal of offered statutory mitigation must be reexamined, as well as the finding that the CCP aggravator was inappropriate, since such finding was based on negation by the statutory mental health mitigators. Particularly worthy of rejection were the "experts'" specious opinions that (1) the threat may have been just an expression of displeasure which Spencer did not understand in his condition, where Spencer contemplated methods of killing such as throwing the victim off a boat and such threats were carried out and (2) that donning rubber gloves and parking away from the scene was part of "cognitive confusion" where in his first attack Spencer told the victim's son he did not want any witnesses, and the expert also indicated that active emotional stability was triggered only at the point when Karen screamed and as Justice Grimes noted "he might have remained undetected except

that his wife's son was awakened by her screams from being hit in the head with a brick." 645 So.2d at 385.

C. WEIGHING OF AGGRAVATING AND MITIGATING FACTORS

Appellant first complains that the sentencing court utilized the wrong standard for determining what is mitigation and what weight it should have in the capital sentencing decision as the order reflects that "In weighing the mitigating circumstances the Court must examine what connection they had to the murder of Karen Spencer." (R 117). Appellant concludes that the trial court limited mitigation to matters connected to the killing instead of considering the totality of the defendant's life or character in derogation of *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *Hitchcock v. Dugger*, 481 U.S. 393 (1987), and the decisions of this court. In support thereof Appellant cites to *Brown v. State*, 526 So.2d 903 (Fla. 1988).

The record reflects that the sentencing court did not at all limit mitigation to matters connected to the killing, as did the trial judge in *Brown* but found as mitigating drug and alcohol abuse, paranoid personality disorder, sexual abuse as a child by the father, an honorable military service record, a good employment record or reputation with his painting company, and the fact that Spencer could function in a structured environment that does not

contain women without being a danger to himself or others (R 108). Judge Perry required no "connection to the killing" in finding this mitigation. Judge Perry, further followed the dictates of this court and found the two statutory mental health mitigators and did not require that they have any connection to the killing. It was only in weighing the two mitigators that the sentencing judge examined what connection they had to the murder, and appropriately so, as is further discussed below.

Appellant argues, further, that the sentencing court failed to adhere to the procedure required by *Rogers v. State*, 511 So.2d 526 (Fla. 1987), and *Campbell v. State*, 571 So.2d 415 (Fla. 1990), because the court failed to find as mitigation unrebutted evidence of mitigating factors and without explanation gave very little weight to extremely significant and unrebutted factors. Appellant complains specifically that the sentencing judge improperly gave minimal weight to the extreme mental or emotional disturbance and impaired capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of the law statutory mitigators because the judge felt that Spencer knew right from wrong, which Appellant asserts is an inappropriate standard pursuant to *Ferguson v. State*, 417 So.2d 631 (Fla. 1982). Appellant contends that these statutory mitigators should have been

given great weight as this was a heated domestic confrontation as Spencer believed his wife was being unfaithful, that she was out to steal his business, and under the stress of confrontation lost control. Appellant concludes that coupled with his mental problems, the drug use and alcoholism caused extreme mental or emotional disturbance.

It is not true, as Appellant claims, that the sentencing court failed to find as mitigation unrebutted evidence of mitigating factors. The sentencing order clearly reflects that Judge Perry did consider and find as mitigating the statutory mental health mitigating factors. The sentencing order states:

> Thus, while this Court gives the mitigating circumstances of extreme mental or emotional disturbance and impaired capacity to conform his conduct to the requirements of the law some weight, it is clear that by any reasonable assessment and evaluation of the evidence that I can not give them overwhelmingly great weight.

(R 118).

The determination as to whether the facts alleged in mitigation are supported by the evidence was made on direct appeal. The determination as to whether those established facts were capable of mitigating the defendant's punishment by extenuating or reducing

the degree of moral culpability for the crime committed, and, particularly, what degree they were capable of so doing goes to the weight to be give to the factors to determine if they are of sufficient weight to counterbalance aggravating factors. *See, Hall v. State,* 614 So.2d 473 (Fla. 1993). It is clear that the relative *weight* to be given each mitigating fact is within the province of the *sentencing court*. *Campbell v. State,* 571 So.2d 415 (Fla. 1990). While the existence of a mitigating circumstance is a fact susceptible to proof under a preponderance standard the relative weight of a circumstance is not, and the process of weighing such circumstances is a matter for the judge and jury and, unlike facts, it is not susceptible to proof by either party. *Ford v. Strickland,* 676 F.2d 434 (11th Cir. 1982). Much as Appellant would portray it as so, this is not an instance where a mitigating factor, once found, was dismissed as having no weight. If the testimony of various psychiatrists that a defendant is suffering from some form of emotional disturbance, standing alone, does not even require a finding of extreme mental or emotional disturbance, *see Provenzano v. State,* 497 So.2d 1177 (Fla. 1986), such testimony cannot compel a sentencing judge to accord great weight to mental health mitigation where such determination is within his province to make. Section 921.141 Florida Statutes assigns no weight to the statutory

mental health mitigation and it is clear that such is left to the discretion of the sentencing court. The fact that these mental health mitigators are statutorily enumerated does not mean they are significant, just that they were contemplated by the Legislature. The Legislature assigned no weight to the factors in Section 921.141 and for this court to do so would invade the province of the Legislature and constitute legislating through judicial fiat.

Even is this court was empowered to review the issue of weight to be given to mitigators, relief would still not be warranted. These statutory mental health mitigators were entitled to little weight under the circumstances of the case. The jurors also listened to testimony concerning mental health mitigation and it is obvious from their seven-to-five vote that they, likewise, could not find that such testimony demonstrated that Spencer succumbed to passions or frailties inherent in the human condition to the degree that this tenuous mitigation should be accorded great weight in the weighing process.

Spencer set upon a course of conduct aimed at getting money from Karen through violence. On December 10, 1991, he assaulted her and demanded she get money from the bank. The next day he called and threatened her from jail. In order to preserve his monetary position he considered doing away with her and took steps

in furtherance of the plan as he reported that she would no longer go out on the boat he planned to throw her off. On January 4, 1992, he covertly gained access to her house and when noticed told her he was going to kill her and he attacked her son, as well, and stated "You're next; I don't want any witnesses," and yanked the phone cord from the wall. When he returned on January 18, 1992, he wore gloves and parked his vehicle away from the house.

The experts remained ignorant of this history of stealth or did not recognize it for what it was because Spencer was, obviously not very astute in matters of criminology, which the experts interpreted as confusion. Ms. Burch, accepting Spencer's version of events, was not even aware that he had threatened to kill Karen and choked her on December 10 and called her from jail the next day and threatened her again (R 184;187). Dr. Lipman was ignorant of the fact that Spencer previously contemplated murdering Karen by throwing her off a boat (R 363). Although neither expert was willing to revise his opinion, the fact remains that without adequate, rather than ad hoc, consideration of this information Spencer's portrayal of himself as one who lost his head in a domestic dispute was blindly accepted whereas the facts actually reflect his anger was subsidiary to his plan to keep his money, through whatever means necessary. In this respect Spencer is little

different than convicted murderess Judy Buenoano except that he was a man, used more violent methods, and did not have the wherewithal to covertly poison his spouse, a decidedly feminine method of killing. *Cf. Buenoano v. State,* 527 So.2d 194 (Fla. 1988). This history was relevant not only in regard to heightened premeditation but also as demonstrating that any mental or emotional disturbance lacked a direct causal connection to the murder. In Dr. Lipman's opinion Spencer's cognitive confusion and disorientation was at a low level and the borderline syndrome did not trigger active emotional instability until Spencer was confronted with the stress of Karen screaming (R 372). When the facts show, however, that Spencer had planned to kill her all along, not just get the title to his car, and repeatedly threatened to do the same, it is not particularly ameliorating that at the midnight hour some additional anger overtook him. Such a theory was found to be not ameliorating but preposterous in *Bertolotti v. State,* 534 So.2d 386, 390 (Fla. 1988), where a psychiatrist testified that Bertolotti was a schizophrenic who had a catastrophic reaction to stress which was triggered by the victim's screams which caused him to become insane and kill her. Thus, under the experts theory Spencer's insubstantial mental problems, a paranoid personality and alcoholism, which had no apparent affect on his everyday affairs,

were not even implicated in the murder except in the midst of carrying it out.

The mitigator of impaired capacity to conform one's conduct to the requirements of the law can also hardly be considered to be of a highly ameliorating degree when Spencer was able to run a successful business, and had supposedly similar suspicions about his first wife in regard to taking his assets, yet that wife did not meet the same fate as Karen Spencer under similar circumstances of emotional arousal. The experts also indicated that the inability to conform his conduct to the requirements of law began when he was directly threatened which caused him to go into a state in which he wasn't aware of what he was doing (R 209). This inability, likewise, then only manifested itself in the midst of a crime he had previously manifested a clear intent to commit.

Aside from the absence of a causal connection between Spencer's mental state and the killing, the testimony of the psychologist also demonstrates the weakness of this evidence as mitigation. Ms. Burch clearly stated that "Overall, he was really less impaired than many people with his long history of drug and alcohol abuse and I did not find evidence of neuropsychological impairments that would seem to significantly affect his behavior." (R 160).

The willingness of the experts to opine without basis that Spencer's mental constellation fit within the definitions of the statutory mitigating factors lead not only to an erroneous finding of such factors but had a domino or chicken/egg effect as the existence of statutory mitigation having no relevance to the murder was inappropriately found to negate the existence of the CCP factor. Tangential anger in the actual commission of a contemplated murder was found to negate the coldness factor. For all the same reasons that Judge Perry gave the statutory mental health mitigators little weight, they should not have been found in the first place and the CCP and mental health mitigation issues should be reopened based on reasons previously discussed (Appellant seeks to reopen issue of intent; Appellant implicitly agrees with Judge Grimes' dissent in regard to mitigation by claiming Spencer's normal traits and accomplishments should have been given more weight). In *Walls v. State*, 641 So.2d 381, 390 (Fla. 1994), this court stated:

> As a general rule, uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable, or contradictory. This rule applies equally to the penalty phase of a capital trial. Opinion testimony, on the other hand, is not subject to the same rule. Certain

> kinds of opinion testimony clearly are admissible--and especially qualified expert opinion testimony--but they are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking. A debatable link between fact and opinion relevant to a mitigating factor usually means, at most, that a question exists for judge and jury to resolve.

In *Walls*, a similar case in which reasonable persons could conclude that the facts of the murder were inconsistent with the presence of the two mental mitigators, and where the experts were equivocal, this court would not revisit the judge and jury's determination on appeal, especially where the offered mitigation was nonstatutorily credited and weighed. The only possible reason for doing so in this case, and an argument again urged by Appellant, is the domestic dispute exception, a thread of which runs through the opinion of this court. Appellant urges that Florida remain one of those states in which the killing of another's spouse as in *Bertolotti* warrants the ultimate sanction but the killing of one's own spouse does not. Such theory is logically flawed. Every social deviant or criminal comes from a family or has a family. He will have close associations in his lifetime. Those associates are as

blameless as the population in general. Under this theory such person is severely punished only when he does ill to an unknown member of the general public. But even given this propensity for harm in general he is permitted to form close associations in which the likelihood of doing harm is even greater by virtue of increased social interaction. When the inevitable harm does come in the course of human interaction his punishment is lesser. This is so only because marriage is viewed as a difficult institution under a "two to tango" approach. The reality is such a person could harm anyone. The stark reality is that women are afforded less protection under the law in terms of deterrence when they associate with men. The domestic dispute theory does not hold water in this case, in any event. This court has carved out an exception to the domestic dispute exception in cases where a defendant has killed a woman with whom he has had a relationship after a previous conviction for a similar violent offense. *Cf. Henry v. State*, 649 So.2d 1361 (Fla. 1994)(previous conviction of second-degree murder for the stabbing death of his first wife, and conviction of first-degree murder for the stabbing death of his second wife); *Lemon v. State*, 456 So.2d 885 (Fla. 1984); *King v. State*, 436 So.2d 50 (Fla. 1983) and *Harvard v. State*, 414 So.2d 1032 (Fla. 1982). Such an exception seems to be premised on a recognition that repetition

demonstrates the problem is not the situation but the person. That is certainly the case here. Spencer is not entitled to another free bite, so to speak. While the murder of Karen Spencer occurred on January 18, 1992, it was preceded by the attempted second-degree murder of Karen Spencer and the aggravated battery upon Timothy Johnson on January 4, 1992. Spencer is not entitled to add the name of a new victim to his list, where it is obvious his is a continuing course of conduct. This court also previously determined on direct appeal that this was not a "heat of passion" killing. *Spencer v. State*, 645 So.2d 377, 381 (Fla. 1994).

Appellant next contends that in the section of the resentencing order dealing with mitigation the trial judge merely listed the statutory mitigators, citing to this court's opinion, without any analysis.

Another way of looking at it, and the more logical way, is that the judge adopted this court's analysis of the mitigating factors as he was required to do by virtue of such reference to this court's opinion.

Appellant next endeavours to show the many ways in which the trial court went wrong, which he speculates caused the court to give little weight to mitigation. Appellant specifically alleges that the trial court did not understand the mental health experts'

testimony and misconstrued and minimized it; utilized the M'Naughten standard, premeditation, and Dr. Burch's acknowledgement that Spencer did not drink the morning of the murder to give the factor little weight. Appellant concludes that he has established that these statutory mental mitigating factors are significant, are what caused the crimes to occur, were the reasons for the violent rage and are entitled to great weight and a reduced sentence of life imprisonment.

The sentencing judge did not misunderstand, misconstrue or minimize the experts' testimony he simply put it in its proper perspective as he was entitled to do under *Walls*. If such allegation of misconstruction is based on the fact that the judge had conflicting or ambiguous statements to select from then his discounting the ultimate opinion of the experts was also proper under *Walls*.

Judge Perry also found nonstatutory mitigation and, again, Appellant merely quarrels with the weight accorded such factors which is entirely in the judge's discretion. Any omission from consideration was harmless error.

D. WEIGHING/PROPORTIONALITY

In *Santos v. State*, 629 So.2d 838 (Fla. 1994), this court found that death was not proportionally warranted because the case

for mitigation was far weightier than any conceivable case for aggravation. In *Santos* aggravation consisted only of the finding of another violent felony during the transaction in which the murders occurred. There were four mitigators: extreme emotional disturbance; substantial inability to conform his conduct to the requirement of the law; and no history of criminal activity. In *Santos* a history of domestic problems preceded the murders. The relationship was sometimes stormy. Santos was deeply disturbed by the fact that the woman he had lived with for many years would not give his name to his daughter. He was also extremely emotional concerning the restriction of access to his child. In the present case there was no history of domestic problems as even Dr. Lipman noted. In the case at bar there was no lashing out because of emotional wounding but simply a desire to do away with someone about to relieve Spencer of money and anger at finding himself in those circumstances. The aggravation is this case is much weightier and the mitigation of marginal relevance and weight.

In *Wilson v. State,* 493 So.2d 1019 (Fla. 1986), the defendant became enraged when his stepmother told him to keep out of the refrigerator and began striking her with a hammer. His father came to her aid and Wilson also beat him with a hammer. During his struggle with the father Wilson stabbed his young cousin in the

chest with a pair of scissors. The father directed the stepmother to get a pistol. Wilson grabbed it and shot the father in the forehead and emptied the pistol into a closet where the stepmother was hiding. This court found that the murder of the father was the result of a heated domestic confrontation and while there were two aggravating circumstances and no mitigating factors the death penalty was not proportionately warranted. The contrast in the factual scenario in *Wilson* and the case at bar speaks only to why a death sentence is proportionately warranted in this case. In this case there is a total absence of a sudden rage or emotional frenzy except in the carrying out of a murder already contemplated over a period of time. There was no monetary theme in *Wilson,* only a coming upon of the defendant of an emotional paroxysm.

In *Ross v. State,* 474 So.2d 1170 (Fla. 1985), the evidence reflected that the defendant *had* been drinking , not just had a drinking problem, and the killing was the result of an angry domestic dispute. The defendant had stated that he had argued with his wife and hit her once with a hammer. Again there was a heat of passion, rather than a monetary theme.

In *Farinas v. State,* 569 So.2d 425 (Fla. 1990), the defendant was obsessed, not with the victim taking money, but with having the victim return to live with him. The defendant was also intensely

jealous. This court found that there was evidence which tended to establish that the defendant was under the influence of extreme mental or emotional disturbance. The court also found that the murder was the result of a heated, domestic confrontation. It was not, as in this case, mere anger in the carrying out of an often expressed intent to murder the victim and involved no covert actions such as wearing gloves or parking the car out of sight.

In *Occhicone v. State*, 570 So.2d 902 (Fla. 1990), this court found that death was not a disproportionate punishment in comparison to similar cases as the case involved substantially more than passionate obsession and was the culmination of avowed threats to terminate the lives of parents standing between the defendant and his former girlfriend. This case, as well, involved more than passionate obsession. It involved a concern with money and avowed threats to kill unless the same was provided. Spencer's deceased wife stood between him and his money. Spencer's act was not of momentary but monetary passion.

In the present case, the sentencing court found the aggravating circumstance of previous convictions of felonies involving the use or threat of violence, to-wit: the convictions of attempted second degree murder and aggravated battery stemming from the January 4 incident and the conviction of the aggravated assault

to the victim's son on January 18. This court has found a death sentence to be proportionately warranted in circumstances where a defendant has killed a woman with whom he had a relationship where he has had a previous conviction for a similar violent offense. *Cf. Harvard v. State*, 414 So.2d 1032 (Fla. 1982); *King v. State*, 436 So.2d 50 (Fla. 1983); *Lemon v. State*, 456 So.2d 885 (Fla. 1984); *Porter v. State*, 564 So.2d 1060 (Fla. 1990); *Duncan v. State*, 619 So.2d 279 (Fla. 1993). Spencer has a previous aggravated assault on Timothy Johnson. That the victim in the January 4 incident was the same murdered victim should make no difference. Having been in jail for the incident and having the ability to distinguish between right and wrong and the sure knowledge of the consequences of any future action Spencer was in no lesser position than defendants whose prior convictions were for violent crimes to other victims.

In *Correll v. State*, 523 So.2d 562 (Fla. 1988), Jerry Correll had slashed his ex-wife's tires some two years prior to her murder. On the night of her murder Correll saw Susan and the man she was then dating inside the ABC Lounge. The tires of her escort were slashed. Susan stayed at her mother's home that evening. Correll went there and stabbed Susan to death, as well as her sister, mother, and his own five year old daughter. Also Correll could not

be ruled out as the person whose sperm was found in Susan's vagina. Correll claimed to have been drinking and smoking marijuana on the night of the murders. This court affirmed all of the convictions, including the conviction for the murder of Correll's ex-wife. The present case is not distinguishable in any visible way except that Timothy Johnson, who Spencer had previously attacked, did not hang around long enough to provide Spencer with a second victim. Spencer is every bit as culpable as Correll, in terms of sentencing, for the murder of his wife.

Spencer's mitigation, as properly reviewed and put into perspective, is also abysmally weak, and weighed against two strong aggravators, it is readily apparent that death is the appropriate sentence.

II. THE CLAIM THAT THE TRIAL COURT IMPROPERLY ADMITTED HEARSAY TESTIMONY DURING THE PENALTY PHASE WAS RAISED AND DECIDED ADVERSELY TO APPELLANT ON DIRECT APPEAL, WAS NOT AN ISSUE ON REMAND AND CANNOT BE ENTERTAINED AGAIN.

On direct appeal Appellant raised as his fifth claim the argument that the trial court improperly admitted hearsay testimony during the penalty phase. Over defense objections, a police officer testified about Karen's statements regarding Spencer's December 10, 1991, attack on her and his subsequent threat from jail to finish what he had started. Spencer claimed, as he does

now, that the introduction of this hearsay testimony denied his constitutional rights to confront witnesses and due process of law. This court found as follows:

> Initially, we note that this testimony was not the only evidence cited in the sentencing order for the CCP factor. The order noted that Spencer 'on numerous occasions prior to the date of the homicide had openly expressed his desires to kill the victim.' In addition to the December 10 and 11 events related in the testimony at issue, the order also noted Spencer's actions and statements during the January 4, 1992, attack on Karen and his statement that he would like to take her out in the boat and throw her overboard. Moreover, based upon out disposition of the CCP issue below, any alleged error on this point would be harmless. However, we find no error in admitting the officer's testimony. Although the testimony involved hearsay, it was admissible under Florida's death penalty statute. During the penalty phase proceedings for capital felonies, '[a]ny 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.' This hearsay testimony was probative of both the CCP and HAC aggravating factors as it showed Spencer's intention to kill Karen as well as his intention to punish her.

> Spencer was also given the opportunity to cross-examine the officer.

Spencer v. State, 645 So.2d 377, 383 (Fla. 1994).

For all the same reasons that Appellant cannot reopen the issue of the propriety of finding HAC, discussed in Point I (B)1, Appellant also cannot reopen this issue.

The issue was decided correctly, in any event. In accordance with Section 921.141 (1), Florida Statutes (1991), Appellant was accorded a fair opportunity to rebut any hearsay statements. There is no constitutional requirement that a defendant be able or willing to take the stand to actually rebut the hearsay. All that is required is that the opportunity to do so be there. The threats were certainly relevant to the aggravating factors and this court specifically found they were relevant to the HAC aggravator as it demonstrated not only the intent to kill but to punish Karen, as well, which would reflect her terror and fear of impending death. Considering that Spencer's course of conduct toward Karen was continuing, as was her fear, the argument that the threats were too remote is time is meritless.

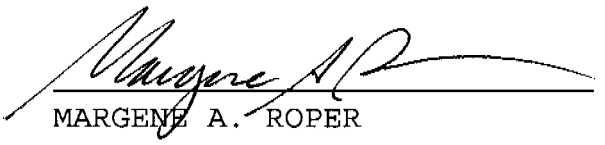
CONCLUSION

Appellant was resentenced in accordance with the mandate of this court. Any possible or imagined error would not have changed

the result of the weighing process. Based upon the foregoing arguments and authorities, Appellee respectfully requests that this Honorable Court affirm the sentence of the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



MARGENE A. ROPER
ASSISTANT ATTORNEY GENERAL
Fla. Bar #302015
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U. S. Mail to James R. Wulchak, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, FL 32114 on this 27th day of December, 1995.

Margene A. Roper
Of Counsel