IN THE SUPREME COURT OF FLORIDA

DUSTY RAY SPENCER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 85,119

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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DUSTY RAY SPENCER, Appellant,	)	
vs.	)	CASE NO. 85,119
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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

In this brief, the symbol "R" will designate the current record on appeal; the symbol "PR" will designate the prior record on appeal from the original appeal, Fla. Sup. Ct. Case No. 80,987; and the symbol "T" will designate the transcripts from the original appeal.

STATEMENT OF THE CASE

The defendant was charged by amended information with four offenses: Count I - first degree murder of Karen Spencer (the defendant's wife) on January 18, 1992, by blunt force trauma and/or by stabbing with a knife; Count II - aggravated assault

on Timothy Johnson (the defendant's wife's son) on January 18, 1992, with a knife; Count III - attempted first degree murder of Karen Spencer on January 4, 1992, by application of blunt force with a deadly weapon, an iron; Count IV - aggravated battery on January 4, 1992, by causing great bodily harm or by using a deadly weapon, an iron. (PR 602-604) A jury trial commenced on November 2, 1992, before the Honorable Belvin Perry, Jr., Judge of the Circuit Court of the Ninth Judicial Circuit of Florida, in and for Orange County. (PR 901-904) The jury found the defendant guilty of first degree murder, aggravated assault, attempted second degree murder, and aggravated battery. (PR 1081-1084)

The penalty phase of the trial was held on December 8, 1992. During the penalty phase, the state introduced, over the defendant's hearsay and relevancy objections, statements of the victim concerning a fight she had had with her husband, the defendant, on December 10, 1991, and of alleged threats he had made to her on that date and again on December 11, 1991. (PR 90-95, 124-125)

The court denied a requested defense instruction that the jury was permitted to consider mercy in its penalty recommendation. (PR 778-781, 1396-1397) The court also denied the defendant's motion to declare the death penalty unconstitutional because of the vague aggravating circumstances of heinous, atrocious, and cruel, and cold, calculated, and premeditated, and the jury instructions thereon. (PR 628-650, 657-676, 1331-1332) The jury recommended by a vote of seven to five that the defen-

dant be sentenced to death for the first degree murder. (PR 1148)

Following the denial of the defendant's motion for a new penalty phase, and additional argument, the court sentenced the defendant to death. In so doing, the court found the existence of three aggravating circumstances: (b) previous convictions of felonies involving the use or threat of violence, to-wit: the contemporaneous convictions of attempted second degree murder and aggravated battery stemming from the January 4th incident, and aggravated assault to the victim's son on January 18th; (h) heinous, atrocious, and cruel; and (i) cold, calculated, or premeditated, although the court did find that reasonable jurists could differ on the finding of this circumstance. (PR 1231-1236, 1243) The court rejected all of the statutory mitigating factors, including circumstance (b) that the defendant suffered from extreme mental or emotion disturbance, and mitigator (f) that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, despite recognizing that the expert testimony was undisputed regarding the existence of these mitigating factors. (PR 1237-1241) The court rejected these factors, finding that the defendant knew right from wrong. (PR 1239, 1241) The court did find the existence of a single nonstatutory mitigating factor, listing the defendant's alcohol and drug abuse, his paranoid personality disorder, the fact that the defendant was sexually abused as a child by his father, the defendant's honorable military service

record, his good employment record and reputation with his painting company, and the fact that the defendant could live in a structured prison environment, that does not contain women, without being dangerous. (PR 1242) The court found "this [singular] mitigating factor to be present, but [gave] it very little weight." (PR 1242) The court ruled that the aggravating factors it had found greatly outweighed the one nonstatutory mitigating factor, ruling that death was the appropriate sentence (even without the aggravator of CCP). (PR 1242-1243)

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

On direct appeal, this Court affirmed the judgments but reversed the death sentence, striking the aggravating factor of CCP, and finding the existence, as a matter of law, of the statutory mitigating factors (b) that the defendant suffered from extreme mental or emotion disturbance, and mitigator (f) that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Spencer v. State, 645 So.2d 377

(Fla. 1994). While Justice Kogan would have remanded for the imposition of a life sentence since the death sentence would not be proportional in this instance, the majority remanded the case to the trial court for it to reconsider its sentence in light of the stricken aggravator and the existence of the two additional statutory mitigating circumstances. Id.

On remand, neither side attempted to introduce any additional evidence. (R 3, 9, 19) Following the argument of counsel, the trial court again imposed the death sentence on the defendant. (R 56-70, 104-119) This time, the court found two aggravating circumstances: (b) previous convictions of felonies involving the use or threat of violence, to-wit: the contemporaneous convictions of attempted second degree murder and aggravated battery stemming from the January 4th incident, and the contemporaneous conviction of the aggravated assault to the victim's son on January 18th; and (h) heinous, atrocious, and cruel. (R 105-108) The court, citing only to this Court's previous opinion in this case, found that the defendant had established as mitigating factors the two statutory mental mitigators of (b) that the defendant suffered from extreme mental or emotion disturbance, and mitigator (f) that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (R 108) The court also found the existence of "any other factors in the defendant's background" as a single mitigator, listing the defendant's alcohol and drug abuse, the

defendant's paranoid personality disorder, and the sexual abuse that Dusty suffered as a child by his father. (R 108) The court found "this" (singular) mitigating factor to be present, but gave it "very little weight." (R 108)

The trial court's order also stated that it took "into consideration" the defendant's honorable military service record, the defendant's good employment record or reputation with his painting company, and that the defendant could function in a structured environment that does not contain women, without being a danger to himself or others, which factors were unrebutted. (R 108) The order does not reveal that the court found these factors to be mitigating. In fact, the court, in weighing the statutory mitigating factors, used the mitigation evidence of the defendant's successful business and his heroic act "of rescuing someone while station (sic) in the Philippine Islands" to aggravate the crime and/or diminish the statutory mitigation. (R 117)

For the weighing process, the trial judge indicated that, in order to be mitigation, these factors had to relate to the crime, stating:

> In weighting (sic) the mitigating circumstances **the Court must examine what connection they had to the murder of Karen Spencer**. Both experts felted (sic) that due to the Defendant's long history of drug and alcohol abuse and his personality disorder he committed this 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 117) (emphasis added) Then, the court, although not finding the aggravator of cold, calculated, and premeditated (since this Court had struck that aggravating circumstance), utilized factors of that aggravator in its weighing decision, including that the defendant fantasized about killing his wife, his alleged motive to kill her, and his prior alleged threats (which were only shown by hearsay).[1] (R 117-118)

In conclusion, and despite expert testimony to the contrary[2], the court utilized the cold, calculatedness and premeditation and the fact that he was sane (knew right from wrong) to diminish the weight given to the statutory mental mitigators:

> 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

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[1] On direct appeal, the defendant raised the impropriety of hearsay statements to be introduced at the penalty phase of the trial where the defendant had no means to rebut this hearsay. This Court, in its opinion, found that this hearsay evidence was admissible since the defendant could cross-examine the police officer whom the victim had told of these alleged threats (even though the defendant had no means to test the veracity of the victim's statements themselves to the officer). This Court also concluded that, because it struck the CCP aggravator, this alleged error was harmless. Because of this hearsay's persistent use by the trial court in its sentencing decision, the appellant continues to maintain that it was improperly admitted and utilized since he could have no meaningful opportunity to rebut and to discredit the veracity of the **content** of this complaint to the police and, especially in light of the fact that Karen Spencer invited Dusty back into the marital home for the Christmas holidays after the alleged threats, there is no indication of any reliability and no way to tell whether Karen Spencer was lying to the police concerning these statements.

[2] See Spencer v. State, 645 So.2d 377, 384 (Fla. 1994), wherein this Court specifically held that the mental mitigating evidence negated, as a matter of law, the cold, calculated, and premeditated factor.

> 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**[3] connection to the murder of Karen Spencer.
>
> Thus, while this Court gives the mitigating of (sic) 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[4] that I can not give them overwhelmingly great weight.

(R 118) (footnotes and emphasis added). The trial court concluded that, in arriving at its death decision, it had "carefully weighed and considered each **statutory** aggravating and mitigating circumstance. . . ." (R 119) (emphasis supplied).

A notice of appeal from the capital resentencing was timely filed. (R 156) This appeal follows.

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[3] The trial judge, apparently, disagrees with this Court's opinion to the contrary, Spencer v. State, supra at 384-385, as well as the experts' analyses and conclusions upon which this Court relied in its decision to reverse.

[4] See footnote 3, supra.

STATEMENT OF THE FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Regarding the prior incidents of threats of harm on December 10-11, 1991, and January 1, 1992, a psychologist stated that this was indicative of his uncontrolled state, wherein Dusty did not understand the impact of his threats; they were not meant to be taken seriously, but were mere fantasizing and just expres-

sions of the defendant's displeasure. (PR 360-364) Concerning the acts of bringing gloves to the scene and parking his car away from the house, the doctors stated that this was not indicative of a heightened plan, because the defendant was not able to think out his actions rationally. (PR 209, 373-374) As one doctor put it, "This boy is confused." (PR 373) Concerning the brutality of the injuries, the doctor again opined that this was due to the defendant's mental impairment, that he lost control and the ability to control his actions. (PR 205) The doctors testified that the defendant would be able to function well in the controlled environment of a prison, since his emotional problems and stress only surrounded his failed relationships with women. (PR 218, 231)

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

The defendant served his country in the Marines, and performed admirably as a leader of his squad in rescue operations. (PR 313-315) On another occasion, Dusty assisted in

saving an acquaintance's life when there was an accident which caused the friend severe life-threatening head injuries. (PR 327-331) Evidence also revealed that the defendant was a hard worker and extremely conscientious about his painting business, which had an excellent reputation, and feared that Karen was trying to take his business away from him. (PR 190-191, 318-319, 324-325)

SUMMARY OF ARGUMENT

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

Point II. The trial court erroneously allowed the state to introduce evidence at the penalty phase of the trial of hearsay statements of the victim to police regarding a December 10 and 11, 1991, incident, and erroneously considered such hearsay in his resentencing order. The hearsay statements deprived the defendant of his right to confrontation. Further, the alleged incident was too remote in time to be relevant to the death determination, especially since the victim invited the defendant back to live in their marital home between December 10th and the killing.

ARGUMENT

POINT I.

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

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

A. The Trial Court's Sentencing Order Is Insufficient In Its Factual Basis And Rationale To Support The Death Sentences.

The trial court's sentencing order is sparse, to say the least, with its factual support, especially in rejecting or in assigning little weight to unrebutted significant mitigating factors. The aggravating factors are supported by incomplete and inaccurate facts only, not giving any detail as to rejection of

some facts and blind acceptance of others; the weighing of mitigating circumstances is conclusory only, offering absolutely no basis for giving only little weight to significant mitigation. The order is fraught with misspellings and grammar errors, showing clearly that this trial court did not carefully review his sentencing order and engage in a reasoned, thorough, and intelligent analysis, as is required by State v. Dixon, 283 So.2d 1 (Fla. 1973), and its progeny. Such a careless order is an embarrassment to Florida justice and should not be countenanced. The death sentence cannot be affirmed on the basis of such insufficient written findings. To uphold such sentences on the basis of this order would deny the defendant 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.

This Court has stressed the importance of issuing specific written findings of fact in support of aggravation and mitigation in capital cases. Van Royal v. State, 497 So.2d 625 (Fla. 1986); State v. Dixon, supra. The sentencing order must reflect that the determination as to which aggravating and mitigating circumstances apply under the facts of a particular case is the result of "a reasoned judgment" by the trial court. State v. Dixon, supra at 10. Florida law requires the judge to lay out the written reasons for finding aggravating and mitigating factors, then to personally weigh each one in order to arrive at a reasoned judgment as to the appropriate sentence to impose.

Lucas v. State, 417 So.2d 250, 251 (Fla. 1982). The record must be clear that the trial judge "fulfilled that responsibility." Id.

Weighing the aggravating and mitigating circumstances is not a matter of merely listing conclusions. Nor do the written findings of fact merely serve to memorialize the trial court's decision. Van Royal v. State, supra at 628. Specific findings of fact are crucial to this Court's meaningful review of death sentences, without which adequate, reasoned review is impossible. Unless the written findings are supported by specific facts, the Supreme Court cannot be assured that the trial court imposed the death sentence on a "well-reasoned application" of the aggravating and mitigating circumstances. Id.; Rhodes v. State, 547 So.2d 1201 (Fla. 1989). Although the Court considered the sentencing order sufficient (but barely) in Rhodes, the Court cautioned that henceforth trial judges must use greater care in preparing their sentencing orders so that it is clear to the reviewing court just how the trial judge arrived at the decision to impose death over life. As the Court held in Mann v. State, 420 So.2d 578, 581 (Fla. 1982), the "trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not speculate as to what he found." See also Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985).

Here, the judge's analysis is not of "unmistakable clarity" and it cannot be said that he "fulfilled that responsi-

bility" of weighing the aggravating circumstances against the mitigating factors calling for life. 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 (see subsection B, infra), why it summarily rejected mitigators which had been unrefuted (see subsection C, infra), 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 (see subsections C and D, infra). The death sentence must be reversed on this basis alone. Santos v. State, 591 So.2d 160 (Fla. 1991) [death sentence reversed for new sentencing where record not clear that trial court adhered to the procedure required by Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), and Campbell v. State, 571 So.2d 415, 419-420 (Fla. 1990), and reaffirmed in Parker v. Dugger, 498 U.S. 308 (1991)]; Lamb v. State, 532 So.2d 1051 (Fla. 1988) (death sentence reversed and remanded where unclear whether court had properly considered all mitigating evidence); Mann v. State, supra; Lucas v. State, supra.

In a line of cases commencing with Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court held that a trial court may not refuse to consider, or be precluded from considering, any relevant mitigating evidence offered by a defendant in a capital case. The Lockett holding is based on the distinct peculiarity of the death penalty. An individualized

decision is essential in every capital case. Lockett, 438 U.S. at 604-605. The Supreme Court has consistently reiterated the Lockett holding. See, e.g., Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986).

In Campbell v. State, 571 So.2d 415, 419-20 (Fla. 1990), and Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990), this Court held that, where uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. This Court will not tolerate a trial court's unexplained rejection of substantial and/or uncontroverted evidence. See, e.g., Santos v. State, 591 So.2d 160 (Fla. 1991) and Hall v. State, 614 So.2d 473, 478-9 (Fla. 1993). While the relative weight to be given each mitigating factor is within the province of the sentencing court, a valid mitigating circumstance cannot be dismissed as having no weight. Dailey v. State, 594 So.2d 254 (Fla. 1991). See also Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982).

Since the clarification by this Court concerning the proper treatment of mitigating evidence, counsel has noticed a disturbing trend in trial courts' sentencing orders. In dealing with mitigating factors, trial courts (as did the sentencing judge in Appellant's case) frequently find that a mitigating circumstance exists, but unilaterally give the factor very little weight. Spencer's trial judge concluded without any analysis that three mitigating circumstances applied to the murder. (R 108) However, the trial court attributed virtually **no** weight to

the plethora of mitigating factors. The court decided that the singular nonstatutory mitigating factor deserved only "very little weight," and the statutory mental mitigators (which this Court had to tell the trial judge to find and which Justice Kogan indicated should cause a reduction of the sentence to life) were not entitled to great weight. (R 108, 118)

> 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 of (sic) 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[5] that I can not give them overwhelmingly great weight.

(R 118) (emphasis and footnote added). In light of the minuscule weight which the trial court incorrectly and unconstitutionally allotted to the numerous uncontroverted mitigating circumstances, it erroneously concluded that the aggravating circumstances outweighed the mitigating circumstances, thus warranting the ultimate sanction. (R 119)

While the Lockett doctrine is clearly violated by the

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[5] Apparently, in stating this, the trial court found this Court's opinion concerning this mitigation (and especially Justice Kogan's opinion) to be an unreasonable assessment and evaluation of the evidence. See Spencer v. State, supra at 384-385, 386.

explicit refusal to consider mitigating evidence, it is no less subverted when the same result is achieved tacitly, as in this case. By refusing to give Appellant's uncontroverted, mitigating evidence any substantial weight, the trial court has vaulted this state's capital jurisprudence back to the unconstitutional days prior to Hitchcock v. Dugger, 481 U.S. 393 (1987).

Prior to Hitchcock, this Court adopted a "mere presentation" standard wherein a defendant's death sentence would be upheld where the trial court permitted the defendant to present and argue a variety of nonstatutory mitigating evidence. Hitchcock v. State, 432 So.2d 42, 44 (Fla. 1983). The United States Supreme Court rejected this "mere presentation" standard, and held that the sentencer not only must hear, but also must not refuse to weigh or be precluded from weighing the mitigating evidence presented. Hitchcock v. Dugger, supra. Since Hitchcock, this Court has repeatedly reversed death sentences imposed under the "mere presentation" standard where there was explicit evidence that consideration of mitigating factors was restricted. E.g., Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Thompson v. Dugger, 515 So.2d 173 (Fla. 1987).

The recent trend of trial courts attaching no real weight to uncontested mitigating evidence, results in a *de facto* return to the "mere presentation" practice condemned in Hitchcock v. Dugger. Appellant's trial court's refusal to give any significant weight to Appellant's uncontroverted mitigating evidence violates the dictates of Lockett and its progeny. By allowing

trial courts unfettered discretion in determining what weight to give mitigating evidence, trial judges can effectively accomplish an "end run" around the constitutional requirement that capital sentencings should be individualized. Appellant's trial judge has effectively failed to consider mitigating evidence within the statutory and constitutional framework.

By giving "very little weight," to valid, substantial mitigation, trial judges can effectively ignore Lockett, supra, and the constitutional requirement that capital sentencings must be individualized. The trial court's refusal to give any significant weight to valid mitigating evidence, calls into question the constitutionality of Florida's death penalty scheme. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9, 16 and 17 Fla. Const.

B. The Trial Judge Considered Inappropriate Aggravating Circumstances.

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

death.

1. Heinous, Atrocious, Or Cruel

The trial court found, and this Court on the initial appeal approved, this factor based solely upon the method of the killing.[6] However, for the same reasons that the factor of cold, calculated, and premeditated fell [see Spencer v. State, supra, 645 So.2d at 384, and subsection §B (2), infra], so, too, must this factor fall. Because of the defendant's uncontroverted and extreme mental impairment and state of stress and rage, there can be no showing that the defendant intended for the victim to suffer or even intended the method for the killing.

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

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means

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[6] Foster v. State, 654 So.2d 112 (Fla. 1995), provides authority for this Court to revisit this issue on this appeal after remand. On a previous appeal in Foster, the Court had rejected a constitutional challenge to the standard jury instruction on the coldness circumstance, but remanded for the trial court to enter a new sentencing order expressly evaluating mitigation under Campbell and Rogers v. State, 511 So.2d 526 (Fla. 1987). Foster v. State, 614 So.2d 455 (Fla. 1992). On the appeal after the remand, this Court allowed the appellant to relitigate the jury instruction issue because the sentence was "not yet final." 654 So.2d at 115, n.6. So, too, should the appellant here be permitted to relitigate this issue, especially in light of the extreme weight the trial court gave to this circumstance in its new sentencing decision. See also Proffitt v. State, 510 So.2d 896 (Fla. 1987) (this Court must review the factors anew on an appeal from remand); Santos v. State, 629 So.2d 838 (Fla. 1994).

> designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

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

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

State v. Dixon, supra at 9.

Quoting from Sochor v. Florida, 504 U.S. ____, 119 L.Ed.2d 326, 339 (1992), this Court has held that, for this factor to apply, the crime must not only be unnecessarily torturous to the victim, but it also must be conscienceless or pitiless on the defendant's part. Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992). Thus, as this Court has stated in Santos v. State, 591 So.2d 160, 163 (Fla. 1991), and Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990), this factor is appropriate only in torturous murders which exhibit a **desire** to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. See, e.g., Douglas v. State, 575 So.2d 165, 166 (Fla. 1991) (torture-murder involving heinous acts extending over four hours). The present murder happened too quickly and during a highly emotional confrontation with no suggestion that Spencer

consciously **intended** to inflict a high degree of pain or otherwise torture the victim. In fact, Dusty blacked out during the after being repeatedly struck on the head with a rifle butt and has absolutely no recollection of the actual killing (which amnesia the doctor's opined was genuine). (PR 208-209, 356, 371, 378-381) Thus, there was no **intentional** infliction of pain and no utter indifference to or enjoyment of the suffering of another.

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

Though this factor has been approved in diverse factual situations, a consistent thread has been that the victim was **intentionally** made to suffer prior to being killed. See Omelus v. State, 584 So.2d 563, 566 (Fla. 1991) ("we find that the heinous, atrocious or cruel aggravating factor cannot be applied vicariously."); Teffeteller v. State, 439 So.2d 843 (Fla. 1983) ("The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this

prospect may have been, does not set this senseless murder apart from the norm of capital felonies."). See also, Amoros v. State, 531 So.2d 1256, 1260-61 (Fla. 1988).

In Porter v. State, 564 So.2d 1060, 1063 (Fla. 1990), this Court rejected the trial court's application of the HAC factor where the evidence was "consistent with the hypothesis that Porter's was **a crime of passion, not a crime that was meant to be deliberately and extraordinarily painful."** (Emphasis in original). The facts here are quite comparable. To fail to apply this rationale of Porter to the instant case would be to invite arbitrariness and capriciousness back into the death penalty scheme.

"It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). There is no logical reason to apply a statutory aggravating factor in "strict liability" fashion simply because the way it occurred was an unintended consequence. If it can be shown that a particular person intended that a victim suffer, a rational basis exists for application of the HAC factor. See Cochran v. State, 547 So.2d 928, 931 (Fla. 1989); Porter v. State, supra.

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

was unable to control his actions.

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

(PR 205, 209) This uncontroverted testimony shows the relationship between the aggravating factor of heinousness and the mental mitigation presented here: the defendant's mental condition specifically negates any showing of the aggravator since he was incapable of **consciously** intending to inflict pain, suffering, and torture on the victim, his wife. As this Court recognized in its previous opinion, when rejecting the coldness factor, his severe mental impairment negated his ability to handle and control his emotions in this stressful confrontation:

> Although there is evidence that Spencer contemplated this murder in advance, we find that 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 recapitulation 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." In light of this evidence, we find that the trial court erred in finding that the murder was CCP.

Spencer v. State, supra at 384. So, too, in light of this same evidence, is the factor of HAC negated since Dusty was not in control of his actions and emotions, and thus was unable to consciously and intentionally inflict pain, suffering, and torture on the victim. This evidence was never refuted.

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

2. Nonstatutory Aggravating Circumstances -- CCP revisited

As noted earlier in this brief, this Court struck the statutory aggravating factor of cold, calculated, and premeditated on the initial appeal, finding as a matter of law that that factor did not apply in the instant domestic situation and was, in fact, specifically negated by the mental health experts' testimony, which testimony was unrefuted. Spencer v. State, 645 So.2d at 384. Following the remand, the trial court did not specifically list this factor as an aggravating circumstance. However, not listing it was the only difference; the trial judge's sentencing order is replete with this factor as a justification for imposing the death sentence. (R 116-118) The following are just a few of the examples wherein the judge used this inappropriate aggravator in his weighing decision:

> . . . Dr. Burch could not rule out that the Defendant thought about and fantasized about killing the victim.
>
> * * *
>
> 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.
>
> * * *
>
> 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 (sic) 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.

(R 115, 117-118)

By continuing to give extensive weight to this stricken aggravating circumstance in its determination for a death sentence, the trial court is essentially still finding what this Court has said is an inappropriate aggravator. Spencer v. State, supra. In utilizing this factor, then, the trial court has all but ignored this Court's mandate or, at the very least, is now utilizing a nonstatutory aggravating circumstance in its weighing process. This Court has repeatedly denounced such usage of nonstatutory aggravating circumstances, and, in particular, the use of "premeditation" as a nonstatutory aggravator. Geralds v. State, 601 So.2d 1157 (Fla. 1992); Blair v. State, 406 So.2d 418 (Fla. 1981); Lucas v. State, 376 So.2d 1149 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1978); Elledge v. State, 346 So.2d 998 (Fla. 1977). See also Barclay v. Florida, 463 U.S. 939, 956 (1983).

Similarly, the trial court, in extensively relying on the alleged December 10th incident and the alleged December 11th threat (which were only established by rank hearsay [see Point II, infra]) also utilized a nonstatutory aggravating factor, to-

wit: criminal allegations without any convictions. Odom v. State, 403 So.2d 936 (Fla. 1981). Also, the court used the factors of the defendant's successful business and his heroism in the military (matters which should be considered mitigating factors -- see Point I(C), infra) to instead diminish or negate the mitigating circumstances of the defendant's mental state and his drug addiction and alcoholism. (R 117) Thus, the court was improperly utilizing these factors also as nonstatutory aggravating circumstances. Lucas, supra; Elledge, supra. Because of these improper considerations in the judge's weighing process, the sentence must be vacated.

This Court's language in Trawick v. State, 473 So.2d 1235 (Fla. 1985), is quite appropriate in the instant situation.

> In general, the trial court's findings are replete with statements that are not specifically linked to any statutory aggravating circumstance. While some of the findings may properly relate to statutory aggravating circumstances, the lack of clarity makes it difficult for us to sort out the relevant and sufficient findings from the irrelevant or insufficient ones. We have noted several infirmities in the trial judge's findings. In effect the trial judge went beyond the proper use of statutory aggravating circumstances in his sentencing findings and the sentence of death cannot stand. See Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982); Brown v. State, 381 So.2d 690 (Fla. 1980).

Trawick v. State, supra at 1240.

Additionally, the trial court, in repeatedly continuing to give heightened premeditation extensive weight in its determi-

nation of death, also still totally ignores the evidence presented by the expert witnesses that the defendant was suffering from extreme mental or emotional disturbance and that he was unable to conform his conduct to the requirements of the law and possess heightened premeditation. See Spencer v. State, supra. (See Point I, §C, infra) In fact, the doctors specifically negated heightened premeditated by stating that the defendant, in his mental state, was unable to formulate any coherent, reasonable plan. (PR 209, 373-374) When questioned about the defendant's prior threats to the victim, a factor on which the trial judge still placed great weight in finding death to be appropriate, one doctor stated:

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

had on her. . . . It may have just been an expression of displeasure.

* * *

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

* * *

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

* * *

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

> the police are called, it's because there has been a series of these assaultive altercations. This was the first. And she called the police. Something else was going on in his paranoid mind, and perhaps even in reality, so that he was caught unawares. He wasn't ready for it suddenly to move into the end zone. Which helps explain his disequilibrium a little bit, I think.

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

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

Q: At that point in time, when he was parking the car away from the house, was that parking of the car away from the house part of his cognitive confusion, and disorientation?

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

* * *

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

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

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

* * *

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

(PR 372-374)

This uncontroverted evidence firmly establishes that Dusty was suffering from a severe mental illness which would have precluded him from the type of heightened premeditation utilized by the judge in weighing circumstances. It thus has no place, factually or legally, in the trial court's sentencing order or decision.

These improper factors must be stricken from the sentencing decision, the sentence vacated, and the case remanded for imposition of a life sentence.

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

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

this Court enunciated a three-part test for weighing evidence:

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

The record here shows clearly that the trial court below failed to adhere to the procedure required by Rogers and Campbell, supra, and reaffirmed by the United States Supreme Court in Parker v. Dugger, supra, 498 U.S. 308 (1991). The trial court inexplicably failed to find as mitigation unrebutted evidence of mitigating factors and, also without explanation, gave merely little or very little weight to extremely significant and unrebutted factors that, "in fairness or in the totality of the defendant's life or character, may be considered as extenuating or reducing the degree of moral culpability for the crime committed." Rogers v. State, supra. See also Santos v. State, 591 So.2d at 163-164.

Initially, it must be noted that the trial court utilized the wrong standard for determining what is mitigation and what weight it should have in the capital sentencing decision. The court, in its sentencing order stated, "In weighting

(sic) the mitigating circumstances the Court must examine what connection they had to the murder of Karen Spencer." (R 117) Thus, the trial court limited mitigation to matters directly connected to the killing, instead of also considering "the totality of the defendant's life or character." Rogers, supra. This Court and the United States Supreme Court have repeatedly held that "[m]itigating evidence is not limited to the facts surrounding the crime but can be anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant." Brown v. State, 526 So.2d 903, 908 (Fla. 1988). See also Maxwell v. State, 603 So.2d 490, 491 & n.2 (Fla. 1992); Hitchcock v. Dugger, 481 U.S. 393 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982). A mitigating circumstance should be defined broadly as "**any aspect of a defendant's character or record and** any of the circumstances of the offense" that reasonably may serve as a basis for imposing a sentence less than death. Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis added). By limiting the mitigation as the court expressly did here to "what connection they had to the murder" and thereby excluding that which related to "anything in the life of a defendant," is to unconstitutionally exclude relevant and crucial mitigation from the sentencing decision. In Brown v. State, supra, this Court expressly disapproved of a sentencing order, quite similar to the one here, which concluded that appellant's family and educational background were not "mitigation in the eyes of this court or in the eyes of the law." 526 So.2d at 908.

This Court reversed, holding that such aspects of the defendant's personal life and background must be considered as mitigation, and can be particularly significant in a given case. Id.

Because of the failure on the trial court's part to apply the correct standard, the sentences must be reversed and the case remanded for resentencing. Brown v. State, supra; Rogers v. State, supra; Santos, supra; Hitchcock v. Dugger, supra; Eddings v. Oklahoma, supra; Lockett v. Ohio, supra. In this case, it is clear that the evidence of mitigating factors, which is entirely unrebutted, far outweighs any aggravating circumstance that could be proposed by the state. Clearly, under the formula set out in Campbell v. State, the trial court was mandated to find in favor of the defendant. There is significant evidence of the following mitigating factors:

1. Under Extreme Mental or Emotional Disturbance.

   and

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

This Court on direct appeal from the first death sentence had to instruct the trial judge to find the statutory mitigating factors that the murder was committed while the defendant was under the influence of **extreme** mental or emotional disturbance, and 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. Spencer v. State, 645 So.2d at 384-385. Previously, the trial judge had summarily rejected these factors, despite uncontroverted evidence of them, because he simply chose to reject the expert's testimony as speculative and conclusory. Id. While Justice Kogan would have ruled that these circumstances, under the facts of this case, called for a reduction of the sentence to life, a majority indicated that it would give the trial judge another chance. Id. The trial court has had another chance, and has still failed to follow correct constitutional standards by all but rejecting these factors again, this time again using incorrect standards and inaccurate summations of the facts, most times taken completely out of context.

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

mining the applicability of the mental mitigating factors. This Court noted:

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

Ferguson, supra at 638.

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

dant's alcohol and drug abuse specifically contributed to the defendant's loss of control.

This testimony is unrefuted. It caused the crimes to occur; it caused the nature of the defendant's actions; Dusty was unable to control his actions; it cannot be discounted. See Thompson v. State, 565 So.2d 1311 (Fla. 1990), (where this factor was present as shown by the defendant's domestic problems). **Compare with** Maulden v. State, 617 So.2d at 302; White v. State, 616 So.2d 21, 25 (Fla. 1993); Richardson v. State, 604 So.2d at 1109; Santos v. State, 591 So.2d at 162-163; Wright v. State, 586 So.2d at 1031; Rivera v. State, 561 So.2d 536 (Fla. 1990); Izarry v. State, 496 So.2d 822 (Fla. 1986). As this Court held in Farinas v. State, 569 So.2d 425, 431 (Fla. 1990):

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

> court properly found two aggravating circumstances to be applicable, we conclude that the death sentence is not proportionately warranted in this case. Wilson; Ross v. State, 474 So.2d 1170 (Fla. 1985).

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

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

1986).

In the section of the resentencing order dealing with mitigation, the trial judge merely listed these statutory mitigators, citing to this Court's previous opinion. Period. No analysis whatsoever was given to them at all. (R 108) In the section of the resentencing order dealing with the "REWEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES," the trial court again, just as it did the first time around, shows a complete lack of understanding of these mitigating factors and of the mental health experts' testimony, misconstruing it and minimizing it by paying attention only to certain segments of it, all the while taking it completely out of context. The trial court indicates that Dr. Burch found no "evidence of neuropsychological impairment that would seem to significantly effect his behavior," and that the defendant did not have much impairment. (R 109) As detailed throughout this brief and in this Court's original opinion, Dr. Burch, while finding no evidence of physical brain damage did find substantial mental impairment on the defendant's part, a diagnosis with which Dr. Lipman concurred. (PR 163-164, 167-169, 173, 175, 177, 192, 197, 205, 209, 213-215, 246-247, 340-344, 346-355, 360, 372) As this Court correctly summarized in the initial appeal:

> During the penalty phase, a clinical psychologist testified that Spencer thought that Karen was trying to steal the painting business, which was a recapitulation 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 ability," "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.**"
>
> * * *
>
> 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 the law was impaired.

Spencer v. State, supra at 384. Thus, the trial judge's minimalization of these factors is unfounded and his record support is clearly taken out of context.

The trial court also erroneously utilizes the M'Naughten standard [see argument above], the defendant's alleged premeditation [see subsection (B)(2), supra], and the fact that "Dr. Burch acknowledge (sic) that the Defendant did not have anything to drink of an alcoholic nature the morning of the murder" to give this factor little weight. (R 109-110, 114, 115) "Dr. Lipman noted at time (sic) of the murder the Defendant was biochemically intoxicated, which he described as a hangover." (R 117) To compare the defendant's severe alcoholism and biochemi-

cal intoxication as a mere "hangover" is to totally ignore and/or misconstrue the expert's entire testimony. When Dr. Lipman was describing biochemical intoxication, he simply used an example of a hangover as a time when someone was still somewhat impaired even though they had not consumed any alcohol for a while (PR 287-289); he did not state that the defendant simply had a hangover. Dr. Lipman opined that the defendant "wasn't sober at all at any time in those days before the killing." (PR 285)

> Q [by defense counsel]: Okay. Now, do you know or do you have an opinion as to whether or not, at the time of the killing, that Dusty Ray Spencer was intoxicated?
>
> A [Dr. Lipman]: By my calculation, his blood alcohol concentration was zero at the time of the killing. But let me explain that biochemically, he would in fact have still been suffering a bio-chemical intoxication. Although we wouldn't call that drunkenness, because his alcohol level would be zero at the time.
>
> Q: Okay. Could you elaborate on that to the jury further?
>
> A: Yes, of course. When you drink, your blood alcohol level rises and then falls. And if you are lucky, nothing happens, and if you are unlucky, you have a hangover. At the time of the hangover, you are quite impaired. But you are not drunk. On the other hand, there are many things you cannot do. Calculations are very difficult, spacial coordination is poor, you really can't manage a lot of driving tasks that you should. You probably all know what I am talking about. But you are not drunk at the time. Nevertheless, biochemically, you are intoxicated. Now, when a person drinks regularly, they enter a state of disequilibrium, distorted metabolism and

biochemistry, as a result of being perpetually pickled. So that being constantly drunk changes a person's biochemistry, changes their thought process, changes their ability to act, interact, and cope, and if you have met chronic alcoholics, you will find that they are still diagnostically different than the rest of us, even when they are not drinking. By that, I mean that they, like Dusty Spencer, behave like a chronic alcoholic. And because he drinks all the time, he is subject to constant disequilibrium of his biochemistry. Constant unbalancing of the balancing process in his nerves and brain. This is very disorienting. A person in this state, for instance, doesn't dream. They may rest, they may collapse, they may fall down, they may close their eyes and snore, but they don't dream. And for that reason, even in their waking moments, they tend to be disoriented, and to shift into sleep patterns during waking. Their twenty-four hour rhythms are disrupted by constantly drinking. Their light/dark day/night cycle becomes disruptive by constantly drinking. They suffer that -- that is a continual poisoning as a result of being drunk. Now, when they stop, although their blood alcohol concentration goes to zero, and perhaps a DUI van would say oh, he is not drunk, actually they don't return to competency for quite a long time. They remain disordered. Even though they are not actually suffering a blood, actual concentration of .10. Such a person perhaps shouldn't be in charge of a machine. So alcohol produces that effect when it's constantly used. And Dusty Spencer is no different. Was in that condition.

Now, in addition to that, when a person uses alcohol addictively, as he did, when they stop using it, they start to suffer a sign of a withdrawal syndrome. Its worst example you probably heard all these delirium stories, seeing pink elephants, that kind of thing. Having seizures. That does happen, but

> in fact, it only happens between five and fifteen percent of chronic alcoholics. It's a lot more rare than the textbooks would have us believe. What more commonly happens is that they suffer a withdrawal syndrome that is marked by cognitive changes, confusion, disorientation, and serious impact upon their thinking process. This is a mild withdrawal syndrome, by textbook standards. No pink elephants, but it is still enough to completely disorder a person's normal flow of thought.
>
> Now, Dusty Spencer had an additional problem. And that was that he suffers from paranoid personality disorder.

(R 287-89)

These errors made by the trial judge and the trial court's obsession with the defendant's premeditation through prior threats [see subsection (B)(2)] and knowing right from wrong caused the trial court to improperly weigh these factors.

Indeed, the defendant established that these statutory mental mitigating factors are significant in this case; they are what caused the crimes to occur and were the reasons for the violent rage and manner in which they occurred; they are entitled to great weight. These mental mitigators, alone, cry out for a reduced sentence of life imprisonment. Yet there is a lot more mitigation present in this case.

Nonstatutory Mitigating Circumstances.

The trial court correctly listed as nonstatutory mitigation several aspects of the defendant's character and background which should serve as mitigation. However, the trial

court only listed them and did not give them appropriate weight. Additionally, the court considered these multiple aspects as only one factor, rather than giving them separate weight, just as it had done in the first sentencing order. (R 108; PR 1242) These factors all have been used to justify the imposition of a life sentences capital murders.

The defendant served honorably in the Marine Corps and, in fact, was a squad leader in search and rescue missions. (PR 313-315) See Masterson v. State, 516 So.2d 256 (Fla. 1987); Rogers v. State, 511 So.2d 526 (Fla. 1987); Pope v. State, 441 So.2d 1073 (Fla. 1983); Halliwell v. State, 323 So.2d 557 (Fla. 1975).[7]

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

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[7] This factor is a substantial mitigator. But, the trial court instead found it as a nonstatutory aggravator or else used it to diminish other mitigation. [See subsection (B)(2), supra.] It is entitled to separate weight as mitigation and Dusty Spencer should not be penalized by having it listed as a factor to diminish his case in mitigation.

worker, and a caring employer.[8]

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

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

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

Moreover, the trial court completely omitted from

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[8] As noted in the previous footnote, this matter, too, is not an aggravating factor which should penalize the defendant, but it has been found in the cases cited to be a meaningful mitigating circumstance.

consideration the specific good act of the defendant in saving a man from certain death following an accident. (PR 327-331) Specific good deeds or characteristics are mitigating factors which should be considered. Lockett v. Ohio, supra; Bedford v. State, 589 So.2d 245 (Fla. 1991); McCrae v. State, 582 So.2d 613 (Fla. 1991); Hooper v. State, 476 So.2d 1253 (Fla. 1985).

Reviewing the mitigating evidence presented in this Point of the brief, as compared to the aggravating factors (which the defendant additionally submits are unsupported), clearly shows that a life sentence is the only sentence which is proportionally warranted.

C. Weighing The Factors And Proportionality Review

The trial court, in reweighing the aggravation and mitigation, rejected trial counsel's arguments (and Justice Kogan's dissenting/concurring opinion in the original appeal) that the death penalty was not proportionally warranted in this case. In so doing, the trial court ignored or overlooked many similar cases in which life sentences were ordered by this Court, and instead attempted to compare this case to others where the death penalty was affirmed, which cases are so completely dissimilar from the instant case as to render the comparisons ludicrous.

As pointed out by Justice Kogan in his original opinion, this case is strikingly similar to Santos v. State, 591 So.2d 160 (Fla. 1991); and Santos v. State, 629 So.2d 838 (Fla.

1994). Santos killed his ex-girlfriend, Irma, and their daughter. Two days before the murder, Santos had gone to Irma's home and threatened to kill her. Later, Santos acquired a gun. Id. at 161. On the day of the murder, Santos traveled by taxi to Irma's parents' home, where she was staying. Santos saw Irma and her child walking down the street and proceeded toward them. When Irma saw Santos coming, she attempted to flee. Santos, however, gave chase, caught her, spun her around, and shot Irma and her daughter, killing them both. Id. This Court reversed the finding of CCP, and, on the second appeal concluded that the death sentence was not proportionally warranted despite the finding of a prior (concurrent) violent felony. Id. This Court found the existence of the two mental mitigators (just as is present here) and an abusive childhood (also, just like here). This Court, in reducing the sentence to life, ruled that "the cause for mitigation is far weightier than any conceivable case for aggravation," and that "the aggravating weight is obviously of lesser magnitude than the case for mitigation." Santos v. State, 629 So.2d at 840. A comparison of the instant case to Santos cries out for equal treatment and a reduction to life.

Similarly, in Wilson v. State, 493 So.2d 1019 (Fla. 1983), a double murder case (one count of second degree murder and one count of first degree murder) arising out of a domestic dispute, this Court reduced the sentence to life where there were two aggravators (HAC and prior violent felony). The Court concluded that the death sentence was not proportionately war-

ranted because of the heated domestic confrontation.

Next, in Ross v. State, 474 So.2d 1170 (Fla. 1989), the Court reduced the sentence to life imprisonment where the defendant had killed his wife. There, despite a finding HAC, the Court looked to the mitigators of a domestic dispute, no prior history of violence, that the defendant was an alcoholic, and was intoxicated at the time of the killing (despite the trial court's rejection of this factor since the defendant had testified that he was "cold sober" at the time of the killing. This Court ruled, "We find the trial court erred in not considering these [mitigating] circumstances collectively as a **significant** mitigation factor. . . . We conclude the death penalty is not warranted under the circumstances of this case." Id. at 1174 (emphasis added). Due to the similarity of the cases and for the same reasons, the death penalty is also not warranted for Dusty Spencer.

Farinas v. State, 569 So.2d 425, 431 (Fla. 1990), involved the killing of a former girlfriend during a heated domestic confrontation during which the defendant kidnapped her. This Court found that the domestic confrontation called for the finding of mental mitigation which would necessarily reduce the appropriate sentence to life, despite the presence of two valid aggravating circumstances (HAC and while engaged in a kidnapping). In Dusty Spencer's case, this Court should come to the same conclusion that, despite two aggravators [but see subsection (B)(1), supra] "the death sentence is not proportionately war-

ranted in this case." Id.

As noted above, the trial court attempted to compare this case to other cases wherein the death sentence was affirmed. The trial court stated in his sentencing order:

> This Court has reviewed Henry v. State, 19 FLW S653 (12/15/95) (sic), Lemon v. State, 456 So.2d 885 (Fla.1984), King v. State, 436 So.2d 50(Fla.1233) (sic), and Harvard v. State, 414 So.2d 1032 (Fla.1982) in which the death penalty was imposed. Henry, Lemon, King, and Harvard all involved the Defendant's (sic) killing women with whom they had a relationship, after a previous conviction for a prior conviction for a similar violent offense. While this case does not involve a previous conviction for a prior violent offense, it does like the other cases involves (sic) acts of violent (sic) prior to the murder.

(R 118) About the only similarity those cases have with Spencer's was the fact that they involved the killing of a spouse or girlfriend.

Henry v. State, 649 So.2d 1366 (Fla. 1994), involved **two** murders (one of his estranged wife and the second of his five year old son) which were completely separate, occurring some nine hours apart and after kidnapping the son. The Court there found as aggravation the completely separate prior violent felony and HAC (the victim was stabbed 13 times and was conscious for three to five minutes after the last wound was inflicted). In mitigation, none were found since even the defense doctors did not believe that the statutory mental mitigators were present. This Court found minimal evidence of mitigation which caused a jury death recommendation of 12-0 in favor of death. Unlike Henry,

the defendant here was in a emotional rage and could not control his actions. He had substantial mitigation, both statutory and nonstatutory and had a bare majority of the jury recommending death (7-5 vote).[9]

Next, the trial court compared this case to that of Lemon v. State, 456 So.2d 885 (Fla. 1984). This case is also quite dissimilar to Spencer's. In Lemon, the prior offense of violence was one which had occurred some time earlier. The Court found as mitigation that the defendant was emotionally disturbed, but found that there were serious questions about the degree of the emotional disturbance, completely unlike the case here. No other mitigating evidence was presented in Lemon, either.

King v. State, 436 So.2d 50 (Fla. 1983), also is quite dissimilar in that the Court found two aggravators (including a prior conviction for murder of his first wife ten years earlier) and the Court found absolutely no mitigating circumstances present in the case, noting that even the psychiatric reports did not support any mental mitigation. The same scenario is present in the dissimilar case of Harvard v. State, 414 So.2d 1032 (Fla. 1982), wherein the defendant killed his second ex-wife after prior violence to his first ex-wife and her sister some five years earlier. Harvard also involved stalking of his second

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[9] It is interesting to note that the only other three cases which the trial court cited for comparison were cited by this Court in the Henry affirmance. Apparently, the trial court merely lifted them from the Henry opinion and did not consider the other domestic cases cited in this brief, supra, for comparison.

wife and no mitigating factors.

All of the cases referred to by the trial court for comparison are, thus, dissimilar to the instant one. Instead, this Court is directed to those cited above by Appellant, which are quite similar to this case and provide clear and compelling authority to hold that the death sentence is not proportionately warranted in this case. This Court is also specifically referred to the aggravating and mitigating portion of this brief for further argument and case support. Comparing the facts of this case with those cited in this point, renders the conclusion inescapable: the death sentence must be vacated and a life sentence imposed.

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

POINT II.

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

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

The language of Section 921.141(1), Florida Statutes (1991), notwithstanding, it is clear that a defendant has the right to cross-examine and to confront witnesses during the penalty phase of a capital trial. It goes without saying that a

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[10] As noted in footnote one, supra, the Appellant, under the case law cited there, should be permitted to relitigate this issue on this appeal from the resentencing.

statute cannot divest a citizen of constitutional rights. In Engle v. State, 438 So.2d 803 (Fla. 1983), this Court clarified any doubt as to whether the Sixth Amendment applies to the penalty phase of a capital trial:

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

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

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

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

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

The introduction of the hearsay cannot be said to be harmless error in this case. The trial court's sentencing order recites facts that are supported solely by hearsay. The portion of the resentencing order that expounds on the defendant's prior threats only comes from the hearsay testimony of Officer Hughley.

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

to maintain that it was improperly admitted and utilized since he could have no meaningful opportunity to rebut and to discredit the veracity of the **content** of this complaint to the police and, especially in light of the fact that Karen Spencer invited Dusty back into the marital home for the Christmas holidays after the alleged threats, there is no indication of any reliability and no way to tell whether Karen Spencer was lying to the police concerning these statements.

The introduction and use of hearsay and irrelevant testimony over Spencer's objection gives pause concerning the reliability of the facts upon which imposition of the death sentence has been imposed. Because the death penalty hearing was rendered constitutionally infirm by the introduction of this testimony over objection, the death sentence must be vacated and the matter remanded for a new penalty phase or for imposition of a life sentence.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the appellant requests that this Honorable Court reverse vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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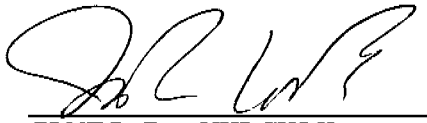
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Mr. Dusty Ray Spencer, No. 321031 (46-1316-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 9th day of October, 1995.



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