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

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

STATEMENT OF THE CASE AND FACTS

The appellant relies on the Statement of Case and Facts as contained in his Initial Brief as a correct, complete, and unbiased statement of the evidence presented at the guilt and penalty phases of the trial. The appellant vehemently objects to the state's version of facts as totally incomplete and, by taking matters out of context and failing to include modifying sentences and phrases, extremely biased and misleading. As a result of this action, the appellant must devote the majority of his reply brief responding to and clarifying these misconceptions.[1]

The first two pages of the state's answer brief contain matters introduced solely through hearsay testimony. See Point II of the Initial Brief. Additionally, the "facts"

[1] The appellant has attempted to refrain from argument in this portion of the reply brief. However, due to the page constraints of this brief, counsel has had to include some editorial comments in this section of the brief concerning the state and trial court's loose translation of the "facts" to obviate the need to repeat these facts in the argument portion of the brief, thereby conserving valuable space in this brief.

contained therein are incomplete. This Court is referred to pages 9-11 of the Initial Brief for an accurate, complete statement of the events leading up to the killing.

On page 3 of the state's brief, the appellee states that Timothy struck Spencer on the head with the rifle butt. A more accurate account from the testimony of Timothy Johnson was that he struck Spencer on the head with the rifle butt **three times**, causing the rifle butt to shatter. (T 481, 497, 542-543)[2]

The state has not included record citations to many items in its statement of case and facts. (In response to the motion to strike the facts, the state contends that these facts were contained in the opinion from the original appeal.) Despite the fact that the assistant attorney general has quoted from the opinion in the original appeal, some of the "facts" contained therein are simply wrong and have absolutely no record authority. Thus, they must be corrected in this appeal to avoid a manifest injustice. One such "fact" is the assertion that the victim had been stabbed four or five times to the chest. (Appellee's brief, p. 3) This is completely false. The record reveals several superficial cuts to the face and arms of the victim, but only **two** stab wounds to the chest. (T 726, 728, 735-736 -- one to the sternum, "the other" into the lung on the right side) Similarly, the state claims that Karen suffered three impacts to the back of the head (Appellee's brief, p. 4) However, the record clearly reveals only two impacts to the head. (T 732-733)

On page 6 of the state's brief, the state notes, misleadingly, that Ms. Burch, a

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[2] As in the Initial Brief of Appellant, 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 trial transcripts from the original appeal. The state, in its brief, chose not to differentiate among the three separately numbered records, referring to all three as simply "R".

psychologist, testified that, "Overall, he was really less impaired than many people with his long history of drug and alcohol abuse . . . ." (PR 160)[3] This testimony viewed in context, however, reveals that Burch meant "less impaired" as in **physical** damage to the brain and **not**, as the state's (and trial court's) version reads, less impaired in the psychological disorder department. (PR 158-160) Burch started off her testimony on this section by stating she was looking for evidence of "neurological" [meaning physical] damage to the brain from the drinking. (PR 159) Burch testified repeatedly that Spencer was drastically impaired (PR 163-164, 167-169, 173, 175, 177-179, 192, 204-205, 213-215, 246-247), and Dr. Lipman agreed wholeheartedly. (PR 340-344, 346-356, 360, 372, 377)

Regarding the results from each of the psychological tests conducted by Ms. Burch on Spencer, the state paraphrases Burch's testimony, most of the time leaving out important details and occasionally completely changing the results as testified to by Ms. Burch. The following facts, taken from the state's answer brief on pages 7-12, are presented in the following pages of this brief, containing direct quotes from the witness. The underlined portions of the quotations are those relevant portions of the testimony conveniently omitted by the Attorney General's Office.

Ms. Burch testified to the profile within which the tests indicated that Spencer would most likely fall. However, she noted in several places that Spencer's characteristics or results from other tests showed that he did not match all of the profile characteristics which the state has posited in its brief. On page 7, the state maintains that Burch opined that

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[3] The trial judge also made much of this misleading, out of context statement in his sentencing order. (R 109, 115)

Spencer "had a poor work history." Of course, there is ample unrefuted testimony concerning Spencer's good work habits. (See PR 318-319, 324-325) The exact quote which the state bastardized, reads that Dusty "is a person who probably has not achieved to his potential. Who would have a poor work history, relating to his ability." (PR 163) Further Ms. Burch testified that the defendant "sometimes has a tendency to blame other people," (the state leading us to believe that he always has this problem by omitting the word "sometimes"); and that the defendant has "a lot of anger and hostility inside [Appellee's brief, p. 7], but he will never let you see it." (PR 164) In fact, the entire text of Ms. Burch's testimony reveals a much more passive and laid back person than the selective quotes of the state would have this Court believe:

> It also indicates that he is very emotionally isolated from other people. He is not someone who has good quality, deep, meaningful relationships. He tends to be suspicious, either misunderstands or misreads the intent of other people to the belief that people are not treating him right, and to just kind of anticipate in fact that he will not be treated well by other people. He is shy, he is not real comfortable with groups of people and meeting people. He is a person, and this is very important, and it shows up in several places on this test, he is a person who would tend to be in most of his activities, and his life, very overcontrolled. He would impress other people as a very passive, kind of laid back guy, who will not stand up for himself very well, who would kind of let people run over him, who would not be someone who people would say hey, you know, he has a short fuse. That he is overcontrolled. He has got a lot of anger and hostility inside, but he will never let you see it. However, under extreme stress, he is the kind of person who can explode. He has not successfully developed internal controls. He has an overcontrol of his hostility, but it's not an adaptive kind of control of his feelings. Because he has that vulnerability under extreme stress to just explode.

(PR 163-164)

Concerning the Rorschach (Ink Blot) Test, the state again is highly selective in

its paraphrasing of the testimony, leading the reader to believe incorrectly that Dusty is an angry man who always explodes. (Appellee's brief, pp. 7-8) But, in its entirety the testimony again reveals a shy individual who attempts at all costs to avoid conflict in his life:

> It shows again, very consistent with the MMPI, that he is a person who is very, very uncomfortable with his feelings, his emotions, and in fact, on this test, he made very, very stringent efforts to avoid dealing with emotion. This suggests in his everyday life he will try not to get upset, that he would try to avoid getting in any kind of situation where he will get upset. Because he doesn't know how to deal with it when he does get upset. In fact, he is a person who tends to hang back, and think about things.
>
> Now, this is a coping style that is useful for many people. Because it involves delay, and thinking about things. However, with Dusty, what we see on this test is that when he is emotionally stimulated, his thinking gets very, very strange. His perceptual accuracy is very impaired, he sees things that are very unusual, and that would be very hard for another person to understand. He will take the card and say it looks like this, another person would say there is no way. I cannot see that. Also, the form of his thought becomes illogical, and nonsequential. This continues, when he is emotionally stimulated in this testing situation, he comes up with strange reasons for things. Things that don't hang together and don't make sense. He is someone who is very able, when things are kind of unambiguous and straightforward, to see things in conventional ways. Even be very conventional when a situation is not emotionally arousing, and not too confusing.

(PR 166-167) While Dusty can be manipulated and become angry if overly emotionally stimulated (Appellee's brief, pp. 7-8), he is normally a very passive individual.

> This suggests he sees the environment as kind of threatening and dangerous, and he is very, very cautious. Also, and very importantly, the Rorschach shows up the passivity that is also shown in the MMPI. Again, he is a person who kind of lays back, and he will let things happen, he will tend to be submissive, even, in relationships, and sometimes things will get sort of out of his control. Or he will be manipulated by other people, or he is vulnerable to being manipulated by other people, because he lets other people take things over for him. Then, gets angry about it. And the anger also clearly shows up. Person who is very chronically angered to a very high degree. Al-

though he doesn't show it, unless things get out of control, and he is emotionally stimulated, and then gets explosive.

(PR 168-169)

The state again misleads by stating that Ms. Burch only spent three hours talking with the defendant. (Appellee's brief, p. 9) The truth is that Ms. Burch spent two days and a total of ten hours with Dusty, first conducting psychological tests for seven hours on one day, and then returning the next day to spend three additional hours obtaining a history from him. (PR 176) The state also correctly notes that Burch did not review any trial testimony (Appellee's brief, p. 9) (most likely because she had already completed her evaluation prior to trial), but the state again fails in its factual recitation by refusing to acknowledge that Burch spoke to various people who had known Spencer throughout his life and had reviewed police reports, newspaper clippings, autopsy reports and photographs, statements, reports of interviews, and work summaries from Dr. Lipman, a neuropsychologist who also testified. (PR 175-176, 206)

Next, the state falsely claims testimony of Ms. Burch opined that the defendant "could have been **contemplating** or fantasizing murdering Karen as early as December 10 (R 185)." (Appellee's brief, p. 10) A review of PR 185 shows that the psychologist clearly stated that she could **not** know whether Spencer actually **contemplated** murdering her (definitely not as the state proffers in its brief), but only that he may have **fantasized** about it. (PR 185)[4] Ms. Burch cautioned that it must be remembered that Dusty's thinking and

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[4] Ms. Burch did state later in her testimony (not where the state gives a record cite for this "fact"), in response to "misunderstandings" of the state attorney in his questions, that "You misunderstood what I said. . . . I said that I **cannot rule out** that he **thought about**

(continued...)

reality testing, under these circumstances, was very impaired. (PR 185)

The attorney general next makes the assertion that because Dusty Spencer was jailed following the December 10th incident, that he would know that his conduct was wrong and there were consequences for this type of conduct (apparently intimating that Spencer did not fit within the criteria of impaired ability to conform his conduct to the requirements of the law). But, again, a look at the entire text of the testimony reveals a different answer and explanation by Ms. Burch:

> Q [by prosecutor]: Did you consider that, being arrested and put in jail, whether it would or would not have given him the message that his conduct was wrong and that there were consequences for being violent to her?
>
> A: Of course it gives that message.
>
> Q: Okay. Did you take that into consideration?
>
> A: Of course.
>
> Q: Okay. In what way did you take that into consideration as

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[4](...continued)
and fantasized killing Karen." (PR 186) (The trial court also utilized this statement from PR 186 in its sentencing order by, counsel believes, mistakenly equating it with positive testimony of "contemplation" or "planning" on the defendant's part.) The appellant submits that this testimony is quite different from the state's assertion in its answer brief that Spencer "could have been contemplating . . . ." for two reasons. First, "cannot rule out" is entirely different from the positive assertion that there was testimony that Spencer "could have." Secondly, counsel's understanding of the word "contemplate" implies much more thinking and planning than the words "thought about." According to Webster's Third New International Dictionary, "contemplate" is defined as: "to view with **sustained** attention; gaze at **thoughtfully for a noticeable time**; observe with **ostensibly steady reflection**. 2: to view mentally with **continued** thoughtfulness, **attention**, or **reflection**."

Therefore, the state (and the trial court) should not be permitted to equate Ms. Burch's testimony as evidence that the defendant reflected upon for a considerable time, or contemplated, killing his wife, especially in light of the testimony concerning his psychological problems with thinking rationally.

affecting your ultimate opinion that he had impaired ability to conform his conduct on the date of the murder?

A: Well, they are separate issues, actually.

Q: Well, please explain how you fit it into your analysis.

A: This was a couple that was in very severe conflict. And the situation, as Dusty construed it, and understood it, was that his wife was stealing his business from him, which was similar to what had happened in his first marriage, and that she was being unfaithful to him. And that the relationship was coming to an end. And there were several incidents that were reflective of this dynamic. Again, in his view, that she was trying to take him. And the conflict was escalating between them. And there was an arrest of him, and several accusations made by her, as well as threats made by her, and just an escalation of the violence.

Now during this time, he continued to be drinking and doing marijuana every day, to the point of impairing himself, and the murder was a culmination of all that.

Q: What do you mean the murder was a culmination of all of that?

A: What was happening between them.

Q: Okay. Now, explain what you mean, though. The murder is a culmination. The murder is his act that he commits. The murder itself is not a culmination of anything, correct?

A: No, remember his personality. And remember the fact that this is a man who has no clue how to handle his affections. He is in a situation which is causing him a tremendous amount of anger, and frustration, and **he is a person who characteristically sits on his anger. Does everything he can to avoid expressing it, to avoid getting mad at people, or spouting off at them**. He is being punished again, in his view, beyond the point of being able to deal with it, and he explodes. That's what I mean by the culmination.

(PR 190-192)

The state also tries to diminish the unrefuted testing and conclusions of the psychologist by overstressing the fact that Spencer knew that she was being consulted to

testify at his death penalty sentencing hearing. (Appellee's brief, p. 11) However, as Ms. Burch stated, this was no different a situation than many of her patients since these psychological tests are "hardly ever given to somebody who doesn't have some kind of problem." (PR 194)

The state further deceives by stating that Burch diagnosed the defendant as matching the profile of the type D of the Medgargee typology, "which suggests" the defendant was "impulsiv[e] and insist[ed] on his own way regardless of the law or feelings of other people." (Appellee's brief, p. 11) This is completely opposite of what Burch testified to; she replied with a resounding, "**No!**" when asked this direct question by the prosecution. (PR 197) While Spencer may match this profile in other aspects, he clearly did not match it in this regard. (PR 195-197) Burch started off by stating the **general** characteristics of this psychological profile (which is where the state retrieved its fallacious "facts"), but Burch ardently denied that Spencer met this particular characteristic. In fact, she stated that Dusty was "quite the contrary":

> Q [by prosecutor]: What is the type D on medgargee typology Dusty Spencer matched against?
>
> A: I would like to refer to my notes. Now the type D suggests impulsive, non-reflective. May have a history of serious legal offenses, hedonism, particularly amoral lifestyle, likely to come from a family with chaotic tendencies, with inconsistent discipline. A significant interpersonal difficulty in the past, and anger and violence may be expressed if he is provoked. His basic problems seem to be that he is impulsive and insists upon his own way, regardless of law or feelings of other people.
>
> Q: Okay. Now, the fact that this profile that he matches, based upon your testimony, that he insists upon his own way, regardless of the law, or the feelings of other people, doesn't that refer to intentional conduct of his? The tendency towards intentional conduct?

A: That's not a question that can be answered yes or no. It requires some expansion. Because the scales that feed into which typology would suggest that kind of behavior. However, it must also be tempered with the results from the other tests, which suggest that **he is not at all an impulsive person**. The evidence is that he is not. This reflects the elevation that he has on scale four on the MMPI, which is reflective of his difficulties dealing with authority figures, and with the anger that he feels inside, and on the minor elevation, that he has on scale nine, which does not reach clinical significance, but almost does, which is reflective of someone who is kind of stirred up inside, and maybe hyperactivity, and grandiose exhibition, narcissistic, but again, it has to be looked at in the context of everything else.

Q: Okay. Now, whether or not Dusty Spencer, based upon his testing which would match any particular profile on that Negargi typology, would that in any way be -- how long would he have had that type character?

A: A personality disorder is something that is basically pretty well set by early adult life. Then we continue to develop throughout our lives. So it could be either exacerbated or modified by life experience. And with someone like Dusty Spencer, who continued the pattern of alcohol and drug abuse, thereby completely eliminating any possibility that he would have of developing more adaptive coping mechanisms, I will say that his personality disorder has probably worsened over time.

Q: Okay. But you would have felt that he would have probably have had this basic character or personal profile since he was a young adult?

A: Basically.

Q: Okay. So you basically felt he would have probably had this character or personal profile before he met Karen Spencer, independent of his relationship with Karen Spencer?

A: The basic personality, yes.

Q: Okay. And so that would be, according to this profile which you are testifying you said he matched, that based upon this type D of the Negargi typology, you thought he probably had, since he was a young adult, his basic problem was that he was impulsive and insisted upon his own way, regardless of the law or feelings of other people?

A: No.

Q: Okay. No. Why not?

A: I don't think you understood me. I said that the scales that feed into that Negargi typology give those kinds of statements. However, they are belied by other test data, which indicate very strongly that Dusty Spencer is not an impulsive person who insists on his way. He is quite the contrary. A person who is overideational, who thinks and thinks and thinks about things, who doesn't know how to deal with his feelings, so only under the impact of very severe or very prolonged stress is he going to insist on his own way, as it were, or explode.

(PR 195-197)

The state then complains that Burch's conclusions on the issue of impulsiveness and the improbability of aggression towards other inmates were contrary to that of "James Butcher, Ph.D." (Appellee's brief, p. 11, 14) First, it should be noted that "James Butcher, Ph.D." is simply **a computer program** (PR 376)[5], that only takes into consideration the test results and not the person's history, any interview data or personal observations, or the results from other tests. (PR 219-220)[6] Based upon this other data, Burch's

[5] James Butcher, Ph.D., whoever he may be, has had no involvement with this case whatsoever; he merely designed a computer program to assist in evaluating MMPI test data. (PR 219-220, 376) It appears that the assistant attorney general (and the state below -- PR 198, 219-221, 225-226, 230-231) wants us to base life and death decisions on incomplete and inadequate computer programs, rather than the superior reasoning and opinions of human experts. Maybe, to carry the state's thinking further, we should also do away with juries, judges, and this Court's review, and simply plug in data to a computer and let it decide who should live! As shown by Dr. Lipman's testimony, this computer program merely shows statistical data from the population as a whole, but "may have nothing to do with your client" and, "on its own, doesn't mean anything." (PR 376) The state's reliance on a computer program to justify death is thus absurd.

[6] Moreover, this computer report does not diagnose Spencer's condition, but only notes that this may be a **treatment** consideration, the **potential** for which a therapist should be aware. (PR 219)

opinion is "unqualifiably no," Spencer would not be a danger to other people in prison, and he was not an impulsive individual who insists on his own way. (PR 197, 219-220, 235)

The answer brief also oversimplifies Burch's opinion that she did not believe Spencer's ability to appreciate the criminality of his conduct was substantially impaired. (Appellee's brief, pp. 11-12) However, Ms. Burch explained and refined her opinion, by stating that, while she believed Spencer knew right from wrong, he was unable to conform his conduct to the requirements of the law and was under the influence of extreme mental or emotional disturbance at the time of the murder. (PR 177-178, 209) She expounded:

> Well, the chronic alcohol and marijuana abuse, obviously, affects a person's ability to control emotions, and behaviors. The paranoid personality disorder can at times include brief psychotic episodes. And by psychotic, I mean **irrational thinking, impaired ability to perceive and interpret reality, or perceptual inaccuracies. And I believe that at the time of this murder, he was really suffering some impairment of his ability to think rationally.**
>
> * * *
>
> And I believe that he was. That he was able to appreciate the difference between right and wrong at the time. I believe that, because of the severe stress, and the alcohol abuse, **he was deficient in his ability to conform his conduct to the law.**
>
> * * *
>
> The analysis that I arrived at as a result of my evaluation indicates that he has distorted reality. That is part of the symptomatic picture and that is part of the condition that he has. He is a person who is paranoid. That means that he misconstrues the intentions of others, he approaches interpersonal situations with an expectation that he is not going to be treated very well, and, in fact, he would tend to gravitate towards people who would fulfill those expectations.
>
> * * *
>
> He knew that to murder her was wrong, yes, I believe so.

Q [by prosecutor]: And he understood the possible consequences of murdering her?

A: Yes.

Q: Okay. Is it your opinion that his ability to conform his conduct to the requirements of law was impaired?

A: Yes, it is.

Q: On the date of the murder?

A: Yes, it is.

Q: And why is that?

A: That is because, again , of the severe impairment in his reality testing that he undergoes when he is under severe emotional stress, because again, of his developmental -- in the development of coping ability. Of the ability to handle his emotions. That, combined with the effects of chronic substance abuse, and actual drunkenness, over the days preceding this event.

* * *

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 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**.

(PR 177-178, 203-205)

The state places great weight in the fact that Spencer parked away from the house apparently to avoid detection (and also wore painters' gloves), in a flimsy attempt to show his ability to plan and to show that his ability to conform was not impaired. (Appellee's brief, p. 12-13) However, again the state takes Burch's testimony out of context to support its contention. It is most assuredly **not** what the mental health experts say; it has no bearing whatsoever on his inability to conform his conduct to the requirements of the law:

Q [by prosecutor]: Okay. Wouldn't a very reasonable, logical interpretation of why he would have parked away from the house be that he was attempting to avoid detection?

A: Well, yes. And I do remember now that he did say that.

Q: Okay. Wouldn't that indicate that he had a sufficient mental state to be able to think ahead, plan ahead, do what was necessary ahead of time, and during the course, to attempt to protect his own interest?

A: To some extent. However, there were other aspects of his behavior that were highly bizarre, and not thought out well at all.

Q: Okay. Why would he have a sufficient mental state to be able to think ahead, plan ahead, to park away from the house to avoid detection, but in your opinion, that he was impaired to the extent he was incapable of conforming his behavior to the requirements of law?

A: You are talking about two different issues. 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 208-209) (See also PR 211-212)

The state attempts repeatedly in its statement of facts to infer that Burch relied solely on the defendant's version of events (such as Karen striking him with a brick) and his alcohol history (and the truthfulness thereof) in making her conclusions about his mental impairment. (Appellee's brief, pp. 13-14)[7] Initially, however, as noted earlier, Ms. Burch also reviewed and relied on police reports, statements, interviews, etc. in reaching her

[7] The trial court, in its sentencing order, also tries to diminish the experts' testimony and conclusions by inaccurately stating that they "depended upon the Defendant's self-report concerning the events surrounding the murder" (R 115), when that plainly and unquestionably was not true. (See this reply brief, pp. 6, 14-15, 20-21)

conclusions. Specifically with regard to the brick incident, Burch indicated that she did not rely on the **accuracy** of what the defendant told her, but rather used his version to determine his **perceptions**. (PR 210)[8] To expand on the quotation included in the state's brief:

> Q [by prosecutor]: Okay. Wouldn't it be also consistent with the symptomatic pattern, according to the MMPI, that he would deny culpability, and blame problems instead on others, and falsify that she hit him with a brick?
>
> A: No. No. Again, you're construing that to mean lying, and it's a different thing. The part that talks about the blaming others, and denying culpability, refers to his paranoid disorder which has to do with how he **construes** reality.

(PR 210-211) The experts both reviewed all of the police reports and witness statements. Again, they only were interested in Spencer's account of the acts to determine his perceptions, not to determine the truthfulness of what Dusty said. When asked by the prosecutor if she presumed Dusty's account of alcohol and drug consumption to be true, Ms. Burch stated clearly and unequivocally, "No, never do,". (PR 192)

The state indicates that "Ms. Burch took into account in formulating her opinion that the day before the murder a neighbour (sic) saw Spencer driving the Grand Prix and waiting at the corner looking in disgust at the house (R 217)." (Appellee's brief, p. 14) This is not an accurate characterization of Ms. Burch's testimony. She stated that she had that information available to her but that she did not take it into account very much since, psychologically speaking (her area of expertise), it is impossible to accurately read facial

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[8] It should, however, be noted that Spencer's statements that he did not hit Karen with the brick, but that she hit him with it and he was merely taking it away from her when Tim saw them, is likely true. The medical examiner testified that there was no evidence of Karen being hit with the brick. (T 750)

expressions, especially from a distance. (PR 217-218)

The state asserts that Burch opined that "Spencer most fits into the characteristics of a paranoid personality disorder." (Appellee's brief, p. 15) More accurately, she stated that he has mixed traits of other personality disorders, but most fits into that category. (PR 244) The state admits in this portion of its facts that the defendant is not quick to react and not an impulsive person. (Appellee's brief, p. 15) It is important to understand the complete context of Ms. Burch's diagnosis:

> He does not meet the criteria number six, which includes being easily slighted. Now he may meet that one, but quick to react with anger or counterattack, he does not meet that, because of the clear evidence of overcontrol, overcontrolled hostility, on the MMPI, and the passive personality style that is indicated on the [Rorschach] test.
>
> Q [by prosecutor]: Okay. You indicated that he would not meet the quick to react with anger or to counterattack?
>
> A: Yes, his history has shown that he is on the contrary, not quick to react, he is not an impulsive person.
>
> Q: **Does that mean that he will be more likely to think out his response?**
>
> **A: No, well, no, but he would tend to sit on his anger, that he would tend to deny his anger, to want to be a nice guy, to be submissive and pleasing in his relationships.**
>
> Q: But this indicates he would not be spontaneous in his anger, isn't that correct?
>
> A: He is a person who doesn't know how to deal with his anger. He doesn't know how to express anger adaptively. He sits on it and it's like a pressure cooker.

(PR 246-247)

The state again omits relevant testimony from its version of the facts, relating

only a partial list of traits to which Dr. Lipman testified: Spencer was, as noted by the state, schizoid, withdrawn, timid, and threat-sensitive (Appellee's brief, p. 15), but Spencer was also "extremely submissive and accommodating," according to the same quote from the doctor. (PR 340) Spencer did score a 5.34 for alcohol on the addiction severity index, rating him in the middle. (Appellee's brief, pp. 15, 18) But, the attorney general fails to note, he also scored a 6.36 for psychiatric problems. (PR 342) These two traits should not be looked at individually, as does the state and as the trial court did (Appellee's brief, pp. 15, 33; R 61-62), but, according to the doctor, **must** be considered in conjunction with each other and the effect each problem has on the other. (PR 353-355) (See also PR 346-347)

Dr. Lipman testified that his and Ms. Burch's testing both showed that Spencer would, under stress and as a result of it, become paranoid, as the state reports. (Appellee's brief, p. 15) However, the state omits other aspects shown by the tests which Dr. Lipman also related in his same answer:

> Particularly, what was found was a borderline trait structure, and a paranoid personality disorder. What I mean by those is a person who's borderline, who has borderline syndrome, has very little resistance, very limited coping capacity, to stress. And they experience it as the level of emotion, very little resistance. What both of them also agreed on was that he is overcontrolled, and overinhibited, suggesting that he keeps himself very much under control, all of the time. The importance of the paranoid personality aspect, which came from the testing that Dr. Burch did, is that this is an individual who, under stress, as a result of it, borderline traits, is going to become paranoid when stressed.

(PR 343-344) The state does note that Spencer is subject to constant disequilibrium of his biochemistry, but omits that he would also be very disoriented and that the alcoholism would change his thought process and his ability to act, interact, and cope, even when he was not

drinking. (PR 351-352)

Next, the state (and the trial court) diminishes the effect of stopping consumption of alcohol in a person such as Spencer as a "mild withdrawal syndrome" or a "hangover." (Appellee's brief, p. 16, 35; R 117) These statements are shamefully misleading; the full text of Dr. Lipman's testimony reveals instead that it has a **serious** impact on Spencer's thinking process:

> 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 biochemical intoxication. Although we wouldn't call that drunkenness, because his alcohol level would be zero at the time.
>
> * * *
>
> When you drink, your blood alcohol level rises and then it 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, <u>even when they are not drinking</u>. 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/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 disoriented.** Even though they are not actually suffering a blood, actual concentration of .10 such a person should not 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.

(PR 351-353) The doctor's testimony reveals that Dusty's disorientation and disruption to his thinking process brought on by the chronic alcoholism and the stopping of alcohol was bad enough by itself. However, the doctor continued, it was made even worse because of being coupled with his suffering from the paranoid personality disorder, rendering him impaired "to an abnormal, intense degree." (PR 353-355)

The state incorrectly states that "the paranoid personality disorder would help symptomatically." (Appellee's brief, p. 16) The state has it backwards -- the alcohol would help symptomatically with the personality disorder, because it would tranquilize (but note that it only helps the symptoms, not the disease itself). (PR 353-354) But once the alcohol, which has previously been acting as a counterweight, is discontinued, their emotional instability "is unleashed. The thing tips over. They become extremely anxious." (PR 354)

The alcoholism and drug addiction, which began quite early in Spencer's adolescence, contributed to Dusty's mental and emotional disorders:

> [Spencer began] using alcohol to intoxication at an unusually early age. By fourteen, he was using it regularly to become quite drunk. His principal drug abuse at that time was alcohol. And this was during the years of sexual maturity, growing adolescence. I should explain the significance of its use during that time.
>
> Because later points in his life, early adulthood, represented the results of his emerging from his adolescence. Dusty, who had been sexually abused at the beginning of that adolescent period, the time in fact when he started to drink, Dusty did abuse alcohol during that time of late adolescence during which most of us find life to be particularly painful. We're developing sexual feelings, developing adult feelings, we're developing serious conflicts with the generation, and as we grow through adulthood, we have to resolve these in order to become a well-formed person. Instead of doing that, Dusty got drunk.
>
> Now, during the final years of adolescence, the brain, which that occurs in various stages, experiences its final growth interconnectness [sic] of nerves within the brain. This is why the last connections are made when the person becomes mature. **Those are very important years.** We should in fact feel pain during our adolescence. **And we should learn to deal with it. Dusty didn't do that. He got drunk, instead. Because of that, alcohol had a major impact on the development of his personality, as it did with his nerves.** They were undergoing their final interconnection, so that when he emerged from adolescence an alcohol abuser, his personality had largely been formed, and probably didn't differ greatly from how we measure it now.

(PR 345-347) Doctor Lipman continued in his testimony to relate Dusty's drug abuse history, which included, LSD, hashish, marijuana, mescaline, and quaaludes. (PR 347-348) All of Spencer's drug usage was of tranquilizing drugs, rather than stimulants, which, the doctor stated, fits his personality disorder, since stimulants would have been very unpleasant coupled with his mental disorder, whereas depressants or tranquilizers would assist in dealing with his severe mental and emotional instability. (PR 347-348)

The state contends in its brief that Dr. Lipman did not have any corroboration

regarding Spencer's usage of alcohol from any other sources. (Appellee's brief, p. 17) This is not the case. The doctor appears to have answered the state's questions in that fashion due to confusion regarding the assistant state attorney asking him about "unsworn testimony." (PR 357) Later in the testimony, Dr. Lipman states quite unequivocally that he did have corroboration from Spencer's companion, Curtis "Zane" Zink, which revealed that Dusty's reporting of his alcohol consumption was indeed accurate or maybe even an underestimate. (PR 366-367) Indeed, Curtis Zink reported that Spencer, in the weeks prior to the killing, was drinking half gallons of Captain Morgan rum at a time. (PR 367) Additionally, the doctor had reviewed all of the material which Ms. Burch had, which, as has been detailed above, included interviews with family and acquaintances throughout Dusty's life, all of which would have corroborated Spencer's alcohol and drug history. (PR 366)[9]

The state also maintains that "Spencer may have been insulted by being in jail" following the December 10th incident, apparently implying that Spencer was at that time able to think rationally about formulating some kind of plan to get even and was not impaired. (Appellee's brief, p. 17) This is an inaccurate implication on the state's part. The state again has taken this material entirely out of context to give a misleading account. The entire testimony reveals that Spencer was so impaired as to not know what it meant to be in jail:

> Q [by prosecutor]: All right. Now, he did not have a blood alcohol level . . . when he was in jail?

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[9] The appellant fails to understand why the state is attempting to make it appear that Dusty's personal history and history of alcohol and drug abuse was uncorroborated since the record belies this. The transcripts are replete with reports and live testimony regarding Spencer's life story and his history of drug and alcohol abuse, all of which serve to corroborate Spencer's history to the mental health experts. (See, e.g., PR 293-300, 304-306, 311, 312-316, 366-367)

A: Right.

Q: Would sitting in jail and being in jail, would he be impaired about understanding what that means?

A: Yes, he may be impaired. 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.

(PR 362)

While Dr. Lipman, as the state notes, was not previously aware of Spencer's exaggerated, fantasizing statement on January 1st that he would like to throw Karen overboard from their boat (Appellee's brief, p. 17), the doctor opined that that incident fit perfectly within his diagnosis and, in fact, "helps explain his disequilibrium a little bit." (PR 363-364) The impact of all of the threats were not understood by Dusty and may have been simply an expression of displeasure:

Q [by prosecutor]: Well, what would impaired mean, in your opinion, in reference to his mental ability when he calls his wife, when I get out, I'm going to finish what I started? What does impaired mean in terms of her calling her (sic) from jail, and telling her that?

A: 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: 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.

Q: Okay. Is he impaired to the extent that he would not have known what he was saying?

A: No, he would have known what he was saying.

Q: He would have known. Would he have been impaired to the extent that he would not have understood the impact that it would have had on her?

A: Right. He may not have understood the impact it had on her.

Q: Wouldn't that be obvious to the person, making the call and telling her that, to make her afraid?

A: No. It may have just been an expression of displeasure. In a sense, metaphorically, I have personally said to someone, oh, I'll kill you for that.

Q: Okay. Is that --

A: I didn't mean I was going to kill them.

Q: Is that indeed your opinion in this case, based upon all the evidence that you know, that that was just a metaphorical expression on his part when he called her December 11th from the jail and said that? Is that your opinion, Doctor?

A: I'm confident that his emotional state at that time is consistent with the kind of emotionality and exaggeration that would have led him to say such a thing.

(PR 361-362)

The state, recounting Spencer's version of events which he had related to Dr. Lipman, indicates in its brief that Karen Spencer had told Dusty that she had gone to the police and he was wanted for attempted murder. (Appellee's brief, p. 18) The state leaves out that Karen specifically went to Curtis Zink's house, where Dusty was, and goaded him

by saying sarcastically, "How does it feel to be wanted for attempted murder?" (PR 368) This was the context of Spencer's leaving town (consistent with his personality disorder of attempting to avoid confrontation and stress -- PR 166-167, 192-193) and the context of his returning to town to obtain the title for his automobile from his wife's house. (PR 368)

The state also goes to great lengths to note that lay witnesses (friends and relatives of the defendant) did not ascertain that Dusty had any emotional problems. (Appellee's brief, pp. 22-23, 24-25) But the state fails to point out that Dr. Lipman, in an unrefuted statement, specifically noted that Dusty's cognitive confusion and disorientation would have begun before the time of the killing, "It would have been at a constant and low level, and observable to someone trained to observe it." (PR 372) Those lay people, obviously not trained in psychology or psychiatry, then, would not necessarily have observed Dusty's psychological traits and would not have been aware of Spencer's mental and emotional problems.

The appellant also objects to the state's assertion that the trial court took "all of the mitigating circumstances in the light most favorable to the defendant." (Appellee's brief, p. 36) While the appellant recognizes that the trial court's sentencing order incanted these magic words, the inaccuracies, discrepancies, and out of context quotations which have been discussed throughout this brief and in the initial brief belie this claim.

SUMMARY OF ARGUMENT

Point I. The state has played "fast and loose" with the facts presented in its brief in an attempt to support the trial court's findings in support of the death sentence. The trial court, similarly, took matters out of context and/or totally misread the testimony of the mental health experts. This Court, therefore, should not give deference to the factual recitation of the trial court, but should, itself, undertake a "discrete analysis of the facts" to gain a more accurate account of the crime and the defendant's mental health problems. 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 or adequately weigh 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.

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 state mischaracterizes that portion of appellant's initial brief in which counsel complains of the many errors in spelling and grammar which, counsel maintains, is an indication of the lack of attention given to this sentence. The state criticizes counsel for engaging in a personal attack on the trial judge. Counsel in no way meant his brief to be interpreted as such and apologizes if it can be construed in this manner. Counsel never, as the state claims, said that the "eminent jurist below is . . . an embarrassment to Florida's judiciary." (Appellee's brief, p. 42) What the appellant meant to do is to be critical of the trial court's sentencing **order**, not the trial judge personally, since that order, by its excessive errors, shows that it was not reviewed very closely by the court and hence is an indication of a failure to engage in a reasoned, thorough, and intelligent analysis. The appellant still maintains that the order is careless and, hence, is "an embarrassment to Florida justice" (not "judiciary," as the state claims).

The state maintains that "the weight to be given a mitigator is **entirely** within the sentencing judge's discretion" and that this Court cannot vacate a death sentence based on the weight (or lack thereof) given to mitigating circumstances. (Appellee's brief, pp. 39, 43-

44) The very fact that there is proportionality review by this Court implies that there is some weighing process and standards which the trial court must employ. See Terry v. State, 21 Fla. L. Weekly S9, at S12 (Fla. January 4, 1996) (wherein this Court apparently struck down the weight given by the trial court to aggravators and mitigators in vacating the defendant's death sentence). As noted in that case, this Court's "proportionality review requires a discrete analysis of the facts," citing Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), and that Florida's death penalty scheme, including this Court's review, "relies on the weight of underlying facts," citing Francis v. Dugger, 908 F.2d 696, 705 (11th Cir. 1990). This is especially true where, as here, it is apparent from the sentencing order that the trial court used an unconstitutional standard in weighing the mitigating factors, applying only those in its weighing process which had a direct connection to the crime and ignoring those which relate to the totality of the defendant's life or character. (R 117) See Initial Brief of Appellant, pp. 40-42. The state even admits that the trial court limited the weight given mitigation by "examining what connection they had to the murder of Karen Spencer." (Appellee's brief, pp. 58-59) There is no other way to interpret the trial court's clear statement that: "In weighting [sic] the mitigating circumstances the Court must examine what connection they had to the murder of Karen Spencer." (R 117)

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 weight given to unrebutted 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 or diminish relevant and crucial mitigation from the sentencing decision. In Brown v. State, supra, this Court expressly disapproved of a sentencing order, 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; Hitchcock v. Dugger, supra; Eddings v. Oklahoma, supra; Lockett v. Ohio, supra. See also Initial Brief of Appellant, pp. 40-42. In this case, it is clear that the evidence of mitigating factors, all of 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, 571 So.2d 415 (Fla. 1990), the trial court was mandated to find in favor of the defendant. See Initial Brief of Appellant, pp. 18-59.

The state argues that, in considering the heinousness aggravating factor, the

court only need consider the effect upon the victim, and can ignore the lack of intent on the defendant's part to inflict pain or torture. (Appellee's brief, pp. 39, 45-47, 51-56) For this proposition, the state cites Gorby v. State, 630 So.2d 544 (Fla. 1993); and Clark v. State, 443 So.2d 973 (Fla. 1983). See also Hitchcock v. State, 578 So.2d 685, 692 (Fla. 1990) (wherein this Court stated that application of the HAC statutory aggravating factor "pertains more to the victim's perception of the circumstances than to the perpetrator's.") While those cases may be interpreted to indicate such a view, this Court is directed to its own conflicting decisions wherein this Court has taken a diametrically opposite view that the HAC factor must look to the **intent of the defendant** to torture or cause suffering:

> Whether death is immediate or whether the victim lingers and suffers is pure fortuity. The **intent** and method employed by the wrongdoers is what needs to be examined.

Mills v. State, 476 So.2d 172, 178 (Fla. 1985) (emphasis added). Also in Chesire v. State, 568 So.2d 908, 912 (Fla. 1990), this Court indicated that it has always focused on the mental state of the defendant to determine the applicability of HAC, writing:

> The factor of heinous atrocious or cruel is proper **only** in torturous murders -- those that evince extreme or outrageous depravity as exemplified either by the **desire** to inflict a high degree of pain or **utter indifference** to or **enjoyment** of the suffering of another. State v. Dixon, 283 So.2d 1 (Fla. 1973).

(emphasis added). See also Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992); Santos v. State, 591 So.2d 160, 163 (Fla. 1991); Porter v. State, supra at 1063 (wherein this Court rejected the trial court's finding of HAC where the evidence was consistent with the hypothesis that Porter's crime was **a crime of passion, not a crime that was meant to be deliberately and extraordinarily painful.**" [emphasis in original]); Initial Brief of

Appellant, pp. 26-31.

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 incident, 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) All of the mental health testimony is consistent with this, it was a killing out of passion, one that occurred due entirely to Dusty's mental health problems, which caused him to lose control.[10] Thus, there was no **intentional** infliction of pain and no utter indifference to or enjoyment of the suffering of another.

The state continues by contending that the "intent" to be torturous is presumed from the killing and that "excessive, unnecessary wounding or slowly killing could **only** be the result of a desire to inflict a high degree of pain." (Appellee's brief, p. 56) A killing committed during the heat of passion, such as here, is the perfect example of just how wrong and absurd the state's argument is. See, e.g., Porter v. State, supra. To apply this factor in the instant case would be to ignore the clear holdings of Porter, Richardson, Santos,

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[10] This Court, in conducting its proportionality review of the weight to be given the defendant's mental impairment and loss of consciousness during the killing, should consider the factually similar case of Wise v. State, 580 So.2d 329 (Fla. 1st DCA 1991), wherein the first district announced that such evidence is highly relevant even in considering the guilt of a defendant. If such evidence is enough to reduce culpability or be a defense in considering the guilt of the accused, then it must also be highly relevant in considering a defendant's life or death sentence. As stated in the opinion, "The instant case presents a question of the defendant's consciousness of his acts themselves . . . that a physical condition may have caused him to blackout at the time of the assault in question. . . . [T]his evidence went to the heart of the defense itself." 580 So.2d at 330.

Cheshire, and Mills, and would result in vacillation on this Court's part concerning the definition of this aggravator, rendering it unconstitutionally vague under the federal and Florida constitutions. Additionally, it totally ignores the unrefuted testimony of the mental health experts who opined that Dusty's mental health problems and alcoholism were what caused Spencer to lose control, and that, therefore, Dusty did not intend for the killing to happen or the manner in which they happened. (PR 177-178, 203-205)

In the answer brief, the state portrays this killing as motivated by money, that "Spencer set upon a course of conduct aimed at getting money from Karen through violence," that Spencer lashed out because Karen was "about to relieve Spencer of money," there was a "monetary theme" here (unlike other cases), and was of "monetary passion." (Appellee's brief, pp. 69, 78-80) There was, however, no finding that this killing was for pecuniary gain, and the state should not be permitted to now argue for the first time on this second appeal that it was.[11] The mental health experts stated unequivocally that the murder and the manner in which it occurred was a direct result of Dusty's mental problems brought on by the extreme stress of the situation.

The state repeatedly contends that Spencer had planned this killing all along. (Appellee's brief, pp. 69-72) This is a total invention on the part of the assistant state attorney. It is expressly rebutted by **all** of the mental health expert's testimony and,as a result, must be rejected by this Court. See statement of facts contained in this reply brief, supra.

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[11] The state did not argue for the pecuniary gain aggravator at trial and the jury was never instructed on that factor. (PR 423-425)

The state somehow claims mental health experts "blindly accepted" defendant's version of facts. (Appellee's brief, pp. 9, 13-14, 40) This also is a total fabrication and deception on the attorney general's part (as well as on the trial court's part -- R 115) This Court cannot be blind to the clear, simple fact that the mental health experts, while taking a statement from Spencer concerning his **perception** of the events, reviewed many, many sources of information to ascertain the factual setting of this crime and specifically said they did not accept what Dusty told them as true. (PR 175-176, 192, 206, 210, 366-367)

Giving the unrebutted and wholly substantiated mitigating circumstances the proper weight they are due, rejecting the state's and the trial court's patently false, incomplete, and out of context version of the facts of the crime and the mitigation evidence (which they need to support their argument and findings in favor of death), and comparing this case to others in which the death sentence has been vacated, can only result in a finding for life, instead of death. See Initial Brief of Appellant, pp. 18-59.

CONCLUSION

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

Respectfully submitted,

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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 1st day of March, 1996.

JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER