IN THE SUPREME COURT OF FLORIDA

TIMOTHY HUDSON,

Appellant/Cross-Appellee,

vs.

CASE NO. 85,693

STATE OF FLORIDA,

Appellee/Cross-Appellant.

ANSWER BRIEF OF THE APPELLEE/

INITIAL BRIEF OF CROSS-APPELLANT

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STATEMENT OF THE CASE AND FACTS

At the resentencing proceeding the State's first witness, Mandy Kio, testified that she was the thirty-two year old daughter of murder victim Molly Ewings. Her mother was good to her, her sister and their children. The victim had been divorced and was a loving, trusting person (Vol. V, R179-182).

Becky Collins knew the victim Molly Ewings from work at MacDill AFB Noncommissioned Officers Club. She was personable, friendly, and loved animals. Collins became romantically involved with the appellant, became engaged to him but problems developed with his drug use (R184-186). Collins decided she could not live with him anymore and moved in with Molly (R187). Appellant started making threats to the witness over the phone while he was in jail (R188-189). He pulled a knife on her once and damaged the interior of her car and slashed the tire on her car (R189-190). He hit her after an argument (R190). Collins became very scared of Hudson and did not want to deal with him (R191). She went into hiding upon learning he was going to be released from jail (R192). She first learned something was wrong with Molly when she went to her home and found the automobile missing, the bed was unmade, what appeared to be blood spots were present. Collins called police (R192-194).

Jasmin Robertson, a fellow employee with Ewings and Collins, was aware that Hudson and Collins were no longer together. She saw appellant the day before Ewings was taken from her house; he asked if she had given Becky Collins the message from the previous Monday -- that when he got home he had something for her (R203-205). On June 17 he told Robertson that he had something waiting for Collins when she got home. He was calm (R205). He was not acting unusual. The next morning she learned of Molly's disappearance (R206).

Detective Noblitt was involved in the Ewings homicide investigation. Her roommate had called to report the victim was missing (R209). There were blood spatters in the bedroom (R210). The bed had no covers (R212). A witness reported to another officer there had been screaming which was not investigated (R214). Appellant was interviewed and denied going to the residence (R216) and denied that he was wearing blood stained pants that night (R217). He admitted having changed his clothes when told his mother reported his changes of clothes at one in the morning (R217-218). Noblitt learned that Hudson was in violation of his probation status (R218). Hudson was charged with violating community control (R219).

Appellant was very talkative and alert on the 18th. Hudson was *Mirandized* even though it was only a missing person rather than a homicide at that point (R221). On the 19th Noblitt reinstated contact with appellant and after readvising him of *Miranda* (R222-223) told Hudson that he did not think he was being truthful and appellant admitted as much (R223). Then he said he told an acquaintance Peabody when they were smoking crack cocaine that he knew of a house to burglarize to steal money for more cocaine (R223-224). He directed Peabody to the house and waited outside while Peabody went in. A few minutes later he saw Molly's car traveling westbound toward him at the intersection. When he got in he saw Molly's bloody body inside. They drove to a dumpster and Hudson got out and drove Peabody's car away. He claimed not to know what Peabody had done with the body (R224-225). He was more emotional during this interview. Appellant told Noblitt that Peabody could not be found and he did not provide a description of him (R226). Noblitt left the interview room and the witness subsequently was made aware that appellant **was** willing to lead them to where he thought the body was (R228). They went to the area of the dumpster and appellant had a brief conversation with Sergeant Price. Price told Noblitt that appellant would show them where the

vehicle was and where the victim was (R230). They left the area. Ewings' vehicle was recovered, not readily visible from the main road (R231-232). At Hudson's direction they walked into an orange grove. Appellant pointed to a green army blanket under a tree and said someone had stolen the victim. A few minutes later appellant agreed to show them where the victim was. They found a white female laying in the bushes (R234-236). She wore a nightgown with no underwear (R237). Appellant told the witness there was no Peabody; at the office appellant gave a statement admitting the murder of Molly Ewings. Hudson claimed he went to the home to confront Becky armed with a knife (R240-241). The victim screamed when she saw him and he stabbed her more than once (R241). Afterward, he disposed of the body (R241). In his last statement Hudson did not assert that his motivation was to get cocaine or money for cocaine; nor did he mention using cocaine prior to going to the house (R248).

Detective Childers went to appellant's residence the afternoon of June 18, 1986. Appellant agreed to come to the station (R253-254). Hudson mentioned the last time he had been inside Molly's house was five or six months ago; then he added he was by her property a month earlier but was not inside the residence (R255).

Appellant had no difficulty in directing the officers to various locations (R258-260). The witness described appellant's admitting the crime (R261-262).

Detective Black described his observations at the crime scene residence of the victim (R265-275). Officer Keith Bush testified that in 1982 he responded to a complaint generated by Linda Benjamin (R276). An entry had been made through a bedroom window of her residence (R277). There were signs of a disturbance (curtains knocked off the window, headboard pushed away from the wall). Benjamin was taken to the hospital for physical examination (R279). Linda Benjamin told him she was in her bedroom, saw a man in her room; when told to leave the man inserted his finger into her vagina and attempted to insert his penis. She fought back and the assailant fled (R282). Hudson was seventeen years old at the time of this offense (R285). State Exhibits 2 and 3, the judgment of conviction for robbery and sexual battery and burglary **were** introduced (R285-288).

Medical examiner Dr. Charles Diggs performed an autopsy on Molly Ewings. There were four stab wounds on the chest area (Vol. VI, R299). Each of the wounds was lethal. The penetration of the stab wounds went into the lungs, producing hemorrhage and sending

the person into shock (R300). The person was alive when all four stab wounds were inflicted (R301). Infliction of the wounds would cause severe pain (R304). Wounds of this nature tend to produce unconsciousness in two minutes or so (R305). A laceration "defensive wound" was found on her finger (R306).

Defense witness Daniel Hudson, appellant's father, described their migrant worker life style and testified his wife (appellant's mother) had a drinking problem. Appellant got into drugs, but seems to be more mature after years in prison (R311-320). The witness's efforts to get appellant help with his drug problem were unsuccessful (R320-323).

Charles Bedford testified that when appellant was eight or nine years old he played baseball and Bedford provided surrogate support (R324-333).

Appellant's sister, Deborah Hudson, testified that their parents divorced which affected appellant; he started being disobedient and spent a lot of time away from home (R334-335). Other brothers had substance abuse problems (R336). In 1985 she realized that appellant was involved with drugs. His behavior changed, he acted paranoid, would become frustrated if he could not get money for what he wanted (R337). Appellant wanted money for

crack before Molly Ewings' murder (R338). Appellant had no respect for his mother and after the divorce would not listen to his father; he did what he wanted to do (R340-341). Appellant was not kicked out of the house. His mother tried to teach him right from wrong but he would not listen (R342).

Littleton Long, an instructor at the Hillsborough Correctional Institute, described appellant as hardworking; he did not pass the GED test (R345-346). Appellant later told him he began experimenting with drugs again (R348).

Anthony Bembow grew up with appellant and used crack cocaine with him, even on the evening before Ewings' murder (352). Bembow never saw appellant get violent, hit or threaten people (R356).

Kelley Doster smoked crack with Hudson (R357). Doster did not see appellant threaten or hit anyone when he was on crack cocaine (R362). Doster got off cocaine, "just quit" (R363). Doster did not have occasion to smoke crack cocaine with appellant since 1990 and in a previous affidavit stated she only smoked once with him (R365).

Gerald Bembow, appellant's ex-brother-in-law, smoked crack cocaine with appellant two years prior to the murder (R371-372). Hudson would react paranoid and defensive after smoking it (R372).

Hudson was high on' the night before Ewings died and he was higher afterwards (R373-374). Appellant was mad at Becky Collins and made threats toward her (R375). The witness had gotten off crack cocaine (R376). The threat he heard about Becky Collins was "That bitch got me put in jail and I'm going to kick her ass". Appellant had a knife wrapped in a towel in his hand (R377). Appellant would not answer Bembow when he asked what he was going to do with that knife. He never saw appellant become violent when under the influence of crack cocaine (R378).

Captain Robert Price with the Tampa Police Department testified that he talked to appellant about funerals in an attempt to get him to talk and Hudson volunteered to show them where the victim's car was and the body (R382-386). The victim had been missing for almost two days and her nude remains were in the middle of vegetation and under brush (R388).

Dr. Michael Maher saw appellant on two occasions for a total of three hours (R393). They discussed his background and drug use (R396-397). Maher opined that Hudson was under extreme mental or emotional disturbance at the time he murdered Molly Ewings (R397); the significant factors comprising that disturbance were his immediate intoxication on crack cocaine, the long term effect of

his using drugs, the presence of a personality disorder and family instability during childhood (R397-398). Maher posited that when confronted by the stimulus of the screaming victim, in his frightened, desperate and paranoid state, he reacted with horrible violent intensity not out of a thoughtful, considered, clear state of mind (R405-406). Appellant went to the house to make up with Becky (R406). Maher opined that Hudson had a "mixed personality disorder", a personality disorder with a variety of excessive personality traits, some antisocial, some narcissistic, some depressive, some dependent (R413). Maher further opined that Hudson's ability to conform his conduct to the requirements of law was substantially impaired at the time of the killing (R419). He thought appellant's ability to appreciate the criminality of his conduct **was** substantially impaired in the sense that his emotional awareness of the horror of killing someone **was** impaired (R423-424).

On cross-examination, Maher admitted that he did not talk to anyone other than appellant in reaching the conclusion concerning Hudson's family background, educational history, cocaine abuse and mixed personality disorder. He did not interview any witnesses or contact any family members (R433). An exhaustive background check would be impractical considering the need for it (R433). It was

not important to talk to appellant's siblings (R434). Appellant told Maher he was not physically abused or abused in any other way by his parents (R437). Both parents loved him, both were employed from time to time; Maher did not think his parents supported him in his school work or at the beginning of Hudson's drug addiction (R437-438). He opined that the children in this family did not develop in a manner which allowed them to be productive, law-abiding citizens. He got the family information from talking to appellant (R441). The witness acknowledged that in evaluating someone, one can not always rely on self-report which is especially true when a defendant is in a capital trial (R444). Maher was aware that appellant had given several different versions of the Molly Ewings incident to mental health professionals and law enforcement officers over the years (R444). Appellant told Maher that he went to the house "to have it out" with Becky (R445). He claimed he carried the knife because he was concerned about a dog (R445). Maher thought having a knife because of fear of a specific dog in a house he had been in previously was "too simplistic" (R447-448). Maher thought it a distortion by Hudson. The witness thought appellant's recitation of stabbing the victim in the hallway was consistent with the physical evidence of the struggle

and blood in the bedroom (R450-451). He considered appellant's admission to police that the victim asked him what he was doing in her bedroom (R452). The version appellant gave in 1986 was not consistent with that given to him (R452-453). When asked if there was an important difference in the report to Maher that Hudson was surprised by the victim in the hall and the version Hudson gave to police that he surprised the victim in her bedroom, the witness responded "I think they were both surprised" (R454) . The witness acknowledged that appellant had previously told mental health professional, Dr. Macaluso in 1990 that he went to the house to steal jewelry to buy cocaine and he told Dr. Wheaton in 1994 that he went to the house because he knew it was open and that there was stuff in it (~456). The witness had no problem reconciling the inconsistent statements (R456). Hudson told Maher he was not planning on taking anything from the house (R456-457). Maher thought appellant minimized his intent to steal when talking to him. He thought appellant was telling part of the story to each mental health professional (R457). The witness recognized that a possible motive was that Ewings could provide information to him as to the whereabouts of Becky Collins who had been in hiding and trying to avoid Hudson (R458-459). It was possible Ewings did not

want to tell him in order to protect Collins (R459). It was also a possible scenario that Hudson realized he was in violation of probation when Ewings began screaming in her bedroom (R459). The witness conceded that some of his post-homicide actions were logical and rational (taking the body and dumping it in a secluded place) (R460). Maher acknowledged that someone with antisocial traits has a disregard for and violates the right of others, characterized by a pattern of law violations. Hudson had a well documented pattern of law violations and disregard for the rights of others (R462). The witness was aware that appellant's history included a sexual assault involving Linda Benjamin and a robbery involving Julie Ossi (R463). When asked what the facts were relating to the Linda Benjamin incident, Dr. Maher stated he believed appellant went to her house to develop or renew a romantic interest in her and when she expressed a lack of interest he inserted a finger into her vagina and hit her when he ran off (R465). He based that on appellant's recital to him (R465). Maher did not obtain the police report providing an account of Ms. Benjamin's version or the post-sentence investigative report. Appellant had given a number of different accounts of that offense, as well as the Ewings crime (R466). Maher did not look at and

consider appellant's incarceration records in 1982 (R466). Appellant having told someone in 1982 that he did not have a drug addiction was of very limited significance (R469). It was possible for someone simply to be a violent person; it was possible Hudson was lying to him. One of the characteristics of antisocial personality disorder is that the person is manipulative and deceitful (R470). He minimized the violence when speaking of his relationship with Becky Collins (R471). He denied to other people threatening to kill Becky when he **was** incarcerated (R472). Hudson has a propensity to violence regardless of his exposure to drugs (R473). He was not aware of the testimony of those who smoked cocaine with Hudson that he was never seen to be violent when under the influence of cocaine (R473). The witness thought that appellant's visit to his probation officer the day before the Ewings' murder (and during an alleged four day cocaine binge) without the probation officer's noticing anything unusual did not effect his opinion (R475).

The jury recommended a sentence of death by a vote of nine to three (Vol. VII, R553). The trial court concurred with the recommendation finding two aggravating factors: prior violent felony conviction and capital felony committed while engaged in the

commission of an armed burglary. The court considered but was not convinced by Dr. Maher's testimony that appellant's mental or emotional disturbance 'was either substantial or extraordinary" and assigned little weight to it; the court found the mitigating factor of substantial impairment of the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. The court found as a nonstatutory mitigator that appellant cooperated with police in locating the victim's body (Vol. III, R397-399).

CROSS-APPEAL

FACTS

At the jury charge conference the prosecutor indicated her desire that the jury be instructed on the "heinous, atrocious or cruel" aggravator (HAC) (Vol. VII, R487). The defense argued that in Hudson's prior trial the prosecution had requested an instruction on the HAC factor and former presiding Judge Griffin had declined to instruct on it; the defense urged the court to conclude that it was an issue that had already been litigated and decided against the state (Vol. VII, R487-488). when the court asked the prosecutor about the law of the **case** argument, the state cited Preston v. State, Ferguson v. State, and Spaziano v. State. The prosecutor argued that the court was not bound by Judge Griffin's earlier order (R488-490). The trial court analogized the situation to the granting of a judgment of acquittal followed by appellate reversal and the prosecutor attempting "another shot" (R492). The state argued that new aggravators were allowed in a resentencing proceeding because it **was** "a clean slate" (R492). The court noted that an earlier trial court had ruled the evidence to be insufficient and in the absence of additional evidence sustained the defense objection on the grounds of law of the case (R492).

Additionally, in a pretrial ruling on February 14, 1995, J. Mitcham granted a defense motion to exclude the use of the "community control" aggravator on ex post facto grounds (Vol. VIII, R623).

Following the jury's nine to three death recommendation, the prosecutor argued in a sentencing memorandum that the court should find the two aggravating circumstances presented to the jury (prior felony conviction and homicide committed while engaged in a burglary), and two other aggravators -- capital felony committed by a person under sentence of imprisonment or placed in community control, F.S. 921.141(5) (a), and heinous, atrocious or cruel, F.S. 921.141(5)(h). (Vol. III, R378-389). The defense filed a response in opposition to the latter two aggravators (R373-377).

The lower court heard argument on sentencing on April 10, 1995, at which the state urged the court to find HAC and community control sentence of imprisonment and the defense argued they should not be found (Vol. VIII, R643-677). The court indicated it would take the matter under advisement (R677). In its April 24, 1995, sentencing order the court found only the two aggravators submitted to the jury (R397-398).

The state cross-appeals (R410).

SUMMARY OF THE ARGUMENT

ISSUE I. The imposition of a sentence of death sub judice is not disproportionate. As this Court previously determined on Hudson's prior direct appeal in 1989 no legitimate argument can be made that this was a domestic killing by an overwrought romantic; the victim was the roommate of appellant's ex-girlfriend. Appellant has a history of violence to women and Hudson indicated to some his presence at the residence was for the purpose of stealing what was there.

ISSUE II. The lower court did not fail to evaluate nonstatutory mitigation. The court simply failed to attach the sufficient weight appellant would desire. The court adequately explained its reasons.

ISSUE III. Appellant was not improperly denied the right to contest the prior violent felony conviction aggravator. Appellant acknowledged the conviction, case law permits the use of hearing evidence at penalty phase and the prosecutor properly avoided the use of prejudicial emotional testimony by the victim.

ISSUE IV. The prosecutor did not utilize any inflammatory or improper comments and arguments; most of the challenges asserted here were unobjected to and thus not preserved for appellate review and did not constitute fundamental error.

ISSUE V. The lower court did not err reversibly in permitting the introduction of brief testimony concerning the unique personal qualities of victim Molly Ewings, consistent with Payne v. Tennessee, 501 U.S. 808, 114 L.Ed.2d 720 (1991) and this Court's precedents.

ISSUE VI. The prosecutor properly exercised its peremptory strikes in a racially non-discriminatory manner; the prosecutor provided a racially-neutral reason for striking juror Siplin which the trial court believed and which was supported by the record. A white juror who had given a similar response was also peremptorily excused by the state.

ISSUE VII. The lower court did not improperly excuse potential jurors for cause based on their capital punishment views since the excused jurors clearly indicated an inability or unwillingness to follow the law and defense counsel, satisfied with their responses, did not seek to rehabilitate them by further questions.

ISSUE VIII. Appellant's contention that the death penalty is being exacted pursuant to a pattern and practice of discrimination on the basis of race, sex and poverty appears not to have been urged below and is therefore procedurally barred. The claim is also meritless.

ISSUE IX. The lower court correctly denied defendant's request since the appropriate sentence for appellant was either death or life imprisonment without eligibility for parole for twenty-five years.

ISSUE X. The Court should continue to reject the contention that F.S. 921.141 (5) (d) constitutes an impermissible automatic aggravator.

ISSUE XI. Appellant was not absent from any critical stage of the proceedings. The claim that he was not escorted to a bench conference during voir dire jury selection is answered by the fact that no request for his immediate presence at the bench was made and Boyett v. State, ___ So.2d ___, 21 Florida Law weekly S535 (Fla. 1996). Hudson's presence was not requested and not required for a defense initiated bench conference or for legal discussion on the admissibility of exhibits.

ISSUE XII. Appellant's allusion to lower court error without argument is not sufficient under Duest v. Duaaer, 555 So.2d 849, 852 (Fla. 1990).

ISSUE XIII. Appellant's challenge to the vagueness of the instruction on the prior violent felony aggravator must be rejected for appellant's failure to submit a proposed correct instruction, the alleged basis for the challenge does not encompass his

circumstances and the aggravator does not, unlike the former HAC instruction, contain terminology confusing to the jury.

ISSUE XIV. The trial court did not improperly lead the jury to believe that responsibility for their actions rested elsewhere. The instructions the court provided were correct.

ISSUE XV. Appellant's claim that the death penalty constitutes cruel and unusual punishment in that it is applied in an arbitrary and capricious fashion was not preserved by presentation in the lower court. The claim is also meritless.

ISSUE XVI. The instant trial was not fraught with procedural and substantive error and appellant's failure to identify such error should preclude the granting of relief.

CROSS-APPEAL ISSUE I. The lower court erred in failing to instruct the jury on the heinous, atrocious or cruel aggravator since the homicide victim was stabbed multiple times and in obvious fear and apprehension when she confronted appellant in her bedroom. The trial court's reliance on the law of the case doctrine was misplaced since no appellate decision in Mr. Hudson's case had previously determined HAC to be inapplicable and this Court has held that a resentencing proceeding constitutes a clean slate and prior lower court determinations are not binding. Preston v.

State, 607 So.2d 404 (Fla. 1992); Hall v. State, 614 So.2d 473 (Fla. 1993).

CROSS-APPEAL ISSUE II. The lower court erred in failing to find that the multiple stabbing of a defenseless woman in her home is heinous, atrocious, or cruel. Hansbrough v. State, 509 So.2d 1081 (Fla. 1987).

CROSS-APPEAL ISSUE III. The lower court erred in concluding that the ex post facto clause precluded applying the community control aggravator of F.S. 921.141(5)(a). The legislature clarified the prior law and did not add a totally new aggravator or otherwise change the elements of the crime.

ARGUMENT

ISSUE I

WHETHER THE DEATH SENTENCE IS DISPROPORTIONATE.

This Court in Hudson's last direct appeal found that the imposition of a sentence of death was not disproportionate for the murder of Molly Ewings. Hudson v. State, 538 So.2d 829, 831-832 (Fla. 1989):

> Hudson also argues that the death penalty is disproportionate in his case and that the trial court erred in giving little or no weight to the mitigating evidence. (FN5) It is up to the trial court to decide if any particular mitigating circumstance has been established and the weight to be given it. Toole v. State, 479 So.2d 731 (Fla. 1985); Daugherty v. State, 419 So.2d 1067 (Fla. 1982), cert. denied, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983). See also Roberts v. State, 510 So.2d 885 (Fla. 1987) (trial court may accept or reject expert testimony just as the testimony of any other witness may be accepted or rejected), cert. denied, U.S. , 108 S.Ct. 1123, 99 L.Ed.2d 284 (1988). Our review of the record reveals no support for Hudson's contentions that the trial judge abused his discretion regarding the mitigating evidence or that he refused to consider any of the testimony Hudson presented in an attempt to mitigate his sentence.
>
> [2] [3] 'Our function in reviewing a death sentence is to consider the circumstances in light of our other decisions and determine whether the death penalty is

appropriate." Menendez v. State, 419 So.2d 312, 315 (Fla. 1982). After reviewing this case, we cannot agree with Hudson that the death penalty is not warranted when compared with other cases. In arguing that, under proportionality review, we should reduce his sentence to life imprisonment Hudson asks us to consider the statutory and nonstatutory mitigating evidence in spite of the trial court's refusal to find much in mitigation. We have already found no error in the trial court's consideration of the aggravating and mitigating evidence. Thus, what Hudson really asks is that we reweigh the evidence and come to a different conclusion than did the trial court. It is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). We must, therefore, decline Hudson's invitation to reweigh the mitigating evidence and place greater emphasis on it than the trial court did.

Hudson relies on several cases in arguing that death is not appropriate in his case. After studying them, however, we find all of them distinguishable. In Wilson v. State, 493 So.2d 1019 (Fla. 1986), the defendant killed his father and young cousin during a heated domestic confrontation. This Court invalidated one of the three aggravating circumstances and, despite the lack of mitigating circumstances, found the death sentence not warranted on the facts of that case.

In comparison the trial judge in the instant case found two valid aggravating circumstances so there is no possibility that he assigned any weight to, or relied on in any was, an invalid aggravating circumstance. Additionally, Hudson did not kill this victim

in a domestic confrontation, heated or otherwise. Instead, Hudson entered **a** home, where he knew he was not welcome and had no right to be, at night and armed with a knife, apparently expecting to find someone (probably his ex-girlfriend) at home. Contrary to Hudson's contention, these facts could easily be seen as demonstrating more than just slight premeditation. There are, therefore, more dissimilarities than similarities between this case and Wilson.

The same is true of Peavy v. State, 442 So.2d 200 (Fla. 1983), and Thompson v. State, 456 So.2d 444 (Fla. 1984). In Peavy this Court threw out one aggravating circumstance, leaving three to be weighed against two mitigating circumstances and remanded for resentencing. In Thompson not only did we find that invalid aggravating circumstances had been used, but we also found that the trial court should not • 832 have overridden the jury's recommendation of life imprisonment. Holsworth v. State, 522 So.2d 348 (Fla. 1988), as Hudson concedes, is also distinguishable as an improper jury override case.

In Proffitt v. State, 510 So.2d 896 (Fla. 1987), we disapproved a death sentence and compared Mason v. State, 438 So.2d 374 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984). Proffitt had no prior conviction of a crime of violence and was given the benefit of the mitigating factor of no significant history; Mason had a prior conviction of violence as does Hudson. Proffitt was not under any type of restraint, Hudson was. There was no evidence that Proffitt was armed when he entered the home he burglarized; Hudson **was** armed. Thus, Hudson's situation is more closely allied to Mason than Proffitt.

> Caruthers v. State, 465 So.2d 496 (Fla. 1985), is also distinguishable from the instant case, based on the strength of the mitigating circumstances, including no significant prior history of criminal activity, and this Court's finding two of the three aggravating factors not to have been established beyond a reasonable doubt. In Ross v. State, 474 So.2d 1170 (Fla. 1985), the defendant killed his wife in a drunken rage. The domestic setting, together with the substantial mitigating circumstances (notably no prior criminal history), distinguishes Ross from this case.
>
> Finally, while arguably a close call, we also find Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), distinguishable. This Court approved all five of the aggravating factors found by the trial court in Fitzpatrick. In view of the three mitigating circumstances, however, this Court stated: "Fitzpatrick's actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer." Id. at 812. Fitzpatrick's experts found his emotional age to be between nine and twelve years, and one characterized him as "crazy **as** a loon." Id. Hudson's mitigating evidence is not **as** compelling as that presented by Fitzpatrick, and we do not find that Fitzpatrick controls the proportionality review in this case.
>
> Based on our review of other cases and the facts of this case, we do not find Hudson's death sentence disproportionate.

It is not clear whether appellant's mention of Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988) is merely an historical notation that this Court previously compared appellant's case to it or

rather it is intended to be urged again in the proportionality analysis. In any event, relief should be denied. In Fitzpatrick there was unanimous opinion of several mental health professionals that both statutory mental mitigators were present, he had an emotional age between nine and twelve years old and was "crazy as a loon". His actions were those of a seriously emotionally-disturbed man-child, not those of a cold-blooded, heartless killer. Id. at 812. In contrast, the trial court found the presence of only one statutory aggravator, the live testimony of Dr. Maher was severely damaged by his cross-examination admissions and his seeming taking at face value the self-serving comments of the defendant as well as his acknowledgment of Hudson's lies, his history of violence and lack of respect for others that Hudson exhibited. Appellant is a manipulative, violent man, not a man-child with an emotional age of nine. Additionally, the trial court erred in failing to find the presence of the HAC factor in this multiple stabbing. See cross-appeal, infra.

In Hudson's prior direct appeal which this Court affirmed at 538 So.2d 829 (Fla. 1989) the jury had returned a recommendation by a vote of nine to three (R863, Case No. 70,093). Appellant emphasizes that the courts subsequently determined that Mr.

Hudson's prior trial counsel rendered ineffective assistance; with the now competent, estimable team of Mr. Donerly and current appellate counsel Driggs -- and after presenting to the jury all that was desired in the way of mitigation -- the recommending jury, the conscience of the community, recommended a sentence of death by a vote of -- nine to three (Vol. VII, R553; Vol. III, R355). It would appear that the juries were less concerned by the performances of counsel than with correctly determining that Mr. Hudson's murder of Molly Ewings appropriately called for the imposition of a sentence of death.

Appellant argues that appellant had a drug addiction of long standing and that he was extremely intoxicated on crack cocaine at the time of the murder. The trial court in considering the mitigating factor of under the influence of extreme mental or emotional disturbance acknowledged Dr. Maher's testimony about cocaine addiction and ingestion but was not convinced that Hudson's condition was either substantial or extraordinary and assigned little weight to it (Vol. III, R398). The court did find from Dr. Maher's testimony that appellant's capacity to appreciate the criminality of his conduct or to conform to the requirements of law was substantially impaired (Vol. III, R399). Appellant appears to

disagree only with the trial court's conclusion that proffered mitigation was not sufficient to outweigh the substantial aggravation found. That the prosecutor chose not to call an expert witness in rebuttal does not mean that Dr. Maher's testimony did not go unchallenged; the vigorous cross-examination belies that including Dr. Maher's admissions that Hudson was not entirely truthful in dealing with him or others (Vol. VI, R433-475). See also testimony of Jasmin Robertson that appellant was not acting unusual (Vol. V, R205); consider appellant's ability to sneak into the residence armed with a knife, to remove the victim's body from the scene, take the victim's car, change his clothes and tell a series of elaborate lies. According to Hudson's sister, Hudson does not like being told what to do (Vol. V, R340-342). Even defense witness Dr. Maher described appellant's propensity to violence irrespective of drugs (Vol. VI, R473). Dr. Maher even acknowledged that Hudson's explanation of taking a knife to the residence because of fear of a dog was "too simplistic" and a "distortion" by Hudson (Vol. VI, R447-448). Hudson told other mental health experts he went to the house to steal jewelry and because it was open and "there was stuff in it" (R456).

Reluctantly, Dr. Maher acknowledged that Hudson's post-homicidal actions were logical and rational (R460).

Appellant contends that precedent requires a finding of disproportionality and a reduction to a sentence of life imprisonment. He cites Nibert v. State, 574 So.2d 1059 (Fla. 1991); Morgan v. State, 639 So.2d 6 (Fla. 1994); Kramer v. State, 619 So.2d 274 (Fla. 1993); White v. State, 616 So.2d 21 (Fla. 1993); Penn v. State, 574 So.2d 1079 (Fla. 1991); Proffitt v. State, 510 So.2d 896 (Fla. 1987); Ross v. State, 474 So.2d 1170 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984).[1] Appellant is not aided by Kramer, supra, where the evidence suggested "nothing more than a spontaneous fight occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk". 619 So.2d at 278. Kramer is hardly comparable to the instant case where the defendant arms himself with a knife

[1]The cited cases of Rembert, Ross, and Proffitt were all cited in appellant's brief on his prior direct appeal (Case No. 70,093) in support of his disproportionality argument and this Court's rejection of the argument in its opinion of Hudson v. State, 538 So.2d 829 (Fla. 1989) should portend an equal rejection here. Rembert involved, inter alia, a concession by the State at oral argument that many in similar circumstances received a less severe sentence, Ross (unlike Hudson) had no prior history of violence, nor did Proffitt (and Proffitt had no weapon prior to entry).

prior to entry, confronts and kills the defenseless resident, who had the temerity to inquire as to his presence in her bedroom and still had the presence of mind afterwards to steal her car, conceal her body and fabricate a story for the police. In Morgan, supra, the defendant was aged sixteen, of marginal intelligence, consumed alcohol and sniffed gasoline the day of the murder and was in a rage during the homicide. In contrast, appellant seemed not to be acting unusual to Jasmin Robertson, had never acted violently on previous occasions when smoking crack cocaine and admitted to other mental health professionals a purpose to steal what was in the residence (Vol. VI, R456). This Court in Morgan found the trial court erred in failing to find age of sixteen as mitigating and found eight mitigators including an absence of history of violence. Here, in contrast, defense expert witness Maher conceded appellant may have lied to him, acknowledged that those with antisocial personalities are manipulative, and that Hudson was violent to women (witness the sexual battery conviction on Linda Benjamin) irrespective of drug use.

Penn, supra, involved a defendant with no significant history of prior criminal activity and the Court found an aggravator (CCP) improperly found. A closely divided Court found the death penalty

disproportionate noting Penn's drug use and his wife telling him that his mother (the victim) stood in the way of reconciliation.[2] Appellant, sub judice, did not submit evidence that he killed Ewings because she stood in the path of a Becky Collins reconciliation. In White, supra, the trial court erroneously found CCP leaving one aggravator and three mitigators (including both statutory mental mitigators). The Court reasoned:

> "While we have found that the death sentence may be imposed in cases involving domestic disputes, in which the defendant had previously committed violent felonies, see, e.g., Lemon v. State, 456 So.2d 885 (Fla.1984), cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985); Williams v. State, 437 So.2d 133 (Fla.1983), cert. denied, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 164 (1984); King v. State, 436 So.2d 50 (Fla.1983), cert. denied, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 163 (1984), those cases did not involve defendants whose mental mitigating factors were as extensive as those presented in the record of this cause. Further, as we stated in McKinney v. State, 579 So.2d 80 (Fla.1991), "This Court has affirmed death sentences supported by one

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[2]Dissenting Justice Grimes pointedly observed that while the defendant had a history of chemical dependency only his confession established drug use on the night of the murder and others testified that he did not appear affected in any way the next day. Similarly, here the testimony of Jasmin Robertson and police officers who dealt with Hudson in locating the body noted his calmness and ability without difficulty to direct the officers to various locations.

> aggravating circumstance only in cases involving 'either nothing or little in mitigation.' " Id. at 85 (quoting Nibert v. State, 574 So.2d 1059, 1163 (Fla.1990), and Songer v. State, 544 So.2d 1010, 1011 (Fla.1989)). Given these circumstances and our duties of appellate review as set forth in State v. Dixon, (FN1) we conclude that the presence of only one valid aggravating circumstance in this case is offset by the substantial mitigating evidence in the record. Consequently, we find that this death sentence is disproportional when compared with similar capital cases where this Court has vacated the death sentence and imposed life imprisonment. McKinney."
>
> (Id. at 25-26)

In the instant case, the effects of use of cocaine at the time of the homicide was not as extensive as in White (he appeared normal to Jasmin Robertson, would not tell the purpose for the knife he was holding in a towel, able to enter the Ewings' premises, remove the body and hide it, create an elaborate fabrication); appellant here did not kill his girlfriend after a jilted relationship but rather a roommate present in the residence. There were two aggravators including a sexual battery conviction demonstrating Hudson's proclivity for violence.

The instant case is more comparable to Pope v. State, So.2d , 21 Florida Law Weekly S257, 259 (Fla. 1996):

> "We disagree with Pope's claim that his death sentence is disproportionate because the killing was a result of a domestic dispute. Pope argues that his death sentence should be reduced to life in prison to comport with the line of cases dealing with murders arising from lovers' quarrels or domestic disputes. See Fead v. State, 512 So. 2d 176 (Fla. 1987); Ross v. State, 474 So. 2d 1170 (Fla. 1985); Blair v. State, 406 So. 2d 1103 (Fla. 1981). Unlike the cited cases, this record contains competent, substantial evidence to support the court's finding that this was a premeditated murder for pecuniary gain, not a heat of passion killing resulting from a lover's quarrel. We conclude that the circumstances establish that Pope's death sentence is proportional to other cases in which sentences of death have been imposed. See Whitton v. State, 649 So. 2d 861 (Fla. 1994); Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L. Ed. 2d 1106 (1991)."

See also Orme v. State, 677 So.2d 258, 263 (Fla. 1996).

Appellant urges here -- apparently seriously -- that the instant homicide should be categorized as a "domestic" dispute. Understandably, trial defense counsel made no effort to sell that contention to the jury. There, he argued:

> "Now, transport that human being with that set of problems to the home of Mollie Ewings on the night of her murder. He looks at the lights. He looks at the cars, pattern of cars that are there, and believes that there's no one home.
>
> He goes through the back door, back door, past the little family dog, and one of two

> things happens. Either Mollie Ewings hears a noise and comes out or he passes the door and Mollie Ewings sees him. In any event, Mollie Ewings screams.
>
> If we know anything about Tim Hudson when he is in that second phase of crack intoxication, the down phase, the irritable phase, the craving phase, that he is tremendously reactive to noise. He tells Mollie Ewings to shut up. That's what he told Detective Childers. Do you think Mollie Ewings shuts up? She's not one of his crack-smoking buddies. She's not used to his nonsense. Mollie Ewings doesn't shut up. Tim Hudson reacts violently and unthinkingly. He stabs Mollie Ewings four times.
>
> (Vol. VII, R541)

Domestic dispute? This Honorable Court should reject Hudson's appellate afterthought urging that the instant homicide constituted a domestic dispute. Not only did the defense not argue it to the jury, the facts would not support it since victim Molly Ewings was not a spouse or even romantically involved with appellant. Moreover, appellant mistakenly believes that a domestic homicide renders his death penalty disproportionate. As this Court explained in Spencer v. State, So.2d , 21 Florida Law Weekly S366 (Fla. 1996), domestic killings do not render a death sentence disproportionate but rather tend to refute the presence of the CCP aggravator and in some instances removal of the CCP aggravator with the presence of mitigation may render the death penalty

disproportionate in a given context. That situation is not presented here since there is no CCP factor to remove from the equation. See also Orme v. State, 677 So.2d 258, 263 (Fla. 1996:

> Third, Orme argues that death is not a proportionate penalty in this case because his will was overborne by drug abuse, and because any fight between the victim and him was a "lover's quarrel." As to his drug abuse, the evidence again is conflicting. Orme paints a portrait of himself as a person rendered conscienceless by drugs. But the State submitted competent substantial evidence that, despite his addiction, Orme was able to hold down a job and hide his drug abuse from his family. On the night of the murder he was able to drive a car without incident and talked in a normal manner with persons he encountered, Moreover, we decline to find that the instant homicide was a lover's quarrel. The argument supporting such a claim is simply too tenuous, resting primarily on a relationship with the victim that had ended. There is no evidence the murder was sparked by an emotional reaction to this breakup. Rather, competent substantial evidence shows this killing to be a strangulation murder designed to further both a sexual assault and a robbery, not a "lover's quarrel." Upon consideration of all of the circumstances of this case, we find death to be a proportionate and permissible sentence.

In the instant case it is similarly simply too tenuous to attribute the instant homicide to an emotional reaction to a breakup, especially since the victim had no romantic involvement with

appellant and Hudson mentioned to law enforcement officers the availability of things to take.

Appellant in his proportionality analysis next attempts to minimize the effect of the finding in aggravation of a prior violent felony conviction.[3] The defense in closing argument to the jury conceded that the State had proven its two aggravators (Vol. VII, R526). Hudson argued that the robbery was "essentially a purse-snatching" (R527) but admitted "none of that is to say that these are not serious crimes" (R528). Appellant observes that the trial court's finding of the prior violent felony conviction mentions only the sexual battery of Linda Benjamin and concludes that the sentencing judge agreed with the defense assertion that the robbery conviction was not a serious matter. Since the trial judge offered no explanation about the Ossi robbery, no inference can be drawn at all. It is at least as likely that the sentencing judge deemed it unnecessary to address the Julia Ossi robbery of 1982 since Florida Statute 921.141(5)(b) was established by the

[3]Appellant in Sections D and G of Issue I contends that substantial mitigation below was unrecognized and that the court neglected to evaluate nonstatutory mitigation. Since such argument is repeated in Issue II, appellee will not repeat the State's response here but rely on the Issue II discussion.

uncontested -- even admitted -- sexual battery conviction upon Linda Benjamin. This court has found the death penalty proportionate even where only one aggravator is present. Ferrell v. State, ___ So.2d __, 21 Florida Law Weekly S388 (1996) and here as there the aggravator was a similar crime of violence against a woman, confirming defense expert Maher's testimony that irrespective of drugs Hudson has a propensity to violence (Vol. VI, R473).

Appellee understands that this Court performs proportionality review as part of its appellate function in capital cases. The instant case remains as this Court found in 1989 not to be a domestic killing.

> 'Hudson did not kill this victim in a domestic confrontation, heated or otherwise. Instead, Hudson entered a home, where he knew he was not welcome and had no right to be, at night and armed with a knife, apparently expecting to find someone (probably his ex-girlfriend) at home.
>
> (Id. at 831)

As in 1989 when this Court rejected the asserted similarity to the domestic confrontation in Wilson v. State, 493 So.2d 1019 (Fla. 1988), so too is appellant's reliance on the domestic homicide in Penn v. State, 574 So.2d 1079 (Fla. 1991) and Blakely v. State, 561

So.2d 560 (Fla. 1990) inapposite. Similarly, reliance on Livingston v. State, 565 So.2d 1288 (Fla. 1988) is inappropriate. The court there was moved by the defendant's age of seventeen and childhood beatings that had been inflicted. Hudson was not abused as a child (Vol. VI, R437). And in Smalley v. State, 546 So.2d 720 (Fla. 1989), unlike the instant case this Court opined that the defendant did not intend to kill the infant victim.

ISSUE II

WHETHER THE TRIAL COURT IMPROPERLY FAILED TO EVALUATE NONSTATUTORY MITIGATION.

The trial court in its sentencing order found in aggravation that the defendant was previously convicted of a felony involving the use or threat of violence, a sexual battery upon Linda Benjamin and that the capital felony was committed while the defendant was engaged in the commission of an armed burglary (entering the home of victim Molly Ewings armed with a knife with which he stabbed her) (Vol. III, R397-398).

With respect to mitigating factors the court found:

> 'II. STATUTORY MITIGATING FACTORS
>
> A. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. Dr. Michael Maher, a psychiatrist, testified, without contradiction, that the defendant, at the time of the murder, was suffering from an extreme mental or emotional disturbance because of cocaine addiction and ingestion, a personality disorder and a deprived background. The court was not convinced by this testimony that the defendant's condition in this regard was either substantial or extraordinary and the court assigns little weight to this mitigating circumstance.
>
> B. The capacity of the defendant to appreciate the criminality of his

> conduct or to conform his conduct to the requirement was substantially impaired. Dr. Maher's testimony supports a finding by the court that this mitigating circumstance indeed existed at the time of the murder.
>
> III. NON-STATUTORY MITIGATING CIRCUMSTANCES There was testimony concerning defendant's earlier years and family background and, though unfortunate, the court finds that this testimony did not establish anything substantial or extraordinary. It was established by the evidence, however, that the defendant cooperated with the police in locating the body of the victim and the court finds this to be a single non-statutory mitigating circumstance."
>
> (R398-399).

Appellant argues that the state did not offer any evidence in rebuttal to the mitigation presented, but defense witness Dr. Maher's testimony, including both direct and cross-examination, rendered the calling of contrary witnesses unnecessary. Dr. Michael Maher, for example, provided an opinion regarding Hudson's alleged family instability during childhood (Vol. VI, R397-398) but acknowledged that he did not talk to anyone other than appellant in reaching the conclusion about Hudson's family background, educational history, and cocaine abuse. He did not interview any witnesses or contact any family members. He thought it unimportant

to talk to appellant's siblings (R 433-434). Hudson told Maher that he was not physically or otherwise abused by his parents who loved him (R437-438). Maher, who opined that the children in this family did not develop into law-abiding citizens, got the family information from Hudson and acknowledged that in evaluating someone one can not rely always on self-report especially when a defendant is in a capital trial (R441-444). Dr. Maher knew that Hudson had given several different versions of the Ewings' homicidal incident to mental health professionals and law enforcement officers over the years (R444). The version Hudson gave in 1986 was not consistent with that given to him (R452-453). Maher thought appellant was telling part of the story to each mental health professional (R456) and it was possible Hudson was lying to him (R470). Dr. Maher was even unaware of the testimony of appellant's colleagues that Hudson was never seen to be violent when using cocaine (R473). The trial court could permissibly give minimal or no weight to the defense expert testimony since contradicted by the facts of the case. Walls v. State, 641 So.2d 381 (Fla. 1994); Wuornos v. State, ___ So.2d ___, 21 Florida Law Weekly S202 (Fla. 1996).[4]

[4]This is especially so given the testimony of appellant's sister, Deborah Hudson, that appellant had no respect for his mother and

It is inaccurate to suggest that the lower court failed to take into account appellant's use of cocaine and the attendant characteristics from such use. The lower court found:

> 'The capacity of the defendant to appreciate the criminality of his conduct or to conform to the requirements was substantially impaired. Dr. Maher's testimony supports a finding by the court that this mitigating circumstance indeed existed at the time of the murder."
>
> (Vol. III, R399).

It makes little sense to require the trial court to repeat itself in the nonstatutory mitigating section its "substantial impairment" findings contained in the statutory mitigation section.

Appellant complains that the trial court apparently should have cited the testimony of Gerald Bembow that appellant would act paranoid when using cocaine but that testimony was effectively reduced by his testimony that Hudson was mad at Becky Collins and made a threat about her, had a wrapped knife in a towel in his hand for which he refused to offer an explanation as to its intended use (Vol. VI, R375-378). Gerald and Anthony Bembow and Kelley Doster

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after the divorce would not listen to his father -- appellant did what he wanted to do. He was not kicked out of the house and his mother tried to teach him right from wrong but he would not listen (R342).

both stated they never saw Hudson become violent when using cocaine (R356, 362, 378).

As to Hudson's alleged remorse expressed to police officers, suffice it to say that the trial court found as mitigation that appellant had cooperated with the police in locating the body of the victim (Vol. III, R399) and the weight of such mitigation is minimized by appellant's delay in furnishing the information while the body decomposed in the bushes and his initial false statements attempting to fix the blame on the mysterious and non-existent Peabody. In addition to witnesses' testimony that appellant was non-violent when using drugs (and this does not aid in explaining his conduct toward homicide victim Molly Ewings) defense mental health expert Dr. Maher admitted, after noting appellant's behavior to sexual battery victim Linda Benjamin and ex-girlfriend Becky Collins (Vol. VI, R463, 471), that appellant has a propensity to violence regardless of his exposure to drugs (R473) and that Hudson had antisocial traits characterized by a well-documented pattern of law violations and a disregard for the rights of others (R462). While Dr. Maher proffered a scenario that Hudson was 'surprised" when he confronted Ewings at knife point in her residence, he admitted Hudson had told other mental health professionals of a motive to steal (R456) and he conceded an equally plausible

scenario **was** Hudson's desire to learn the whereabouts of the hiding Becky Collins whom he wanted to see or his realization by Ewings' discovery of his presence that he was in violation of his probation (R458-459). In any event his post-homicidal actions removing the body and secreting it in the bushes were logical and rational (R460).[5]

It would seem that appellant's real complaint is that the lower court failed to give sufficient weight to the mitigating factors that were found.

See Atkins v. Sinaletary, 965 F.2d 952, 962 (11th Cir. 1992); Nixon v. State, 572 So.2d 1336, 1334 (Fla. 1994) (clear that trial court considered and rejected all mitigating evidence offered); Robinson v. State, 574 So.2d 108, 112 (Fla. 1991) (trial court's comprehensive order discussed all mitigating evidence presented and reflected it considered it and weighed it); Gunsby v. State, 574 So.2d 1085, 1090 (Fla. 1991)(resolution of factual conflicts is solely the responsibility and duty of the trial judge and as appellate court we have no authority to reweigh that evidence); Zeigler v. State, 580 So.2d 127, 130 (Fla. 1991)(no error in weight trial judge assigned to mitigating evidence; judge could properly

[5]As noted previously, Dr. Maher's testimony regarding his parents not supporting Hudson in his school work was weak.

consider witnesses' relationship to defendant and their personal knowledge of his actions in deciding what weight to give their testimony); Sochor v. State, 580 So.2d 595, 604 (Fla. 1991) (deciding whether family history establishes mitigating circumstances is within trial court's discretion); Pettit v. State, 591 So.2d 618, 621 (Fla. 1992)(decision as to whether mitigation has been established lies with the trial court); Ponticelli v. State, 593 So.2d 483 (Fla. 1991), vacated on other grounds, 113 S.Ct. 32 (1992), affirmed on remand, 618 So.2d 154, (Fla. 1993) (rejecting defense argument that court failed to consider unrebutted mitigating evidence; trial court found doctor's testimony "speculation" and there was competent, substantial evidence to support rejection of the mitigating evidence); Sireci v. State, 587 So.2d 450 (Fla. 1991)(the decision as to whether a particular mitigating circumstance is established lies with the trial judge; reversal is not warranted simply because an appellant draws a different conclusion; since it is the trial court's duty to resolve conflicts in the evidence, that determination should be final if support by competent, substantial evidence); Hall v. State, 614 So.2d 473 (Fla. 1993)(record supports trial judge's conclusion that mitigators either were not established or entitled to little weight); Sims v. State, ___ So.2d , 21 Florida Law

Weekly S320 (Fla. 1996); Kilgore v. State, ___ So.2d , 21 Florida Law Weekly S345, 347 (Fla. 1996); Jones v. State, 648 So.2d 669, 680 (Fla. 1995); Swafford v. State, 533 So.2d 270, 278 (Fla. 1988); Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984); Spencer v. State, ___ So.2d , 21 Florida Law Weekly S366 (Fla. 1996).

The trial court adequately complied with the dictates of Campbell v. State, 571 So.2d 415 (Fla. 1990).[6] Cf. Barwick v. State, 660 So.2d 685 (Fla. 1995). Any deficiencies in the form of the sentencing order is harmless error. see Wickham v. State, 593 So.2d 191 (Fla. 1991).

Hudson's claim is without merit.

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[6]Appellant's reliance on Lockett v. Ohio, 438 U.S. 586 (1978) is unavailing since the trial court did not refuse to permit the introduction or consideration of any mitigating evidence.

ISSUE III

WHETHER APPELLANT WAS IMPROPERLY DENIED THE RIGHT TO CROSS-EXAMINE THE VICTIM OF HIS PRIOR VIOLENT FELONY.

Officer Keith Bush testified that he responded to a complaint generated by Linda Benjamin at 1:00 a.m. on June 1, 1982. Entry to her residence had been made through a bedroom window. There were signs of a disturbance in the bedroom (Vol. V, R276-279). Defense counsel objected to the officer repeating what Benjamin told him claiming a denial of the opportunity to confront witnesses. Appellant acknowledged he had been convicted ("He plead to it. I am not saying there is anything wrong with the conviction" -- R281). When the court asked if counsel had deposed Benjamin, defense counsel Donerly replied:

> 'That is what I was to do and I tried to depose her several times and I was put off and I guess this is the result of it."
>
> (R282).

The court allowed the witness to testify that Benjamin told him a man appeared in her bedroom when she awakened. She told him to get the hell out; he pushed her on the bed, inserted his finger into her vagina, attempted to insert his penis. She fought with the black male and screamed, the children also screamed and the assailant ran out of the house (R282-283). Appellant's judgments

of convictions, Exhibits 2 and 3, were admitted without objection (R286-288). In his closing argument to the jury defense counsel acknowledged that the state had proven the sexual battery conviction of Linda Benjamin (Vol. VII, R526). Defense counsel noted that the jury had received "a rather dry description from Officer Bush of what happened in the sexual battery" (R526). Counsel then argued that Dr. Maher testified that appellant told him he was attempting to rekindle a romantic relationship and "obviously went wrong" and that Kelley Doster testified that appellant and Linda Benjamin were friends (R526-527). Defense counsel then mitigated this aggravator by noting that it was a second degree felony, "the lowest and least serious degree of sexual battery" (R527). Counsel acknowledged Hudson's prior conviction of a violent crime (R530).

This Court has held that it is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction involving the use or threat of violence to the person rather than the bare admission of the conviction. See Tompkins v. State, 502 So.2d 415 (Fla. 1986); Waterhouse v. State, 596 So.2d 1008 (Fla. 1992); Rhodes v. State, 547 So.2d 1201 (Fla. 1989). In Breedlove v. Sinsletary, 595 So.2d 8 (Fla. 1992), this Court denied habeas corpus relief on a claim of

ineffective assistance of appellate counsel where at trial during the sentencing proceeding a Los Angeles detective testified about Breedlove's prior crime and what the sexual battery victim had told him. The Court denied relief, explaining:

> 'In Rhodes we held that playing a tape recording of the victim's recounting the crime was error because Rhodes could not cross-examine that recording. Here, however, the witness was available for cross-examination. (emphasis supplied) (Id. at 10).

See also Wyatt v. State, 641 So.2d 355 (Fla. 1994) (rejecting defense contention that state presented improper hearsay testimony of police officers concerning Wyatt's prior felonies for failure to preserve for appeal and "in any event, hearsay evidence of this nature is admissible in the penalty phase" Id. at 360).

The Court observed in Finney v. State, 660 So.2d 674, 683 (Fla. 1995) that victims of prior violent felonies should be used to place the facts of prior convictions before the jury with caution; this is particularly true when there is a less prejudicial way to present the circumstances to the jury. The court explained that such caution is appropriate because of the potential that the

jury will unduly focus on the prior conviction if the underlying facts are presented by the victim of that offense.[7]

Appellant's attempt to equate his situation with that in Gardner v. Florida, 430 U.S. 349 (1977) is unpersuasive. The defendant in Gardner did not have the opportunity to address or respond to sealed materials in a pre-sentence investigation report; appellant Hudson had the opportunity to respond to the conviction for the Lisa Benjamin sexual battery. He could have taken the stand and given his version -- (or blame it on the mysterious, non-existent Peabody as he originally did in the Molly Ewings investigation) or present his version through surrogates like Dr. Maher as he did do (and avoid cross-examination).

Appellant's claim should be rejected.

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[7]It appears that the state was attempting to honor the concerns expressed in Finney, to avoid problems that might arise from an emotional recalling of the events on the stand by the sexual battery victim. Defense counsel acknowledged there was nothing wrong with the conviction and that he had tried to depose Ms. Benjamin but "was put off" (Vol. V, R281-282). The matter of fact recitation by Officer Bush was less damaging than requiring victim Benjamin and as the defense closing argument indicated the defense was able to put a positive spin on the incident. Cf. Long v. State, 610 So.2d 1268 (Fla. 1993).

ISSUE IV

WHETHER THE PROSECUTOR'S ALLEGEDLY INFLAMMATORY AND IMPROPER COMMENTS AND ARGUMENTS RENDERED APPELLANT'S SENTENCE UNFAIR AND UNRELIABLE.

Appellant complains here about the prosecutor's comment in opening statement about the victim being found decomposing, essentially nude, being infested by bugs (Vol. V, R160). There was no objection so the issue has not been preserved for appellate review. Mordenti v. State, 630 So.2d 1080 (Fla. 1994). It was also supported by the testimony of Captain Price (Vol. VI, R388).[8]

Appellant's complaint about the prosecutor's comments during voir dire examination (Vol. IV, R67, 72, 107) similarly were unobjected to and cannot form the basis for initial challenge here. See Mordenti, supra. Moreover, her comments constituted neither fundamental error or error of any kind.

With respect to the prosecutor's closing argument (Vol. VII, R505-525), the comment at R516 regarding the state of decomposition of the victim's body -- as stated above -- was neither objected to nor was it unsupported by the evidence (see testimony of Price). Appellant argues that at R508 the prosecutor improperly argued

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[8]That Mr. Hudson is annoyed on appeal to be reminded of his handiwork is hardly a matter of serious consequence. See Muehleman v. State, 503 So.2d 310 (Fla. 1987).

without supporting evidence that Hudson reported to his probation officer the day before the crime and appeared normal. There is no such comment at R508 but at R511 the prosecutor made such an observation -- unobjected to there and thus not preserved for appeal -- which **was** supported in the cross-examination testimony of Dr. Maher (R475). Similarly, the comment at R515 about the availability of crack cocaine in 1982 was unobjected to and did not amount to fundamental error requiring the trial court's order for an unrequested mistrial. Moreover, in Dr. Maher's testimony, appellant had told someone in 1982 that he did not have a drug addiction.

Appellant complains that the prosecutor argued about the victim's suffering -- again no objection below for appellate preservation, Certainly, there is nothing improper in reviewing the facts of the murder. The prosecutor's reference to the victim's daughter's testimony was appropriate (R523-524) and even carried the instruction not to consider it in aggravation. Appellant complains about the prosecutor's reference to four mental health experts retained by the defense -- the only instance where the defense interposed an objection below (R520-521) -- and the trial court ruled that the defense could respond in its closing argument (R521) which it did by arguing that the state could have

subpoenaed whatever experts it wanted (R532). The prosecutor's argument was not improper given the cross-examination testimony of Dr. Maher who admitted that appellant had given several different versions to mental health professionals over the years (R444) and that statements of the incident Hudson gave to Maher were inconsistent with and contradictory to those given to Dr. Macaluso and Dr. Wheaton, among others (R447-457).[9]

The prosecutor's argument at R510 -- challenged here but not below -- was a permissible form of advocacy urging that Hudson's voluntary ingestion of cocaine promptly upon release from jail should not be deemed mitigating. There was nothing improper in the prosecutor's unobjected to argument that justice was due to Molly Ewings as well as Hudson and that there was no room in the facts for mercy to appellant (R523-524). In short, appellant's claims must be rejected since the arguments challenged here were not preserved by objection below. Mordenti, supra; Davis v. State, 461 So.2d 67 (Fla. 1984); Rhodes v. State, 638 So.2d 920 (Fla. 1994). They did not constitute fundamental error under State v. Smith, 240 So.2d 807 (Fla. 1970); Sochor v. State, 580 So.2d 595, 601 (Fla. 1991); Hopkins v. State, 632 So.2d 1372, 1374 (Fla. 1994).

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[9]There was no impermissible shifting of the burden; it is the defense burden to demonstrate mitigation.

Finally, the arguments constituted legitimate advocacy; any error would be harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). As noted in Muehleman v. State, 503 So.2d 310, 317 (Fla. 1987)("We cannot, however, rewrite on the behalf of the defense the horrible facts of what occurred or make the slaying appear to be less reprehensible than it actually was.").

ISSUE V

WHETHER THE TRIAL COURT ERRED REVERSIBLY IN PERMITTING THE ADMISSION OF VICTIM IMPACT EVIDENCE.

Testimony regarding the personal characteristics of the victim has been authorized by the legislature and approved by the courts. Florida Statute 921.141(7) (1992); State v. Maxwell, 647 So.2d 871 (Fla. 4th DCA 1994), approved 657 So.2d 1157 (Fla. 1995); Stein v. State, 632 So.2d 1361 (Fla. 1994); Windom v. State, 656 So.2d 432, 438 (Fla. 1995); Archer v. State, ___ So.2d , 21 Florida Law Weekly S119 (Fla. 1996); Consalvo v. State, ___ So.2d , 21 Florida Law Weekly S423 (Fla. 1996); Branch v. State, ___ So.2d ___, 21 Florida Law Weekly S497 (Fla. 1996)("Few types of evidence can demonstrate the victim's uniqueness as an individual more aptly than a photo of the victim taken in his or her life before the crime"). The Court should continue to reject the defense disagreement with Windom.

Appellant seems to complain that the prosecutor used the victim's daughter's testimony first, prior to the establishment of a statutory aggravator; it does not appear that this specific objection was urged below and must be considered procedurally barred. See Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990). Even if this 'order

of proof" challenge were properly preserved and deemed to constitute error, the fact that the testimony was very brief (R177-182), the contents were a proper commentary on the qualities of the victim and contained no improper opinions as to the appropriate penalty deserved [and the prosecutor in closing statement specifically informed the jury not to consider it as aggravation -- Vol. VII, R522]; any error was de minimus and harmless given the brutal, unprovoked circumstances of the crime and the multiple aggravators. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Windom, supra.

ISSUE VI

WHETHER THE STATE PROPERLY EXERCISED ITS PEREMPTORY STRIKES IN A RACIALLY NONDISCRIMINATORY MANNER.

Appellant next contends that the state improperly excused peremptorily a black juror, Siplin, in violation of State v. Neil, 457 So.2d 481 (Fla. 1984), and its progeny. The record reveals:

> "MS. COX: Okay. And the people who have joined us, I guess, I really haven't addressed you yet.
>
> Any of the four people who have joined us who think that under no circumstances you'd be capable of recommending the death penalty in this case?
>
> PROSPECTIVE JURORS: (No response.)
>
> MS. COX: Okay. And I talk about these things now because I don't want anybody to not know what they're getting into. I mean I want everybody to go into there knowing exactly what the process is about.
>
> Because as I said, once we go beyond this, it's not necessarily too late, but there's no more opportunity to have direct conversation with the attorneys. It's possible that in the course of these proceedings not only will you see Mr. Hudson here, but you will hear from members of his family. People who will -- who obviously care for him and you'll realize that your decision is going to have an effect on them.
>
> Now, knowing that, is there anybody here who thinks they would be incapable of recommending the death senalty when Mr. Hudson's mother is sitting in the courtroom, or his sister, or his brother or his father?
>
> Anybody here who that would just be so much pressure that even though you know it's right, and even though you know the lay

requires it, you don't want to be in any way a part of saying that in front of his family members who didn't do anything?

MR. SIPLIN: (Indicating)"

(emphasis supplied) (Vol. IV, R25-26).

* * *

"MS. COX: Okay. And you're Mr. Siplin?

MR. SIPLIN: Yes, uh-huh.

MS. COX: I'm sorry.

MR. SIPLIN: Yes.

MS. COX: And is your position that under any circumstances you would not be able to recommend the death penalty if the -- if you heard from family members, the defendant, and they were in the courtroom?

MR. SIPLIN: Well, it would be a lot of doubt in my mind because I'm a strong family man and I don't know if seeing his family in the courtroom would affect me somehow make my decision."

(R26-27).

* * *

"MS. COX: Okay. Anybody had a close friend or a family member whose been arrested?

MR. SIPLIN: (Indicating)

MS. CASKEY: (Indicating)

MS. WILLIAMS: (Indicating)"

(R30).

* * *

'MS. COX: What was that person's relationship to you?

MR. SIPLIN: That was my nephew.

MS. COX: Were you present or close enough to him that you were familiar with the facts and circumstances that led to his charge?

MR. SIPLIN: No, I wasn't,

MS. COX: Okay. Did that occur here in Hillsborough County?

MR. SIPLIN: Yes, it did.

MS. COX: Do you have an opinion as to whether the outcome of **his case was fair?**

MR. SIPLIN: I believe it was.

MS. COX: Anything you know about -- anything about what you know about the case that would cause you to harbor any bad feelings about the court system?

MR. SIPLIN: No.

MS. COX: The State Attorney's office:

MR. SIPLIN: No.

MS. COX: Or law enforcement?

MR. SIPLIN: No."

(R32).

The prosecutor subsequently requested **a** peremptory challenge on Siplin and the defense objected on Neil grounds. The prosecutor explained:

'MS COX: And, Your Honor, he -- Mr. Siplin, although he was equivocal about whether or not he would be able to render a death recommendation with the defendant's family in the courtroom, he said he **was a** strong family man and it would be very difficult for him. So I don't think he raised a level of cause, on the other hand, his answer gave me concern.

MR. DONERLY: I thought he **was** reasonably well rehabilitated.

THE COURT: On the other hand, that is a race neutral reason. If he weren't **a** black man and you wanted to peremptorily challenge him, I think we would all understand why. So that being the standard, I'm going to find that is a sufficient reason.

MR. DONERLY: I just wish that our objection be clear on that, Your Honor.

THE COURT: Okay."

(Vol. IV, R58-59).

Appellant contends that the-explanation was pretextual, not race neutral and not supported by the juror's answers. The prosecutor was not using a pretext to eliminate black jurors. The record reflects that a white juror who similarly had indicated -- **as** did Siplin -- a concern about returning a death recommendation because of the pressure of saying that in front of the defendant's family members -- prospective juror Del Valle -- was also stricken peremptorily by the prosecutor (Vol. IV, R26, R104). Appellant predicates his entire argument on the footnote observation that the trial court rejected a state peremptory excusal request on Rhonda Williams (Vol. IV, R80-81) but the court's action does not reflect a recognition that the prosecutor **was** acting pretextually only that the court's conclusion ("I think she's answered all the questions appropriately" -- R81) differed from the prosecutor's stated concern that the juror may not have been entirely forthcoming in disclosing both her nephew's and brother's criminal charges or convictions.

In Melbourne v. State, 679 So.2d 759 (Fla. 1996) this Court after reviewing Parkett v. Elem, 514 U.S. , 131 L.Ed.2d 834 (1995) issued guidelines encapsulating existing law to be used

whenever a race-based objection to a peremptory challenge is made. The Court explained that when the trial court asks the proponent of the strike to explain the reason for the strike:

> "[3-9] At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2).[6] If the explanation is facially race-neutral' and the court believes that, given all the circumstances surrounding the strike,[8] the explanation is not a pretext, the strike will be sustained (step 3). The court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness.[9] Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination.[10]
>
> (Id. at 764).

The Court added:

> "[10-12] Voir dire proceedings are extraordinarily rich in diversity and no rigid set of rules will work in every case.[11] Accordingly, reviewing courts should keep in mind two principles when enforcing the above guidelines. First, peremptories are presumed to be exercised in a nondiscriminatory manner.[12] Second, the trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous.[13] The right to an impartial jury guaranteed by article 1, section 16, is best safeguarded not by an arcane maze of reversible error traps, but by reason and common sense."
>
> (Id. at 764-765).

In the instant case the prosecutor's stated reason was both reasonable and nonracial. The claim must be rejected.

Finally, even if the issue were deemed to be meritorious, relief should be denied since the claim was not preserved for appellate review. Appellant accepted the jury without renewing his Neil challenge (Vol. IV, R134). See Joiner v. State, 618 So.2d 174 (Fla. 1993).

ISSUE VII

WHETHER THE TRIAL COURT IMPROPERLY EXCLUDED POTENTIAL JURORS ON THE BASIS OF THEIR VIEWS ON CAPITAL PUNISHMENT.

Appellant boldly states that six jurors were improperly excused for cause based on their response to questions about their ability to follow the law and to give a recommendation of death or life imprisonment (Brief, p. 70). Initially, he alludes to potential jurors Motes, Downs and Hearsum. The colloquy with Motes reveals:

> "MS. COX: I'm sorry, Motes. Mrs. Motes, what is your concern?
> MS. **MOTES:** I **wrote a letter in telling** them that I cannot **say** someone is guilty, and I tried to get out of this, but they wouldn't let me. **And there's no way I could say someone is guilty of a crime I never saw.**
> **MS. COX:** Okay. Just to follow-up on **that.** In this case you're not going to be asked to say whether or not he's guilty or not. What you'll be asked is to tell the judge whether or not he should be sentenced to life in prison without the possibility of parole or the death penalty.
> MS. **MOTES:** I understand that, but there's no way I could do that.
> MS. COX: so you're incapable of rendering any kind of --
> MS. **MOTES: No."**
>
> (R16-17).

The colloquy with Downs is as follows:

> "MS. COX: Mr. Downs?

MR. DOWNS: I don't believe in the electric chair.

MS. COX: Are you saying under no circumstances then you could recommend that the death penalty be imposed in this case?

MR. DOWNS: No."

(R17).

And Ms. Hearsum stated:

"MS. COX: Mrs. Hearsum?

MS. HEARSUM: Uh-huh. I don't think I could pass that judgment either.

MS. COX: Okay. And I just want to make sure that I'm clear. I certainly don't mean to quarrel with anybody. I just want to make sure that we get everybody's position clear for the record.

Are you saying that under no circumstances you could find or recommend to Judge Padgett that a sentence of death be handed down?

MS. HEARSUM: Absolutely not.

MS. COX: No matter what the facts and evidence are?

MS. HEARSUM: No.

THE COURT: Okay. Ms. -- Counsel, approach the bench.

MS. COX: Okay."

(R17-18).

Defense attorney Donerly initially noted that he had a right to question the jurors prior to their being excused but wanted to "confer with co-counsel" (R18). Donerly told the court: 'Let me talk to everybody and see if they're willing to let them go at this point." (R18). After conferring Donerly reported that he was "authorized to let them go" (R19). The removal of Motes, Downs,

and Hearsum clearly comported with the requirements of Wainwright v. Witt, 469 U.S. 412, 83 L.Ed.2d 841 (1985) as their answers were sufficient to demonstrate to the trial judge observing their demeanor an inability or unwillingness to perform their duty and render a recommendation on sentencing. Appellant complains that these three jurors were not asked follow-up questions to determine their ability to listen to instructions. It was not necessary for additional questions in light of the clarity of their expressed views and defense counsel specifically declined the court's invitation for further inquiry. See concurring Justice Stevens' opinion in Witt, supra, noting that significance can be attached to counsel's failure to object or seek clarification. 83 L.Ed.2d 841, at 859-860.

Appellant next focuses on prospective juror Menendez. After initially indicating non-verbally to questions by prosecutor Cox an inability to vote for the death penalty, this exchange took place:

> "MS. COX: All right. And let me just go back and talk to you a little bit. You're Mrs. Pulgaron. I'm sorry. I'm looking at the wrong -- you're Jennifer Menendez.
>
> MS. MENENDEZ: (Nodding head affirmatively.)
>
> MS. COX: And I guess basically what I'm asking you is when you go back to the jury room in this case, do you think that under no circumstances you would be able to recommend

to Judge Padgett that Timothy Hudson be sentenced to death?

MS. MENENDEZ: Yes, ma'am."

(R23).

Thereafter, the state moved to excuse Menendez for cause:

"MS. COX: Your Honor, I think that Jennifer Menendez was a cause.

THE COURT: What do you think?

MR. DONERLY: Jennifer Menendez, I don't have any notes on Jennifer Menendez. What did she say?

MS. COX: She said about the family, she couldn't recommend the death penalty.

MR. DONERLY: I thought it was McElroy.

THE COURT: She did, too, but she rehabilitated herself. She, remember the convoluted question, she said she would reject the cocaine business.

MR. DONERLY: I didn't even take a note about that. I have half of my thing taken up with McElroy. I don't have a thing on Menendez.

THE COURT: I agree with Ms. Cox. We'll let her go."

(R57-58).

Appellant appears to be arguing that the prosecutor's queries at R25-26 were improper; the state answers those questions were not directed to the now-challenged Menendez, were not objected to in the lower court and thus may not be urged for the first time on appeal -- Steinhorst v. State, 412 So.2d 332 (Fla. 1982) -- and are irrelevant to the issue whether Menendez was properly stricken. Her responses at R23 clearly demonstrated an inability to follow

the law since under no circumstances would she be able to recommend death.

Finally, appellant points to jurors Grattan and Vasquez. Juror Grattan stated:

> "I could not recommend a death penalty for someone.
> MS. COX : Under no circumstances?
> MS. GRATTAN: Right."
> (R120).

Ms. Vasquez was a nurse and 'I've taken a pledge to preserve life" (R120).

> "MS. COX: Do you think that by your profession that that is going to make it very difficult or impossible for you to recommend someone to death because it's inconsistent?
> MS. VASQUEZ: It might be."
> (R121).

The defense neither made any attempt to ask rehabilitating questions or interposed any objection. Obviously, defense counsel was satisfied by the answer, tone and demeanor that excusal was proper. The trial court properly applied Wainwright v. Witt, 469 U.S. 412, 83 L.Ed.2d 841 (1985). See also Castro v. State, 644 So.2d 987, 989 (Fla. 1994); Marquard v. State, 641 So.2d 54, 56 (Fla. 1994); Peterka v. State, 640 So.2d 59 (Fla. 1994); Hannon v. State, 638 So.2d 39, 41 (Fla. 1994); Taylor v. State, 638 So.2d 30,

32 (Fla. 1994); Foster v. State, 614 So.2d 455, 462 (Fla. 1992); Johnson v. State, 608 So.2d 4, 8 (Fla. 1992).

ISSUE VIII

WHETHER APPELLANT'S SENTENCE OF DEATH IS BEING EXACTED PURSUANT TO A PATTERN AND PRACTICE OF DISCRIMINATION ON THE BASIS OF RACE, SEX AND POVERTY.

Appellant does not identify where in the record this claim was presented to the lower court for consideration; if the trial court did not rule on such an issue, appellant is precluded from initiating it in this Court. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990).

Additionally and alternatively, the claim is meritless. See McCleskey v. Kemp, 481 U.S. 279, 95 L.Ed.2d 262 (Fla. 1987); Foster v. State, 614 So.2d 455 (Fla. 1992).

Appellee respectfully requests the Court to specifically find that this claim is procedurally barred for the failure to present it below, as well as being meritless.

ISSUE IX

WHETHER APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BY THE COURT'S DENIAL OF THE REQUEST TO INSTRUCT THE JURY THAT A LIFE SENTENCE WOULD BE WITHOUT PAROLE.

At the jury charge conference this colloquy ensued:

> "MR. DONERLY: Your Honor, the next point is I'm going to request that the State instruct on present penalty law rather than the law of 1986. Present penalty law, 775.982, is that the alternatives of the death penalty is life in prison with no possibility of release.
>
> While the defendant certainly can object on the basis of ipso facto, [sic] we do not so object. Indeed, we believe it to be an enumerative change in the law, the case law, and I know back from the time you were on the bench the first time we had these retained for a half, retained for a third, retained for a third, and the case law developed if somebody **was** arrested and wanted to be retained for a half because of time basis, he was sentenced to retained for a third.
>
> The reason it is my -- I think it's an enumerative change is because life 25 was always life without parole anyway. The only difference was it might -- it had the unfortunate effect from the point of view of the accused of fooling juries into believing otherwise.
>
> I think this is further true because Mr. Hudson committed his crime during a period of time after which parole was essentially obliterated, which would have been 1984, and this crime was in 1986.
>
> So it would be a dual position because life without parole was -- although I see a couple Second District Court of Appeal cases that in dictum says they think the parole

> commission in 2009 will find that there's still parole eligibility for the life 25s, but, secondly, that it is not ipso facto [sic] because the -- because it's an enumerative change in the law, and, third, to the extent it is ipso facto [sic] we specifically waive it.
>
> Mr. Hudson, is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: How about that, Ms. Cox?
>
> MS. COX: Your Honor, I think that it is clearly ipso facto [sic] because it does clearly increase the permissible penalty, and although I would have no objection at all to the Court sentencing him to life without any possibility of parole instead of saying life without possibility of parole for 25 years, the fact of the matter is that would be an illegal sentence. He can't agree to an illegal sentence, and it would be a point on direct appeal or 3.850.
>
> THE COURT: I don't think the Court can take judicial notice of the things you say, Mr. Donerly. That may be the way we think things **are** going, although I heard at a seminar one time, I heard a prisoner doing such a sentence telling among other things that he expected to be released at end of 25, the thrust of his release was because the only person in the world I would ever kill I've already killed.
>
> So, anyway, the Court can't take judicial notice of those things. Whether I agree with you or not is beside the point. I think Mrs. Cox is right."
>
> (Vol. VII, R493-495).

The trial court instructed the jury that if they found the aggravating circumstances did not justify the death penalty or that if six or more voted that Hudson should not be sentenced to death,

the advisory sentence should be one of life imprisonment without the possibility of parole for twenty-five years (Vol. III, R358, 361; Vol. VII, R546, 550).

First, appellant's claim should be deemed procedurally barred as appellant acquiesced to the lower court's determination without citing contrary legal authority to the lower court's understanding of the law (indeed, defense counsel suggested dicta from the District Courts of Appeal indicated the availability of parole). See Lucas v. State, 376 So.2d 1149, 1152 (Fla. 1979).

Secondly, Simmons v. South Carolina, 512 U.S. ___, 129 L.Ed.2d 133 (1994) does not require relief to appellant. Unlike Simmons, 'future dangerousness" is not a statutory aggravator upon which to predicate the imposition of a sentence of death in Florida, the prosecutor did not argue Hudson's 'future dangerousness" in closing argument (Vol. VII, R505-525) and the trial court correctly instructed the jury (since appellant committed the murder in 1986 prior to the amendment of F.S. 775.082(1)) that the two options available were death or life imprisonment without eligibility for parole for twenty-five years, The lower court's action did not violate Simmons. See also Allridge v. Scott, 41 F.3d 213, 220-222 (5th Cir. 1994).

Relief must be denied.

ISSUE X

WHETHER THE DEATH SENTENCE RESTS ON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCTJMSTANCE.

Appellant contends that Florida Statute 921.141(5) (d) (capital felony committed while engaged in the commission of a burglary) is unconstitutional because it is an automatic aggravator. This claim has been repeatedly rejected by this Court. See Clark v. State, 443 So.2d 973 (Fla. 1983); Bertolotti v. State, 534 So.2d 386 (Fla. 1988); Taylor v. Stat-p, 638 So.2d 30 (Fla. 1994); cert. denied, 130 L.Ed.2d 424 (1994); Stewart v. State, 588 So.2d 972 (Fla. 1991). The contention should be rejected again.

ISSUE XI

WHETHER APPELLANT'S ALLEGED ABSENCE FROM CRITICAL STAGES OF THE PROCEEDINGS PREJUDICED HIS PENALTY PHASE.

(1) Appellant alludes first to the beginning of the voir dire proceedings. Defense counsel Donerly requested a bench conference to discus whether the jury should be told that appellant had been sentenced to life without parole on another count (R IV, p. 4). The record does not reflect that appellant was not present; no complaint was submitted that he was not permitted to participate. Defense counsel informed the court that the matter need not be immediately resolved on the appropriate instruction to the jury (R5-6). The court informed the jury of Hudson's presence in the courtroom (R7). Ten pages later when prospective jurors Motes, Downs, and Hearsum demonstrated an inability to follow the law and make a recommendation of death or life imprisonment, the court inquired of counsel:

> "THE COURT: Should we go ahead and bump these people like I do in ordinary cases, or do you want to question them?
>
> MR. DONERLY: I have a right to question them. Let me confer with co-counsel."
>
> (R18).

* * *

"MR. DONERLY: Let me talk to everybody and see if they're willing to let them go at this point.
THE COURT: Okay.
(Counsel conferring)
MR. DONERLY: I'm authorized to let them go, but I would certainly like to hear what Number 6 says. She's one of the two blacks in the first twelve.
THE COURT: I'll hold off until we finish with her."

(R18-19).

After further inquiry in open court with prospective juror Griffith, she along with Motes, Downs, and Hearsum were excused (R20-21).

No complaint was advanced that appellant was absent or unable to participate. Relief is unavailable. Boyett v. State, So.2d ___, 21 Florida Law Weekly S535 (Fla. 1996).

(2) During the prosecutor's closing argument, defense counsel objected and approached the bench. The court listened to the defense objection and ruled that the defense could respond in closing argument (R521). No request was make for appellant to also appear at the bench.

(3) At the close of Officer Bush's testimony, defense counsel approached the bench to interject objection and to correct typographical errors on exhibits. Defense counsel did not object to the admissibility of Exhibit 2 (R286-288). No request was made

or objection submitted to appellant's presence at the bench conference.

Appellant was not denied the right to be present at any critical stage; moreover, his failure to invoke his right to be present at a bench conference should operate as a waiver. Cf. United States v. Gagnon, 470 U.S. 522, 84 L.Ed.2d 486 (1985). Moreover, as Gaanon, supra, notes the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence and to that extent only. 84 L.Ed.2d at 490. Appellant was present in court and even if he did not step up to the bench conference, his presence was not mandated to insure a fair and just hearing. See, e.g., Hall v. Wainwright, 805 F.2d 945 (11th Cir. 1986); Garcia v. State, 492 So.2d 360 (Fla. 1986); Hodges v. State, 595 So.2d 929 (Fla. 1992); Harvey v. State, 529 So.2d 1083 (Fla. 1988); Turner v. State, 530 So.2d 45 (Fla. 1988); Coney v. State, 653 S.2d 1009, 1012-1013 (Fla. 1995); United States v. Provenzano, 620 F.2d 985 (3rd Cir. 1980); United States v. Gradsky, 434 F.2d 880 (5th Cir. 1970). See also Wrisht v. State, ___ So.2d __, 21 Florida Law Weekly S498 (Fla. 1996) (bench conference initiated by defense counsel to discuss a prosecutor's "doodling" was not a critical stage requiring the presence of the

defendant at the bench; especially where defense counsel gave no hint that his client wished to be present).

ISSUE XII

WHETHER RULINGS BY THE TRIAL COURT DENIED APPELLANT A FAIR TRIAL.

Appellant correctly points out that a number of pretrial motions were filed and received adverse rulings by the lower court. Since appellant makes no effort to present legal argument on this claim in support of his contention that judicial error occurred, the point must be deemed barred and abandoned. See Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) ('Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to be waived."); Kight v. Dugger, 574 So.2d 1066, 1073 (Fla. 1990); see also Polyglycoat Corporation v. Hirsch Distributors, Inc., 442 So.2d 958, 960 (Fla. 4th DCA 1983)("It is the duty of counsel to prepare appellate briefs so as to acquaint the Court with the material facts, the points of law involved, and the legal arguments supporting the positions of the respective parties").

Appellee notes that many of the pretrial motions alluded to are routine, pro forma contentions which have been routinely denied and rejected by trial courts and this Court.

ISSUE XIII

WHETHER THE AGGRAVATING CIRCUMSTANCE OF PRIOR VIOLENT FELONY IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD AND IMPROPERLY APPLIED IN THIS CASE,

Appellant's pretrial motion challenging on vagueness and overbreadth grounds the prior violent felony aggravator and the instruction was denied (R213-219, R613). The defense did not propose an alternative instruction. Appellee respectfully submits that appellant's failure to propose what he perceived to be a satisfactory jury instruction should be deemed a procedural default precluding appellate review.

Additionally, appellant does not have standing to complain that the prior felony conviction aggravator has been impermissibly interpreted to include convictions pending appeal or to include contemporaneous violent felony conviction since neither condition describes Hudson's circumstance. Appellant was convicted in 1982 of sexual battery on Linda Benjamin. Cf. Moorehead v. State, 383 So.2d 629 (Fla. 1980) (rejecting constitutional challenge where argument did not apply to the facts of the case).

The challenged aggravator does not contain any vague terms, unlike the former HAC instruction, which would not be understood by the jury. Cf. Whitton v. State, 649 So.2d 861, 867, n 10 (Fla. 1994). Finally, this Court has consistently rejected

constitutional challenges to the death penalty statute. See, e.g., Hunter v. State, 660 So.2d 244, 252-253 (Fla. 1995); Spencer v. State, 645 So.2d 377, 384 (Fla. 1994); Fotopoulos v. State, 608 So.2d 784, 794, n 7 (Fla. 1992).

ISSUE XIV

WHETHER THE JURY WAS IMPROPERLY LED TO BELIEVE THAT THE RESPONSIBILITY FOR THEIR ACTIONS RESTED ELSEWHERE.

Appellant next complains that the trial court instructed the jury that the final decision as to what punishment should be imposed was the court's responsibility (Vol. VII, R543). The court also instructed the jury it was their duty to provide an advisory sentence based on whether sufficient aggravating circumstances existed and whether sufficient mitigating circumstances existed to outweigh the aggravating, that their advisory sentence **was** to be based on the evidence (R543-544) and that:

> 'The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot, you should carefully weight, sift and consider the evidence, and all of it, realizing that a human life is at stake, and bring to bear your best judgment in reaching your advisory sentence."
>
> (R549).

Appellant's complaint regarding the court's instruction must fail because it is meritless. The trial court's instruction did not improperly diminish the jury's role nor was it erroneous. Grossman v. State, 525 So.2d 823 (Fla. 1988); Combs v. State, 525

So.2d 855 (Fla. 1988); Harich v. Dugger, 844 F.2d 1464, 1473-1474 (11th Cir. 1988).

With respect to the challenges now made to the comments during voir dire inquiry (R IV, 3, 55-57, 79, 104), suffice it to say there was no objection to the Court's observation at R3 (which merely mentioned the jury would recommend life without parole or death) and the other remarks were made by defense counsel inquiring as to their thoughts on a recommendation that would be given great weight.[10]

[10]It was not the prosecutor but defense counsel Donerly who made the remark cited at R93.

ISSUE XV

WHETHER THE DEATH PENALTY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN THAT IT IS APPLIED IN AN ARBITRARY AND CAPRICIOUS FASHION.

Appellant does not identify where in the trial court record he has preserved for appellate review by objection or complaint below this argument. If he did not urge it below, it must be deemed procedurally barred. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990) .

Even if the claim had been preserved, it would be meritless. This Court has repeatedly and consistently rejected similar attacks on the death penalty statute. See, e.g., Johnson v. State, 660 So.2d 637 (Fla. 1995); Hunter v. State, 660 So.2d 244 (Fla. 1995); Thompson v. State, 619 So.2d 261 (Fla. 1993); Wuornos v. State, 644 So.2d 1000 (Fla. 1994); Spencer v. State, 645 So.2d 377 (Fla. 1994). See also, Taylor v. State, 638 So.2d 30 (Fla. 1994); Stewart v. State, 588 So.2d 972 (Fla. 1991); Gamble v. State, 659 So.2d 242, 246 (Fla. 1995); Pope v. State, ___ So.2d ___, 21 Florida Law Weekly S257 (Fla. 1996); Sims v. State, __ So.2d , 21 Florida Law Weekly S320 (Fla. 1996); Williamson v. State, ___ So.2d , 21 Florida Law Weekly S383 (Fla. 1996).

ISSUE XVI

WHETHER THE INSTANT TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS.

Appellant contends that the 'sheer number and types of error involved in his resentencing" (Brief, p. 96) require reversal. Since he does not with specificity identify them here, appellee urges this Court to reject the claim. There are no errors singly or in combination that mandate reversal. Accordingly, the sentence of death must be affirmed.[11]

[11]At page 99 of his brief appellant indicates that there are other unstated claims. The failure to brief them constitutes an abandonment and procedural default. See Duest v. Duaser, 555 So.2d 849, 851-852 (Fla. 1990).

CROSS-APPEAL ISSUE I

WHETHER THE LOWER COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE HAC FACTOR.

The lower court erred in concluding that the law of the case doctrine precluded the state from urging the applicability of the HAC aggravator (Vol VIII, R492). This Court has held that the clean slate rule is applicable to resentencing proceedings.

> "Applying these principles to the case before us, we find that no double jeopardy violation occurred. Bullington is not applicable because neither the trial judge nor this Court on review found that the State failed to prove its case that the defendant deserved the death penalty. Because there was no acquittal of the death penalty, the State was not barred from resubmitting the aggravating factors not found by the judge in the original penalty phase proceeding. See also Zant v. Redd, 249 Ga. 211, 290 S.E.2d 36 (1982) (if death-sentenced defendant overturns sentence on technical grounds, the sentence is nullified and the State and defense start anew; on resentencing the State may offer any evidence on aggravating circumstances, including those submitted to the first jury but not listed by the jury in support of the death sentence), cert. denied. 463 U.S. 1213, 103 S.Ct. 3552, 77 L.Ed.2d 1398 (1983); State v. Koedatich, 118 N.J. 513, 572 A.2d 622 (1990) (double jeopardy did not prevent State upon resentencing from relying on aggravating factors not unanimously found by the jury in the initial sentencing proceeding); Hopkinson v. State, 664 P.2d 43 (Wyo.) (allowing resentencing jury to consider evidence concerning aggravating circumstances deemed

inapplicable in first penalty hearing did not violate double jeopardy), cert. denied, 464 U.S. 908, 104 S.Ct. 262, 78 L.Ed.2d 246 (1983). Contra State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981) (if upon defendant's appeal of death sentence, the case is remanded for a new sentencing hearing, the State is precluded from relying on any aggravating circumstances of which it offered insufficient evidence at the hearing appealed from).

This Court has applied the "clean slate" rule to resentencing proceedings. We have held that a resentencing is a completely new proceeding and a resentencing judge is not obligated to find mitigating circumstances found by the first judge. See King v. Dugger, 555 So.2d 355, 358 (Fla.1990). See also Teffeteller v. State, 495 So.2d 744 (Fla.1986) (resentencing should proceed de novo on all issues bearing on the proper sentence). In King, we held that "a mitigating circumstance in one proceeding is not an 'ultimate fact' that collateral estoppel or the law of the case would preclude being rejected on resentencing." King, at 358. Moreover, we have held that a trial judge may properly apply the law and is not bound in remand proceedings by a prior legal error. Spaziano v. State, 433 So.2d 508, 511 (Fla.1983), aff'd, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

Preston does not suggest that a resentencing judge is bound by a prior judge's rejection of mitigating circumstances. The resentencing judge here found Preston's age to be a mitigating factor while the original trial judge rejected that factor. Nor does Preston advance any basis for distinguishing between that situation and the finding of an aggravating circumstance on resentencing that was not found by the original sentencer. The

> **basic** premise of the sentencing procedure is that the sentencer consider all relevant evidence regarding the nature of the crime and the character of the defendant to determine the appropriate punishment. See Sec. 921.141(1), Fla.Stat. (1989). This is only accomplished by allowing a resentencing to proceed in every respect as an entirely new proceeding. (FN2)
>
> Preston v. State, 607 So.2d **404**, 408-409 (Fla. 1992).

Accord, Hall v. State, 614 So.2d 473, 477 (Fla. 1993) (". . . because a resentencing is a totally new proceeding, the resentencing court is not bound by the original court's findings"); Merck v State, **664** So.2d 939, 945 (Fla. 1995) (J. Wells, concurring).

The trial court erred in concluding that the law of the case doctrine had any applicability whatsoever herein. As explained in Florida Jurisprudence 2d Appellate Review § 414 - 415, pp. 566-568:

> **§ 414. In general; definition**
>
> **"Law** of the case" refers to the principle that the questions of law decided on appeal to a court of ultimate resort must govern the case in the same court and the trial court through all subsequent stages of the proceeding. Or, as otherwise stated, whatever is once established between the same parties in the **same case** continues to be the law of the case, whether correct on general principles or not, so long **as** the facts on which such decision was predicated continue to be the facts of the case.[76] Generally, therefore, when a reviewing court in deciding

a case states in its opinion a principle or rule necessary to the decision, that principle or rule becomes the law of that case.[77] and must be adhered to throughout all subsequent stages and proceedings,[78] both in the lower court[79] and upon any succeeding appeal, [80] although it would be wrong to say that an appellate court is wholly without authority to reconsider and reverse a previous ruling that is "the law of the case."[81] Such principles or rules adjudicated by an appellate court, therefore, are ordinarily no longer open for discussion and consideration.[82] This is true also where questions are decided on an **appeal** from an interlocutory order.[83]

The general doctrine of the law of the **case** applies equally to appeals from inferior courts. For example, where **a** judgment of the Circuit Court on appeal reversed judgment of a lower court which had entered a final judgment against the plaintiff on a demurrer, such judgment settled the law of the case to the extent that if the plaintiff proved its case **as** alleged and if no countervailing defense were offered and established, the plaintiff was entitled to recovery.[84]

§ 415. Distinguished from stare decisis and res judicata

'Law of the case" is **a** limited application of the doctrine of res judicata. The latter means that the judgment of a court of competent jurisdiction directly rendered on a particular issue is conclusive as to the parties and the issues decided in the same or any other controversy. The former applies only between parties to an appeal in proceedings subsequent to the appeal as to such questions as were considered and decided on the appeal.[85]

(emphasis supplied).

This Court on Hudson's last appeal did not settle the question of law, which would be binding on remand to the circuit court, as to whether the HAC aggravating factor was appropriate to be applied. Thus, there was no law of the case binding on the trial court. The instant case is in contrast to cases like Henry v. State, 649 So.2d 1361 (Fla. 1994), where the court had previously resolved on appeal a suppression hearing issue.

The trial court erred in concluding that the state was barred by the law of the case doctrine from urging the applicability of the HAC statutory aggravating factor and the court should enter its order on the instant cross-appeal reversing that determination.

CROSS-APPEAL ISSUE II

WHETHER THE LOWER COURT ERRED IN FAILING TO FIND THAT THE INSTANT HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

This Court has consistently upheld a finding of HAC where the victim has been killed with multiple stab wounds. See Hansbrough v. State, 509 So.2d 1081 (Fla. 1987); Nibert v. State, 508 So.2d 1 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla. 1986); Johnston v. State, 497 So.2d 863 (Fla. 1986); Hardwick v. State, 521 So.2d 1071 (Fla. 1988); Floyd v. State, 569 So.2d 1225 (Fla. 1990); Haliburton v. State, 561 So.2d 248 (Fla. 1990); Pittman v. State, 646 So.2d 167 (Fla. 1994).

See also Atwater v. State, 626 So.2d 1325 (Fla. 1993) (victim stabbed at least forty times; medical examiner testified that injuries occurred while victim was alive and that the death or unconsciousness, would not have occurred until one to two minutes after the most serious life threatening wounds to the head were inflicted); Trotter v. State, 576 So.2d 691 (Fla. 1990) (seventy year old woman stabbed at least seven times); Davis v. State, 648 So.2d 107 (Fla. 1994). And in Derrick v. State, 641 So.2d 378, 381 (Fla. 1994) this Court opined:

[5] Regarding the heinous, atrocious, or cruel aggravating factor, the trial court's order states:

> [T]he evidence indicates that the victim's body sustained thirty-three (33) knife wounds, thirty-one (31) of which were characterized as stab wounds and two (2) of which were characterized as puncture wounds. Some of the wounds noted by [the medical examiner] were characterized as defensive wounds. The scene of the crime indicated that, after the initial attack, the victim traveled approximately twenty (20) feet, trailing blood along his path of travel, before falling to the ground where he ultimately died from the combination of blood loss and the collapse of his lungs. [The medical examiner] noted that many of the numerous stab wounds would have been extremely painful although [he] was unable to say exactly when the victim lost consciousness, the three defensive wounds noted by [the medical examiner] would indicate that the victim experienced a pre-death apprehension of physical pain and death while making his unsuccessful effort to defend himself. . . .

This Court has consistently upheld the heinous, atrocious, or cruel aggravator where the victim was repeatedly stabbed. Floyd v. State, 569 So. 2d 1225, 1232 (Fla. 1990), cert. denied, 501 U.S. 1259, 111 S.Ct. 2912, 115 L.Ed.2d 1075 (1991); Haliburton v. State, 561 So. 2d 248, 252 (Fla. 1990), cert. denied, 501 U.S. 1259, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991); Nibert v. State, 508 So. 2d 1, 4

> (Fla. 197); Johnston v. State, 497 So. 2d 863, 8971 (Fla. 196). We reject Derrick's contention that the victim may have been unconscious during the attack. This claim is particularly unbelievable in light of Derrick's own confession indicating that the victim was screaming as he was being stabbed.

In the instant case, medical examiner Dr. Charles Diggs testified that the autopsy on Molly Ewings revealed the presence of four stab wounds over the upper torso area, one on the left and one on the right side of the chest, a third over the left shoulder and one right lateral midline stab wound. All were lethal penetrating into the lungs, causing bleeding into the lungs and producing shock (Vol. VI, R299-300). The wounds were three inches deep (R301-302). Ewings was in a "severe amount of pain" and consciousness would last about two minutes (R305). A defensive wound was on the finger (R306). Testimony was adduced that the victim screamed while being attacked (Vol. V, R214, 241).

In addition to the victim's physical pain and suffering, fear and emotional strain may be considered as contributing to the heinous nature of the murder, even if the death was almost instantaneous. Preston v. State, 607 So.2d 404 (Fla. 1992). In this case death or unconsciousness would not have occurred immediately, but would have taken at least a couple of minutes. In this case like in Mason v. State, 438 So.2d 374 (Fla. 1983), Molly

Ewings was not killed quickly and painlessly, but she lingered aware of what was happening to her as her lungs filled with blood. The fact that the victim was attacked in her own home without provocation after she had gone to bed may also be considered. See Haliburton v. State, 561 So.2d 248 (Fla. 1990) (victim was man who was attacked as he slept in bed); Floyd v. State, 569 So.2d 1225 (Fla. 1990); Wvatt v. State, 641 So.2d 1336 (Fla. 1994).

Any contention that appellant did not intend any suffering to accompany the homicide is frivolous. The HAC factor is viewed more from the perspective of the victim rather than the defendant. Hitchcock v. State, 578 So.2d 685 (Fla. 1990), and this case did not involve a shooting to the head which frequently results in instantaneous death.

The trial court erred in failing to consider and to find the presence of the HAC aggravator.

CROSS-APPEAL ISSUE III

WHETHER THE LOWER COURT ERRED IN FAILING TO CONSIDER AND APPLY THE AGGRAVATING FACTOR OF CAPITAL FELONY COMMITTED WHILE UNDER A SENTENCE OF IMPRISONMENT OR COMMUNITY CONTROL. F.S. 921.141(5)(a).

In Hitchcock v. State, 578 So.2d 685 (Fla. 1990), this Court rejected an ex post facto argument similar to that advanced by Hudson:

> [27] In our original opinion in this case, we noted that the court could have found committed by a person under sentence of imprisonment in aggravation because Hitchcock was on parole at the time of this crime. 413 so. 2d at 747 n. 6. The court found this aggravator applicable on resentencing. Hitchcock now argues that this is an ex post facto violation and constitutes double jeopardy because this Court did not recognize parole as the equivalent of being under sentence of imprisonment until ***Aldridge v. State,*** 351 so. 2d 942 (Fla. 1977), cert. ***denied, 439*** U.S. 882, 99 S.Ct. 220, 58 L.Ed.2d 194 (1978). Resentencing proceedings, however, are completely new proceedings. ***King v. Dugger, 555 So.*** 2d 355 (Fla. 1990). These ex post facto and double jeopardy claims are of no merit because the resentencing occurred after we released ***Aldridge. See Spaziano v. State,*** 433 so. 2d ***508*** (Fla. 1983), *aff'd,* ***468 U.S.*** 447, a04 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

The courts have upheld newly-enacted or new case law interpretations of aggravating factors applied to persons who prior

thereto had committed their offenses. See, e.g., with regard to the CCP aggravating factor Combs v. State, 403 So.2d 418, 421 (Fla. 1981); Zeigler v. State, 580 So.2d 127 (Fla. 1991); Sireci v. State, 587 So.2d 450, 454 (Fla. 1991); Foster v. State, 614 So.2d 455, 461, n. 7 (Fla. 1992); see also Valle v. State, 581 So.2d 40, 47 (Fla. 1991) (upholding against an ex post facto challenge the new aggravator that the victim was a law enforcement officer engaged in the performance of his official duties since this was not an entirely new factor and the defendant was not disadvantaged by its application). Jackson v. State, 648 So.2d 85 (Fla. 1994); Hitchcock v. State, 578 So.2d 685, 693 (Fla. 1990), vacated on other grounds, 120 L.Ed.2d 892 (1992) (use of on parole to support under sentence of imprisonment aggravator when resentencing occurred after decision announced in Aldridge v. State, 351 So.2d 942).

Appellant argued that the Combs-Valle line of cases is distinguishable because the new aggravating factors at issue there were not entirely new but a part of what had been the law. The same is true here. The legislature has not added a whole new aggravator not previously enacted but has only explained that community control is and has the same effect as a sentence of imprisonment. F.S. 921.141(5)(a). See also State v. Smith, 547

So.2d 613, 617 (Fla. 1989) (J. Shaw, concurring in part and dissenting in part) (citing Lowry v. Parole and Probation Commission, 473 So.2d 1248, 1250 that where an amendment to a statute is enacted soon after controversies arise as to the interpretation of the original act a court may consider the amendment as a legislative interpretation of the original law and not as a substantive change thereof). State v. Lanier, 464 So.2d 1192 (Fla. 1984); Lincoln v. Florida Parole Commission, 643 So.2d 668 (Fla. 1st DCA 1994).

In Collins v. Youngblood, 497 U.S. 37, 111 L.Ed.2d 30 (1990), the Supreme Court revisited its ex post facto jurisprudence and cited with approval the formulation in an earlier decision Beazell v. Ohio, 269 U.S. 167, 70 L.Ed 216 (1925):

> 'It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with crime of any defense available according to law at the time, when the act was committed, is prohibited as ex post facto. Id. at 169-170, 46 S.Ct. at 68-69."
>
> * * *
>
> 'The Beazell formulation is faithful to our best knowledge of the original understanding

of the Ex Post Facto clause:

> Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts."
>
> (497 U.S. at 42-43)

In Collins, after overruling two prior precedents which the Court felt had extended ex post facto protection unjustifiably to any situation which altered the situation of a party to his disadvantage, determined that a Texas statute which allowed reformation of improper verdicts did not punish as a crime an act previously committed which was innocent when done, did not make more burdensome the punishment for a crime after its commission, did not deprive one charged with crime of any defense according to law at the time when the act was committed was not prohibited by the ex post facto clause. See also California Dept. of Corrections v. Morales, 514 U.S. ___, 131 L.Ed.2d 588, 115 S.Ct. 1597, 1608, n 3 (1995) ('After Collins, the focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.")

In the case sub judice, the legislature's amendment to F.S. 921.141(5) (a) explaining that the aggravator included a capital felony committed while under community control neither altered the

definition of the crime of first degree murder or increased the penalty by which a crime is punishable. The ex post facto change would not be violated by application of the factor to Mr. Hudson.

Appellant is not aided by Trotter v. State, 576 So.2d 691 (Fla. 1990). There, this Court determined, over the dissent of Justices McDonald and Grimes, that the trial court erred in treating a violation of community control as an aggravating factor (capital felony committed by a person under sentence of imprisonment -- F.S. 921.141(5)(a)). The legislature has now clarified that the aggravator enumerated in (5)(a) pertains to a capital felony committed by a person "under sentence of imprisonment or placed on community control." The intervening decision in Trotter suggesting a contrary understanding -- now corrected by the legislature establishing what the legislative intent had been -- is of no moment. As this brief was being completed, this Honorable Court decided Trotter v. State, ___ So.2d ___, (Fla. Case No. 82,142, December 19, 1996) agreeing with much of the foregoing analysis and receding from Trotter (I), supra.

CONCLUSION

For the foregoing reasons, arguments and authorities the imposed sentence of death should be affirmed.

Additionally, the Court should determine on the cross-appeal issues that the lower court erred in failing to consider and find the aggravating factors of especially heinous, atrocious or cruel, F.S. 921.141(5)(h), and that the capital felony was committed by a person under sentence of imprisonment or placed on community control, F.S. 921.141(5)(a).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Kenneth David Driggs, 229 Chapel Drive, Tallahassee, Florida 32304, and M. Elizabeth Wells, 376 Milledge Avenue, Atlanta, Georgia 30312, this 26TH day of December, 1996.

Robert J. Landry

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