IN THE SUPREME COURT OF FLORIDA

GARY LAWRENCE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE **NUMBER: *85,* 725**

APPEAL FROM SENTENCE OF DEATH, CIRCUIT COURT FOR THE FIRST JUDICIALCIRCUIT, SANTA ROSA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

STEVEN L. SELIGER
GARCIA AND SELIGER
Florida Bar Number 244597
16 North Adams Street
Quincy, Florida 32351
(904) 875-4668

Attorny for the Appellant

TABLE OF CONTENTS

TABLE OF [illegible]

NAME	PAGE NUMBER(S)
Arbelaez v. State, 626 So. 2d **169** (Fla. 1993)	2, 6
Assay v. State, 580 So. 2d 610 (Fla. 1991)	*6*
Atwater v. State, 626 So. **2d 1325** (Fla. 1993)	2, 7
Bruno **v.** State, 574 So, 2d 76 (Fla. 1991)	*2*
Fennie v. State, 648 So. **2d** 95 (Fla. 1994)	6
Fotopoulos **v.** State, 608 So. 2d 784 **(Fla.** 1994)	*6*
Geralds v. State, 601 So. 2d 1157, 164 (Fla. 1992)	7
Haliburton **v.** State, 561 So. 2d 248, 252 (Fla. 1990)	4
Harvey v. State, 529 So. 2d 1083 (Fla. 1988)	8
Hunter v. State, **660** So. 2d 244, 254 (Fla. 1995)	11
Jackson **v.** State, 648 ***So.*** 2d 85 (Fla. 1994)	7, 8
Lamb **v.** State, **532** So. 2d 1051 (Fla. 1988)	8
Memwaldy Curtis **v. State,** ___So. 2d__ Case No. 84, **293** (Fla. October 19, 1996)	2
Pietri **v.** State, 644 So. 2d 1347 (Fla. 1994)	4, 7
Ponticellli v. State, 593 So. **2d 483** (Fla. 1991)	9
Proffit **v.** State, 510 So. **2d** 896, 897 (Fla. 1987)	*2*
Terry v. State, 668 So. 2d 954 (Fla. 1996)	1
Windom v. State, 656 So. 2d **432** (Fla. **1995)**	*9*

OTHER AUTHORITIES

Section 944.291, Florida Statutes (1979)	4

PREFACE

The primary issue in this case is whether the death sentence is proportional to the crime and the defendant. This Court must find that the lulling of Michael Finken was a "most aggravated, . . .most indefensible of crimes" to sustain this death sentence. Therefore, while the substantive challenges to the sentence of death stand on their own, each must be considered in determining whether a sentence of life in prison would suffice.

The State argues that no death sentence with an equation of *two* statutory aggravators and "minimal nonstatutory mitigation" has been reversed, excepting *Terry v. State,* 668 So. 2d 954 (Fla. 1996). This counting process is inimical to the jurisprudence of the death penalty; it is not simply a numbers game. The quality of the case in aggravation matters, regardless of the strength of the mitigation.

To this end, this reply brief will focus generically on the proportionality issue, encompassing the specific arguments relating to aggravation and mitigation.

WHETHER LAWRENCE'S DEATH SENTENCE IS PROPORTIONATE

A.

The State argues that this claim has no merit. The State is wrong. A review of the cases cited by the State shows that a death sentence for Mr. Lawrence is disproportionate. *Proffit v. State,* 510 So. 2d 896, 897 (Fla. 1987) For instance in *Atwater v. State, 626* So. 2d 1325 (Fla. 1993), the trial court weighed three aggravators against no mitigation. In that case, the defendant looked for the victim on each of three days before Atwater committed the murder. In *Bruno v. State,* 574 So. 2d 76 **(Fla.** 1991), the victim was shot twice and Bruno made numerous trips to and from the victim's apartment after the murder to steal his **stuff.** The trial court found three. aggravators and no mitigation. The murder itself had been planned two weeks in advance. It is totally inappropriate to compare this *case* to *Arbelaez v. State, 626 So.* 2d 169 (Fla. **1993).** The defendant and his ex-girlfriend had an argument the night of February 13, 1988. Arbelaez sought to get back at her the next morning; his **plan was** to kidnap and drown her son. **He** ultimately accomplished this goal, getting revenge by killing a child.

Most recently in *Memwaldy Curtis v. State,* ___So. 2d___, **Case** No. 84, 293 (Fla. October 19, 1996), this Court reversed the death sentence imposed on Mr. Curtis. Curtis and another person entered a food store in Duval County and ordered the two clerks to **give** them money. Without waiting for the clerks to obey, Curtis' co-defendant

shot one of the clerks. After getting the money from the cash register, the co-defendant shot the other clerk twice. One clerk lived, the other died.

The co-defendant pled guilty and received a life sentence for the murder. Curtis was convicted of murder, attempted murder and robbery, The jury recommended death (9-3) and the trial court imposed death. The State proved three aggravators, but two were merged into one. These two aggravators were (1) the murder was committed in the course of a robbery (and far pecuniary gain) and (2) that Curtis has previously been convicted of a violent felony. The case for life was Curtis's age (17); that Curtis did not fire the shot that killed the clerk; and that his co-defendant got a life sentence. In addition, the trial court found that Curtis was remorseful and had adjusted well to prison life.

This Court reversed the death penalty finding the mitigation "substantial". Although this Court is silent as to the point, it must have disagreed with the trial court's evaluation of the mitigating evidence. It is also clear that the case in aggravation could not have been that overwhelming.

B.

While the State believes there *are* "three strong aggravators" (AB-pg. 9), Mr. Lawrence challenges that conclusion. One of the aggravators was that he was on mandatory conditional release at the time of the murder. It is important to note that the crimes that Mr. Lawrence had been imprisoned for were grand theft and burglary. These crimes *are* consistent with the trial judge's finding that Mr. Lawrence's criminal history was not violent. This could hardly be characterized as a "'strong aggravatar".

As described in *Haliburton v. State,* 561 So. 2d 248,252 (Fla. 1990), mandatory conditional release was a statutory provision that the State of Florida required anyone in prison to be on subsequent to serving their prison time, Mr. Lawrence was placed under supervision by operation of law; he had served all of his time. Although Section 944.291, Florida Statutes (1979) required a person to be subject to parole supervision, Mr. Lawrence did nothing to actively get out of prison except serve his time.

C.

In addition, Mr. Lawrence has demonstrated that the cold, calculated and premeditated aggravator does not fit the circumstances of this case. This is shown in the trial court's own findings of fact. Mr. Lawrence had regular contact with Michael Finken during the day that Finken was killed. This conduct included drinking together, having a "minor skirmish", and then resolving their differences by drinking together some more. The State *argues* that Mr. Lawrence had planned to kill Finken for some time, at least at the point when Finken went to lay down on the couch. This was sufficient to establish premeditation but there is nothing in the record to find heightened premeditation.

Although the Lawrences (Gary and Brenda) did talk in hushed tones in the house where Finken lay, there is nothing to suggest that any effort was made to design a plan to kill Finken *until* that moment. This was, in fact, a spur of the moment killing. All of the weapons used to attack Finken were procured from inside. the apartment. There had been no prior stockpiling of an arsenal; each piece of weaponry was garnered from what was available.

The self-professed motive of Lawrence to kill Finken was not revealed to Lawrence until the day of the murder, July 28, 1994. It was only then that Brenda Lawrence told *Gary* Lawrence that she and Finken were sexually involved, This time element is crucial

for it establishes the lack of the requisite heightened premeditation.

In *Assay v. State, 580* So. 2d 610 (Fla. 1991) the defendant killed two people. One of them, McDowell, was a person that Assay believed had cheated him out of ten dollars from a prior drug and who had warned that "if he ever got him that he would get even." Although Assay met McDowell that evening by chance, it was not an "impulsive spur-of-the-moment decision to kill without reflection."

In *Bruno v. State,* 574 So. 2d 76 (Fla. 1991), the cold, calculated aggravator was properly found because Bruno planned to murder two weeks before. This is consistent with this Court's generic use of this aggravator - for execution or contract-style murders. See *Fennie v. State,* 648 So. 2d 95 (Fla. 1994) (protracted execution-style slaying; forced victim at gunpoint into car and made several stops to gather the necessary items to use to drown the victim. In addition?Fennie took the victim to a location where no one would witness the killing).

The location of the murder is another reason why the murder of Finken was not cold, calculated and premeditated. It was not a careful plan to kill Finken where he lay on the couch. The State's argument might have some legitimacy if Finken was killed where the body was burned, in a remote location. But no one could even agree for some time about how to dispose of the body and ultimately it was left in plain view.

In *Fotopoulos v. State,* 608 So. 2d 784 (Fla. 1994), the defendant lured the victim (Kevin Ramsey) to an isolated rifle range on the pretense that Ramsey was going to be

initiated into a dub. Ramsey was tied to a tree and then shot four times by another co-defendant and once by Fotopoulos. Ramsey was selected to die because he was blackmailing the defendant. Fotopoulos videotaped the lulling and then used it to get the co-defendant to kill Fotopoulos' wife for some insurance proceeds. When the killing of his wife was unsuccessful, Fotopoulos Idled the person who had been hired to kill his wife to throw suspicion away from the defendant. These murders were not comparable to the lulling of Finken by Lawrence.

In reviewing the cases cited by the State, it is important to discriminate between those decided before and after *Jackson v. State,* 648 So. 2d 85 (Fla. 1994) In *Atwater v. State,* 626 So. 2d 1325 (Fla. 1993), the defendant searched for the victim on each of the three days before the killing took place. To gain access to the victim's apartment, Atwater had to concoct a story for the doorman that he was the victim's grandson.

In *Geralds v. State,* 601 So. 2d 1157, 164 (Fla. 1992), the victim was killed in her own home after being bound, beaten and stabbed to death. Geralds was a carpenter who had previously worked on renovating the victim's home. He learned that the victim's husband would be out of town for a specific period to time from talking with the victim's children. In committing the crime, Geralds brought gloves, a change of clothes, and plastic ties to the house. He left his car at a distant location so that no one could see it and identify it at a later time. This Court held that the State had not proven beyond a reasonable doubt the existence of the cold, calculated, premeditated aggravator. Mr.

Lawrence's conduct was substantially less calculated than Mr. Geralds.

Harvey v. State, 529 So. 2d 1083 (Fla. 1988) is another pre-Jackson case approving the ccp aggravator. (This was done on a 4-3 vote). Harvey and another person developed a plan to rob the Boyds. Once inside the house, Harvey got physical control over the Boyds. The defendant and his accomplice robbed the victims and the began to discuss what to do with them. Harvey decided he would have to kill the both of the Boyds; hearing this, the Boyds tried to flee. Before the Boyds could get away, they were shot and killed.

Lamb v. State, 532 So. 2d 105 1 (Fla. 1988) is an example of a pre-Jackson decision about ccp. Iamb planned a burglary and specifically contemplated violence against the victim. Lamb brought a weapon with him but exchanged it for a better weapon inside the victim's house. After initially breaking in the house, Lamb concealed himself and waited for the victim to return because he was dissatisfied that the burglary netted so little. This Court considered the fact that Lamb brought a deadly weapon to the scene of the crime critical to its ccp analysis. Of course Mr. Lawrence did no such thing. His choice of weapons was dictated by what was available in Brenda Lawrence's home.

In a case contemporaneous with Jackson, *Pietri v.* **State,** 644 So. 2d 1347 (Fla. 1994), this Court reversed a trial court finding of ccp. Pietri had escaped from a community correctional center. During the next four days, he committed numerous crimes, including the burglary of a dwelling and stealing some guns He drove away from

the burglary in a stolen car. A police officer spotted him and gave chase, ultimately getting Pietri to pull over. When the police officer approached the stolen vehicle, Pietri shot and killed him. On these set of facts, this Court found no careful design and heightened premeditation; that is, "no calculation". Much the same could be said of Mr. Lawrence. The murder of Finken was committed in a totally unsophisticated manner, not designed to deceive anyone.

A vivid contrast can be found in *Ponticelli v. State, 593 So.* 2d 483 (Fla. 1991). Ponticelli had a prearranged plan to kill two people involved in the drug business. He thought about killing the victims in their own home but did not because others were present. Instead, Ponticelli got the victims to leave the house on a pretext of going to another house to set up a fake drug deal. Ponticelli killed the two people while driving around in the car. Lawrence killed Finken in the sight and sound of at least two other adults and three children.

After Jackson, this Court has strictly adhered to making the State prove the four elements of ccp. In *Windom v. State,* 656 So. 2d 432 (Fla. 1995), the defendant killed three people. One of them was an intended target because he owed Windom some money. Windom learned that the victim had won some money at the dog track but did not pay off his debt, Windom then made it publicly known that he was going to kill him and purchased a gun and bullets to accomplish his goal. When he located the victim shortly thereafter, Windom shot him twice in the back.

Windom, in a rage, then killed his girlfriend and girlfriend's mother in separate shootings at different locations. This Court upheld the ccp finding as to the debtor but reversed as to the girlfriend and her mother, finding that Windom had no prearranged design to kill them.

D.

> In reviewing a death sentence, this Court must consider the particular circumstances of the case on review in comparison to other decisions we have made, and then decide if death is an appropriate penalty in comparison to those other decisions.

Hunter v. State, 660 So. 2d 244, 254 (Fla. 1995).

One of these particular circumstances is the existence of another person involved in the crime. In this case, Brenda Lawrence was similarly involved in the killing of Michael Finken. Mr. Lawrence acknowledges that the evidence showed that he physically killed Finken but only because Brenda Lawrence made that possible.

This Court had permitted sentence disparity in the imposition of the death penalty when the disparity is related to varying degrees of culpability and participation. A less culpable defendant can receive a less severe sentence. It is simply not relevant for comparison purposes that the co-defendant got a life recommendation from a jury and that the State did not contest it. Brenda Lawrence, by her conduct, wanted Michael Finkendead. She used Gary Lawrence to obtain this result. In every important respect, she is equally culpable.

All of these factors lead to one answer-the death penalty given Gary Lawrence must be removed and replaced with a sentence of life in prison.

CONCLUSION

For the reasons stated in Mr. Lawrence's reply brief, he requests this Court to either (1) vacate the death sentence and remand for a life sentence or (2) vacate the death sentence and remand for a new jury sentencing hearing.

CERTIFICATE OF SERVICE

I *HEREBY CERTIFY* that a copy of the foregoing has been furnished by United States mail or hand delivery this 1st day of November, 1996 to **Barbara Yates,** Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050.

STEVEN L. SELIGER
GARCIA AND SELIGER
Florida Bar Number 244597
16 North Adams Street
Quincy, Florida 3235 1
(904) 8754668

Attorney for Mr. Lawrence