IN THE SUPREME COURT OF FLORIDA

RONALD JORGENSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

Case No.: 86,916
(Court Appointed)

ON APPEAL FROM THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR POLK COUNTY

APPELLANT'S REPLY BRIEF

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ISSUE II.

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLEGEDLY PERMITTING THE STATE TO INTRODUCE EVIDENCE OF COLLATERAL CRIMES AND BAD ACTS WHICH APPELLANT MAINTAINS WAS IRRELEVANT, PREJUDICIAL AND BECAME A FEATURE OF THE TRIAL?

Not noted in Appellee's restatement of this issue is the fact that Appellant asserts *prejudicial contamination of both guilt and penalty phases* of his trial. In its rendition of the facts to support the use by the State of collateral crimes evidence at trial, i.e that Appellant was a drug dealer, Appellee implies it was necessary because the Appellant's defense counsel wished to exclude evidence of Appellant's drug use and then to besmirch the State's witnesses [Finley, Maynard and Kilduff] by portraying them alone as a bunch of "druggies." [Answer Brief Page 19]. The record undeniably demonstrates defense counsel never contemplated trying to exclude evidence of *drug* use by Appellant, or anyone else.

Appellant agreed that the fact of drug use was so inextricably intertwined in the case and was necessary to show the relationship of the parties and the context of the crime. However, Appellant did oppose the repeated admission of evidence that Appellant was *a drug dealer*. That prejudicial information had little or no relevance and, if relevant at all, its probative value was substantially outweighed by its dramatic prejudicial impact.

There was no showing by the State at trial that drug-dealing as distinguished from drug use had any nexus with this murder, and the State admitted it could not present evidence that

would link drug dealing to a motive for the killing [See argument in Appellant's Initial Brief P. 36-41].

In its rationale for admission, Appellee in its Answer Brief [Page 19-25] repeats the State's argument at trial that the evidence of Appellant's drug-dealing was relevant to show his motive for the murder and to show the State's theory of the case. Appellee also minimized the evidence of domestic discord between Appellant and the victim, which had a lot to do with drug use, but nothing to do with drug selling. The snippet of Michael Hughes' testimony is used by the Appellee because *it is the only evidence in the whole trial* even suggesting that Appellant had a non-domestic motive for the murder. Even that [suggesting a drug dealing motive] is ambiguous. Hughes, in the same breath also attributes to the Appellant domestic motives including: that the relationship [of Appellant and Tammy] had gone sour; that Appellant had gotten tired of the victim; and that Appellant was seeing someone else. [T.2012-2014].

The Appellee also misstated [Answer Brief Page 19] Tammy Ruzga's role in its effort to claim a non-domestic motive. Contrary to Appellee's statements, no witness ever said Tammy "regularly delivered drugs for Appellant" or was a "runner" [the trial court said that T.343]. They said she had delivered on occasion. [T 1484; 1491; 1513-19]. Finley was Appellant's drug dealing partner not Tammy.

All the other State witnesses contradict Hughes on motive [Finley, Maynard, Kilduff.]. *These witnesses, who knew Appellant and the victim intimately and saw them daily, all attributed the Appellant's anger and hostility toward the victim to her excessive drug use, whining and depression, her jealousy, her stealing and lying.* All of them attributed the Appellant's hostility toward Tammy, not to protecting his drug business, but to her out-of-control drug use and the

negative behavior it engendered. [T. 13981405; 1503-1511; 1544-45; 1624-25;1704; 2630-37]. All of these witnesses affirmed that Appellant and the victim, Tammy, had a romantic relationship, not a business one.

Appellant's drug-dealing business partner [Finley], obviously an interested party on this subject, did not know of nor testify to any "blackmail" efforts by the victim. [T. 1398-1405].

Appellee argues that the prosecution in Appellant's case did not introduce the evidence of Appellant's drug dealing *solely to prove bad character orpropensity.* [Answer Brief Pages 26-29]. Appellee maintains that the prosecutor's failure to argue in its closings that Appellant's motive for the murder was to protect his drug business is meaningless. [Answer Brief Page 29]. However, the argument that the prosecutor did not argue motive at closing because he did not need to do so, supports Appellant's point that the drug-dealing evidence was never viewed by the State as either relevant or persuasive of guilt and was introduced solely for the purpose of showing bad character and propensity. The absence of substantial credible evidence of a non-domestic motive, except for mere speculation, was the reason the State had conceded Defendant's Motion in Limine initially at the pretrial hearing. [R. 348-5 1].

Unlike the factual setting of **Caruso *v. State,*** 645 **So.2d** 389,394 **(Fla. 1994)** and other cases recited by Appellant [Initial Brief Pages 37-38], the trial court here erred in admitting the drug dealer testimony *because no substantial nexus with this homicide was ever established,* Such an error, because of its powerful prejudicial impact, is presumed harmful and must result in a reversal unless it can be shown to be harmless beyond a reasonable doubt. ***Czubak v. State,*** **570 So.2d** 925,928 **(Fla. 1990)** et al. Appellant asserts that, as in the reversal cases he cited in his Initial Brief [Pages 37-41], this error is not harmless here and must result in a reversal and new

trial.

In that connection it should be noted that Appellant was convicted of premeditated first degree murder. There was no felony murder theory. The primary evidence of premeditation was provided by one witness alone: Laurie Kilduff. Her credibility was therefore of critical importance. Kilduff s credibility was vulnerable in view of the coercion brought to bear on her by police threatening her with 1st degree murder charges as a principal, and a VOP.[T. 1608-09;1654-62; 1668-70; 169 1-98] and the very compelling interest she had in inculpating Appellant created by the State's offer of total transactional immunity for her testimony. Thus, the jury's weighing of Kilduff s credibility against Appellant's [via his not guilty plea] may have been prejudiced against Appellant by the cumulative and irrelevant evidence that Appellant was a "drug dealer." Without the drug dealer evidence, the jury may well have concluded that Appellant killed Tammy, in an angry, irrational, impulsive, drug-befogged state of domestic strife and, committed only second degree murder. Further, all that has been said previously by Appellant about *the harmful spillover of this evidence into penalty phase* is likewise hereby reiterated. [See Initial Brief Pages 68-74].

Even assuming, without admitting, some small degree of relevance to the evidence that Appellant was a drug dealer, *the trial court was obligated to apply the balancing test to determine whether the unfair-prejudice [with a view to both guilt andpenalty phases] substantially outweighed the probative value of that evidence under* **Fla. Stat. Section 90.403.** ***See State v. McClain,*** 525 **So.2d** 420 **(Fla. 1988).** This Court has recently reiterated the need for the careful application of such a balancing test in death penalty cases. ***Steverson v. State, 695*** **So.2d 687, 688-90 (Fla. 1997).** *See* also *Henry v. State,* 574 **So.2d** 73 **(Fla.** 1991). Appellant's asserts that a careful review of the record will show that the trial court here, in reversing itself on

Appellant's Motion in Limine to exclude the drug dealer evidence, ***considered only relevance [and decided that erroneously in Appellant's view], but gave absolutely no consideration to potential unfair prejudice and certainly applied no balancing test at all that can be discerned [*** R. 302, 360-63; T. 23-26, 329-64; Initial Brief Issue II. and V].

Appellant concedes that in his case the egregiousness of the use of improper collateral crimes evidence does not rival that in ***Long*** v. ***State,*** 610 **So.2d 1276 (Fla. 1992).** However, that does not change the fact that this evidence of drug dealing was presented over and over making it at least a substantial sideshow of the case. [T. 1162-63; 1347; 1351-54; 1357-59; 1439; 1471; **1484; 15 14; 1541-42; 1638;** 1642]. See also related prosecutorial remarks recited in Appellant's Initial Brief [Page **73**].

This use of irrelevant collateral crimes evidence was so pervasive in this trial that the jury was deeply imprinted by repetition with the image of "Ronald Jorgenson the drug dealer." This clearly colored the issues and influenced the jury's view, especially at penalty phase. That drug dealer evidence together with the "snitch" evidence that Appellant sought to have witnesses killed by "hit men." [T. 1373-74; 1436; 2014-15; 2066-67; 2078-80; 2087-89; 2240-45; **2419],** even if marginally relevant, would certainly affect jurors and cause them decide on that emotional basis to put him to death. The jury did not recommend death for a drugged-out, irrational guy who killed his estranged girlfriend. They recommended death for the image of a cold-hearted big-time drug dealer who manipulated people and casually hired hit men to solve his legal problems. It is an image out of the "Godfather," a false image which had no place in this trial.

REBUTTAL ARGUMENT ISSUE III.

(As Restated by Appellee)

ISSUE III.

WHETHER THE TRIAL COURT ERRED REVERSIBLY IN FAILING TO FIND AND WEIGH MITIGATING CIRCUMSTANCES?

Appellant relies upon and restates the extensive arguments set forth in his Initial Brief on Issue III. [Pages 42-63], but will respond to rebut certain arguments in Appellee's Answer Brief on that issue.

A. The Mental Mitigators:

In the initial section of its Answer Brief on Issue III [Pages 34-45] the Appellee rehashes the argument made by the trial court in its sentencing order rejecting the Appellant's expert and lay evidence of both statutory mental mitigators or even non-statutory mental mitigation. Appellee ignores, as did the trial court, that the evidence at trial was that of two qualified mental health experts of great experience, both of whom, based on the facts of this case, found to a reasonable degree of medical/psychiatric certainty that Appellant on the night of the murder was suffering from an extreme mental or emotional disturbance and from a substantial impairment of his ability to appreciate the wrongfulness of what he did and to conform his conduct to the requirements of the law.

The testimony of the defense mental health experts was solidly grounded on and consistent with facts from mostly State witnesses and defense penalty phase witnesses about the crime, Appellant's drug use and behavioral changes over time, and it was unrebutted at trial. Dr.

Dee stated that changes in Appellant's behavior and loss of moral and emotional self-regulative ability were the best indicators [aside from his own neuro-psychological testing] of the presence of brain damage. Consistent with Dee's testimony, was uncontradicted testimony by numerous family members and friends at penalty phase of just such marked negative changes in Appellant's behavior, associations, employment, and temperament as his drug addiction worsened. State witnesses testified as to Appellant's drug problem, domestic strife and hostility toward Tammy, and his heavier than usual drug use on the day of the murder.

Appellee can quibble over minute details of the expert testimony until the proverbial cows come home, but the statutory mental mitigators were unequivocally found, to a reasonable degree of medical/psychiatric certainty, to be present in Appellant on the night of the murder by both these experts, without contradiction at trial.

It should further be noted that while **Fla. R Crim. P.** 3.202 had not yet been promulgated, ***Dilbeck v. State,*** 643 **So.2d** 1027 **(Fla. 1994)** had been decided. Further the new rule was promulgated some two months after this trial. All the attorneys at trial were aware of that change in the law as was the trial court. Consequently, at trial the trial court notified the State in the presence of this author that it would approve a request for evaluation of the Appellant by the State's expert(s) prior to penalty phase. The State could have called experts to examine Appellant and to rebut Drs. Dee and McClane, but chose not to do so.

The Appellant's expert Dr. Dee, an expert in neuro-psychological diagnosis, also found clear clinical evidence that Appellant was suffering from brain damage caused by chronic methamphetamine abuse. He administered Appellant twelve hours of personality and neuro-psychological tests. Both Dr. Dee and Dr. McClane found that brain damage secondary to chronic

drug abuse [which Dee diagnosed in Appellant] causes loss of impulse control and behavioral, emotional, and moral self-regulative capability. [T. 2803-2822; 2852-79].

The trial court in rejecting this mitigation in its entirety and for all purposes statutory or non-statutory *recited as justification for its rejection evidence ofpremeditation [especially via Kilduff] and the attempts to avoid detection by Appellant.* Yet both experts testified repeatedly that such purposive planning and efforts to escape detection by Appellant were not inconsistent with their findings at all. [T. 2830-3 1; 2841-44; 2866-67; 2874-79]. The trial court, by so doing, engaged in "voodoo psychology" by arbitrarily and capriciously rejecting this unrebutted scientific expert testimony. Having been presented with a reasonable quantum of evidence, uncontradicted at trial, the trial court's rejection of this evidence is contrary to this Court's teachings in ***Nibert v. State,*** 574 ***So.2d 1059 (Fla. 1990)*** et ***al.*** [Initial Brief Pages 43-56].

Appellant is an intelligent man as Appellee and the trial court stated ad nauseam. That fact does not preclude, as Appellee and the trial court clearly imply, that Appellant suffered from an extreme mental or emotional disturbance, or a substantial impairment, or even extreme methamphetamine intoxication.

In their repeated sarcastic comments on Appellant's high I.Q., what Appellee and the trial court seem to say is: because Appellant's I.Q. is high, he cannot be mentally ill, or impaired in his awareness, perception, and impulse controls by chronic brain damage, or he cannot be acutely intoxicated by methamphetamines to the point of paranoia and extreme violent impulsivity.

Both the trial court in its sentencing order and Appellee then embellish the *'high I.Q. as nullifier of mitigation" argument* by stating further that if Appellant can premeditate and carry out a murder plan and seek to avoid detection, however ineptly as the trial court points out, it is

impossible that he was acting under substantial mental impairment or any extreme mental or emotional disturbance, or even the lesser non-statutory versions of those things at the time. As Appellant's experts stated a person may be able to plan and carry out a plan with purposive activity and still have a distorted perception of what they are doing, or a loss of control [moral and behavioral self-regulation] due to irrational and overpowering impulses or emotions or neurological damage. The premeditation may go to weight, but it does not disestablish scientific fact. The trial court's thesis is seriously flawed.

The trial court and Appellee ***also exaggerate the premeditation facts and deal with them very selectively.*** For example, the court's sentencing order states: "a few days prior to the murder the defendant started carrying a gun." [R. 53 1] This is true, but it ignores State witness Finley's other testimony that he and the defendant regularly took guns in trade for drugs and then defendant resold them. [T. 1362-63; 1375-79]. The court describes in elaborate detail the plan for the murder in order to make it appear very calculated. [R.530-33] But it ignores Hughes' testimony [which it finds so reliable on motive] when he testified:

> Q. Who did he say planned to kill her?
>
> A. Him and his girl [Laurie Kilduff]..... ,... ,..... ,, ... ,, ...
>
> .....
>
> Q. What did Mr. Jorgenson tell you he and Laurie Kilduff planned?
>
> A , ...They had been planning it for a while. And they never really had a set time to do anything. But one evening, that they decided to go ahead and get rid of her or the time was right. ***It was sort of a spur-of-the-moment thing. To me, it was a spur-of-the-moment thing.*** [emphasis supplied] [T. 1998].

The trial court also ignored the implications for mental mitigation of Hughes' testimony

that the defendant also told him that on the night of the murder that he was on drugs and they "messed up his thinking." This caused defendant to screw up by leaving evidence at the murder. CT.20151 The trial court uses that testimony twice in its order by saying:

> "Defendant's use of methamphetamine did not in any way cause him to kill the victim. At most, the facts of this case establish to this court the defendant gob ***caught*** [emphasis in original] because methamphetamine caused the defendant to make mistakes that resulted in his arrest." [R. 53 1]

The court ignored the consistency of this testimony with the expert's analysis of the impairment and disturbance of Appellant on the fatal night. The court quotes Dr. Dee's comment that Appellant was stupid leave cigarette butts and footprints at the scene. [R. 532; T. 2842-44]. But, while the trial court makes much of Appellant's attempt to set up an alibi as proof of premeditation and disproof of mental mitigation, it totally ignored Dr. Dee *'s* testimony that such conduct was evidence that Appellant was heavily affected by drugs on that night, [T. 2830-3 1].

There is no scientific support or expert opinion anywhere in this record [or in the academic world] for this dubious thesis of ***the trial court?*** Appellant urgently asserts that: to permit a lay judge to rewrite the mental health sciences, pharmacology, and medicine based his own idiosyncratic biases with no basis in any competent and relevant evidence at all, ***is to invite the destruction of rationality and meaningful criteria in death penalty sentencing and to obviate the important role in such sentencing of the mental health sciences of psychology and psychiatry.***

This Court has stated that it will reverse the trial court's rejection of mitigators supported in the record by a reasonable quantum of uncontroverted evidence, without competent, substantial evidence to support such rejection. [Initial Brief P. 49-56].

This Court recently applied that principle in ***Franqui v. State, 699*** So.2d 1312, 1325-26

(Fla. 1997). In ***Franqui*** the trial court rejected mitigation of defendant's mental retardation and brain damage proffered by defense experts. ***This Court upheld the trial court only because the defense mental health expert was directly contradicted by the State expert, Dr. Mutter.*** The ***Franqui*** trial court discussed the conflicting expert testimony in its order, and cited clear evidence of premeditation and shrewd planning by defendant against the claim of mental retardation. By contrast, the rejection by the trial court in Appellant's case of the uncontroverted testimony of both defense experts was arbitrary, unsupported by any evidence, except the facts of premeditation, which facts the defense experts declared were consistent with their findings of statutory mental mitigation. The selective use of facts by the trial court is blatant here.

In another 1997 case, ***Walker v. State*** 1997 **WL** 539438 **at** 5-7, **17-21,** this Court affirmed the trial court's rejection of one of the statutory mental mitigators, despite expert testimony for the defendant finding such mitigation, ***because the one defense expert was equivocal, and the State presented substantial contradictory expert testimony.*** However, in ***Walker*** this Court also remanded for a new sentencing because the trial court failed to find and weigh considerable non-statutory mitigation [just as Appellant's trial court did]. This Court in ***Walker*** also reaffirmed in the strongest possible terms the solemn obligation of the trial court to carefully consider and weigh all mitigating evidence found in the record. After reiteration of the requirements of ***Campbell v. State,; Ferrell v. State,; State v. Dixon, 283*** **So.2d 1 (Fla. 1973)** in death penalty sentencing, this Court made this eloquent statement:

> " This bedrock requirement cannot be met by treating mitigating evidence as an academic exercise which may be summarily addressed and disposed of.....,.....,.....,....,.....,,,....,....,.....
> ..... clearly then, the "result of this weighing process" can only satisfy

> ***Campbell*** and its progeny if it truly comprises a thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty. We do not use the word "process" lightly. If the trial court does not conduct such a deliberate inquiry and then document its findings and conclusions, this Court cannot be assured that it properly considered all mitigating evidence." **[at 20-21].**

Appellant respectfully submits that the trial court's analysis in his case failed to meet this standard and was characterized by superficial, arbitrary, and highly selective analysis obviously tailored to justify the trial court's determination to impose a sentence of death.

Appellee recites ***Walls v. State,*** 641 **So.2d** 381 **(Fla.** 1994) and ***Wuornos v. State, 676*** **So.2d** 972 (Fla. 1996) [Answer Brief Pages **86-87]** in support of the proposition that the facts of this case [evidence of premeditation] contradicted Appellant's mental health experts and that rejection of the mental mitigators was proper. Appellant disposed of that application of ***Walls*** in his [Initial Brief Page **54]** by showing that the rejection in ***Walls*** was supported by the fact that the opinions of defense experts in that case were equivocal, not firm.

The other case relied upon by Appellee is likewise inapposite. In ***Wuornos v. State, supra at*** 975 this Court held that the trial court's rejection of mental mitigation was proper because the testimony of one defense expert [Dr. Krop] was equivocal and because *the only evidence of Wuornos's intoxication at the time* of *the crime* was her own self-serving testimony rendered incredible by her inconsistent statements; and that the testimony of the other expert was inconsistent with the facts [unspecified.] None of these considerations pertained in Appellant's case.

B. The Trial Court's Failure to Find and/or Properly Weigh Mitigation:

Appellee rightly states [Answer Brief **P.44-45]** that the decision to find or not find

mitigation and to assess its weight if found lies within the sound discretion of the trial court. Appellant simply reiterates this trial court's abuses of its discretion which he has already addressed in detail in his Initial Brief in the [Argument on Issues III., IV.,V., VI. and VII.] which he reasserts in their entirety here.

C ***The Trial Court's Rejection of Appellant's Proffered Domestic Mitigation:***

Appellee in its Answer Brief [Pages 45-48; **84-85]** addressing the rejection by the trial court of Appellant's domestic mitigation cites this Court's decisions in ***Spencer v. State,*** **691 So.2d 1062 (Fla. 1997)** and ***Walker v. State,*** **22 F.L.W. S537 (Fla. 1997) [1997 WL 5394381.** Appellee argues that ***Spencer*** is dispositive of Appellant's claim of domestic mitigation because there is no C.C.P. mitigator to rebut in Appellant's case and because there is no "domestic dispute exception to the death penalty. Appellant states that is not the issue. The issue is whether domestic dispute factors can be mitigating, and clearly they ***can. Walker, supra,*** is distinguishable because therein the primary motive for murder was pecuniary, i.e. to avoid child support.

Nonetheless, Appellant argues that strong emotions growing out of conflicts in a domestic situation can be mitigating, without C.C.P., because they may diminish the coldness and deliberate premeditation aspect of any murder and make the perpetrator less blameworthy by some quantum. If Appellant's state of mind was affected by heated emotions arising from domestic conflict, and they contributed [along with drug abuse and its effects] to causing him to lose control and to kill, then that fact makes Appellant somewhat less blameworthy than one who kills with clear unobstructed, unfettered deliberation unclouded by emotion or drugs and therefore "in cold blood." In addition, no other motive was ever shown in Appellant's case.

What the evidence does show in Appellant's case was *proven domestic* ***stressors***, i.e

Appellant's escalating anger, hostility, and threats toward the victim due to her misbehavior, exacerbated by the victim's tragic out-of-control methamphetamine habit and Appellant's own serious drug abuse and its effects.

Dr. McClane unequivocally opined that such domestic stressors, together with Appellant's own methamphetamine abuse [both chronic and more acute on the day of the murder], would create a much greater probability of Appellant's loss of contact with or distortion of reality and loss of judgment and impulse control [self-regulation] forming a ***causal nexus*** with the explosion of violence by Appellant such as happened on the fatal night. [T. 2868-74]. These domestic passions, fueled, inflamed and distorted by Appellant's own drug-induced violent, impulsive, and paranoid tendencies made murder more probable than would have been the case if they occurred in a non-domestic context or in a setting wherein Appellant was not under the influence of drugs.

If that is so, then those domestic emotions influenced the crime and are mitigating to some degree and should have been weighed by the trial court. Appellant does not deny that the trial court could have used the premeditation evidence to discount the weight of this mitigation, but not to ignore it.

Appellee states [See Answer Brief Pages 47-48] that Appellant misapplies ***Maulden v. State,*** 617 **So.2d 298 (Fla.** 1993) and several other domestic cases in his Initial Brief [Page 58-59]. Yet the trial court in its sentencing order here rejected domestic mitigation based solely on the same evidence of premeditation by Appellant. The sentencing order recited the premeditation evidence and a non-domestic motive, the latter clearly not proven at trial, to argue that Appellant was unaffected by domestic emotions, The trial court's apparent reasoning that: **premeditation= no domestic emotions** led Appellant to recite ***Maulden supra, et al*** to refute that false premise.

Appellant asserts that the trial court's conclusion "begs the question" by assuming premeditation negates the existence of the distorting effects of both the mental mitigators and domestic emotions. *It thereby also denies the dynamic interplay of the statutory mental mitigation factors, drug abuse, and those domestic emotions in Appellant's* case. The mental mitigators were rejected by the trial court reasoning from the identical premise that: ***Premeditation= No Mental Mitigation.*** This is deductive logic from a false premise not established in evidence. The trial court's simplistic logic *makes premeditation the universal antidote to all mitigation* whether substance abuse, mental, or domestic and ignores the interdependency of these variables.

Appellant used ***Maulden*** and some other cases which contained significant domestic mitigation found by the court which also had significant premeditation evidence, thus, to show the inconsistency of the position of the trial court and Appellee herein when they imply that these factors are antithetical or mutually exclusive.

Appellee also compares Appellant's case on the issue of domestic mitigation to several other cases in which that mitigator was rejected by this Court on proportionality argument against the death penalty. Appellee cites in its Answer Brief [Page 48]: ***Riechmann v. State,* 581 So.2d 133 (Fla. 1991); *Pope v. State, 679* So.2d 710 (Fla. 1996);** and ***Orme v. State, 677* So.2d** 258 **(Fla. 1996).** Appellee cites these cases to support the trial court's conclusions in Appellant's case that this is not a case in which any domestic aspects are mitigating against the death penalty. Appellee is really saying that the trial court relied correctly on the premises that Appellant's premeditation **and** the totally unproven assertion that Appellant's sole motive for killing Tammy Ruzga was to "protect his drug business," do totally negate the argument that there were

mitigating personal or domestic motives and extreme emotions involved in causing this murder.

That is a view totally and completely at odds with the evidence in Appellant's case. Indeed, the thrust of the Appellant's experts' unrebutted testimony was that those domestic conflicts and emotions, heightened and amplified into explosive irrationality by Appellant's drug abuse including both its chronic and acute effects, were significant factors in bringing about this murder.

A review of the facts of Appellee's cited cases will demonstrate that its reliance on that logic is misplaced. These cases are not factually comparable to Appellant's at all.

Riechmann lived with a woman named Kischnick for thirteen years. Throughout that time he was her pimp, and she was a professional prostitute. Riechmann lived on the woman's earnings. Kischnick's health declined and she decided not to continue working as a prostitute. She told Riechmann she was going to quit work. The two quarreled over this issue. Riechmann had taken out $94 1,000 in insurance on Kischnick's life with himself as beneficiary. Riechmann shot and killed Kischnick while they were in their rental car and blamed the shooting on a fictitious black man whom, he said, accosted the couple. There was no testimony that Riechmann suffered from any mental disturbances or impairments, nor any alcohol/ drug abuse which contributed to causing him to commit this crime.

In Appellant's case, the victim, **Tammy** Ruzga, was Appellant's live-in girlfriend. She earned him no money, she was supported by him. She played no significant role in his business, even though she may have occasionally delivered drugs for him. There was no insurance on her life. Appellant did not murder **Tammy** for pecuniary gain, but out of anger because he ceased to want her as his girlfriend and was outraged that she had repeatedly betrayed his trust by lying to

him and stealing from him. Tammy also was depressed and whining all the time, and drugged out nearly constantly. Most importantly, Appellant's negative emotions from this soured romance were distorted, magnified, and rendered "out of control" by Appellant's brain impairment from chronic drug use, and probable quasi-psychotic irrationality on the night of the murder from acute drug intoxication. The Appellee's comparison of Appellant's case to ***Riechmann*** falls of its own weight.

In Appellee's second case is ***Pope v. State, supra.*** Pope and victim, Alice, were alcoholics and were drunk at the time of the murder. They had some sort of a drunken, violent, on-again off-again relationship which was somewhat unclear. Pope brutally murdered Alice *specifically and expressly for the purpose of robbing her of her money and her car.* His domestic feelings for her, if any, appear to have played little role in the killing. In Appellant's case there is was no non-domestic primary motive for the killing as there appears to be in both ***Riechmann*** and ***Pope.***

Addressing the proportionality aspects of these cases, **Riechmann** had two aggravators [C.C.P. and pecuniary gain] and no mitigation. **Pope** had two aggravators in his case [prior violent felony and pecuniary gain], but also significant mitigation including both statutory mental mitigators and the non-statutory mitigators of being intoxicated at the time of the killing and that the killing was in a domestic situation. *Appellant's case has only one diminished aggravator, and, similar to* **Pope,** *had mental mitigation, and non-statutory mitigation including domestic , although erroneously neither was found or weighed properly by Appellant's trial court.*

Orme v. State, supra is similar to Appellant's case in that at the time of the murder Orme was suffering from cocaine intoxication and had a history of serious drug abuse [although in Orme

this was disputed by police testimony and contradicted by his ability to hold a job and hide his drug abuse even from his family.] Orme sexually assaulted and robbed Lisa Redd a former girlfriend whom he was not seeing at the time of the murder. Ms. Redd had a previous relationship with Orme which had ended. Orme said he was having a bad high that night and called Redd because she was a nurse. Orme murdered and raped Redd and took her car and some other possessions. The trial court found three aggravating circumstances [murder in course of a sexual battery; H.A.C., and pecuniary gain.] The trial court, despite some conflicting testimony, found both statutory mental mitigators to apply. The trial court found also that the mitigators did not outweigh the three aggravators. This Court on appeal rejected Orme's claim that domestic mitigation should override the death penalty because there was no evidence the killing was motivated by those kinds of emotions [not a lover's quarrel].

Appellant's case differs greatly from Orme's in aggravation, but it is very similar to it with regard to mental mitigation, except that the trial court in Appellant's case wrongly found no mental mitigation. In Appellant's case, unlike Orme, the evidence of mental mitigation was uncontradicted, and there was overwhelming evidence of domestic conflict.

In summary, Appellant urges that his case, with one weakened aggravator, if his trial court had properly found and weighed mental mitigation at some level, and if it had found and given some weight to domestic mitigation, and if it had given some meaningful weight to the disparity of treatment of Laurie Kilduff, then these mitigators, together with the other omitted non-statutory mitigation, the death penalty would be insupportable.

Appellant's trial court failed to properly and objectively consider, find, and fairly weigh the mitigation established in Appellant's case [including domestic mitigation] as it is required to

do by ***Campbell v. State*** 571 **So.2d 415 (Fla. 1990)** and the evidence. There is no substantial competent evidence to support the trial court's position.

D. Other Non-Statutory Mitigating Circumstances:

First, Appellant's ten other non-statutory mitigators set out in his Initial Brief [Pages 60-62] are not individually weighty. However, collectively they clearly have some moderate amount of weight. Each of them was presented clearly in evidence in penalty phase and argued to the jury at closing, albeit briefly. The author herein was the primary attorney for penalty phase and did spend almost two days at trial presenting these circumstances and the other mitigators already discussed. The trial court could not have been unaware of these matters. It did not have to "guess," as Appellee sarcastically asserts, what the mitigation was. This record was clear on these subjects. The State adduced no evidence to contradict these non-statutory mitigators. By its failure to properly find, consider and carefully weigh such mitigation, the trial court has rendered its sentence of death unreliable. ***Walker v. State, supra.*** In a single aggravator case, where that aggravator is diminished somewhat in weight by its own facts, this oversight simply cannot be harmless beyond a reasonable doubt as the State must show it to be.

The trial court's duty was to consider these minor non-statutory mitigators "[which] must be considered and weighed when contained anywhere in the record to the extent that it is believable and uncontroverted." ***Robinson v. State, 684*** **So.2d** 175,177 **(Fla. 1992); *Campbell v. State, supra; Cheshire v. State, 568*** **So.2d** 908 , 911 **(Fla. 1990).**

Appellee argues in its Answer Brief [Page 51] that the trial court's failure to consider or articulate minor mitigation does not "ineluctably result in reversal." citing ***Thomas v. State, 693*** **So.2d 951 (Fla. 1997).** In ***Thomas,*** this Court found the trial court's failure to address

mitigating evidence of good character was harmless error "in view of massive evidence in aggravation, including defendant's killing of his own mother to keep her from talking to police about victim's death." ***This Court upheld the death penalty in light of the trial court 's finding of five aggravators*** [prior violent felony; committed in course of burglary; pecuniary gain, H.A.C.; and C.C.P.] ***and no mitigation. Thomas v. State, supra at*** 952-53. Appellee's comparison of ***Thomas*** to Appellant's case requires no further comment.

Appellee also cited for harmless error purposes relating to minor mitigation, ***Wickham v. State, 593*** **So.2d 191 (Fla. 1992).** While Wickham had a history of alcoholism and multiple hospitalizations for mental illness including schizophrenia ***many years before and Wickham 's mental illness was in remission., and there was no evidence he was drinking at the time of the murder, i.e.*** no ***nexus.*** Compare that to Appellant's case in which the State's own witnesses attested to his drug problem and more than normal drug intoxication at the time of the murder, and to domestic strife. There was also evidence in Wickham's record [unlike Appellant's record] contradicting Wickham's assertion of mental mitigation. This Court found that the trial court should have found the various mitigators it failed to consider or weigh, but that the error was harmless. ***The trial court found six aggravators in Wickham 's case, only one of them [H.A. C.] was reversed by this court, leaving five intact aggravators.***

REBUTTAL ARGUMENT ISSUE IV.

(As Restated by Appellee)

ISSUE IV.

WHETHER THE LOWER COURT ERRED AND ABUSED ITS DISCRETION BY ALLEGEDLY FAILING TO PROPERLY WEIGH THE ONE AGGRAVATING CIRCUMSTANCE?

Appellee's suggestion that Appellant is making a "righteous dispatch" argument with regard to his argument for the diminishment of the weight of the single aggravator in Appellant's case, the prior 1966 homicide, is simply not accurate.

Appellant's point is simply this: that the stipulated facts of the prior second degree homicide make it clear that there was an imperfect self-defense situation in that case. The main facts are undisputed: Appellant killed Morgan 27 years before the present crime; that Phillip Morgan had previously abused Appellant's sister; that on the fatal day Morgan was drunk and began beating on the sister who was six months pregnant in Appellant's presence; that when Appellant fired a warning shot in the air Morgan charged at Appellant vowing to kill him.

The only facts that are in dispute are that Morgan's friends stated Morgan, while he did charge at Appellant, never got close enough to Appellant to touch him and that Appellant fired at Morgan until he dropped, while Appellant testified he grappled with Morgan and that it was at that time the fatal last shot was fired. That imperfect self-defense situation makes Appellant's crime less blameworthy surely, even though a homicide, than compared to the facts in most homicides. Indeed, it could well have been and probably was only a manslaughter case.

This present homicide is totally unlike the 1966 homicide, and thus no repetitive pattern of violence against women or in his own prior domestic relationships appears as it did in ***Ferrell v.***

State, 680 So.2d 390 (Fla. 1996) upon which Appellee relies and seeks to compare to Appellant's case. In *Ferrell* this Court made it clear that the defendant's repetitive pattern, killing two wives or girlfriends, ["bearing many of the earmarks of the present crime"] made the prior violent felony aggravator more weighty. ***A sort of: "He is incorrigible*** *and will kill another woman* ***if*** *he is ever* ***free "*** *aggravating factor.*

Appellee also relies on ***Duncan v. State,*** 619 So.2d 279 (Fla. 1993) for the principle that this Court will uphold death when a single aggravator is a prior homicide. ***Duncan*** had an aggravated assault on another woman and had previously killed a fellow inmate. But is ***Duncan*** really a single aggravator case? The opinion is unclear, but the facts of the murder appear to also make out H.A.C. in that the victim was stabbed multiple times and had defensive wounds. In any case, the trial court found both statutory mental mitigators and apparently the non-statutory mitigator of under the influence of alcohol at the time of the killing. ***This Court reversed the*** *findings of the trial courtfinding the statutory mental and* ***non-statutory alcohol use mitigators on cross appeal because there was no supporting evidence in the record. That left little or no mitigating circumstances and explains the affirmation of the death penalty.*** This Court upholds death penalties based on a single aggravator only when mitigation is of little or no weight. The aggravator must also be fairly assessed and weighed qualitatively. Not all aggravators are equal.

Appellee recites three older cases on the same point. In ***Lemon v. State, 456*** So.2d 885 (Fla. 1984). Lemon served time for stabbing a woman [attempted 1st degree murder.] Soon after getting out of prison Lemon dated Kimble McNeil who stopped dating him after a few months. Lemon became obsessive about McNeil stating that "if he could not have McNeil no one would because he would kill her." Later he did just that by first choking McNeil and then stabbing her to

death. There were two aggravators: H.A.C. and prior violent felony. The trial court found one statutory mental mitigator, but rejected the other and the circumstance of Lemon's age. This Court upheld the death penalty on proportionality review. It should be noted that, like Ferrell, Lemon killed or attempted to kill women twice showing a pattern of repetitive extreme domestic violence.

In another case cited by Appellee, ***Harvard v. State,*** 414 **So.2d 1032 (Fla. 1982),** Harvard stalked, shot and killed his ex-wife. He had previously similarly stalked and shot another ex-wife. There were again two aggravators: H.A.C. and prior violent felony, and there was little in mitigation. Indeed, there was a hint also of C.C.P. even though not formally found when this Court in its initial review called the killing a "cold-blooded execution." ***Harvard v. State, 375 So.2d 833,835 (Fla. 1978). Once again we note the Ferrell/Lemon pattern of repetitive extreme domestic violence against women..***

The last case cited by Appellee is ***King v. State, 436 So.2d 50 (Fla. 1983).*** King bludgeoned his live-in girlfriend and while she was still conscious retrieved a pistol and shot her to death. He had been previously convicted of manslaughter in the murder of his common law wife 10 years before by bludgeoning her to death. The trial court found three aggravators: [H.A.C., C.C.P. and prior violent felony.] This Court upheld two of the aggravators, reversing C.C.P. The trial court found nothing in mitigation. This Court affirmed the death sentence. Once again we find the ***Ferrell/Lemons/Harvard pattern*** of the repetitive homicidal violence against women in domestic situations. This pattern does not exist in Appellant's case. We also find two aggravators and little or no mitigation in all these cases except ***Ferrell*** and ***Duncan,*** in which there was a single weighty aggravator and little mitigation. Appellant's case, ***if properly weighed by the trial***

court, has one aggravator of somewhat diminished weight due its facts, and also significant mitigation.

As Appellant stated in his Initial Brief [Pages 63-67], *the trial court herein did not make a qualitative assessment of the weight of Awwellant 's single aggravator, and no such careful weighing is awwarent anywhere in the sentencing order,* The trial court thereby failed in its duty under ***Campbell v. State, supra et al.*** This Court has clearly indicated [by actually making such qualitative assessments] that such an assessment of weight must be made. ***Finney*** v. ***State, 660 So.2d 674, 682-84 (Fla. 1995; Ferrell v. State, supra; Chaky v. State,* 651 So.2d 1169, 1173 (Fla. 1995); *Slawson v. State,* 619 So.2d 255, 258-60 (Fla. 1993); *Songer v. State,* 544 So.2d 1010, 1011 (Fla. 1989).**

Appellee states in its Answer Brief [Page 57] that Appellant cannot be aided by citing ***Chaky, Ferrell,*** and ***Songer*** because of their fact patterns are different from his. However, those cases were cited by Appellant ***only for the proposition*** that the trial court herein failed in its duty under ***Campbell v. State, supra*** and ***Rogers v. State,* 511 So.2d 526 (Fla. 1987)** to make a careful qualitative assessment and weighing of the single aggravating circumstance and to document its reasoning in the sentencing order so that it can be effectively reviewed. This Court has stated clearly in ***Cochran v. State,* 547 So.2d 928, 932-33 (Fla. 1989)** that the fact that the prior felony is a homicide does not always automatically nullify a life recommendation because to adopt such a rule would be ***tantamount to saying the trial court need not consider mitigating circumstances,***

APPELLANT'S REBUTTAL ARGUMENT
ISSUES V. AND VI.
(As Restated by Appellee)

ISSUE V.

WHETHER THE TRIAL COURT ERRED BY WEIGHING OR PERMITTING THE JURY TO WEIGH NON-STATUTORY AGGRAVATOR THAT APPELLANT WAS A DRUG DEALER?

ISSUE VI.

WHETHER THE LOWER COURT ERRED IN DENYING THE APPELLANT'S REQUESTED JURY INSTRUCTION BASED ON *HARMON V. STATE*, 527 So.2d 182 (Fla. 1988) CONCERNING THE NONSTATUTORY MITIGATOR DISPARITY OF TREATMENT OF AN ACCOMPLICE AND/OR WHETHER THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ITS WEIGHING OF THAT MITIGATOR AT SENTENCING?

Appellant will rely substantially on the arguments set forth in his Initial Brief on Issues V. And VI. [Pages 68-84]. He will simply make a few points in direct rebuttal to the arguments made by Appellee in the Answer Brief without attempting to restate his arguments previously made in detail.

Issue V.: Ignoring the sarcasm of Appellee about the State being unable to limit its witnesses to bishops and Nobel laureates [Answer Brief Page 593, Appellant simply reiterates here *with regard to its effect upon penalty phase* what he has already argued in this Brief in Rebuttal to Issue II. above and in Issues II. and V. of his Initial Brief

The "drug dealer" testimony should have been excluded on grounds of irrelevancy or on Section 90.403 grounds of its minimal probative value and extremely weighty prejudicial effect.[See Argument Issue II above and in Initial Brief].

Appellant urges that the so-called "motive testimony" of witness Hughes, ["nobody fucks with my drug business"], used by Appellee to justify admission of collateral crimes evidence, can be in context more logically and reasonably interpreted as puffery by Appellant [who was indigent with court-appointed counsel] attempting to convince Hughes that he really was a heavy-duty drug dealer who might actually have $50,000 to pay him for killing witnesses. In any case, this drug dealing evidence poisoned the water of the penalty phase well.

The trial court makes much of the drug dealer imagery as well. The trial court in its sentencing order accepted without qualification the clearly speculative and unproven premise that "protection of Appellant's drug business" was the motive for the murder. It rejected the domestic mitigation and mental mitigation out of hand [despite the evidence] for that reason. [R.534]. In effect the trial court in its reasoning was using the alleged drug dealing motive [together with premeditation] in effect as an impermissible non-statutory aggravator here.

Moving to Issue VI. as restated by Appellee, curiously, the trial court and Appellee rehearse that one ambiguous statement of witness Hughes ["nobody fucks with my drug business"] over and over to refute domestic mitigation and justify the death penalty. But, Appellee and trial *court, give Hughes no credit at all when he recites in the same testimony that Laurie Kilduff's helped to plan the murder two weeks beforehand and make clear her active aiding and abetting Appellant in the actual murder,* or when Hughes quotes Appellant on how "messed up on drugs" he was on the night of the murder. [See Appellant's Initial Brief Pages 79-83].

Kilduff's actions in this record were aiding and abetting a first degree murder when she, in her own words to Maynard two days after the event, said she had told Appellant, who asked her "what to do now?". to "go ahead and just do it" [T. 2628-42 and Initial Brief Pages 80-82].

Appellee [Answer Brief Pages 70-71] seeks to discredit Hughes' statements [quoting Appellant relating to Kilduff s role in planning the homicide] saying those statements were "less trustworthy" than his statements to the same witness implicating himself Does Appellee seriously argue that Appellant had some nihilistic kamikaze urge to falsify Kilduff s involvement through Hughes, knowing she had immunity, when he also, in the same conversation, inculpates himself fully in the crime by confessing the details to a cell-mate whom he trusts enough that he was trying to recruit the guy as a hit man to kill this very same Kilduff for $50,000?

As Appellee says, some of the cases relied upon by Appellant in its Initial Brief Issue VI. are jury override cases and therefore involve a different legal question than is presented here. Appellant presented them only to demonstrate this Court's recognition that the disparity of treatment of co-perpetrators, less extreme than appears in Appellant's case, is a rational basis and legally sufficient reason to uphold a jury life recommendation against override even in the face of very weighty multiple aggravators. It is therefore presumably legally significant.

The disparity in Appellant's case is as great as it gets. Laurie Kilduff got total immunity. Additionally, twice, during and after these proceedings, the State apparently intervened in or at least acquiesced to, in VOP actions against Kilduff, her restoration to probation for drug lapses etc. [T. 1608-09; 1691-98]. Her bias and interest in maintaining her initial sanitized version of her own involvement is also about as weighty as it gets.

Appellee states that disparity is insignificant and compares Appellant to ***Mordenti v. State,*** 630 **So.2d** 1080 (Fla. 1994). [Answer Brief Pages 65-66]. Appellant responds that Mordenti was a "contract killing." It is true that Gail Mordenti, who acted as go-between and money courier for the Husband and Michael Mordenti, was given immunity. However ***her testimony was essential***

because there was no other evidence linking Mordenti to the murder. **[at 1083]**. The trial court found two aggravators [C.C.P. and Pecuniary gain] and mitigation was moderate in weight [no mental mitigation]. This Court upheld the death penalty on proportionality review.

Appellee recites other cases which, like ***Mordenti***, are ***not comparable*** to Appellant's. ***Downs v.*** State, 572 **So.2d** 895 **(Fla. 1990)** is a cold-blooded contract killing with two aggravators, wherein less culpable conspirators were given immunity. ***Heath v. State, 648*** **So.2d 660 (Fla. 1994)** an armed robbery and murder with two aggravators [prior homicide and in course of robbery]. Heath had one statutory mental mitigator, and co-defendant was given life sentence. This Court upheld the death penalty. ***Hannon v. State, 638*** **So.2d 39 (Fla. 1994)** a double murder in which court found four aggravtors [contemporaneous homicide; during a burglary; H.A.C.; and to avoid arrest]. Less culpable co-defendants did not receive death. Death penalties affirmed. ***R Ferrell v. State,*** 686 So. 1324 **(Fla. 1996)** a murder in which there were four valid aggravators [C.C.P.; prior violent felony; in course of kidnaping; pecuniary gain]. One co-defendant got death the other life in prison. Defendant not the shooter, but was actively involved in the murder. ***Coleman v. State,*** 610 **So.2d 1283 (1992)** affirmed a life override in a quadruple homicide/sexual battery where court found four valid aggravators and minor mitigation. ***Eutzy v. State,*** **458 So.2d 755 (Fla. 1984)** a life override with C.C.P. and no mitigation.

The government has a solemn duty to exercise the awesome power of life or death with which it is entrusted by our people very scrupulously so as to uphold the highest ideals of impartial justice. It must avoid even the appearance of arbitrariness, caprice, and cynical expediency which a disparity of this kind engenders. The disparity here is simply morally offensive, and no intellectual rationalization will change that.

APPELLANT'S REBUTTAL ARGUMENT

ISSUE*

(As Restated by Appellee)

ISSUE VII.

THE SENTENCE OF DEATH IS DISPROPORTIONATE WHEN COMPARED WITH OTHER CAPITAL PENALTY DECISIONS OF THIS COURT BECAUSE THE ONLY AGGRAVATING CIRCUMSTANCE IS OUTWEIGHED BY SUBSTANTIAL MITIGATING CIRCUMSTANCES.

Appellant asserted in his Initial Brief [Pages 84-86] that if this case consisted of only the one aggravator and the two non-statutory mitigators actually found by the trial court, i.e. under the influence of drugs at the time of the murder and disparity of treatment of an accomplice, both given minimal weight by this trial court, that the question of penalty at sentencing would have been a close case because this Court has repeatedly said that the death penalty in single aggravator cases will not be upheld unless there is little or no mitigation.

If the trial court had objectively and fairly assessed all the mitigation presented and correctly found only two weak non-statutory mitigators, then Appellee could assert with some logic that this Court should not overturn the trial court's sentence of death. The serious points raised by Appellant questioning that premise [Initial Brief Issues II., III.,IV.V. and VI.] which clearly show abuses of discretion by the trial court in several aspects of its sentencing assessment. That being so, no adequate proportionality assessment can be made until those mitigation errors are rectified. Therefore, Appellant's argument is predicated on his faith that those errors alleged will be corrected by this Court. Once done, this is just not a death case.

Appellant's position is that the trial court failed in its duty to find established the two statutory mental mitigators [in the face of uncontroverted expert testimony] and a number of non-

statutory mitigators, including domestic mitigation, and that its weighing of the single aggravator and the non-statutory mitigation which was found was legally insufficient and an abuse of discretion.

This Court has said that proportionality review must take into consideration the totality of the circumstances in a case and compare it with other capital cases. ***Sliney v. State, 699*** **So.2d 662,672 (Fla. 1997)** citing ***Terry v. State,*** 668 **So.2d** 954,965 **(Fla.** 1996). Therefore, everything Appellant says about proportionality is predicated on the earnest belief that neither aggravation nor mitigation was properly considered, assessed, nor weighed by the trial court.

If Appellant is correct in one or more of his arguments because the trial court had no legally sufficient basis for rejection of the statutory and non-statutory mitigation propounded by Appellant [See Initial Brief Issue III. Pages **42-62]** this death penalty should be reversed.

The most serious of the trial court's errors in Appellant's case was the rejection of any and all statutory or non-statutory mental mitigation. This Court has reversed trial court's for their refusal to find and weigh such mental mitigation in similar circumstances where there is no competent substantial evidence to support its rejection. ***Spencer v. State, 645*** **So.2d 377, 384-85 (Fla. 1994).** This Court has upheld trial courts in their rejection of mental mitigation only in factual circumstances which do not pertain here. [See authorities in Initial Brief Pages **43-56]**. Also see a very recent case in which this Court upheld the trial court in giving only minimal weight to statutory mental mitigation ***because the only testimony of mental mitigation presented at trial was from the defendant's mother. Bell*** **v. *State,*** **699 So.2d 674, 678-79 (Fla. 1997).**

In its Answer Brief [Page **73]** Appellee cites nine cases for the proposition that this Court has "frequently upheld a sentence of death where a single aggravator has been found.". Appellant

will address these cases because Appellee's reliance is misplaced.

The first two cases, ***Ferrell v. State, 680*** **So.2d** ***390*** **(Fla. 1996)** and ***Duncan v. State,*** **619 So.2d** 279 **(Fla. 1993)** have already been discussed in part in the Rebuttal Argument on Issue IV. above. In ***Ferrell*** this Court upheld the death penalty on a single aggravator, a prior second degree murder of another woman, when Ferrell murdered his present live in girlfriend. Ferrell's first death sentence was reversed in ***Ferrell*** v. ***State, 653*** **So.2d** 367 **(Fla. 1995)** and remanded for a new sentencing order in compliance with ***Campbell v. State, supra.*** Ferrell's second death sentence imposed after remand was upheld ***Ferrell v. State, 680*** **So.2d supra.** This Court upheld the trial court's rejection of the statutory mental mitigators for reasons unclear, presumably because it was presented in guilt phase as a defense and rejected by the jury. There was no other weighty mitigation. This Court commented that "the lone aggravating circumstance.... is weighty." The prior violent felony was a second-degree murder "bearing many of the earmarks of the present crime." ***Ferrell v. State,*** 680 **So.2d at 391.** See analysis of ***Duncan v. State, supra; Lemon v. State, supra; Harvard v. State, supra;*** and ***King v. State, supa,*** above in Rebuttal Issue IV.

Appellee also cites some other single aggravator cases Appellant has not heretofore addressed. ***Cardona v. State,*** 641 **So.2d 361 (Fla.** 1994) is cited. In ***Cardona*** this court upheld the death penalty of a mother who committed aggravated child abuse and first degree murder of her three year old child. The murder was found to be especially heinous, atrocious and cruel because of extreme abuse and neglect over many months. *Only very minor mitigation was found in the case.*

Appellee cites ***Arango v. State,*** **411 So.2d** 172 **(Fla. 1982)** [later reversed on a Brady

violation]. In ***Arango*** this Court upheld the death penalty on one aggravator, again H.A.C., because Arango first beat the victim viciously, then choked the victim, and finally shot him twice in the head. Only *one mitigator was found, no prior criminal record.* The minimal mitigation was insufficient to outweigh a weighty aggravator.

Appellee also relies on ***Armstrong v. State,*** *399* **So.2d 953 (Fla. 1981),** ***LeDuc v. State,*** *365* **So.2d 149 (Fla. 1978),** ***Douglas v. State,*** *328* **So.2d 18 (Fla. 1976),** and ***Gardner v. State,*** **313 So.2d 675 (Fla. 1975).** In ***Armstrong*** there were two aggravators merged [in the course of a robbery and for pecuniary gain] in this double murder and *no mitigating circumstances were found.* In ***LeDuc,*** the court found the murder heinous, atrocious and cruel ***and found*** *no mitigation.* In ***Doughs*** , the defendant murdered his former girlfriend's husband after forcing the victim and his wife to engage in sex acts at gunpoint. The crime was found to be heinous, atrocious and cruel and committed in a cold and calculated manner. *There was no evidence of mitigation produced.* In ***Gardner*** the jury recommended life, but the trial court imposed death. The aggravator H. A.C. was found and the facts were particularly extreme and horrible in the case. *No* ***significant*** *mitigation was found* This Court **affirmed** the override.

These cases appear similar to Appellant's ***only*** because the Appellant's trial court improperly found only two non-statutory mitigators and gave them each minimal weight. Further, Appellant's court did not discount the weight of his aggravator, a prior homicide, which was not as weighty as in these cases, nor did it fit the ***Ferrell/Lemon/King/Harvard*** pattern.

Finally, Appellee relies also on ***Burns v. State,*** **1997 WL 377601 (Fla. 1997).** This Court upheld the death penalty in ***Burns*** on the strength of one aggravator, i.e three merged aggravators: victim engaged in performance of official duties as a FHP trooper; murder

committed to avoid arrest; murder committed to disrupt lawful exercise of governmental function (enforcement of law against cocaine trafficking). In comparing ***Burns*** to ***Songer v. State,*** **544 So.2d 1010 (1989),** this Court pointed out that Songer's aggravator was reduced in weight by its own facts [just as Appellant urges in respect to ***his]*** while in ***Burns*** the aggravator was not mitigated in any way and deserved great weight. [at pages **6-7**]. Further, this Court noted that ***Songer*** contained very weighty mitigating circumstances, while in ***Burns*** mitigation was relatively minor. *Particularly emphasized by this Court was the absence in* ***Burns*** *of any* ***statutory*** *mental mitigation, which was present in* ***Songer.*** Appellant urges that his case would be much closer to ***Songer*** than to ***Burns*** if the trial court's erroneous rejection of his statutory mental mitigation and the other non-statutory mitigators as set forth above and in Appellant's Initial Brief Issue III. is rectified by this Court and his single aggravator properly reassessed.

It should be noted that this Court upheld the trial court's rejection of statutory mental mitigation in ***Burns*** based on the fact that defense expert **[Dr.Berland]** was contradicted by State expert [Dr. Sidney Merin]. Thus, there was competent substantial evidence in the record to support the rejection. This is not so in Appellant's case where both defense experts were uncontroverted and the facts were consistent with their findings.

Appellee [Answer Brief Pages **84-85]** uses ***Spencer v. State,*** **691 So.2d 1062 (Fla. 1997)** [already utilized on domestic mitigation in Answer Brief Pages **46-47]** to support its argument that death is proportional here. What Appellee fails to note is that Spencer's trial court previously had to be compelled by this Court to find the mental mitigators clearly established at trial. See ***Spencer v. State,*** 645 **So.2d 377,384"85 (Fla. 1994).** Then in ***Spencer*** II. this Court sanctioned a reduced weight for that mental mitigation due to Spencer's capability of maintaining employment

throughout the period of the homicide, while Appellant had lost his job due to drug abuse months prior to the homicide. [See Initial Brief Statement of Facts Page 28; T. 2267-86]. Thus, this Court found death proportional in ***Spencer ZZ*** because the mitigation, including discounted mental mitigation, *did not outweigh the two aggravators* H.A.C.[with horribly aggravated facts] and prior violent felony [prior attempted murder on same victim] in which Spencer, like ***Lemon,*** thus had "a previous conviction for a similar violent offense [against a woman]." Appellant's prior violent felony was very different and not of the same type as to show any such kind of repetitive pattern. The truly horrific facts of ***Spencer*** make it one of the most heinous of murders, the facts of Appellant's case do not compare in any way. The comparison is absurd.

Otherwise, Appellant relies on his arguments herein and in his Initial Brief Issue III and VII. and on the interlacing arguments that appear in the other Issues II., IV., V., VI. in the Initial Brief and this Reply Brief

This case is simply not a death case, *provided that* the mitigation presented is fairly and objectively determined and weighed and the single aggravator properly weighed. Once that it done, this case is only moderately aggravated and has significant mitigation. It would serve to undermine the integrity of death penalty sentencing in Florida for this Court to permit death to be imposed on the Appellant in light of the many errors in the trial court's sentencing assessment and the disingenuous findings and conclusions found in this sentencing order.

CONCLUSION

Appellant requests this Honorable Court based upon the foregoing arguments and authorities presented in this Reply Brief and in his Initial Brief to reverse and vacate the judgment and conviction herein and/or the sentence of death entered in this cause by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant has been furnished by U. S. Mail to ROBERT J. LANDRY, Esquire, Assistant Attorney General, 2002 N. Lois Avenue, Suite 700, Tampa, FL 33607 on this 16th day of December, 1997.

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