IN THE SUPREME COURT OF FLORIDA

LEROY POOLER,

Appellant,

vs.

Case No. 87,771

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, LEROY POOLER, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to the supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or "ST [vol.]" followed by the appropriate page number(s) .

. TEMENT OF THE CASE AND FACTS

On Wednesday, January 25, 1995, Appellant told Carolyn Glass that he was going to kill Kim Brown, with whom he had just ended a relationship. (T 1130). He told Carolyn that he loved Kim, but that if he could not have her then no one else could have her. (T 1131). Carolyn told Appellant that she was going to tell Kim what he said, and she did tell Kim on Saturday, January 28, 1995. (T 1131) .

On Monday, January 30, 1995, at approximately 8:00 a.m., Appellant knocked on the door of Apartment C at 511 22nd Street in West Palm Beach. The victim, Kim Brown; her younger brother, Alvonza Colson; and their mother lived at that address. (T 792-94) . Their mother had already left for work, and Alvonza was still in bed, (T 794, 802). Kim looked out the window, saw Appellant at the door, and said, "Leroy, I don't want you no more." Appellant responded, " [L]et me in." (T 794). Alvonza opened the door halfway and asked Appellant what he wanted. Appellant repeatedly asked Alvonza to let him speak to Kim, but Alvonza refused and tried to shut the door. (T 794-95). Appellant then pulled a gun from his pants, and Alvonza let go of the door and tried to run out, but Appellant shot him in the back. (T 795).

Appellant grabbed Alvonza's leg and pulled him inside the

apartment, saying, "Nigger, don't make me shoot you again." (T 795). Kim began to beg Appellant, "Please, Leroy, please don't kill me and my brother. My brother is sick." (T 796). Appellant responded, "So, I'm going to jail anyway." (T 796). Kim begged him again not to kill her, then vomited into her hands. (T 796). When Kim suggested that they take Alvonza to the hospital, Appellant agreed and started for the door, but changed his mind and told Alvonza to stay and call an ambulance while Kim came with him. (T 797). Appellant walked out the front door, and Kim and Alvonza quickly shut and locked it. (T 797). While Appellant banged repeatedly on the door, Alvonza tried to call for an ambulance, but the phone cord had been ripped from the wall. (T 797, 1031).

When Appellant broke the glass to a window by the door and was reaching in to unlock the door, Kim and Alvonza ran out the back door. Alvonza hid behind a wall of the next-door-neighbor's back porch. Kim ran to the next building, screaming for help. Appellant came out of Kim and Alvonza's back door and approached Alvonza with the gun, but left to find Kim, who was hollering, "Help, help . . . . Don't kill my brother. He done kill my brother." (T 798-99). Appellant found Kim and struck her upside the head, causing his gun to discharge. (T 910, 981). As he was pulling her towards his car, she was screaming, 'No. No. No." and "Lord, please don't kill me." (T 909, 1116). Several people heard

him say something to the effect of, "Bitch, didn't I tell you I [sic] kill you." (T 842, 980, 1116). When she refused to go with him, he shot her several times. Then he stopped and said, "You want some more?" and shot her several more times--five shots in all. According to one witness, Appellant kicked her before walking to his car and driving off. (T 799, 842, 881-83, 910, 981-84, 1116-18).

The jury convicted Appellant of first-degree murder with a firearm, burglary with a firearm, and attempted first-degree murder of a firearm. (T 1321-23). At the penalty phase, Appellant presented the testimony of two psychologists who had been appointed by the court pretrial to evaluate Appellant's competency to stand trial, and two psychiatrists who treated Appellant in the county jail during the first few weeks of his arrest. Dr. Levine, who spent approximately eight hours with Appellant performing psychological tests, testified that Appellant's full-scale I.Q. was 80, which was at the low edge of the low-average range. (T 1381-84). Appellant's reading level and reading comprehension level were at the third grade level. (T 1392-93). However, he admitted that Appellant's continuous eight-year employment with a moving company, his six years of service in the Marine Corps, and his honorable discharge from the service as a Sergeant were inconsistent with his low-average intelligence. (T 1389-90).

Although Dr. Levine had concerns about Appellant's ability to assist in his defense because of his low intelligence and illiteracy, he nevertheless found him competent to stand trial. (T 1395-96).

Dr. Alexander, who spent two hours with Appellant assessing his competency, believed him to be incompetent, but not because of any mental defect or disorder. Rather, Dr. Alexander believed that Appellant had a gross misunderstanding of the legal system and a limited intelligence. (T 1486-87, 1493, 1497). He did opine, however, that Appellant would function well in a structured environment like prison. (T 1495). On cross-examination, he denied that either the "extreme disturbance" or the "impaired capacity" mitigator was applicable. (T 1500-01).

Dr. Desmoreau treated Appellant in the county jail for seven to ten days after Appellant was referred to him by **a** psychiatric nurse. Appellant was very depressed and suicidal, and **was** placed on a suicide watch for approximately 48 hours. (T 1412-14). He prescribed **a** very low dose of Atavan, a tranquilizer, which was discontinued after the week to ten days when Appellant was transferred to the transitional unit. (T 1414-15).

Dr. Armstrong, who treated Appellant for approximately two weeks in the transitional unit, indicated that Appellant reported hearing **a** voice calling his name when he came to jail. (T 1459).

The nurses' notes reflected that Appellant "denied sadness related to events preceding incarceration." (T 1465).

Deputy Rock, a classification officer at the county jail who does not see the inmates interact, testified that he knew Appellant only from the contents of his jail file. (T 1452-53). Appellant's file contained one disciplinary report for threatening an inmate. From the presence of only one disciplinary report, Deputy Rock "presumed" Appellant was a well-behaved inmate. (T 1450-51).

Alice Bradford worked with Appellant at U & Me Moving and Storage. She testified that Appellant worked there for seven or eight years until he hurt his knee on the job. (T 1475-76). He was a reliable employee. (T 1476). He also did odd jobs for her at her home on evenings and weekends. He was always polite and respectful. (T 1478-80). She did not think Appellant was a stupid man. (T 1482).

Appellant's brother, Henry, testified that Appellant had two brothers and two sisters. The family, who lived in Louisiana, was very close until their mother died while Appellant was in Vietnam. (T 1507, 1509, 1510). Appellant was a good brother and father to his four daughters. (T 1508). Appellant spent six years in the military and had a bad temper when he came out. (T 1508, 1512). Their father was a cement finisher, and their mother was a cook. (T 1509). Appellant was 49 years old. (T 1510). As children,

they all went to a segregated school, but Appellant had to maintain a "C" average in order to be on the school basketball team. (T 1510, 1512).

Appellant's sister, Carolyn, testified that their family was very religious and very close. (T 1514). She also testified that Appellant was a good brother and father. (T 1515-16). Appellant's father testified that he raised his children the best he could and that they never gave him any trouble. (T 1521-22).

The jury recommended a sentence of death by a vote of nine to three. (T 1630-33). At the allocution hearing, the trial court sentenced Appellant on the burglary and attempted murder charges to concurrent life sentences--departure sentences based on the unscored capital offense. (T 1691). At a separate sentencing hearing, the trial court imposed a sentence of death for the first-degree murder charge. In aggravation, the trial court found the 'prior violent felony," 'felony murder," and HAC aggravating factors. In mitigation, it found that Appellant committed the murder under the influence of an "extreme mental or emotional disturbance," which it gave little weight; that Appellant had honorable military service, which it **gave** considerable weight; that Appellant had a good employment record, which it gave some weight; that Appellant was a good parent, which it gave some weight; that Appellant had done good deeds, which it gave little weight; and

that it had the option of a life sentence, which it gave some weight. (R 727-34; T 1696-1700). This appeal follows.

SUMMARY OF ARGUMENT

Issue I - The State's comment during jury selection regarding the presumption of innocence was not an incorrect statement of the law. Even if it were improper, it was harmless beyond a reasonable doubt.

Issue II - The trial court did not err by failing to instruct the jury on the nonexistent crime of attempted first-degree felony murder as to Count III.

Issue III - The record supports the trial court's finding of the HAC aggravating factor, as there were facts which set this case apart from ordinary premeditated murders by shooting.

Issue IV - This Court has previously held that a contemporaneous crime against another victim can support the "prior violent felony" aggravating factor.

Issue V - Appellant's sentence of death is not disproportionate to other cases under similar facts.

Issue VI - Appellant's own expert denied the applicability of either mental mitigating factor and no other evidence supported the "substantial impairment" mitigator. Thus, the trial court properly rejected it.

Issue VII - There was no evidence to support the "extreme duress or substantial domination" mitigating factor. Therefore, the trial court properly rejected it.

Issue VIII - The record supports the trial court's rejection of a good jail record and a good adaptation to confinement where Appellant had a disciplinary report while awaiting trial for threatening an inmate.

Issue IX - Other evidence, such as Appellant's employment and military history, contradicted evidence of Appellant's low intelligence, which, by itself, is not mitigating in nature.

Issue X - The trial court properly rejected Appellant's capacity for rehabilitation based on Appellant's juvenile history and disciplinary report while awaiting trial.

Issue XI - The trial court considered the domestic nature of this crime in relation to the "extreme mental or emotional disturbance" mitigator. Moreover, as the trial court stated, there were many premeditated aspects to this murder. Thus, the trial court properly rejected the domestic nature of this murder as a separate and distinct mitigating factor.

Issue XII - The trial court properly rejected Appellant's claim that he had adapted well to incarceration based on his disciplinary report for threatening an inmate while awaiting trial.

Issue XIII - Although Appellant could have done so, the State supplemented the record with Appellant's PSI report. Thus, this issue is moot.

Issue XIV - The trial court noted its reason for departure on

the sentencing guidelines scoresheet, signed the scoresheet, and filed it with the clerk on the day of sentencing. Its reason for departure has previously been upheld and is valid in this case.

Issue XV - Appellant's challenges to Florida's death penalty statute have previously been rejected.

ARGUMENT

ISSUE I

WHETHER THE STATE'S COMMENT DURING VOIR DIRE REGARDING APPELLANT'S PRESUMPTION OF INNOCENCE RENDERED THE TRIAL FUNDAMENTALLY UNFAIR (Restated).

During jury selection, the State questioned the panel about any experiences the jurors had had with the judicial system. Ms. Hershman indicated that she was frustrated with the system because the murderer of a close family friend had yet to be executed after 14 years on death row. (T 585-86). During this discussion with the juror, the prosecutor informed Ms. Hershman that, as they speak, Appellant "is presumed to be innocent." (T 586). Ms. Hershman responded, "Right." The prosecutor then stated, "That doesn't mean that he is innocent, but you have to presume that." (T 586). Defense counsel objected and asked to approach the bench, but the trial court said, "Let's go ahead." (T 586). Immediately thereafter, the juror said, "I still need evidence." When the prosecutor said, "You can keep that presumption unless and until I prove --," Ms. Hershman interrupted, "I can absolutely keep that but it may be somewhat jaded as far as the criminal justice system." (T 586-87). At that point, the prosecutor asked her if her frustration over that other case would prevent her from being a fair and impartial juror in this case, and she responded, "No."

(T 587).

Within moments, the parties were at the bench discussing cause challenges. (T 587-92). At no point did defense counsel challenge the State's comment to Ms. Hershman, or otherwise object to the court's refusal to allow them to come sidebar earlier. Given counsel's failure to follow up on the objection and request that the comment be stricken and/or that a curative instruction be given, defense counsel waived his objection to this comment. See Parker v. State, 641 So. 2d 369, 375-76 & n.8 (Fla. 1994) (quoting Duest v. State, 462 So. 2d 446, 448 (Fla. 1985) ("'The proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury is to disregard the remarks.'").

Even if defense counsel's unpursued, groundless objection was sufficient to preserve this issue for review, his claim that the State's comment rendered his trial fundamentally unfair is wholly without merit. First, the comment was not a misstatement of the law. As the trial court later instructed the jurors who sat on Appellant's case, "[t]he presumption stays with the defendant as to each material allegation in the Indictment, through each stage of the trial, until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt." (T 772). Thus, as the prosecutor said, a presumption of innocence does not equate to

an absolute fact that Appellant is innocent; rather, it can be overcome by the State. Taken in context, the prosecutor's comment was not a misstatement of the law. Cf. Lucas v. State, 568 So. 2d 18, 20 (Fla. 1990) (finding state's question to venire--whether they believed an intoxicated person should be held accountable--did not mislead jury to believe alcohol and drug use could not be considered as mitigation); Combs v. State, 525 So. 2d 853 (Fla. 1985) (finding no error in State's advising jury during voir dire that their sentencing recommendation is merely advisory).

Nor was it the expression of a personal belief in Appellant's guilt, as Appellant now claims on appeal. **Brief of Appellant** at 28-29. The prosecutor did not say, either expressly or by implication, that he believed Appellant to be guilty. Rather, he attempted to explain that the presumption which initially attached could be overcome by the State. This was not error.

Even if the prosecutor's comment was made erroneously, it was harmless beyond a reasonable doubt. As noted, the jury was instructed by the court on the presumption of innocence before any testimony or evidence was presented. (T 772). Moreover, it was instructed that it was the trial court's function to decide what law applies and to explain that law to the jury. (T 768). What the attorneys said was not evidence (nor presumably the law) (T 769), and the jury's function was to decide the facts and to apply

the law, as given by the court, to the facts. (T 768-69). Thus, any inference that the prosecutor may have left with the jury regarding Appellant's guilt or the presumption of innocence was cured by the subsequent jury instructions. Cf. Lucas, 568 So. 2d at 21 (finding that state's comments to venire were not misleading, especially in light of trial court's later instructions); State v. Wilson, 22 Fla. Law Weekly S2 (Fla. Dec. 26, 1996) (finding court's extraneous comments regarding the reasonable doubt standard harmless where standard instruction was given).

ISSUE II

WHETHER THE TRIAL COURT WAS REQUIRED TO INSTRUCT THE JURY ON ATTEMPTED FIRST DEGREE FELONY MURDER--A NONEXISTENT CRIME (Restated).

In Count III of the Indictment, Appellant was charged with the attempted first-degree murder with a firearm of Alvonza Colson. (R 42-43). At the guilt-phase charge conference, no mention was made by anyone regarding an instruction on attempted first degree felony murder.[1] Yet, on appeal, Appellant claims that the trial court should have instructed the jury on this theory of prosecution.

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[1] This Court's decision in Gray v. State, 654 So. 2d 552 (Fla. 1995), finding attempted felony murder to be a nonexistent crime, was issued on May 4, 1995--eight months before Appellant's trial. Thus, it should be safe to assume that the parties were aware of this decision and purposely did not consider an instruction in this case on attempted first-degree felony murder.

Appellant claims that it was unfair for the trial court to base his death sentence on the attempted first-degree murder and on his commission of the murder during a burglary, but not instruct the jury on attempted first-degree felony murder in relation to Count III. According to Appellant, had it done so, such an error would have resulted in the demise of his attempted first-degree murder conviction and these two aggravating factors.

Though creative, Appellant's argument is wholly without merit. First, Appellant was charged with attempted first-degree murder and instructed on that offense. The instruction given was proper, and Appellant has failed to show otherwise. He is certainly not entitled to an instruction on a nonexistent crime. See Gray v. State, 654 So. 2d 552 (Fla. 1995). Second, the record supports the attempted first-degree murder conviction under a premeditated murder theory, since Appellant went to the apartment to kill Kim Brown and shot Alvonza Colson in the back as Alvonza attempted to flee the apartment. At the time he shot Alvonza, Appellant had yet to commit the burglary.

As for the "prior violent felony" and "felony murder" aggravating factors, these are fully supported by the record and have no bearing on Appellant's conviction for attempted first-degree murder. After all, Appellant need not even be convicted of an enumerated felony for the "felony murder" aggravating factor to

apply. Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990). And, as already noted, Appellant's conviction for the contemporaneous violent felony was sufficiently proven under a premeditated murder theory. Therefore, this claim should be denied.

ISSUE III

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE "HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING FACTOR (Restated).

In its written sentencing order, the trial court made the following findings of fact regarding the "heinous, atrocious, or cruel" aggravating factor:

> Once week before the murder, the Defendant told Carolyn Glass that he was going to kill the victim. The victim was told of this threat approximately two days before the murder. The victim watched the Defendant break into her apartment and shoot her younger brother. The victim vomited into her own hands and begged for her life and that of her brother by agreeing to leave with the Defendant, vivid evidence of the mental anguish the victim was suffering. After the victim gained temporary safety by a ruse, the Defendant began to break into her apartment again. Her brother told Kim Wright Brown: "Run for your life." She did but was caught by the Defendant. He hit her in the head with his handgun and began dragging her to his car. She continued to beg for her life. The Defendant told her: "Bitch, didn't I tell you I would kill you." The struggling victim cried: "No, no, no!" The Defendant then shot the victim five times, stopping during the shooting to say, "You want some more." This

> testimony shows the victim was acutely aware of her impending death and suffered terribly in consequence. Wyatt v. state, 641 So. 2d 1336 (Fla. 1994); Hannon v. State, 638 So. 2d 39 (Fla. 1994); Preston v. State, 607 So. 2d 404 (Fla. 1992); Farinas v. State, 569 So. 2d 425 (Fla. 1990). This aggravating factor to have been proven beyond any reasonable doubt [sic].

(R 729-30).

In this appeal, Appellant claims that the record does not support this aggravating factor because there was nothing which set this case apart from the norm of premeditated murders. While the State is mindful that this Court has found that ordinary shootings are not, as a matter of law, heinous, atrocious, or cruel, this was not an ordinary shooting. For two days, Kim Brown lived with the knowledge that Appellant had an intention to kill her. (T 1131). On the day of her murder, Appellant appeared at her door, wanting to see her. Her brother opened the door and told Appellant to go away, but Appellant pulled a gun and shot her brother in the back as her brother tried to escape. (T 794-95). Appellant pulled her brother back into the apartment and said, "Nigger, don't make me shoot you again." (T 795). Watching all of this, Kim Brown begged Appellant, "Please, Leroy, please don't kill me and my brother. My brother is sick." (T 796). Appellant callously responded, "So, I'm going to jail anyway." (T 796). The victim begged him again not to kill her and then vomited into her hands. (T 796). When

she suggested they take her brother to the hospital, Appellant agreed and headed toward the door. He changed his mind, however, and told Alvonza to stay and call an ambulance, while he ordered Kim to go with him. (T 796-97). When Appellant stepped outside the door, Kim Brown and her brother slammed and locked the door, thinking they were going to be alright. Appellant, however, broke the glass by the front door and was reaching in to unlock the door when Kim and her brother fled out the back door. (T 797).

Alvonza hid behind a wall of the next-door-neighbor's back porch. Kim ran to the next building, screaming for help. Appellant came out of Kim and Alvonza's back door and approached Alvonza with the gun, but left to find Kim, who was hollering, "Help, help . . . . Don't kill my brother. He done kill my brother." (T 798-99). Appellant found Kim and struck her upside the head, causing his gun to discharge. (T 910, 981). As he was pulling her towards his car, she was screaming, "No. No. No." and "Lord, please don't kill me." (T 909, 1116). Several people heard him say something to the effect of, "Bitch, didn't I tell you I [sic] kill you." (T 842, 980, 1116). When she refused to go with him, he shot her several times. Then he stopped and said, "You want some more?" and shot her several more times. According to one witness, Appellant kicked her before walking to his car and driving off. (T 799, 842, 881-83, 910, 981-84, 1116-18).

In assessing the applicability of the HAC factor, this Court has repeatedly considered the state of mind of the victims, and their awareness of their impending death. E.g., Wyatt v. State, 641 So. 2d 1336, 1341 (Fla. 1994) ("This Court has repeatedly upheld the heinous, atrocious, or cruel aggravating factor in circumstances where the victim suffers such mental anguish."); Preston v. State, 607 So. 2d 404, 409-10 (Fla. 1992) ("Fear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous."). In all of the cases cited to by Appellant, the victim was either unaware of his or her impending death or had no time to consider his or her impending death because the death was instantaneous or nearly so. For example, in Simmons v. State, 419 So. 2d 316, 318-19 (Fla. 1982), this Court stated, "There was no proof that the victim was aware that he was going to be struck with a hatchet" or that he was "subjected to repeated blows while living." In Herzog v. State, 439 So. 2d 1372, 1380 (Fla. 1983), this Court found that the victim was under the influence of methaqualone and was at least semiconscious, if not unconscious, "during the whole incident." In Craig v. State, 510 So. 2d 857, 868 (Fla. 1987), this Court stated, "Although fully premeditated, the murders were carried out quickly by shooting." In Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990), this Court found that

acts committed after the victim's death did not support the HAC factor where the victims were shot while sleeping in their pickup truck. In Williams v. State, 574 So. 2d 136, 138 (Fla. 1991), this Court found that "Williams restrained the [bank] guard and then shot her with little delay." In Robertson v. State, 611 So. 2d 1228, 1233 (Fla. 1993), the defendant walked up to a couple sitting in a car along the side of the road and after demanding money shot the driver. The woman got out of the car screaming, and he demanded her rings, then shot her. This Court found no facts which set this case apart from ordinary premeditated murders. In Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993), the defendants drove up to an auto parts store and shot the clerk from outside the store. They then crawled in a window, pilfered the cash boxes, and shot the clerk again. Though the victim was begging for his life, this Court found no evidence which set this case apart from the norm. In Kearse v. State, 662 So. 2d 677, 686 (Fla. 1995), the defendant overpowered a police officer, grabbed his gun, and shot him fourteen times in succession. This Court found no evidence of unnecessary or prolonged suffering. Finally, in Hamilton v. State, 678 So. 2d 1228, 1231-32 (Fla. 1996), this Court found that the two victims were shot nearly simultaneously or in such quick succession that reloading the weapon for shooting again would not have caused the victims unnecessary suffering.

Here, on the other hand, Kim Brown had two days to ponder the potential of her impending death. When Appellant showed up at her doorstep with a gun, that potentiality became reality and her mental torment began in earnest. She watched in horror as Appellant shot her brother, and then stood vomiting into her hands as she begged for her life. Although she managed to lock Appellant out, her reprieve was short-lived when he broke the glass to gain reentry. At that point, she fled in fear for her life, begging for help, but Appellant caught up to her and succeeded in doing what she knew he had come to do. He shot her five times in the head and body and walked away.

In Wyatt, 641 So. 2d at 1340-41, this Court upheld the HAC factor, even though the victims were shot to death, where they were "subjected to at least twenty minutes of abuse prior to their deaths." The husband was pistol-whipped, the wife was raped, and all three victims were shot in each other's presence. According to this Court, all three were "acutely aware of their impending deaths." Id.

In Hannon v. State, 638 So. 2d 39, 43 (Fla. 1994), the second victim witnessed the brutal murder of his roommate, then pled for his life and fled upstairs, where he hid under a bed. The defendant shot him six times as he huddled defenselessly on the floor. In upholding the HAC factor, this Court stated, "Under

these circumstances, where the victim undoubtedly suffered great fear and terror prior to being murdered, the trial court did not err in finding Carter's murder to be heinous, atrocious, or cruel." Id.

In Farinas v. State, 569 So. 2d 425 (Fla. 1990), the defendant stalked his former girlfriend, who had broken up with him and moved back into her parents' house. He managed to stop her car one day and force her into his own car, despite her pleas to the contrary. When he stopped at a stop light, she jumped out and ran, screaming for help. He shot her once in the back, paralyzing her, unjammed his gun, then shot her three more times, killing her. Id. at 427. In upholding the HAC factor, this Court noted that the defendant ignored the victim's pleas for mercy, that the victim's flight from the car indicated a "frenzied fear for her life," and that she was fully conscious and aware of her impending death during the time the defendant unjammed his gun.

Were this Court to find, however, that the HAC factor is not supported by the record in this case, Appellant's sentence of death should nevertheless be affirmed. Two valid aggravators remain: Appellant's conviction for the attempted first-degree murder of Alvonza Colson, and his commission of the murder during the course of a burglary. In comparison, although the trial court gave Appellant's military service considerable weight, it described the

rest of Appellant's mitigation as "relatively weak." (R 734). Moreover, it believed that each aggravator, standing alone, would have supported the death sentence. (R 734). Thus, even if the trial court erroneously found the HAC factor, such error was harmless beyond a reasonable doubt. See Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied, 112 S. Ct. 955, 117 L. Ed. 2d 122 (1992).

ISSUE IV

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING OF THE "PRIOR VIOLENT FELONY" AGGRAVATING FACTOR BASED ON CONTEMPORANEOUS OFFENSES AGAINST A SECOND VICTIM (Restated).

In its written sentencing order, the trial court made the following findings of fact regarding the "prior violent felony" aggravating factor:

> Before shooting and killing Kim Wright Brown, the Defendant shot and attempted to kill her teenage brother, Alvonza Colson. The Defendant very nearly succeeded in his attempt. The Defendant was contemporaneously convicted in Count III of Attempted First Degree Murder with a Firearm in this case. This conviction is found to be a felony involving the use of violence to a separate victim as required for the purposes of aggravation of the First Degree Murder conviction. Windom v. State, 656 So. 2d 432 (Fla. 1995). This aggravating factor has been proven beyond all reasonable doubts.

(R 728).

While acknowledging Windom and the applicability of the contemporaneous conviction on a separate victim to support this aggravating factor, Appellant claims that this Court's rationale in Windom is "a legal fiction . . . which flies in the face of real-world reason and logic." **Brief of Appellant** at 41. Appellant does not, however, provide any compelling legal justification for overruling Windom and its predecessors. Thus, this claim should be denied.

ISSUE V

WHETHER APPELLANT'S SENTENCE IS PROPORTIONATE TO THAT IN OTHER CASES UNDER SIMILAR FACTS (Restated).

In this appeal, Appellant claims that his sentence is disproportionate because his premeditated murder of Kim Brown was the result of a heated domestic dispute. Unfortunately, this Court has historically considered a defendant's bruised ego and his anger against a current/former lover to constitute mitigation, if not total immunity from the death penalty. Recently, however, in Spencer v. State, 21 Fla. L. Weekly S366, 377 (Fla. Sept. 12, 1996) (reh'g pending), this Court repudiated the existence of a "domestic dispute" exception to the death penalty, but then vacated a death sentence in Wright v. State, 21 Fla. L. Weekly S498, 499 (Fla. Nov.

21, 1996) (reh'g pending), on proportionality grounds because the murder was the result of a domestic dispute.

These two cases simply cannot be reconciled. In Spencer, the defendant's wife told him to move out of the house. Several days later, Spencer and his wife got into an argument, during which Spencer hit, choked, and threatened to kill his wife. Spencer threatened to kill her again while he was in jail for the assault. In January, Spencer and his wife got into another fight, during which he assaulted both her and her teenage son, who tried to intervene. Two weeks later, Spencer returned to the home and assaulted his wife in the yard. When her son intervened, Spencer threatened him with a knife, and the boy ran to a neighbor's house to call for help. When the police arrived, Karen Spencer was dead.

The trial court imposed a death sentence, finding three aggravating factors: "prior violent felony," based on the January offenses and the contemporaneous aggravated assault on the son; HAC; and CCP. On appeal, this Court struck the CCP factor and faulted the trial court for failing to find the "extreme disturbance" and "impaired capacity" mitigating factors. As a result, it remanded for the trial court to reweigh the aggravators and mitigators. Spencer v. State, 645 So. 2d 377 (Fla. 1994) (Spencer I).

On remand, the trial court again found the "prior violent

felony" and HAC aggravators. In mitigation, it found the two statutory mental mitigators, as well as drug and alcohol abuse, a paranoid personality disorder, sexual abuse by his father, an honorable military record, a good employment record, and the ability to function in a structured environment that does not contain women. Spencer, 21 Fla. L. Weekly at 366.

On appeal, Spencer claimed that his sentence was disproportionate, citing numerous domestic dispute cases. In rejecting this claim, this Court wrote:

> However, this Court has never approved a "domestic dispute" exception to imposition of the death penalty. In some murders that result from domestic disputes, we have determined that CCP was erroneously found because the heated passions involved were antithetical to "cold" deliberation. However, we have only reversed the death penalty if the striking of the CCP aggravator results in the death sentence being disproportionate.

Id. at 367 (citations omitted). In otherwise assessing the proportionality claim, this Court upheld the HAC and "prior violent felony" aggravators. Regarding the latter, this Court noted that the prior violent felonies were based on the January incident and the contemporaneous offense against the son, but found the similarity and contemporaneity of the prior offenses to the murder unimportant. Finally, this Court upheld the trial court's determination that Spencer's mitigation was of "little weight."

Id.

In Wright, the defendant was also estranged from his wife and was undergoing a divorce. The day before the murder, he was prevented from seeing his children by his wife and in-laws, and a friend testified that Wright had asked that evening to borrow a gun. The following morning, Wright went to his in-laws house where his wife and children were staying, snuck into the back yard, shot out the sliding glass doors, followed his wife as she fled with two of her children to the bedroom, and shot her to death. He then kicked in the door of his mother-in-law's bedroom and threatened to kill her. 21 Fla. L. Weekly at 498.

The trial court imposed a death sentence, finding two aggravating factors: "prior violent felony," based on the aggravated assault of the victim's sister six years earlier; and "felony murder," based on the burglary of the home. In mitigation, it found one statutory mitigating circumstance--"extreme disturbance"--and numerous nonstatutory mitigators--remorse, cooperation with police, mental health problems, a history of conflict with the victim, good military and employment record, regular church attendance, mental abuse by the stepfather, and good deeds. Id. at 499.

On appeal, this court vacated the sentence on proportionality grounds, finding the "prior violent felony" and "felony murder"

aggravators of little weight because they were not "unrelated to the ongoing struggle between [Wright] and [his wife]"--a distinction found irrelevant in Spencer. In addition, this Court found Wright's mitigation "copious"--although the quality and quantity of Spencer's mitigation was greater. This Court stated that Wright was "extraordinarily overwrought at the thought of losing his children." Id.

In justifying the vacation of Wright's sentence, this Court cited to Maulden v. State, 617 So. 2d 298, 303 (Fla. 1993), and Blakely v. State, 561 So. 2d 560 (Fla. 1990). Yet, Maulden and Blakely were **legally and/or factually dissimilar** to Wright's case. For example, in Maulden, the trial court specifically stated in its written order that the "prior violent felony" and "felony murder" aggravators would not warrant the death penalty absent the CCP factor. When this Court subsequently struck the CCP factor on appeal, it automatically vacated Maulden's sentence: "The trial judge determined that Maulden's death sentence is only warranted if it is concluded that the murders were committed in a cold, calculated, and premeditated manner. Because we hold the aggravating circumstances [sic] to be inapplicable, the penalty of death cannot stand." 617 So. 2d at 303 (emphasis added). Moreover, in Maulden, this Court noted that Maulden's emotional distress was "worsened by Maulden's **chronic schizophrenia** which was

then going untreated." Id. (emphasis added). Neither Appellant, nor Wright, nor Spencer were suffering from such a major mental disorder.

In Blakely, the trial court found two aggravating factors--HAC and CCP--and in mitigation only a lack of significant prior criminal activity. Curiously, this Court did not strike the CCP factor, though it has been prone to do so in domestic cases. However, without pretense or artifice, this Court openly and notoriously reaffirmed a "domestic dispute" exception to the death penalty:

> "[T]his Court [has] stated that when the murder is a result of a **heated domestic confrontation**, the death penalty is not proportionally warranted." Garron v. State, 528 So. 2d 353, 361 (Fla. 1988). We have expressly applied this proportionality review to reverse the death penalty in a number of **domestic** cases. On the other hand, we have affirmed the death sentence under express proportionality review where the defendant has been convicted of a prior "similar violent offense." In the instant case, Blakely had committed no prior similar crime. The killing resulted from an **ongoing and heated domestic dispute** and was factually comparable to that in Ross v. State, 474 So. 2d 1170 (Fla. 1985), wherein the husband bludgeoned the wife to death with a hammer or other blunt instrument.

Id. at 561 (emphasis added; footnotes omitted).

Despite the express use of a "domestic dispute" exception to vacate Blakely's sentence, as well as those of Garron and Ross and

other defendants, this Court enigmatically stated in Spencer that **"this Court has never approved a 'domestic dispute' exception to imposition of the death penalty."** Spencer, 21 Fla. L. Weekly at 367. Yet, having made that statement in Spencer in September, this Court applied the "domestic dispute" exception to Wright in November.

Though Spencer and Wright are hardly reconcilable, the State submits that Spencer is the more appropriate and applicable case to the present one. The State believes that defendants who kill their spouse or lover, for whatever reason, whether with premeditation or during the course of a felony, deserve not only the equal protection of the law, but also the equal application of the law. A defendant's mental state, be it the result of a mental disorder, a personality disorder, or a domestic dispute, can, if proven, qualify as statutory or nonstatutory mitigation. It should not, however, standing alone, as it has in Wright, Blakely, Garron, and other previous cases, automatically constitute an "exception" to the death penalty. Juries and judges who hear evidence of such a mental state, but who nevertheless consider death the appropriate penalty, should not have their reasoned judgment rejected on proportionality grounds because this Court weighs the emotional aspect of a domestic case more heavily. It is simply not this Court's function to reweigh the aggravating and mitigating factors.

Hudson v. State, 538 So. 2d 829, 831 (Fla. 1989) (emphasis added) ("It is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating and mitigating circumstances."); Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995) ("Once the factors are established, assigning their weight relative to one another is a question entirely within the discretion of the finder of fact . . . ."). Where, as here, the defendant makes a selfish, premeditated determination that the victim should die when she no longer wants him as a lover, and the jury and trial judge consider and weigh the defendant's emotional state at the time, this Court should not undermine those decisions. Otherwise, why have a jury and a trial court?

In addition to Spencer, the State submits that Cummings-El v. State, 21 Fla. L. Weekly S401 (Fla. Sept. 26, 1996), Henry v. State, 649 So. 2d 1366 (Fla. 1994), and Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991), are dispositive in this case. In Cummings-El, the defendant and the victim ended their live-in relationship, and the defendant made numerous verbal threats, such as, "I love her. If I can't have her, nobody [can] have her."[2] One morning, the defendant broke into the victim's home and stabbed her to death. The trial court

[2] Appellant made an identical statement to Carolyn Glass a week before he killed Kim Brown. (T 1130-31).

found four aggravators--"prior violent felony," "felony murder," HAC and CCP--and some nonstatutory mitigation. This Court rejected the defendant's disproportionality claim after upholding the CCP factor. 21 Fla. L. Weekly at 401-402.

In Henry, the defendant and his wife were separated. When Henry returned home to talk to his wife, they got into an argument and Henry stabbed her to death. 649 So. 2d at 1367. The trial court found two aggravating factors--"prior violent felony" based on the second-degree murder of his first wife, and HAC--and nothing in mitigation. This Court specifically rejected Henry's claim that his sentence was disproportionate because the killing resulted from a domestic dispute. Id. at 1369-70.

In Porter, the defendant had a stormy and violent relationship with his girlfriend, Evelyn Williams. One day, he wrecked Williams' car, then called her later and threatened to kill her and her daughter. He left town that day, but returned three months later, and persisted in seeing Williams, who did not want to see him. Several days before he killed her, he told a friend, "you'll read it in the paper." Porter then stole a gun from a friend. Early one morning, Porter broke into his former girlfriend's home and shot her. He pointed a gun at her daughter, but the victim's new boyfriend came into the room and began struggling with Porter. Porter shot him as well. 564 So. 2d at 1061-62.

As to each murder, the trial court found the "prior violent felony" aggravator, based on the contemporaneous murder and the aggravated assault of the daughter, and the "felony murder" aggravator. As to Williams, the trial court also found the HAC and CCP aggravators. It found no mitigating circumstances. Id. at 1062. On appeal, this Court struck the HAC factor because Williams was shot in quick succession, but upheld the CCP factor, finding that, "[w]hile Porter's motivation may have been grounded in passion, it is clear that he contemplated this murder well in advance." Id. at 1064. In rejecting Porter's disproportionality claim, this Court noted that "[t]he circumstances of this case depict a cold-blooded, premeditated double murder."

While Appellant did not commit a double murder, his murder of Kim Brown was cold-blooded and premeditated. Although the trial court found that Appellant committed the murder under the influence of an extreme mental or emotional disturbance, despite absolutely no evidence to support it, it gave this factor little weight. (R 730). Other than the fact that Appellant was angry at Kim Brown for ending the relationship, there was no other evidence that Appellant was laboring under a mental or emotional disturbance, extreme or otherwise. Given that he planned to kill Kim Brown well in advance, announced his intention to Carolyn Glass, and then carried out his plan, his sentence of death should be affirmed.

ISSUE VI

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S REJECTION OF THE "IMPAIRED CAPACITY" MENTAL MITIGATING FACTOR (Restated).

In its written sentencing order, the trial court made the following findings of fact regarding the "impaired capacity" mitigating factor:

> The Defendant has a low-average/ borderline I.Q. of 80. Dr. Alexander testified the Defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not impaired. Other testimony revealed that the Defendant graduated from high school and was a good student, that he was honorably discharged from the Marine Corps as a non-commissioned officer, serving approximately six years, that he had held a job for approximately seven years and was a good employee, that he was "fairly smart," and that he had a Florida Driver's License. This mitigating factor has not been established by a preponderance of the evidence and thus will not be considered by the Court.

(R 730-31).

In this appeal, Appellant claims that the trial court erred in rejecting this mitigating factor. While it may be "his position" on appeal that "he lost the ability to conform his conduct to the requirements of the law" when Kim Brown broke up with him and when Alvonza refused to let Appellant talk to her, **initial brief** at 49, Appellant failed to present any evidence at trial to support this mitigating factor. Appellant presented the testimony of two

psychologists and two psychiatrists at the penalty phase. Not one of the four experts opined that this mitigating factor was applicable. In fact, other than finding limited intelligence, not one of the experts diagnosed Appellant with even a personality disorder, much less a mental disorder or brain damage. More importantly, on cross-examination by the State, one of Appellant's psychologists specifically testified that this mitigating factor was not applicable. (T 1500).

Despite a full-scale I.Q. of 80, which is at the low end of the "low-average" range, Appellant had graduated from high school, he had had to maintain a "C" average in high school in order to play basketball, he had served six years in the Marine Corps, he had survived 13 months in combat in Vietnam, he had been honorably discharged as a Sergeant, and he had been a reliable employee for a moving and storage company for seven or eight years. (T 1389-90, 1475-76, 1492, 1508, 1512). Even his own neuropsychologist, who spent eight hours with him assessing his intelligence, found his military and employment history inconsistent with such a low-average I.Q. (T 1380-81, 1389-90). Given these facts, and the lack of mental health testimony to support this factor, the trial court properly rejected it in mitigation. Jones v. State, 612 So. 2d 1370, 1375 (Fla. 1992) (upholding rejection of mental mitigators where defense expert "specifically testified that Jones did not

meet the criteria for the statutory mitigators of substantially impaired capacity or extreme emotional disturbance"); Ponticelli v. State, 593 So. 2d 483, 490-91 (Fla. 1991) (finding no evidence or testimony to support "impaired capacity" mitigator); Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990) (same); Stevens v. State, 419 So. 2d 1058, 1064 (Fla. 1982) (same).

Even if the trial court should have found the existence of this mitigating factor, Appellant's sentence should nevertheless be affirmed. There are three valid and weighty aggravating factors to support a death sentence for this cold-blooded, premeditated murder. Moreover, the trial court gave little weight to the mental mitigating factor it did find. There is no reason to believe it would have given any more than minimal weight to this factor had it been found. And even in conjunction with the other mitigation, there is no reasonable probability that the sentence would have been different. Cf. Spencer v. State, 21 Fla. L. Weekly S366, 377 (Fla. Sept. 12, 1996) (reh'g pending) (affirming sentence where two aggravators weighed against two mental mitigators and similar nonstatutory mitigators).

ISSUE VII

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S REJECTION OF THE "EXTREME DURESS" MITIGATING FACTOR (Restated).

In its written sentencing order, the trial court made the following findings of fact regarding the "extreme duress or substantial domination" mitigating factor:

> No external provocation was established in this case. The victims were peacefully in their home at the time the Defendant began his assault. This mitigating factor has not been proven and thus will not be considered by the Court.

(R 731).

Citing to Toole v. State, 479 So. 2d 731, 734 (Fla. 1985), Appellant claims in this appeal that "Kim Brown's rejecting Appellant for another man" was the external provocation required for this mitigating factor. Appellant clearly misunderstands the type of external provocation of which Toole speaks. In Toole, this Court held that "[d]uress is often used in the vernacular to denote internal pressure, but it actually refers to external provocation such as imprisonment or the use of force or threats." 479 So. 2d at 734. For example, in Toole, wherein the defendant argued with the victim and then burned down the boarding house in which the victim resided, this Court affirmed the rejection of this mitigating factor, where "[t]here was no evidence that appellant

acted under external provocation." Id.; see also Barwick v. State, 660 So. 2d 685, 690 n.9,10 (Fla. 1995) (affirming rejection of "extreme duress" mitigator where defendant, alone, broke into apartment to commit theft and killed resident who "resisted" him); Walls v. State, 641 So. 2d 381, 389 (Fla. 1994) (affirming trial court's refusal to instruct on "extreme duress" mitigator where defendant, alone, broke into trailer to commit theft and killed residents surprised by his intrusion). To apply this mitigator where the defendant breaks into a residence and kills his former girlfriend because she ended their relationship and was seeing another man would be an absurd application of this factor. Cf. Wuornos v. State, 676 So. 2d 972, 975 (Fla. 1996) (finding defendant's claim absurd that victim contributed to acts leading to his death by procuring prostitute and thereby assuming risk of bodily harm; "The statute does not encompass situations in which the killer surprises the victim with deadly force."). Given the lack of evidence showing that Appellant was being provoked by something other than his emotions, the trial court properly rejected this mitigating factor.[3]

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[3] Appellant's citation to Fead v. State, 512 So. 2d 176 (Fla. 1987), receded from on other grounds, Pentecost v. State, 545 So. 2d 861, 863 n.3 (Fla. 1989), to support his argument is clearly misperceived. In Fead, this Court uses the term "extreme duress" when it discusses evidence relating to the "extreme mental or emotional disturbance" mitigator. Id. at 177 (Dr. Mahtre testified "that appellant would have been under extreme mental duress and

ISSUE VIII

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S REJECTION OF NONSTATUTORY MITIGATING EVIDENCE THAT APPELLANT HAD A GOOD JAIL RECORD, HAD SHOWN AN ABILITY TO ADAPT TO PRISON LIFE, AND IS UNLIKELY TO ENDANGER OTHERS (Restated).

In its written sentencing order, the trial court made the following findings of fact regarding Appellant's nonstatutory mitigating evidence that he had a good jail record, had shown an ability to adapt to prison life, and is unlikely to endanger others:

> The Court finds this mitigator not established because of Deputy Sheriff Arthur Rack's [sic] testimony that the file of the Defendant while awaiting trial contained a disciplinary report of a threat to another inmate.

(R 731-32).

In this appeal, Appellant claims that the trial court erred in rejecting his good pretrial behavior, his adaptability to confinement, and his lack of future dangerousness as nonstatutory mitigation. As this Court has previously held, however, "[t]he decision as to whether a particular mitigating circumstance is

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emotional disturbance due to his heavy intoxication"); id. at 179 ("Second, we find that the jury reasonably could have concluded that Fead acted under extreme mental and emotional disturbance and duress, partly as a result of his alcohol consumption and partly because of his jealousy."). This Court was clearly not referring to the "extreme duress or substantial domination" mitigator. Thus, this case is wholly inapplicable.

established lies with the judge. Reversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So. 2d 450, 453 (Fla. 1991). Further, "[t]he resolution of factual conflicts is solely the responsibility and duty of the trial judge, and, as the appellate court, [this Court has] no authority to reweigh that evidence." Gunsby v. State, 574 So. 2d 1085, 1090 (Fla. 1991). See also Lucas v. State, 568 So. 2d 18, 23 (Fla. 1990) ("We, as a reviewing court, not a fact-finding court, cannot make hard-and-fast rules about what must be found in mitigation in any particular case. Because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain within the trial court's discretion.").

Appellant called Deputy Rock as a witness. Deputy Rock was a classification officer at the county jail. (T 1449). He testified that he does not see the inmates interact. (T 1452). All he knew about Appellant was what was in the file. (T 1453). From the presence of only one disciplinary report, Deputy Rock "presumed" Appellant was a well-behaved inmate. (T 1451). That one report, however, was for threatening an inmate. (T 1450). The trial court obviously believed that even one disciplinary report, especially for threatening another inmate, sufficiently contradicted Appellant's claim that he behaved well while awaiting trial.

Similarly, the trial court obviously believed that the nature of the disciplinary report contradicted Appellant's claim that he is unlikely to endanger others if sentenced to life imprisonment, and Dr. Alexander's opinion that Appellant would do well in a structured environment. The record supports these findings. Cf. Garcia v. State, 644 So. 2d 59, 63 (Fla. 1994) (upholding rejection of "defendant's exemplary prison record" where no evidence in record to support it),

Even if the trial court should have found the existence of this nonstatutory mitigating factor, Appellant's sentence should nevertheless be affirmed. There are three valid and weighty aggravating factors to support a death sentence for this cold-blooded, premeditated murder. Moreover, although the trial court gave Appellant's military service considerable weight, it described the rest of Appellant's mitigation as "relatively weak." (R 734). Moreover, it believed that each aggravator, standing alone, would have supported the death sentence. (R 734). Thus, even if the trial court had found the existence of this nonstatutory mitigating factor, there is no reasonable probability that the sentence would have been different. Cf. Spencer v. State, 21 Fla. L. Weekly S366, 377 (Fla. Sept. 12, 1996) (reh'g pending) (affirming sentence where two aggravators weighed against two mental mitigators and numerous nonstatutory mitigators).

ISSUE IX

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S REJECTION OF NONSTATUTORY MITIGATING EVIDENCE THAT APPELLANT WAS OF LOW-NORMAL INTELLIGENCE (Restated).

In its written sentencing order, the trial court made the following findings of fact regarding Appellant's nonstatutory mitigating evidence that he was of low-normal intelligence:

> Although the Defendant's I.Q. tested at 80, the testimony revealed the Defendant functioned at [al higher level as evidenced by his high school, service, and job record. This mitigator was not established and was not considered.

(R 732).

In this appeal, Appellant claims that the trial court erred in rejecting evidence of his low-normal intelligence in mitigation. However, as noted previously, it is the trial court's duty to resolve factual conflicts and to determine whether evidence is truly mitigating in nature. See Gunsby v. State, 574 So. 2d 1085, 1090 (Fla. 1991). Here, the record reveals that Appellant had graduated from high school, he had had to maintain a "C" average in high school in order to play basketball, he had served six years in the Marine Corps, he had survived 13 months in combat in Vietnam, he had been honorably discharged as a Sergeant, and he had been a reliable employee for a moving and storage company for seven or eight years. (T 1389-90, 1475-76, 1492, 1508, 1512). Even his own

neuropsychologist, who spent eight hours with Appellant assessing his intelligence, found his military and employment history inconsistent with such a low-average I.Q. (T 1380-81, 1389-90). The trial court's rejection of this nonstatutory mitigating factor was proper. Cf. Kight v. State, 512 So. 2d 922, 933 (Fla. 1987) (finding "no error in the trial court's failure to find Kight's low IQ and history of abusive childhood as non-statutory mitigating factors"); Woods v. State, 490 so. 2d 24, 27-28 (Fla. 1986) (upholding rejection of defendant's low intelligence as nonstatutory mitigator); Mills v. State, 462 So. 2d 1075, 1081 (Fla. 1985) ("The trial court need not consider low intelligence alone as a mitigating circumstance.").

Even if the trial court should have found the existence of this nonstatutory mitigating factor, Appellant's sentence should nevertheless be affirmed. There are three valid and weighty aggravating factors to support a death sentence for this cold-blooded, premeditated murder. Moreover, although the trial court gave Appellant's military service considerable weight, it described the rest of Appellant's mitigation as "relatively weak." (R 734). Moreover, it believed that each aggravator, standing alone, would have supported the death sentence. (R 734). Thus, even if the trial court had found the existence of this nonstatutory mitigating factor, there is no reasonable probability that the sentence would

have been different. Cf. Spencer v. State, 21 Fla. L. Weekly S366, 377 (Fla. Sept. 12, 1996) (reh'g pending) (affirming sentence where two aggravators weighed against two mental mitigators and numerous nonstatutory mitigators).

ISSUE X

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S REJECTION OF NONSTATUTORY MITIGATING EVIDENCE THAT APPELLANT IS CAPABLE OF REHABILITATION (Restated).

In its written sentencing order, the trial court made the following findings of fact regarding Appellant's nonstatutory mitigating evidence that he was capable of rehabilitation:

> This factor is not found based on the totality of his past criminal history as revealed by the Defendant's Pre-Sentence Investigation and his disciplinary report while awaiting trial.

(R 732-33).

In this appeal, Appellant claims that the trial court should not have rejected this mitigating circumstance because Appellant's past criminal history does not sufficiently rebut his evidence of his potential for rehabilitation. **Initial brief** at **56.** The record reveals, however, that Appellant has been arrested 23 times since 1972 for numerous violent offenses including simple battery, armed robbery, aggravated battery, aggravated assault, cruelty to a

juvenile, attempted murder, manslaughter, false imprisonment, and aggravated battery on a pregnant female. (SR 5-6). While the disposition for many of these offenses are unknown, this lengthy arrest record shows a consistent pattern of violent, or at least aggressive, behavior without any evidence that Appellant can abide by the rules and laws of society. These offenses, which span a period of 23 years, culminate in the murder for which he was sentenced to death. Moreover, even upon his arrest, he was accused of threatening an inmate while awaiting trial. Appellant's arrest record and disciplinary report more than amply support the trial court's rejection of Appellant's claim that he is capable of rehabilitation. Cf. Mills v. State, 462 So. 2d 1075, 1081 (Fla. 1985) (finding trial court justified in rejecting defendant's potential for rehabilitation where defendant had been on parole only a few months before murder).

Even if the trial court should have found the existence of this nonstatutory mitigating factor, Appellant's sentence should nevertheless be affirmed. There are three valid and weighty aggravating factors to support a death sentence for this cold-blooded, premeditated murder. Moreover, although the trial court gave Appellant's military service considerable weight, it described the rest of Appellant's mitigation as "relatively weak." (R 734). Moreover, it believed that each aggravator, standing alone, would

have supported the death sentence. (R 734). Thus, even if the trial court had found the existence of this nonstatutory mitigating factor, there is no reasonable probability that the sentence would have been different. Cf. Spencer v. State, 21 Fla. L. Weekly S366, 377 (Fla. Sept. 12, 1996) (reh'g pending) (affirming sentence where two aggravators weighed against two mental mitigators and numerous nonstatutory mitigators).

ISSUE XI

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S REJECTION OF NONSTATUTORY MITIGATING EVIDENCE THAT THE MURDER WAS THE RESULT OF A HEATED DOMESTIC DISPUTE (Restated).

In its written sentencing order, the trial court made the following findings of fact regarding Appellant's nonstatutory mitigating evidence that the murder was the result of a heated domestic dispute:

> This mitigator was not established. The homicide had many premeditated, calculated elements. The Defendant came armed with the murder weapon and had previously announced his intentions. The Defendant's relationship with the victim had already ended, and the Court believes that women are entitled to the same protection of the law as anyone else.

(R 733).

In this appeal, Appellant claims that the trial court erred in rejecting the domestic nature of the offense as a mitigating

factor. However, while the trial court did reject this circumstance as a separate and distinct nonstatutory mitigating factor, it considered it in and used it to support its finding of the "extreme mental or emotional disturbance" mitigator: 'The record shows some evidence of mental or emotional disturbance. The Court finds the Defendant was angered by the break-up of his relationship with the victim, by her having a new boyfriend, and was depressed and suicidal immediately after the killing." (R 730). Appellant is not entitled to have the same evidence used to support two separate mitigating factors.

Moreover, as in Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), "[t]his is not a case involving a sudden fit of rage." Appellant told Carolyn Glass a week before the murder that he was going to kill Kim Brown. (T 1130-31). Ms. Glass also saw Appellant walking back and forth in front of the victim's apartment the day before the murder saying he was going to kill everyone in the apartment. (T 1143-45). When he came to see Kim Brown on Monday morning, he was armed with a firearm. 'While [Appellant's] motivation may have been grounded in passion, it is clear that he contemplated this murder well in advance." Id.

Even if the trial court should have found the existence of this nonstatutory mitigating factor, Appellant's sentence should nevertheless be affirmed. There are three valid and weighty

aggravating factors to support a death sentence for this cold-blooded, premeditated murder. Moreover, although the trial court gave Appellant's military service considerable weight, it described the rest of Appellant's mitigation as "relatively weak." (R 734). Moreover, it believed that each aggravator, standing alone, would have supported the death sentence. (R 734). Thus, even if the trial court had found the existence of this nonstatutory mitigating factor, there is no reasonable probability that the sentence would have been different. Cf. Spencer v. State, 21 Fla. L. Weekly S366, 377 (Fla. Sept. 12, 1996) (reh'g pending) (affirming sentence where two aggravators weighed against two mental mitigators and numerous nonstatutory mitigators).

ISSUE XII

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S REJECTION OF NONSTATUTORY MITIGATING EVIDENCE THAT APPELLANT IS UNLIKELY TO ENDANGER OTHERS AND WILL ADAPT WELL TO PRISON (Restated).

In its written sentencing order, the trial court listed as a separate nonstatutory mitigating factor whether Appellant is unlikely to endanger others and will adapt well to prison. However, it referred to its previous findings relating to Appellant's good behavior while awaiting trial: "This mitigator is not established as was previously discussed." (R 733). Given the

repetitive nature of the circumstance, and the rationale for its rejection, the State will rely on its arguments made in Issue VIII, supra.

ISSUE XIII

WHETHER REVIEW IS PRECLUDED BECAUSE THE RECORD DOES NOT CONTAIN APPELLANT'S PRESENTENCE INVESTIGATION REPORT (Restated).

In this appeal, Appellant claims that the record on appeal fails to contain the presentence investigation used by the trial court in determining the appropriate sentence. Although Appellant has the burden of ensuring a complete record, Fla. R. App. P. 9.200(e), the State moved to supplement the record with Appellant's PSI, which this Court granted. Thus, this issue is moot.

ISSUE XIV

WHETHER THE TRIAL COURT ERRED IN DEPARTING FROM THE GUIDELINES SENTENCE FOR COUNTS II AND III WITHOUT CONTEMPORANEOUS WRITTEN REASONS (Restated).

In this appeal, Appellant claims that the trial court failed to render a contemporaneous written order containing its reasons for an upward departure for Appellant's two noncapital sentences. Brief of Appellant at 61-62. Appellant was sentenced on the two noncapital offenses on February 23, 1996. (R 693-702; T 1687-91).

On that date, a sentencing guidelines scoresheet was prepared and filed with the clerk. (R 692-95).[4] The fourth page of the scoresheet, which contains a list of reasons for departure, none of which were selected, indicates the following at the top of the page: "If reasons cited for departure are not listed below, please write reasons on the reverse side in the area specified "Reasons for Departure." The reverse side to this page in Florida Rule of Criminal Procedure 3.990 is the third page of the scoresheet in this case. The third page of this scoresheet contains the following written notation at the bottom of the page in the section entitled "Reasons for Departure": "[Defendant] has an unscored capital murder conviction arising from the same set of circumstances." (R 694). Judge Broome's signature appears immediately under this notation. (R 694).

This four-page scoresheet, with the handwritten reason for departure, the judge's signature, and the clerk's stamp constitutes the contemporaneous written reasons required by law. No other, independent document is necessary. See Torres-Arboledo v. State, 524 So. 2d 403, 413-14 (Fla. 1988). Thus, Appellant's complaint that his departure sentences are invalid is wholly without merit and should be denied.

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[4] The first page of the scoresheet was stamped by the clerk with a date of February 23, 1996, indicating that it was filed that day.

As for the propriety of the departure reason given, which Appellant seemingly does not challenge, this reason has previously been upheld as a valid reason for departure. Id.; Bunnev v. State, 603 So. 2d 1270 (Fla. 1992). As a result, this Court should affirm Appellant's life sentences for the burglary of Kim Wright Brown's home and for the attempted first-degree murder of Alvonza Colson.

ISSUE XV

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL (Restated).

Prior to trial, Appellant filed numerous motions challenging the constitutionality of Florida's death penalty statute and various aggravating factor jury instructions. (R 96-107, 116-23, 124-49, 150-67, 168-75, 176-83, 184-99, 215-18, 267-77, 284-91). All motions were denied following a hearing. (T 170-92). Appellant renews many of the challenges raised below, all of which have previously been rejected by this Court. See Hunter v. State, 660 So. 2d 244, 252-53 (Fla. 1995) (rejecting challenge to "felony murder" aggravator as "automatic" aggravator); Fotopoulos v. State, 608 So. 2d 784, 794 & n.7 (Fla. 1992) (rejecting challenge to majority vote, adequacy of counsel, role of trial judge, discriminatory selection of sentencers, lack of appellate reweighing of aggravators and mitigators, inconsistent application

of aggravators on appeal, application of contemporaneous objection rule to capital cases, inconsistent application of Tedder, lack of special verdicts at sentencing, statute's presumption of death, and electrocution as cruel or unusual punishment). Therefore, this claim should be denied, and Appellant's sentence of death for the first-degree murder of Kim Wright Brown should be affirmed.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Michael D. Lebedeker, Esquire, 711 North Flagler Drive, West Palm Beach, Florida 33401, this 31st day of ~~February~~ January 1997.

SARA D. BAGGETT
Assistant Attorney General