IN THE SUPREME COURT OF FLORIDA

LYNFORD BLACKWOOD,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 90,859
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
_____	)	

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Lynford Blackwood, appellant, appeals his conviction and death sentence for first degree murder in the death of Carolyn Thomas-Tynes. The jury recommended a death sentence by a vote of 9-3. R 1538.

In sentencing appellant to death, the court found one aggravating circumstance: that the murder was especially heinous, atrocious or cruel. R 1581-82. In mitigation, the court found one statutory mitigator: appellant had no significant history of prior criminal conduct, to which it gave "significant weight".[1] R 1584. The court also found seven non-statutory mitigators: emotional disturbance at the time of the crime (moderate weight); capacity for rehabilitation (very little weight); cooperation with police (moderate weight); murder resulted from lover's quarrel (the court "considered this as a non-statutory mitigator to the extent that the killing was borne out of a prior relationship, and thus fueled by passion" but assigned no specific weight); appellant is a good parent (some weight); his employment record (some weight); his low intelligence (some weight). R 1584-87.

The record shows that appellant, a self-employed Jamaican immigrant in his mid-thirties had a long-term relationship with Ms. Thomas-Tynes, the operator of a beauty parlor. After she was found strangled in her bed on January 6, 1995, the police turned their investigation to appellant, who had disappeared.

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[1] The record shows no prior criminal conduct by appellant.

A. Katrina Tynes, Carolyn's daughter, testified that appellant her mother dated for about 10 years. R 392-93. She saw him on New Year's morning at Carolyn's mother's house, but had not otherwise seen him for a couple of months. R 393-96. Appellant told her that Carolyn did not want him anymore. R 395-96. Carolyn and appellant were not arguing with each other. R 401.

Serina Thomas, another daughter, testified that appellant and Carolyn broke up around August. R 757. Two weeks before Carolyn's death appellant said that he offered to share her with the other guy, R 758, and two days before the death Serina spoke with appellant: "He told me that he shouldn't be telling me, but she had abortions from him, and that now she was pregnant from someone else, and he doesn't understand how." R 764. "He told me that he had offered to share her with the other guy, and she told him that she didn't want him at all." R 765. "He said that he had offered to have -- asked her to have sex with him on more than one time, and she told him no and cursed him out." R 765. Appellant said he "was getting ready to go to Jamaica because he couldn't handle it anymore, and he was leaving after his son's birthday." R 765.

Hazel Scott, Carolyn's sister, testified that Carolyn and appellant ended their relationship around October. Around Christmas and New Year's, appellant would talk with Hazel. R 769. "He said that she had, you know, left him and everything, and he was, you know, hurt about it, or whatever. And he was just -- he just came, he talked, you know, stuff that had happened in their relationship, he would talk about it. And he said he -- his

parents didn't know that they had broke up, or whatever, because he was gonna wait and see if she was gonna tell them because he wasn't. He was upset. He said he was leaving to go back to Jamaica." R 769-70. "Because there was nothing here for him anymore because they broke up. ... And he talked about her being pregnant from someone else." R 770. He said she was pregnant on New Year's Day. R 770. The Thursday before Christmas he was talking about her other boyfriend. R 771. "He told me the same Sunday, which was New Year's, that Carolyn had told him to stop following her family around, because they are not going to get them back together. And he gave her a look. And she asked him why he was looking at her like that, like he wanted to kill her or something. And he told her before he killed her, he would kill hisself." R 772.

On the morning of January 6, Carolyn took Katrina to school in her Cadillac around 7 or 7:30 a.m. R 392.

Carolyn's brother, Anthony Thomas, testified he went to her home around 6:00 p.m. Appellant's brother's truck was outside. R 407-08. Carolyn's Cadillac was not there. R 412. The door was locked, and Anthony used his key to enter. R 412-13. He found Carolyn nude in bed, and put a pillow over lower part of her body. R 413. He called to see if she was asleep; she felt cold, and he tried to shake her, and then called 911. R 414. There was an open condom package in the hallway by the bathroom. R 419.

A policeman who arrived at the house testified that it was meticulously kept, although he also saw condom a wrapper outside

the bathroom door, which he considered suspicious. R 437. Ms. Thomas-Tynes was naked on the bed. R 438. A cardboard box was tipped to the side, half off the table and objects were knocked off the table: "That, to me, indicated struggle." Id. There was a lock of hair on the mattress. R 438-39. While the EMS was pulling away from the body, his gloved hand hit across foam on her face (it had the consistency of shaving cream), and he wiped it on the pillow by her head. R 444. The officer conceded that he was speculating about the struggle. R 455. There was a box of condoms next to the bed of the same type as the wrapper found on the floor. R 465.

Det. Thomas Hill testified that a washcloth and piece of soap were recovered from her mouth at autopsy. R 526-27. Marks on her neck were consistent with double-stranded speaker wire in the bedroom. R 528. There were sheets on the couch in living room. R 533. There was no sign of forced sex. R 538. There was a knife on the bed. R 540. The clothes were not ripped. R 541. The speaker wire was under a pocketbook and one shoe. R 542.

The medical examiner testified that Ms. Thomas-Tyne's face was dark and discolored, there was white foam in her mouth and nose. R 702. On the floor nearby was a wire. R 703. Death resulted from asphyxia based on foam in the mouth and nose, and injuries to the neck. R 703. There was petechial hemorrhaging in the eyes, which is common for strangling and is not consistent with sudden death. R 709-12. The amount of foam indicated heart failure, which would take several minutes. R 713. Pulmonary edema

indicated she was alive when choked and that “it took some time to do that because you just couldn’t form that over a matter of seconds.” R 713-14. The cloth and soap blocked air passages through the mouth. R 716. She was pregnant, six weeks into the gestational cycle. R 719.

On the night of January 7-8, appellant arrived unexpectedly at the St. Petersburg store of his cousin, Donovan Robinson. R 489. Donovan took appellant to his home to spend the night, R 489, and Donovan’s wife, Vinette asked him how Carolyn was doing, and he said she was okay. R 477. The next day, Vinette telephoned appellant’s father, R 479-80, who said that Carolyn’s body had been found and that appellant was missing. R 485. He had Vinette call appellant’s daughter, Lorna, who gave her a detective’s number, which she gave to Donovan. R 485-86. Donovan told appellant that he could no longer stay with them, and gave him the detective’s number. R 491.

Donovan testified that their conversation continued as follows: “Well, I tell him about what my wife made the phone call and give him the number. And then he started talking to me, and I asked him what did happen. And he was telling me, well, he and his girlfriend get into a fight, you know, and, you know, he choked her.” R 492. “You know, he said he just choked her by the neck, so --” R 492. “First, he told me what happened to the girlfriend, like he wanted to leave, like he was on the run.” R 493. “Well, he was a little scared. He was a little nervous, you know, when he told me what happened.” R 493. “Well, he said probably he would

go to New York." R 493. Appellant said he had hitchhiked to St. Petersburg. R 494. Donovan drove appellant out to the Interstate, but it was really cold that night, so he let him stay overnight at the store. R 495-96. The next day, appellant went to a motel, and Donovan turned him over to the police. R 496-98.

When Donovan told him that Carolyn was dead, appellant was surprised, nervous, shaking; "You could see his eyes was popping." R 502. He never indicated an intent to kill her. R 502. He had a cut on his wrist. R 503. He said he choked her until she was unconscious. R 504.

After his arrest,[2] appellant was taken to the hospital for treatment of large cuts across his stomach and on his wrist, arms and lower extremities. R 576-78. When Officer James Jones was taking him back to jail, appellant "indicated to me, he leaned forward against my grille and he stated to me he didn't mean to kill her." R 582. "He stated ... he didn't even realize that she was pregnant until the detectives had told him. ... He indicated to me he had fear that he had gotten a disease or she had given him a disease." R 583.

He initially told Det. Mark Desaro "that he was hitchhiking from Tampa to St. Petersburg and he was picked up by a man named Robinson who drove him over to the St. Petersburg area and left him. He had spent the night in a motel and was, in fact, trying to

[2] When arrested, he gave a fake name and tried to run away. R 570-71, 575, 586.

get back to Tampa at that time." R 587. Later, he asked to talk to Desaro again and the following occurred:

> Mr. Blackwood started crying. He described to me that he didn't know she was dead until he had been told by one of his relatives. When I asked him which relative it was, he said he believed it was either Donovan or Donovan's wife, this being Donovan Robinson. He informed me that Donovan's brother, Garvey, and a friend of Garvey's, had gone back to Fort Lauderdale after he had come to St. Petersburg to retrieve $14,000 from a car he had left out at the house. He advised they returned early on the morning on the 10th. They didn't have the money with them and told him they couldn't find it.
>
> I asked him why he fled the Fort Lauderdale area. And he stated that he had been dropping off some sheets at his girlfriend's house early in the morning, and his intention was to talk to her and then take her to go get something to eat.
>
> He informed me that they had had sex after they had hugged and spoke for a little while, and this sex was consensual. He advised that they had been together for 12 years, and during the course of their conversation on that day, she informed him that she had killed babies for him. When I asked him to explain what that meant, he said she had abortions. She said she had killed six babies.

R 598-99. "He was very upset, he was crying, and he was shaking." R 599.

> He informed me that he believed his girlfriend was seeing another man, because she was cutting down the amount of time they were spending together, and that she did not want to see him in public anymore.
>
> He then stated to me, I think I strangled her
>
> I asked him what else had happened.
>
> He said they had sex. And, after having sex, they began to argue. He advised me they were in the process of cleaning up and didn't have any soap and wash cloth with them in the bed, and he had possibly put the soap into

> her mouth, but he did not remember whether he had or not. He then indicated that he believed he had done that. He advised he didn't know where the washcloth was at that time.
>
> We reviewed what he had told me again with him, and he stated that they had had sex together and they got into an argument and they were both naked on the bed when he began to choke her.
>
> He then spoke about some of the injuries that he had on him, saying that he did not know whether the injury he had got to his stomach was self-inflicted or he had been cut by her. Then he showed me his wrist where he had some cuts. Then he told me he had done this after finding out that she was dead. He further advised that he didn't mean to kill her. And that he spoke about a vehicle that he had taken from her house that he left on US 27. He again talked about the fact that Ms. Thomas had stated she had killed six children for him by abortion. And that he would do anything for her because he loved her and he was willing to do anything he could to stay with her.

R 599-600. "He told me that he had argued and that he had choked her." R 601. Desaro thought appellant was being honest in his statement. R 606.

In a taped statement to Det. Palazzo, appellant said that he went to Carolyn's house around 7:35 a.m., and she answered the door in her nightgown. R 625. He brought her some sheets. R 626. They sat and talked. R 626. She said she wanted to lie down in bed, and hugged him. R 627. He asked if she wanted to have sex. R 628. They had sex in her bed; she had him use a condom. R 628. Afterward, they started arguing. R 630. "It was like, uhm, more or less she -- I guess she wasn't going to see me that more often and stuff like that." R 631. "Well, you know, I told her I'll work with her whichever way she wanted, but I would, you know --

you know, do whatever it takes just to be with her, you know." R 631. He had had lunch with her a day or two before. R 631-32. Reverting to the argument, appellant said: "Then somehow we start like, uhm, struggling. We started struggling, and somehow I must have strangled her." R 633. "Next thing I know she was like unconscious." R 633. He must have choked her. R 633-34. Palazzo told appellant he knew it was hard to talk about. R 634. Appellant was beside her in the bed while strangling her "with my hand one time." R 634. He thought it was both hands, and was not sure if he used anything else to choke her, and did not remember doing anything with the pillow. R 635. She was breathing when he left: "There was stuff coming out of her mouth." R 637. He took her car, but did not know why. R 637. He slept in the car that night on the road somewhere. R 639. "I was really scared. It was very tired, weak. I was wondering what happened to her, you know. I was just wondering what happened to her." R 640-41. After abandoning the car,[3] he hitchhiked to St. Petersburg. R 641. "I just kind of end up here. I didn't plan to see Donovan 'cause I didn't -- 'cause I didn't know what happened. I didn't know what's going on. I was just -- just going, going, I don't know." R 642. Palazzo told appellant that he had been pretty honest. R 649. Asked again if something other than hands were used for strangling, appellant said: "I'm not sure. I can't -- I can't know anything about what happened. I'm not sure." R 651. "I think I throwed a piece -- I think there was a piece of soap in her mouth." R 652.

[3] The car was found in a field near Belle Glade. R 542, 666.

She had a rag. R 652. He "probably" put the soap in her mouth; he was not sure about the rag: "Anything's possible 'cause I choked her, I don't know. Anything is possible." R 653. He never put the pillow on her face. R 653. He thinks he had the soap and she had the washrag. R 654. They were going to wash up, take a shower. R 655. He must have flushed the condom down toilet. R 656. Appellant said: "Just that I'm just sorry for what happened. I didn't mean to hurt her 'cause I love her and I care about her (unintelligible)." R 657. He was not sure about the cuts on his own body: "I think I might have did it." "I probably done it." R 658.

Det. John Abrams testified that appellant said he had no knowledge about the knife found by Carolyn's leg. R 746. He said appellant was upset during the taped statement. R 749.

B. In the penalty phase, the state presented the medical examiner's testimony concerning asphyxiation. He stated: "The oxygen, it only takes a few seconds for oxygen deprivation for someone to start panicking because the loss of oxygen leads to unconsciousness. That panic leads you to try to fight to breathe or to fight to remove whatever is compressing the neck because it is inherent if you do not regain your consciousness or your oxygen supply, then death is surely going to follow." R 922. He testified that scratches at the neck, such as on Ms. Thomas-Tynes, are consistent with trying to move something from around the neck to get breath. R 925. Petechial hemorrhaging is caused by releasing and reapplying pressure to the neck; it is "present in

people that fight a very long period of time, struggling against someone." R 926. He added that "it is very hard to keep a continuous pressure around someone's neck who is really fighting. You lose your grip quite often." R 926-27. He said that a person in Thomas-Tyne's situation would have known death was pending. R 932. This amounts to torture, in his opinion. R 932.

The medical examiner could not tell whether the towel was in the mouth before manual strangulation. R 936. "All I can tell you is that she is alive throughout the strangulation with the hands and the ligature because you have the marks on her neck. You have to be alive to get that. She was alive when the soap and towel were placed in her mouth. Sequence doesn't matter to me because it all ended in her death." R 939. The thyroid cartilage was not broken. R 939-40.

Bernice Scott, Carolyn's mother, testified that Carolyn left behind six siblings, three daughters, one grandson. R 944. "My daughter was a hard worker. She convinced her kids they needed education to make it in this world. My daughter worked long hours to make it so these girls could go to college. She worked very hard. She was always doing something on behalf of her girls. I had admired her for being a single parent and sending two girls to college and one in high school, almost to finish school. When I was her age, I could not do it. My daughter was a real go-getter." R 946. "Well, my daughter made it from nowhere. Carolyn came up in the ranks that she did go to high school. Didn't have a college education. Worked long time in her father's laundromat. All of a

sudden, she decided she might go to cosmetology to get education for beautician." R 946. She had her own shop "and she was good at it. She was independent. She didn't need anybody to help her or do thing. Carolyn worked all the time. She never bothered anybody about her help. She just worked and did what she had to do." R 946. "The business is really open to the people and she had a lot of friends. I mean, she was, just what you say, a character, that she always was there. She helped people out, whatnot. Summertime the girls come in, wanted their hair done, didn't have money. She would just do it. She would just do it." R 946. People would tell Bernice that Carolyn's not being around any more "affected a lot of people. Carolyn didn't only do hair. People came by, wanted her to do facials. She has one of the customers in this courthouse today. He came by to watch the trial." R 948. She related to all the people that came through, helped with money, food, clothing. R 948. "The girls have lost their mother because Carolyn was not only like a mother to them, she was like I would say a sister. When you saw one, you saw all four of them. They were together most of the time." R 949. "Well, the loss of their mother has affected them tremendously." R 950. "Carolyn was just like a -- she was like the leader of our family. When occasions came along, she was the first to submit whatever needed to be done." R 950. "I could tell you all day and tell you about my relationship with my daughter. She was my first born, like I said. Did everything together. We traveled up and down the road to homecoming games when the kids was at Atlanta, to Morris Brown.

Wasn’t a Sunday she didn’t miss coming to my house to eat. We had so many activities, I didn’t need company. I always had my family. I had my grand kids. I had Carolyn. We were tied together. I could call her over at any time. She would be right there. She was not only like a daughter, she was my sister and my best friend.” R 951. “It really has affected me. So many days you think about different things and I could talk to her when I could talk to nobody else. My daughter was there for me. I lost my husband five months before my daughter died. She was there. I could call her.” R 952.

Bernice never saw appellant get violent with Carolyn. R 954.

C. Paul Bennett, an accountant and fifteen-year acquaintance of appellant, R 963, was the first mitigation witness. He knew appellant in Jamaica, and the two became close friends later in America. R 959-60. They used to play soccer together. R 961. Appellant had a cabinet factory and operated at the flea market. R 961. He needed advice and was always concerned about his finances: “He was always kind of slow, you know, with that part of it.” R 962. “To me, he was like a child. Big boy.” R 926. “You could lead him. He wasn’t the kind of guy who was definite about anything, you know. It’s like something was missing from his childhood, like he didn’t have a peer or something, something to look up to tell him how to live.” R 962-63. Appellant had about a grade 4, 5 intelligence: “It was on a low level.” R 963. Carolyn “always wanted to do her own thing. She is a strong, strong person.” R 964. “He wasn’t definite, wasn’t strong, wasn’t

a man, so to speak. It was basically what she said goes." R 964. When he last saw him around September 1994, appellant was "very depressed." R 965-67. Someone had betrayed him or something like that; "He was just upset. I sensed he was like really bewildered somehow. Absent minded." R 966. Bennett never saw appellant abusive to Carolyn. R 966. "As a matter of fact, if I might say, one of these incidents when we were in the car, and she was really being very very harsh with him, if it was me, I would have said something, you know." R 967. In late fall, early winter of 1994, appellant was not earning much money; "He said I am tired of this life and stuff. I would like to go home, back to Jamaica. He lived in the rural part of Jamaica. Laid back. ... He was selling off these things because he wanted to go back." R 968.

Carter Powell, a jailer, testified that appellant was: "Well behaved. No problems. He doesn't give the staff any problems. He's cooperative. He gets involved with the programs provided." R 986. He was a trustee and a diligent worker. R 987-88. He was a "very well behaved person", respectful to authority. R 988. On cross-examination, Powell testified that it would have been helpful to have found out that appellant was involved in a fight with 8 days lockdown, and refused to come to court. R 989-90. Appellant took computer classes. R 999. He was put on suicide watch by a doctor, R 999-1000, and a nurse later took him off suicide watch. R 1002. At the time of trial, he was still on trustee status -- to have that status he must be well behaved. R 1000-1001.

Joseph Petty, a businessman engaged in real estate, testified that appellant was a good cabinet maker and did work for Petty. R 1006. They were co-tenants of a warehouse where appellant kept his tools, and appellant paid his rent on time and was a hard working guy. R 1007. Mr. Petty did not know appellant to be a violent person; he was of above average intelligence. R 1008. Appellant was a leader. R 1008.

Michael Blackwood, appellant's brother, testified that they were raised in in Jamaica by their grandmother while their parents were in America. R 1010-11. Around Christmas 1994, appellant told Michael that he and Carolyn not getting along too well. R 1013. "He was just in the house. House was in a total mess. Looked like he didn't get out of bed." R 1014. "The door was open. He didn't even come to the door. I knocked on the door. I walked in. And his clothes is on the floor, sheets was off. He was still curled up in a ball. I said what's going on. He said he don't want to talk. I said man, you going to let a female, you know, let you feel like this. I said come on, there's other girls. He replied when you been with someone for so long, it's just hard. I just leave it at that. I said you know it is not human, you need to get over it." R 1014. When they would play soccer, appellant would leave the field when Carolyn told him to, even though that made the sides uneven. R 1015. Appellant has a son, Germayne, and: "His relationship with his son is better than mine." R 1016.

Desmond Campbell, the owner of a moving company, who was appellant's best friend and the best man at his wedding, R 1021-

22, testified that appellant "would always want to do things to make life better." R 1022. Appellant is generous. R 1023. Appellant and Carolyn were always together. R 1023-24. He never saw appellant hit Carolyn: "No. He's not that type of person who over the years I know him, I never see him get into any kind of dispute." R 1025. Appellant is not a violent person. R 1026.

Patricia Culford, the owner of a printing business, who knew appellant both as a friend and through business, testified that appellant is "a very low-key person." R 1033. "He's always been extremely quiet and I have never known him to drink. I have been to parties with him. And if Lynford has one beer, that's a lot. He doesn't smoke. Never seen him do drugs. And I witnessed him with his son. He's an excellent father." R 1033. "Very attentive. Took the child with him all over the place. Always doing things for him. I mean I cleaned out a room one time, had a television and some encyclopedias and stuff, Lynford came and got them for his son." R 1033. He and Carolyn "seemed to have gotten along very well." R 1034.

Lois Bland, a friend of appellant, testified that they had warehouse businesses near each other, and she saw him at least once a week for 13 years. R 1036. "He had a business doing carpentry. I had a business redoing furniture." R 1037. A hard worker, appellant showed up for work every day, and Ms. Bland never saw him drunk or impaired. R 1037. Bland also knew Carolyn -- she would do her laundry at a laundromat owned by Carolyn's family, and later

Carolyn did her hair. R 1039. Carolyn was never afraid of appellant. R 1041.

Claudette Bernard, the mother of appellant's son, testified that she once saw Carolyn take a swing at appellant. R 1058. Carolyn would harass Ms. Bernard. R 1059. Carolyn ran the relationship with appellant. R 1060. She "would follow Lynford everywhere he goes." R 1060. "Lynford was very good to his son. That's his only child. He was allowed any time to pick him up. Sometimes I wouldn't feel like cooking. Call him over. He would take Germayne to take him to get something to eat. Pick him up." R 1060. Appellant and his son were very close; he contributed as much as he could to his son's upbringing. R 1061.

Lana Salmon, appellant's sister and a customer of Carolyn, testified that she and Carolyn were "very good friends." R 1065. They spoke together the Wednesday before her death, and Carolyn said that appellant was there. 1066. Lana never heard appellant threaten Carolyn or physically beat her. R 1069. He planned to move back to Jamaica. R 1070. He and his son Germayne "were like buddies, best friends or brothers. They would come to my house sometimes on weekends. Sometime coming to dinner. Lynn would take Germayne to the flea market when he goes to selling things. Germayne would sometimes work at Lyn's cabinet shop with him. They had a very good relationship. As far as I know, Lyn always did as much as he could for his son. He was a very very willing person as far as being generous." R 1070. When their parents went to America, appellant and his siblings stayed behind. R 1071.

Appellant is not a smart person. R 1071-72. Out of all seven siblings, he "would be on the lower level" intellectually. R 1072. "He always seemed to be a slow learner. As far as you can talk to him and he would not be able to communicate as well as others." R 1072. Carolyn sometimes seemed possessive. R 1072. Carolyn once hit appellant in the eye with a shoe. R 1073.

Germayne Blackwood, appellant's 14-year-old son, testified that: "Basically, me and my dad was like best friends. I didn't consider him as my dad. We had so much fun together. I seen him about at least three times a week. Every time I see him, I was with him all day pretty much. We had fun, basically. Go to the park or take me to his job. I helped him out. I had fun being with him. I liked to be with him. I tried to be with him as much as I could." R 1075. Appellant never struck Germayne. R 1075. Germayne saw Carolyn about twice a week with his father. R 1077. There were no problems with her. R 1077. Germayne wants to become lawyer and works as a prosecutor in team court. R 1078-79. His father is not a violent person. R 1080.

D. After the jury's penalty recommendation, the court heard further testimony at a Spencer hearing.

Dr. Trudi Block-Garfield, a psychologist testified for the defense to three interviews with appellant. At the time of the first interview in April or May 1995, he was "extremely depressed". "The hospital records reflect a depression and the fact that he was -- had been on suicide watch. And some of his responses may have been more due to apathy and depression, and he may just not have

been interested in thinking about those things and giving the -- a full answer. Very frequently when people are depressed, they just, I don't know, I don't know, this kind of thing." R 1170. "He answered questions, but he answered them simplistically. He answered them essentially in a monotone. He was not forthcoming in terms of information, although he was responsive to the questions that I asked." R 1171. At jail he was taking Sinequan, an antidepressant. R 1172-73. "He had indicated to me that he had thought about [suicide] for a long period of time. I found in the medical records that he had been on suicide watch. Although he did not report that to me himself." R 1174.

Appellant had never been arrested before. R 1176.

"I asked him if he attempted suicide. He said yes. But then he said that he thought about it a lot for a couple of years. He didn't do anything, but was going to go in front of a car." R 1178. Dr. Block-Garfield said asked him why he was in jail: "Uhm, his -- I quote him in my report, and he said, They said I killed someone. They said I killed a woman." R 1179. "And he, uhm, indicated to me that his cousin told him that he was accused of it. Quote, They say I was fighting her and I killed her, unquote. He -- I pressed him again, and he said that he remembered having a fight with her, but that he didn't think she was dead." R 1179. Why did he think she was not dead? "And he said, I just don't. She is here sometimes at night." R 1180. "That, in essence, that he -- that she appears to him at night, and that he doesn't think that he actually killed her." R 1180.

In December 1995, Dr. Block-Garfield examined appellant for competency. R 1182. He had not had thoughts of suicide for a while: "He indicated to me that there hadn't been any recently, but that there had been some because he doesn't have a lot of friends, and they don't want to be bothered by him anymore." R 1185. "I asked him what he was charged with. And he again responded identically as he had done before, They said I killed someone. They say I killed my girlfriend. When I asked him how that happened, he said it was some time ago this year. Then he said he didn't remember. I remember I went to her house to talk to her, and I brought -- and I brought some stuff back to her. That she was trying to see someone else. I didn't feel good." R 1187. He said: "I get the feeling that she liked seeing different people." R 1187. "'It's like she was seeing someone, but I never seen that person.' And I asked him how she had died. And he said [he] didn't remember how she died." R 1188. He said: "I -- I don't remember how she died. I left there, and she was unconscious, and I left. She was coughing. I remember she was lying down and moving, and after awhile she coughed, and I got scared and ran out of the house." R 1188.

The verbal part of the Wechsler Adult Intelligence Scale indicated "a verbal IQ of 70, which is right at the borderline between the borderline range of functioning and the retarded range of functioning. I was not inclined to believe that Mr. Blackwood was -- was retarded in any fashion, simply because, number one, I didn't admit -- I didn't administer the second portion. Very often

people, the score could have been brought up by that particular score, so I can't really formulate a conclusion. And, secondly, I also attributed his lower score to the depression. When people are depressed, they don't always verbalize as well. They don't -- they're not motivated to perform well on the tests. They really can't care. So the score could very well have been decreased by the depression, rather than the fact that there may be some intellectual deficits." R 1189.

Testing for neurological deficits showed that "he scored in the impaired range. I can't definitively say that it is because he was -- he is indeed neurologically impaired. I have no reason to believe that he is. I'm not aware of any head injury, okay. He may well have some problems. I can't definitively say that that is the case. It's something that I have to consider. And, again, it can't be partialed out. It could be one, it could be the other." "And in terms of Mr. Blackwood, it's difficult to say because the depression does not seem to have alleviated over time. And if I were to give Mr. Blackwood the benefit of the doubt, then I would say the depression is only a partial factor and there are other difficulties." R 1192. The test for determining retardation is Stanford Binet, which she did not give. R 1194-95. She "saw Mr. Blackwood as depressed." R 1197. "My conclusion was that I did not feel that his performance [on all testing] reflected his true intellectual capability, but rather it was underestimated because of the depression and that he may perhaps even function in the low average range." R 1205.

The third interview was on March 12, 1997. R 1206. "Throughout his evaluations, he always consistently reported that there was no prior criminal activity, that he had never previously been arrested before." R 1208. He "indicated to me that he had a very difficult upbringing." R 1208. "His -- he and his siblings were essentially abandoned by their mother who did not want them. They were, at various times, brought up by an uncle -- I mean, by an aunt and by a grandmother. He -- as well as by their father. He felt that his father carried a great burden in terms of rearing the children. That oftentimes when they were in Jamaica, there would be insufficient food." R 1208-09. "Insufficient food because it was very difficult for the grandmother to take care of three of her own children as well as the seven children that comprised Mr. Blackwood's family." R 1209. "He said that his mother had told the judge that she didn't want them." R 1209. "That his father had heart problems because he carried a great burden. And he indicated that he was very upset because his mother didn't help the girls." R 1209. "Mr. Blackwood always expressed regret at what happened. He would become quite emotional when he was talking about when the topic of the crime came about. I think in large part his depression is also due to the fact that this occurred. Mr. Blackwood does not have any -- there is no previous indications of any domestic altercations or any types of things like that. And I do believe that he -- that what he expressed was genuine regret." R 1211. "I asked him about his son. And he indicated that at that time he did tell me that his son was 14 years old, and that he is

with his mother. That he used to visit him two or three times a week prior to his incarceration. And that he had him every Saturday. That sometimes he would take off time from work to be with him. And that his son has -- he has maintained a relationship with his son throughout the incarceration, and that his son has come to visit him on occasion. And he indicated that they had a contact visit a few weeks prior to that interview." R 1211-12. The night before the murder, "he said he had had a lot to drink the night before, that he had beer and wine, that it was ginger wine from Jamaica." R 1212. "Given the fact that there has never been any prior criminal activity, and this appears to have been something that occurred as a result of an altercation, an argument between two people, I would say that the likelihood of him repeating anything like this is very small." R 1213. Appellant's lack of antisocial behavior gives good indication of amenability to rehabilitation. R 1235.

Dr. Block-Garfield would not characterize appellant's disturbance at the time of the murder as extreme: she considered extreme disturbance equal to psychosis or legal insanity. " ... Mr. Blackwood was under stress, he was under mental disturbance. The extremity of that I -- I cannot say that it was extreme, because I refer that to the involvement of psychotic processes." R 1279. "Had those been present, I would have questioned his sanity at the time." R 1279. "I did not do that because I do not feel that there was sufficient -- that he was sufficiently distressed to qualify for insanity." R 1279.

The state presented evidence from a jail records custodian that appellant denied a psychological or psychiatric history. R 1287. He was on suicide watch from January 18 to January 20, 1995. R 1288. He said he had considered or attempted suicide when he entered jail. R 1290. Doctor's notes show that he reported suicidal thoughts. R 1291. His mood was depressed; the diagnosis was adjustment disorder. R 1292. He indicated he had attempted suicide once, the week before (that is, the week before January 18). R 1292-93.

Another custodian of jail records testified that there was a disciplinary report about a juice bottle, and a disciplinary report for being admonished for having contraband in his cell and for writing on the walls. R 1294-95. The contraband was: "two extra pair of shoes, extra pens, and an extra pillow found in the cell." R 1301. The witness knew nothing about the writing on the walls. R 1301. Appellant refused to get a haircut, and refused to come to court twice. R 1295. He was punished for becoming involved in an altercation with another inmate, that he made a threat. R 1295. The witness testified that, once charged with first degree murder, an inmate is not eligible to work as trustee. R 1298. The file did not show that appellant ever received the designation or classification of trustee. R 1298.

SUMMARY OF THE ARGUMENT

1. The death sentence at bar is disproportionate. The court found only one aggravating circumstance, and found one statutory mitigator and seven non-statutory mitigators. Appellant has no significant prior criminal record, and the murder appears to be a single isolated incident of violence in his life.

2. The judge erred in denying the motion for judgment of acquittal where the state failed to show a premeditated design to kill. The record does not refute appellant's claim that he did not intend to kill and that he did not know that Carolyn Thomas-Tynes was dead when he left her home.

3. The judge erred in applying the especially heinous, atrocious, or cruel aggravator. It is not clear from the evidence how long Ms. Thomas-Tynes was conscious during the murder. The record does not show that appellant deliberately chose a torturous method to kill.

4. The court erred in refusing to consider the reports of Dr. Block-Garfield, the defense psychologist. The court must consider all proffered mitigating evidence. Such hearsay evidence is admissible at penalty.

5. The court erred in permitting guilt-phase evidence of statements that Ms. Thomas-Tynes made to appellant. The statements were hearsay and inadmissible to establish appellant's state of mind.

6. The court erred in failing to find the mitigating circumstance of extreme disturbance on the basis of Dr. Block-Garfield's testimony equating the circumstance with legal insanity.

7. The court erred by failing to make the initial determination that there were sufficient aggravating circumstances to justify the death sentence. Instead, the court merely held that the aggravator outweighed the mitigating evidence. Regardless of the weight of the mitigation, the court must make the initial determination of the adequacy of the case for death. This the court failed to do.

8. The court erred by failing to consider appellant’s age in mitigation.

9. The court erred in excluding at penalty various statements made by the deceased, which would have served to refute the state’s arguments concerning the degree of premeditation and would have supported the mitigating factor that there was little premeditation.

ARGUMENT

1. WHETHER THE DEATH SENTENCE AT BAR IS DISPROPORTIONATE.

A death sentence is disproportionate when there is only one aggravating circumstance unless there is little or nothing in mitigation. Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989), Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990), Deangelo v. State, 616 So. 2d 440 (Fla. 1993), Thompson v. State, 647 So. 2d 824, 827 (Fla. 1994), Jones v. State, 705 So. 2d 1364 (Fla. 1998).

Set against the single aggravating circumstance of heinousness at bar, are the facts that appellant has no other criminal record and was mentally or emotionally disturbed at the time of the murder, and that he had the capacity for rehabilitation, cooperated with the police, that the murder was borne out of a prior relationship, and thus fueled by passion, he is a good parent, has a good employment record, and is of low intelligence. R 1584-87.

Appellant's sentence is disproportionate compared with those in such cases as Penn v. State, 574 So. 2d 1079 (Fla. 1991), Blakely v. State, 561 So. 2d 560 (Fla. 1990), Besaraba v. State, 656 So. 2d 441 (Fla. 1995), Wilson v. State, 493 So. 2d 1019 (Fla. 1986), Deangelo, Farinas v. State, 569 So. 2d 425 (1990), Smalley v. State, 546 So. 2d 720 (Fla. 1989), Sinclair v. State, 657 So. 2d 1138 (Fla. 1995), Caruthers v. State, 465 So. 2d 496 (Fla. 1985), Wright v. State, 688 So. 2d 298 (Fla. 1996), and Santos v. State, 629 So. 2d 838 (Fla. 1994).

In Penn, as at bar, heinousness was the only aggravating circumstance. Also, as at bar, there was the mitigating circum-

stance of no significant history of prior criminal activity. There was also the statutory circumstance of extreme disturbance.[4] Penn does not appear to have had any nonstatutory mitigation. He murdered his mother with a hammer and then stole her credit cards and pawned items stolen from her home. This Court found his death sentence disproportionate.

In Blakely, the defendant bludgeoned his wife to death with a hammer, then awoke his children and showed them the body. The court applied both the heinousness and coldness circumstances. The court found only one mitigating circumstance: no significant prior criminal activity. In finding the death sentence disproportionate, this Court noted that the murder arose from a long-standing and bitter dispute about the children. It noted that the death penalty is not proportionally warranted when it arises from a heated confrontation unless the defendant has been convicted of a prior similar violent offense.

In Besaraba, after being expelled from a bus, the defendant murdered the driver and a passenger, and then shot another person while hijacking his car. There was one aggravator (the contemporaneous violent felonies), two statutory mitigators (no significant prior criminal activity and extreme disturbance), and three nonstatutory ones (history of substance use and physical and emotional problems; good character and reliable employment; and

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[4] As discussed below, the judge at bar rejected this statutory circumstance based on the testimony of Dr. Block-Garfield, who improperly equated the circumstance with psychosis or legal insanity.

good conduct in prison), and the additional circumstance that the defendant had an unstable and deprived childhood. Id. 447. This Court found the death sentence disproportionate.

Wilson murdered his cousin and his father during an argument, then shot his stepmother and left her for dead. The judge found two aggravators (heinousness and commission of prior violent felonies) and nothing in mitigation. This Court reversed the death sentence writing (493 So. 2d at 1023):

> We find it significant that the record also reflects that the murder of Sam Wilson, Sr. was the result of a heated, domestic confrontation and that the killing, although premeditated, was most likely upon reflection of a short duration. See Ross v. State, 474 So. 2d at 1174. Therefore, although we sustain the conviction for the first-degree, premeditated murder of Sam Wilson, Sr. and recognize that the trial court properly found two aggravating circumstances while finding no mitigating circumstances, we conclude that the death sentence is not proportionately warranted in this case. See Ross, 474 So. 2d 1170; Blair v. State, 406 So. 2d 1103 (Fla. 1981).

In Deangelo, the defendant strangled a woman after planning the murder for a considerable period. The only aggravator was that the murder was cold, calculated and premeditated. There were no statutory mitigators, but there was a history of an ongoing quarrel between Deangelo and the victim, Deangelo had served as a volunteer fire-fighter, served his country in the army, confessed to the crime, and presented "significant mental mitigation" amounting to a non-statutory mitigating circumstance. This

Court found the death penalty disproportionate. 616 So. 2d at 443.

In Farinas, there were two valid aggravators: the murder occurred during a violent felony and was heinous. Although the trial court had found only nonstatutory mental mitigation, this Court determined that Farinas was extremely disturbed at the time of the murder, writing (569 So. 2d at 431):

> ... . During the two-month period after the victim moved out of Farinas' home, he continuously called or came to the home of the victim's parents where she was living and would become very upset when not allowed to speak with the victim. He was obsessed with the idea of having the victim return to live with him and was intensely jealous, suspecting that the victim was becoming romantically involved with another man. See Kampff v. State, 371 So. 2d 1007 (Fla. 1979). We find it significant, also, that the record reflects that the murder was the result of a heated, domestic confrontation. Wilson v. State, 493 So. 2d 1019 (Fla. 1986).

At bar, there is less aggravation than in Farinas and more mitigation.

In Smalley, the defendant repeatedly beat a 28-month old girl over the course of a day because she was crying, repeatedly dunked her head in water, and eventually picked her up by her feet and banged her head against the carpet. She lost consciousness and died. The only aggravator was that the murder was especially, heinous or cruel. In mitigation were the facts that Smalley had no significant prior criminal history, had both statutory mental

mitigators, had been an abused child, had a good work record and high esteem with coworkers, and was genuinely remorseful. This Court found his death sentence disproportionate, writing: "This case is somewhat like Songer v. State, 544 So. 2d 1010 (Fla. 1989), in which this Court recently set aside on grounds of proportionality a death sentence predicated upon only one aggravating circumstance in which there were also findings of three statutory mitigating circumstances and additional nonstatutory mitigating circumstances." 546 So. 2d at 723. The case at bar is less aggravated than Smalley and presents more mitigation.

In Sinclair, the defendant murdered a taxi driver in cold blood. There was one aggravating circumstance resulting from merger of the felony murder and pecuniary gain aggravators. The trial court found no statutory mitigators and gave little to no weight to three nonstatutory mitigators: cooperation with police, dull normal intelligence, and being raised without a father or father figure or any positive male role model. On appellate review, this Court found that that there was "evidence in the record that the low intelligence level of and the emotional disturbances inflicting this defendant were mitigators which had substantial weight." 657 So. 2d at 1142. It reversed the death sentence as

disproportionate. The mitigation at bar is much stronger than the mitigation in Sinclair.

Caruthers murdered a convenience store clerk. The only aggravator was felony murder. The only statutory mitigator was no significant prior criminal history. The nonstatutory mitigators were Caruthers' voluntary confession, his conditional guilty plea subject to a life sentence, love of his family and friends, remorse, and encouragement of his brother to do well and not violate the law. This Court found the death sentence disproportionate. The case at bar presents a much stronger case of mitigation.

Wright went to the home of his estranged wife's parents, broke through a plate glass window, shot his wife dead, threatened her mother with his gun, and then left with his children. There were two aggravators: prior commission of a violent felony and felony murder. The court found that the murder was committed while Wright was under the influence of extreme mental or emotional disturbance. It also found that: he was remorseful, cooperated with police, had
mental health problems, the crime arose in a heated domestic dispute, there had been a history of conflict with the wife, the crime arose from an on-going quarrel, there had been a previous altercation between him and his wife, he had a good military and employment record, he regularly

attended church, he had been mentally abused by his stepfather and often lived with friends, and he had done several good deeds for friends. This Court found the death sentence disproportionate based on Maulden v. State, 617 So. 2d 298, 303 (Fla. 1993) (death sentence reversed where two aggravating circumstances were present, defendant had no prior violent crimes unrelated to the present offenses, and defendant believed another man "was replacing him as 'father figure'" to his children) and Blakely v. State, 561 So. 2d 560 (Fla. 1990) (death sentence disproportionate where two aggravating circumstances were present, defendant had no prior significant criminal history, and defendant "had reached his breaking point" in dispute over children). The case at bar is less aggravated than Wright and the other cases, and there is a comparable amount of mitigation.

Santos chased his estranged lover down a street while she clutched her two small children. When he caught her, he shot her and both children. The mother and one child died. There was one aggravating circumstance: that Santos was previously convicted of violent felonies (the contemporaneous offenses). In mitigation were both statutory mental mitigators, "establishing substantial mental imbalance and loss of psychological control". Further, Santos had no prior history of criminal conduct. This Court concluded: "There can be no possible conclusion

other than that death is not proportionally warranted here, because the case for mitigation is far weightier than any conceivable case for aggravation that may exist here." 629 So. 2d at 840. Santos presents a much stronger case for aggravation than the case at bar, and the mitigation is comparable.

In sum, the death sentence at bar is disproportionate in comparison with similar death penalty cases. This Court should reduce the sentence to one of life imprisonment. Appellant's death sentence violates article 1, sections 9, 16, 17, and 21 of the Florida Constitution, and the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

2. WHETHER THE COURT ERRED IN REJECTING APPELLANT'S ARGUMENT THAT THE STATE HAD FAILED TO ESTABLISH THE PREMEDITATION ELEMENT.

The record at bar shows a strangulation and apparent garroting. On the other hand, it does not refute appellant's claim that he did not intend to kill and that he thought Ms. Thomas-Tynes was still alive when he left her home.

The state must produce competent, substantial evidence to contradict the defendant's story. If the state fails in this initial burden, then it is the court's duty to grant a judgment of acquittal to the defendant as to the charged offense, as well as any lesser-included offenses not supported by the evidence. State v. Law, 559 So. 2d 187, 189 (Fla. 1989) (quoting Fowler v. State, 492 So. 2d 1344 (Fla. 1st DCA 1986) with approval). This rule applies even to the mental elements of crimes. See Kormondy v. State, 703 So. 2d 454, 459 (Fla. 1997) (state failed to present evidence to overcome defendant's statement that shooting was not premeditated). A conviction not supported by the evidence violates due process. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

At bar, the state's evidence does not refute appellant's version of the facts -- that there was a heated argument and that he choked Ms. Thomas-Tynes but did not mean to kill her. Although the choking and the apparent use of the speaker wire, cloth and soap evidence some

purposeful action, it does not show that there was a fully formed premeditated design to kill.

In Kirkland v. State, 684 So. 2d 732, 734-35 (Fla. 1996) this Court found insufficient evidence of premeditation, writing:

> The State's case was based upon circumstantial evidence. Kirkland moved for a judgment of acquittal at the conclusion of the State's case. The trial court denied Kirkland's motion. We have stated that such a motion should be granted unless the State can "present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." State v. Law, 559 So. 2d 187, 188 (Fla. 1989). We find that the circumstantial evidence in this case "is not inconsistent with any reasonable exculpatory hypothesis as to the existence of premeditation." Hall v. State, 403 So. 2d 1319, 1321 (Fla. 1981). Indeed, a review of the record forces us to conclude, as a matter of law, that the State failed to prove premeditation to the exclusion of all other reasonable conclusions. "Where the State's proof fails to exclude a reasonable hypotheses [sic] that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained." Hoefert v. State, 617 So. 2d 1046, 1048 (Fla. 1993).
>
> Premeditation is defined as follows:
>
> > Premeditation is a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.
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> Asay v. State, 580 So. 2d 610, 612 (Fla. 1991). The State asserted that the following evidence suggested premeditation. The victim suffered a severe neck wound that caused her to bleed to death, or sanguinate, or suffocate. The wound was caused by many slashes. In addition to the major

neck wound, the victim suffered other injuries that appeared to be the result of blunt trauma. There was evidence indicating that both a knife and a walking cane were used in the attack. Further, the State pointed to evidence indicating that friction existed between Kirkland and the victim insofar as Kirkland was sexually tempted by the victim.

We find, however, that the State's evidence was insufficient in light of the strong evidence militating against a finding of premeditation. First and foremost, there was no suggestion that Kirkland exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the actual homicide. Second, there were no witnesses to the events immediately preceding the homicide. Third, there was no evidence suggesting that Kirkland made special arrangements to obtain a murder weapon in advance of the homicide. Indeed, the victim's mother testified that Kirkland owned a knife the entire time she was associated with him. Fourth, the State presented scant, if any, evidence to indicate that Kirkland committed the homicide according to a preconceived plan. Finally, while not controlling, we note that it is unrefuted that Kirkland had an IQ that measured in the sixties.

In Hoefert, we were unable to find evidence sufficient to support premeditation in a situation in which Hoefert had established a pattern of strangling women while raping or assaulting them. Evidence was presented in that case indicating that the homicide victim, found dead in Hoefert's dwelling, was likewise asphyxiated. Despite the pattern of strangulation, the discovery of the victim in Hoefert's dwelling, and efforts by Hoefert to conceal the crime, this Court found that premeditation was not established. Hoefert, 617 So. 2d at 1049. In this case, there is no evidence that Kirkland had established a pattern of extreme violence as had Hoefert. A comparison of the facts in Hoefert and the instant case requires us to find, if the law of circumstantial evidence is to be consistently and equally applied, that the record in this case is

> insufficient to support a finding of premeditation.

See also Fisher v. State, 715 So. 2d 950 (Fla. 1998).

In Mungin v. State, 689 So. 2d 1026 (Fla. 1995), this Court found insufficient the evidence of premeditation where Anthony Mungin shot a store clerk in the head during a robbery. He had also shot store clerks in two previous robberies. Finding that the evidence did not establish the premeditation element of first degree murder, this Court wrote at page 1029 (e.s.):

> Premeditation is "a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act." Asay v. State, 580 So. 2d 610, 612 (Fla.), cert. denied, 502 U.S. 895, 112 S.Ct. 265, 116 L.Ed.2d 218 (1991).
>
> In a case such as this one involving circumstantial evidence, a conviction cannot be sustained -- no matter how strongly the evidence suggests guilt -- unless the evidence is inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So. 2d 972, 976 (Fla. 1977). A defendant's motion for judgment of acquittal should be granted in a circumstantial-evidence case "if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." State v. Law, 559 So. 2d 187, 188 (Fla. 1989).
>
> The State presented evidence that supports premeditation: The victim was shot once in the head at close range; the only injury was the gunshot wound; Mungin procured the murder weapon in advance and had used it before; and the gun required a six-pound pull to fire. But the

> evidence is also consistent with a killing that occurred on the spur of the moment. There are no statements indicating that Mungin intended to kill the victim, no witnesses to the events preceding the shooting, and no continuing attack that would have suggested premeditation. Although the jury heard evidence of collateral crimes, the jury was instructed that this evidence was admitted for the limited purpose of establishing the shooter's identity.

In Green v. State, 715 So. 2d 940 (Fla. 1998), this Court held that the state had failed to prove that Curtis Champion Green's murder of Karen Kulick was premeditated. The afternoon before the murder, Green said that he was going to kill Kulick. That night, he picked her up at the jail and murdered her. A friend, Angelo Gay "testified that Green confessed that he and a friend picked Kulick up in front of the jail and 'did things' to her. Green related to Gay that 'the bitch got crazy' and he and his friend killed her." Id. 944. Kulick was stabbed three times. This Court noted that "there was little, if any, evidence that Green committed the homicide according to a preconceived plan." Id. Thus this Court concluded on the same page:

> We find that the record in this case supports the reasonable hypothesis that Kulick's murder was committed without any premeditated design. On the night of the murder, Kulick was intoxicated and had a heated argument with Gulledge, her former boyfriend and employer. Kulick was arrested and charged with disorderly conduct and resisting arrest. She was angry and intoxicated upon her release from custody, as indicated by her blood alcohol level at the time of her death. Gay testified that Green confessed that he and a

> friend picked Kulick up in front of the jail and "did things" to her. Green related to Gay that "the bitch got crazy" and he and his friend killed her. There were no witnesses to the events immediately preceding the homicide. Although Kulick had been stabbed three times, no weapon was recovered and there was no testimony regarding Green's possession of a knife. Moreover, there was little, if any, evidence that Green committed the homicide according to a preconceived plan. Finally, although not controlling, it is undisputed that Green's intelligence is exceedingly low.

The evidence of a premeditated design to kill is no stronger at bar than in the foregoing cases. There is no evidence that appellant had contemplated killing Ms. Thomas-Tynes. The record shows no acts of preparation leading up to the fatal incident. There were no witnesses to the events immediately preceding the homicide. As in Kirkland, the record shows no "special arrangements to obtain a murder weapon in advance of the homicide." The state did not show that appellant committed the homicide according to a preconceived plan.

Additionally, a case for first degree murder will not stand where the record shows a "blind and unreasoning passion which momentarily obscured the reason of the accused and displaced any capacity to form a premeditated design to kill". Forehand v. State, 126 Fla. 464, 472, 171 So. 241, 244 (1936) (citing cases). See also Asay v. State, 580 So. 2d 610, 612 (Fla. 1991).

The judge should have granted the defense motion for judgment of acquittal as to the element of premeditated design. A

conviction not supported by the evidence violates due process. This Court should reduce the conviction from one of first degree murder. Appellant's conviction and sentence violate article 1, sections 9, 16, 17, and 21 of the Florida Constitution, and the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

3. WHETHER THE COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

It was error for the court to find the murder especially heinous, atrocious, or cruel. The medical examiner's testimony that the murder was heinous was a combination of fact and speculation, and the record does not show a prolonged, conscious awareness of impending death. He testified that it takes only a few seconds for oxygen deprivation to begin, causing panic because it leads to unconsciousness, causing a person to fight. R 922. He did not testify, however, that the loss of consciousness would take a long time -- indeed, his testimony suggested that consciousness would be lost quickly. He testified that scratches at the neck are consistent with trying to move something from around neck to get breath. R 925. He did not testify, however, that these were the only possible sources on the scratches, or that it would take more than a moment to create them. He testified that petechial hemorrhaging is present in people that fight a very long period of time, struggling against someone, R 926, but did not testify whether there can be other sources of such hemorrhaging. He did not testify that Ms. Thomas-Tynes could not have had such hemorrhaging before the fatal attack. He did not testify that it is present only in persons that fight for a very long period of time. He testified that such hemorrhaging is not consistent with sudden death, but did not testify whether it was inconsistent with sudden loss of consciousness. R 709-12. His testimony about pulmonary edema, R 713-14, was also not probative as to how long she was conscious. He said that it is very hard to keep a

continuous pressure around someone's neck who is really fighting, R 926-27, but could not have known whether that was the case at bar. He said that a person in in Thomas-Tyne's situation would have known death was pending, R 932, but such an opinion is speculation.

Speculation cannot substitute for proof as to this aggravating circumstance. See Knight v. State, 23 Fla. Law Weekly S587, 590 (Fla. Nov. 12, 1998). "[T]he trial court may not draw 'logical inferences' to support a finding of a particular aggravating circumstance when the State has not met its burden. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983), cert. denied, 467 U.S. 1210 (1984)." Robertson v. State, 611 So. 2d 1228 (Fla. 1993). Not every strangulation is especially heinous, atrocious, or cruel. See Deangelo; Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989).

The rationale for applying this circumstance to strangulation cases is that "'it is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable.' Tompkins v. State, 502 So. 2d 415, 421 (Fla. 1986), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987)." Deangelo, 616 So. 2d at 442-443. In such cases, however, the facts usually involve additional evidence of violence such as a struggle arising from an attempted sexual battery. E.g., Tompkins, Sochor v. State, 619 So. 2d 285, 292 (Fla. 1993). This rationale disappears where there are

circumstances casting doubt on the victim's terror or suffering, or on the defendant's intent to inflict torturous pain.

In Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992), this Court wrote: "The United States Supreme Court recently has stated that this factor would be appropriate in a 'conscienceless or pitiless crime which is unnecessarily torturous to the victim.' Sochor v. Florida, 112 S.Ct. 2114, 2121 (1992). Thus, the crime must be both conscienceless or pitiless and unnecessarily torturous." At bar, the state did not show these elements. The court erred in finding the circumstance. Since it was the only aggravator found at bar, this Court should reduce the sentence to one of life imprisonment.

Where, as here, there is no the evidence of a violent beating or rape, the state's case for the circumstance turns into a pyramid of inferences.

The rationale for finding strangulations especially heinous is similar to the rationale for finding the circumstance where the defendant pauses to reload his weapon during a murder: the awareness of impending death is prolonged. See Hill v. State, 688 So. 2d 901 (Fla. 1996), Phillips v. State, 476 So. 2d 194, 197 (Fla. 1985) (citing cases). But the circumstance does not apply where the defendant is involved in a heated quarrel belying a torturous intent.

In Hamilton v. State, 678 So. 2d 1228 (Fla. 1996), the defendant shot his wife and teenaged stepson. The trial court found the especially heinous circumstance because the defendant

reloaded the shotgun at least once. This Court reversed, writing: "Reloading certainly can support such a conclusion in a proper case, but in the context of a domestic quarrel such as this it also can be consistent with a rage killing that lacks the intent [to inflict high degree or pain] described in Santos."[5]

In making this last argument, appellant is aware of Orme v. State, 677 So. 2d 258, 263 (Fla. 1996), in which this Court rejected a similar argument. In that case, however, the murder was not the product of a heated domestic confrontation. The defendant brutally beat, raped, robbed, and strangled an acquaintance who had knocked over his cocaine pipe. There was extensive, bruising and hemorrhaging on the face, skull, chest, arms, leg and abdomen. Jewelry was stolen. The murder was analogous to that in such cases as Sochor. At bar, on the other hand, the murder arose from a heated quarrel without evidence of any torturous intent.

Use of an aggravator not supported by the evidence was constitutional error. Appellant's death sentence violates article 1, sections 9, 16, 17, and 21 of the Florida Constitution, and the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

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[5] Santos v. State, 591 So. 2d 160, 163 (Fla. 1991).

4. WHETHER THE COURT ERRED IN REFUSING TO CONSIDER THE REPORTS OF DR. BLOCK-GARFIELD.

At the close of the Spencer hearing, the defense sought to put into evidence three reports made by Dr. Block-Garfield, the defense expert mental health witness. R 1305. The judge at first ruled that he would accept them, R 1306, but then sustained the state's objections that the reports were cumulative and hearsay. R 1308-09. The court erred.

The court in a capital case may not refuse to consider valid mitigating evidence. E.g. Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Thus, in Maxwell v. State, 603 So. 2d 490, 492 (Fla. 1992), the trial court erred by, among other things, failing to consider in mitigation matters set out in a presentence investigation report which "elaborated on the factual matters disclosed by the witnesses". In Lawrence v. State, 691 So. 2d 1068, 1076 (Fla. 1997), the state's sentencing memorandum "indicated that a presentence investigation report offered into evidence during the penalty phase of Lawrence's initial trial stated that Lawrence had a history of drug and alcohol abuse." This Court found that the trial court erred in failing to consider this in mitigation, but found the error harmless "because the mitigator would not have offset the three aggravators that were properly found." Similarly, in Straight v. Wainwright, 422 So. 2d 827, 830 (Fla. 1982), this Court wrote that the sentencing court may "with proper disclosure" consider the opinions of officers familiar with the case on the propriety of the death penalty as revealed by interviews conducted in the course of preparation of a

presentence investigation. In Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979), the Court found a violation of due process where, in a capital sentencing proceeding, the judge excluded, on hearsay grounds, testimony that the co-defendant had said that he had fired the fatal shots.

Under the foregoing cases, the judge erred at bar in refusing to consider the psychologist's reports. Under section 921.141(1), Florida Statutes, any evidence which the court deems to have probative value may be received "... provided the defendant is accorded a fair opportunity to rebut any hearsay statements." "The discretion of the trial judge in determining what evidence might be relevant to the sentence is not unbridled. It is merely a necessary power to avoid a needlessly drawn out proceeding where one party might choose to go forward with evidence which bears no relevance to the issues being considered. It is easily determined from the broadness of the statute that a narrow interpretation of the rules of evidence is not to be enforced, whether in regards to relevance or to any other matter except illegally seized evidence." State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973) (e.s.).

It was error to exclude the reports on hearsay grounds since the court may, under Straight, and even must, under Maxwell Lawrence, and State v. Dixon, consider reports containing mitigation.

As to the state's argument that the evidence was cumulative, the court should have considered the evidence under Maxwell (error not to consider report which "elaborated on the factual matters

disclosed by the witnesses"). Further, the state's argument subsequently revealed that the reports were not cumulative, as it argued further that "if I were to go line by line, okay, Doctor, you said this, had I known it was going to be admitted initially, then I would be compelled to go line by line, Doctor, do you concede with this statement or do you still concur with it based on having done three evaluations of Mr. Blackwood? There is no way I can be prepared to rebut that if the report comes in." R 1308-09. Thus, the state argued that the reports covered matters not already covered by the examination of the witness. There was nothing to prevent the state from recalling the witness to cross-examine her further, so that it could suffer no prejudice from admission of the reports.

Refusal to consider the reports violated the Cruel, Unusual Punishment and Due Process Clauses of the state and federal constitutions under Skipper, Maxwell and Lawrence. Appellant's death sentence violates article 1, sections 9, 16, 17, and 21 of the Florida Constitution, and the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

5. WHETHER THE COURT ERRED IN ALLOWING TESTIMONY ABOUT APPELLANT'S CONVERSATION WITH MS. THOMAS-TYNES.

Over objection, the state presented the testimony of Serina Thomas, Carolyn Thomas-Tynes' daughter, about a discussion between appellant and Carolyn.

The matter arose when the state began to question Serina about a conversation she had with appellant shortly before the murder. R 758. When she testified that appellant had told her that Carolyn did not want to be with him anymore and did not want him at all, the defense argued that Carolyn's statements to appellant were inadmissible as hearsay. R 758-59. The state argued that the evidence went to appellant's state of mind and motive. R 759. The state proffered Serina's testimony that appellant told her two days before Carolyn's death that Carolyn was pregnant and that "my mother had some abortion from him, and now she is telling him that she is pregnant from someone else", and the he did not understand how. R 760. She also would testify that appellant said he was leaving for Jamaica in a few weeks. R 761.

After the proffer, defense counsel again objected on hearsay grounds to the evidence of what Carolyn said. Id. He further argued that the state-of-mind exception to the hearsay rule did not apply, and that the testimony about appellant traveling to Jamaica was prejudicial. R 762. The judge overruled the defense objections, R 763, and Serina testified that appellant told her that Carolyn was pregnant, that she had had abortions from him, that she was pregnant from someone else and he did not understand how, that he offered to share her with the other guy and she did

not want him at all, that he asked to have sex with her and she told him no and cursed him out, and he intended to go to Jamaica because he couldn't handle it anymore. R 763-65. The state's next witness, Hazel Scott, gave similar testimony without objection. T 769-72.

The lack of objection Hazel Scott's testimony did not waive this issue. Once the court has made clear its ruling on a matter, it is not necessary for counsel to beat a dead horse and argue the matter further. See Simpson v. State, 418 So. 2d 984 (Fla. 1982), Thomas v. State, 419 So. 2d 634 (Fla. 1982), Williams v. State, 414 So. 2d 509 (Fla. 1982), Spurlock v. State, 420 So. 2d 875 (Fla. 1982), Holton v. State, 573 So. 2d 284 (Fla. 1991), Hunt v. State, 613 So. 2d 893 (Fla. 1992). An evidentiary issue is preserved when objection is made during trial, before admission of the evidence. Holmes v. Mernah, 427 So. 2d 378 (Fla. 4th DCA 1983) (citing cases) and Fincke v. Peeples, 476 So. 2d 1319 (Fla. 4th DCA 1985).

The judge erred in overruling the defense objection. It is improper to use the statements of another to establish the defendant's state of mind or motive. In Hodges v. State, 595 So. 2d 929, 932 (Fla. 1992), sentence vacated on other grounds, 112 S.Ct. 2926 (1993), the trial court let the state present evidence that the murder victim wanted to prosecute Hodges for indecent exposure, as a way of showing Hodges' motive to murder her. This Court ruled that admission of the evidence was error writing at pages 931-32:

> Subsection 90.801(1)(c), Florida Statutes (1989), defines hearsay as "a statement, other than one made by the

> declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The victim's statements were admitted to prove that she desired prosecution of Hodges. The State used the statements to prove that Hodges had a motive to kill the victim. The truth of the matter asserted was the victim's adherence to her desire to prosecute and, thus, the statements fall within the definition of hearsay.
>
> The State suggests that if the statements were hearsay, an exception to the prohibition of their admission exists because they were used to prove a state of mind. In Bailey v. State, 419 So. 2d 721 (Fla. 1st DCA 1982), the district court correctly held that statements of a victim cannot be used to prove the state of mind or motive of a defendant because the hearsay exception created by subsection 90.803(3)(a), Florida Statutes (1989), does not apply to such a situation. We conclude, therefore, that the admission of the detectives' testimony as to statements made by the victim was error.

See also Charles W. Ehrhardt, Florida Evidence S 803.3b, at 652-53 (1998 ed.)(citing cases).

Admission of the testimony at bar was error and violated the Confrontation Clause. Further, as argued below, it was prejudicial to present evidence that appellant intended to go to Jamaica. There was no evidence that the proposed trip to Jamaica had any relationship to the murder. Although the state suggested that appellant was planning to murder Carolyn and then flee to Jamaica, there was no evidence of such a plan. Appellant’s conviction and sentence violates article 1, sections 9, 16, 17, and 21 of the Florida Constitution, and the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

6. WHETHER THE COURT ERRED IN REJECTING THE STATUTORY MITIGATOR OF EXTREME DISTURBANCE ON THE BASIS OF DR. BLOCK-GARFIELD'S TESTIMONY, WHICH USED THE WRONG STANDARD FOR THE CIRCUMSTANCE.

The judge rejected the statutory mitigator of extreme disturbance, writing (R 1584):

> Although the defendant offered testimony of a mental health expert, the expert denied that the defendant was under the influence of extreme mental or emotional disturbance at the time of this crime. There were no other witnesses presented to substantiate this statutory mitigator. Accordingly, the Court finds this statutory mitigator does not exist. Since the mental health expert found the defendant was under the influence of an emotional disturbance, the court considered this as a non-statutory mitigator and gave it moderate weight.

Dr. Block-Garfield testified that she would "have to step back from the word extreme", R 1219, as she tended "to put that into the category of a psychotic diagnosis." R 1220. She said that, while appellant seemed depressed throughout the evaluation: "... I do not believe that he's hallucinating. I believe those were thought processes. And, therefore, I would not say extreme." Id. "He certainly was distressed. But in order for me to really say that it was extreme, there would have to have been the hallucinatory experiences." Id. She said further (T 1279-80):

> Q ... . It is your -- is it your expert opinion that at the time of the killing of Carolyn Thomas-Tynes Mr. Blackwood was not under the influence of extreme mental or emotional disturbance?
>
> A Mr. Ullman, as I stated earlier, Mr. Blackwood was under stress, he was under mental disturbance. The extremity of that I -- I cannot say that it was extreme, because I refer that to the involvement of psychotic processes.

Q Okay.

A Had those been present, I would have questioned his sanity at the time.

Q I understand that.

A I did not do that because I do not feel that there was sufficient -- that he was sufficiently distressed to qualify for insanity.

Q I understand that. So, according to you, basically, unless you're insane, you're not going to qualify?

A No.

Q No?

A No, that's not true either. Because you can certainly be psychotic and still not be considered insane.

Q Okay. Let's take out the adjectives and read it this way, that the capital felony was committed while the defendant, being Lynford Blackwood, was under the influence of mental or emotional disturbance.

A I do believe that he was.

Legal insanity or mental incompetence is not the correct standard. See Campbell v. State, 571 So. 2d 415, 418-19 (Fla. 1990), Mines v. State, 390 So. 2d 332, 337 (Fla. 1980) ("The finding of sanity, however, does not eliminate consideration of the statutory mitigating factors concerning mental condition. The evidence clearly establishes that appellant had a substantial mental condition at the time of the offense."), Knowles v. State, 632 So. 2d 62, 67 (Fla. 1992) ("The rejection of Knowles' insanity and voluntary intoxication defenses does not preclude consideration of statutory and nonstatutory mental mitigation. [cit. to Campbell and Mines.] Moreover, we have made clear that 'when a reasonable

quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved.' Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990); see also Campbell, 571 So. 2d at 419.").

A correct standard for the extreme emotional disturbance circumstance is whether the defendant was extraordinarily overwrought or had more than the emotions of an average man, however inflamed -- not whether he was psychotic.

Wright v. State, 688 So. 2d 298, 301 (Fla. 1996), states (e.s.): "The trial court found as a statutory mitigating circumstance that Wright was under the influence of extreme emotional disturbance at the time of the crime. The record shows he was extraordinarily overwrought at the thought of losing his children."

State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), the primary case construing section 921.141, states: "Extreme mental or emotional disturbance is a second mitigating consideration, pursuant to Fla.Stat. s 921.141(7)(b), F.S.A., which is easily interpreted as less than insanity but more than the emotions of an average man, however inflamed." See generally Downs v. State, 574 So. 2d 1095, 1099 (Fla. 1991), Farinas v. State, 569 So. 2d 425, 431 (Fla. 1990).

The absence of expert testimony that the defendant was "extremely" disturbed is not dispositive of this issue. In Stewart v. State, 558 So. 2d 416, 420 (Fla. 1990), the judge had refused to instruct the jury on the substantial impairment circumstance

because the defense expert had testified that Stewart was impaired but not substantially so. Finding error, this Court wrote (e.s.):

> The trial court determined that the instruction on impaired capacity was inappropriate on the basis of Dr. Merin's additional testimony that he believed that Stewart was impaired but not substantially so. The qualified nature of Dr. Merin's testimony does not furnish a basis for denying the requested instruction. As noted above, an instruction is required on all mitigating circumstances "for which evidence has been presented" and a request is made. Once a reasonable quantum of evidence is presented showing impaired capacity, it is for the jury to decide whether it shows "substantial" impairment. Cf. Cooper v. State, 492 So. 2d 1059 (Fla. 1986), cert. denied, 479 U.S. 1101, 107 S.Ct. 1330, 94 L.Ed.2d 181 (1987) (no instruction required upon bare presentation of controverted evidence of alcohol and marijuana consumption, without more). To allow an expert to decide what constitutes "substantial" is to invade the province of the jury. Nor may a trial judge inject into the jury's deliberations his views relative to the degree of impairment by wrongfully denying a requested instruction.

At bar, of course, the issue is not a refusal to instruct on the circumstance, but that the decision not to find it at bar, based solely on the expert's application of an improper standard, was error. The court failed to consider the evidence surrounding the murder showing that appellant was involved in an extreme emotional disturbance at the time of the murder. The judge did not take into account that only an extreme emotional state can explain this crime, which is completely out of character for appellant who had lived a peaceable, law-abiding life up until this point. The violent details of the crime establish that he was extraordinarily overwrought, and possessed by more than the emotions of the average man. Further, his subsequent actions -- leaving his brother's

truck behind, abandoning the Cadillac, expressing great shock and fear after learning that Carolyn was dead -- show a disturbed state of mind.

The trial court erred in rejecting this circumstance on the basis of expert testimony using an incorrect standard. Appellant's death sentence violates article 1, sections 9, 16, 17, and 21 of the Florida Constitution, and the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

7. WHETHER THE COURT ERRED IN FAILING TO MAKE THE INITIAL DETERMINATION THAT THE SINGLE AGGRAVATING CIRCUMSTANCE WAS SUFFICIENT TO JUSTIFY THE DEATH PENALTY.

The Legislature has made it clear under section 921.141(3), Florida Statues, that if the judge is to sentence a defendant to death it "shall set forth in writing its findings" that (1) "sufficient" aggravating circumstances exist to justify the death penalty and (2) there are insufficient mitigating circumstances to outweigh the aggravating circumstances.[6] The Legislature has directed in § 941.141(3) that if the trial court "does not make the findings requiring the death sentence" within 30 days -- a life sentence must be imposed. In this case, the trial court did file the sentencing order within 30 days, however, the order does not contain "the findings requiring death."

As noted above, there are two specific findings "requiring the death sentence." First is a finding that "sufficient aggravating circumstances exist" to justify the death sentence. The trial court at bar never made this required finding -- instead it only determined that the aggravating circumstance outweighed the mitigating circumstances (R 1589):

> The court having considered and weighed the aggravating circumstance and mitigating circumstances found to exist in this case, and having given great weight to the jury's

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[6] This Court has also recognized that both of these circumstances must exist to uphold the death penalty. See Rembert v. State, 445 So. 2d 337, 340 (Fla. 1989) (sentence reduced to life even though trial court had found no mitigating circumstances and this Court upheld one aggravating circumstance); Terry v. State, 668 So. 2d 954 (Fla. 1996) (reduced to life where two aggravators were not sufficient for death even where no mitigation).

> recommendation, finds that the aggravating circumstance does outweigh the aggravating circumstances.

Again it must be emphasized that the Legislature did not state that one aggravating circumstance is sufficient to justify the death penalty unless rebutted by the fact that mitigating circumstances outweigh aggravating circumstances. Instead, the Legislature stated that two evaluations must be made and two conditions must exist -- (1) an evaluation and finding of sufficient aggravation [one or even two aggravators may not be sufficient] and (2) the aggravation outweigh the mitigation. If the aggravating circumstances do not justify the death penalty, then the second evaluation is not important -- life is the appropriate sentence. Proffitt v. Florida, 428 U.S. 242, 250, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Rembert; Terry.

The failure to make the required finding that sufficient aggravating circumstances exist requires vacating the death sentence and imposition of a life sentence. § 921.141(3). Appellant's death sentence violates article 1, sections 9, 16, 17, and 21 of the Florida Constitution, and the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

8. WHETHER THE COURT ERRED IN FAILING TO CONSIDER APPELLANT'S AGE IN MITIGATION.

The trial court erred in not considering the statutory mitigating circumstance of appellant's age. § 921.141(6)(g).

This Court discussed this circumstance in State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), concluding (e.s.):

> Thus, the Legislature has chosen to provide for consideration of the age of the defendant--whether youthful, middle aged, or aged--in mitigation of the commission of an aggravated capital crime. The meaning of the Legislature is not vague, and we cannot say that such a consideration is unreasonable per se. Any inappropriate application by a jury of the standard under the facts of a particular case may be corrected by the Court.

Appellant was born January 18, 1957, R 1347, so that the January 6, 1995 murder occurred shortly before his 38th birthday.

In Burns v. State, 699 So. 2d 646, 649, n. 4 (Fla. 1997), the mitigating factor of age was applied to a 42-year-old. This Court observed:

> Age at the time of the offense is a mitigating factor in this case to the extent that it demonstrates, in conjunction with Burns' lack of a history of prior criminal activity, the length of time Burns obeyed the law prior to committing this crime. See State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

The record at bar shows that the mitigating factor of appellant's age is especially important in that it demonstrates the length of time he obeyed the law prior to committing this crime.

In Maxwell v, State, 603 So. 2d 490, 491 (Fla. 1992), this Court found a violation of the Eighth Amendment where the sentencer had not considered mitigation, and wrote:

> [E]very mitigating factor apparent in the entire record before the court at sentencing, both statutory and nonstatutory, must be considered and weighed in the sentencing process. Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990) (citing Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988)). Moreover, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990) (emphasis added). The rejection of a mitigating factor cannot be sustained unless supported by competent substantial evidence refuting the existence of the factor. Id. (citing Kight v. State, 512 So. 2d 922 (Fla. 1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988); Cook v. State, 542 So. 2d 964 (Fla. 1989); Pardo v. State, 563 So. 2d 77 (Fla. 1990), cert. denied, 500 U.S. 928, 111 S.Ct. 2043, 114 L.Ed.2d 127 (1991)).

There was a violation of the Eighth Amendment and section 921.141 at bar. The court should have found and given weight to appellant's age in mitigation. Pursuant to State v. Dixon, this Court should correct the error and either reduce the sentence to life imprisonment or remand for resentencing. Appellant's death sentence violates article 1, sections 9, 16, 17, and 21 of the Florida Constitution, and the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

9. WHETHER THE COURT ERRED IN REFUSING TO PERMIT HEARSAY TESTIMONY AT SENTENCING.

As noted in point 4 above, hearsay is admissible in penalty proceedings. State v. Dixon, Green v. Georgia. The trial court erred in excluding on hearsay grounds testimony by Lana Salmon to her telephone conversation with Ms. Thomas-Tynes the Wednesday before the murder. The court granted the state's hearsay objection to testimony that appellant was at Carolyn's house at the time of the conversation and that appellant and Carolyn would occasionally spend the night together. This evidence would have served to rebut the state's claim that Carolyn had ended the relationship well before the murder. It was relevant to show the mitigating circumstance that there was little in mitigation. This Court has held that it is a mitigating circumstance if the "killing, although premeditated, was most likely upon reflection of a short duration". Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986) (reversing death sentence on basis of this factor); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985) (citing this factor as "significant").

Failure to allow this evidence violated the Cruel, Unusual Punishment and Due Process Clauses of the state and federal constitutions and section 921.141.

CONCLUSION

This Court should vacate the judgments and sentences and remand with such instructions as the Court deems appropriate.

Respectfully submitted,

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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Sara Baggett, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier December 15, 1998.

_____
Attorney for