**IN THE SUPREME COURT OF FLORIDA**

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

REPLY BRIEF OF APPELLANT

RICHARD L. JORANDBY
Public Defender

GARY CALDWELL
Assistant Public Defender
15th Judicial Circuit of Florida
Florida Bar No. 256919
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

Attorney for Lynford Blackwood

## CERTIFICATION OF FONT

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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## ARGUMENT

1. WHETHER THE DEATH SENTENCE AT BAR IS DISPROPORTIONATE.

The sentence is disproportionate for this isolated, out-of-character incident. Pages 8-9 of the state's brief misapprehend proportionality analysis. Woods v. State, 24 Fla. L. Weekly S183 (Fla. Apr. 15, 1999), Cole v. State, 701 So. 2d 845 (Fla. 1997) and Jones v. State, 705 So. 2d 1364 (Fla. 1998) show that this Court examines the entire record and reaches its own conclusion as to the significance of the sentencing circumstances.

In Woods, the judge gave "little weight" to Woods' IQ of 77 and "moderate weight" to his lack of violent prior offenses, id. at S184, but this Court found those circumstances "most significant" in reducing the sentence to life imprisonment.[1] In Cole, this Court undertook its own proportionality review "based upon the entire record". 701 So.2d at 853. In Jones, the judge found no statutory, and "little nonstatutory mitigation." 705 So. 2d at 1365. This Court's own review of the record revealed copious unrebutted mitigation.

While appellant agrees with the state's citation to Songer v. State, 544 So. 2d 1010 (Fla. 1989), and Alvord v. State, 322 So. 2d 533 (Fla. 1975) at page 8 of its brief, he disagrees with its reliance on Gunsby v. State, 574 So. 2d 1085 (Fla. 1991), Hudson v. State, 538 So. 2d 829 (Fla. 1989) and State v. Henry, 546 So. 2d

[1] Appellant has stronger mitigation than Woods. He had no criminal record at all, and was a productive member of society until the murder. His verbal IQ was 70.

466 (Fla. 1984). (Page 8 also refers to Floyd v. State, 569 So. 2d 1225, 1233 (Fla. 1990), but the issue there was not proportionality -- it was whether the judge had failed to weigh sentencing circumstances.) Both Gunsby and Hudson mingled claims that the judge had failed to consider mitigation and that this Court should find the death sentence disproportionate. This Court noted that resolution of factual disputes is left to the trial court and that the sentences were proportionate. Significantly, Hudson's sentence has twice been reversed for resentencing. Hudson v. State, 614 So. 2d 482 (Fla. 1993), Hudson v. State, 708 So. 2d 256 (Fla. 1998).

In Henry, this Court wrote in a post-conviction case that it had not considered nonstatutory mitigation on proportionality review of the sentence. A pre-Hitchcock case, Henry's continuing validity is doubtful: this Court does now consider nonstatutory mitigation in proportionality review. E.g. Woods.

Appellant agrees that under Windom v. State, 656 So. 2d 432 (Fla. 1995), cited at page 9 of the state's brief, it is the weight rather than the number of circumstances that is critical in proportionality review.[2]

At page 9, the state says the judge "obviously assigned significant weight" to the heinousness circumstance. The sentencing order, however, assigns no specific weight to the circumstance. Although, as the state notes, Maxwell v. State, 603 So. 2d 490,

[2] Windom was sentenced to death for three murders. As to one, there were two aggravators; as to the other two, there was one -- the contemporaneous murders. This Court determined that this aggravation outweighed "the little weight given to the mitigating factors set forth in the sentencing order."

494, n.4 (Fla. 1992) states that the heinousness and coldness circumstances "are of the most serious order", the discussion there concerned whether a Hitchcock error was harmless. Maxwell does not suggest that the heinousness circumstance is automatically of great weight in proportionality analysis in every case.

As to the discussion at pages 9-11 of the state's brief, this murder is not among the most egregious that this Court has had to consider. Assuming, arguendo, that the heinousness factor applies, this is not a case of prolonged torture, a long contemplation of death, mutilation, or a purposely cruel method of death. Hence, the circumstance is not unusually weighty. Compare the facts at bar with those in, e.g., Cardona v. State, 641 So. 2d 361 (Fla. 1994) (circumstance had "overwhelming and ... enormous weight" for prolonged aggravated child abuse), Hoskins v. State, 702 So. 2d 202, 206-207 (Fla. 1997), Rolling v. State, 695 So. 2d 278 (Fla. 1997), and Mendyk v. State, 545 So. 2d 846, 847-48 (Fla. 1989).

Further, it is irrelevant that the state argued for the coldness circumstance, state's brief 10, since the trial court rejected it.

At page 11-17, the state disagrees with the judge's findings of mitigation. The state hardly gives a nod to the mitigator (no criminal record) which he found most significant, and ignores that he gave moderate weight to appellant's emotional disturbance. These two factors alone take this case out of the realm in which there is "little or nothing in mitigation" under Songer and Woods.

As to the judge's giving "moderate weight" to cooperation with the police, the state says: "this label should not be taken too

literally." State's brief, 12. Contrary to its argument at page 8, it urges this Court to reweigh the mitigation. The state cannot show that the judge failed to consider all the circumstances of the arrest and statements to the police. There is no basis for the claim that "the trial court truly deemed Appellant's 'cooperation' inconsequential". The state merely disagrees with the judge's exercise of his discretion in determining the mitigator's weight.

Without a cross-appeal, the state says at page 14 that it was error to find that the murder arose from a lover's quarrel. Again, the state may not replace the court's judgment with its own. It ignores that the murder occurred right after the two had consensual sex, and there were substantial conflicts as to whether, if at all, Carolyn ended the relationship. See point 9 below, concerning the state's efforts to exclude testimony that the sexual relationship was still ongoing on the week of Carolyn's death.

As to appellant's being a good parent, the state says at page 15 that the judge "strained to find support for this mitigator."[3] The record does not show that the judge "strained" to find a mitigator which is uncontradicted by the record. As to appellant's not giving his son's age, the testimony was that this was at the April 1995 evaluation at which the doctor was only trying to decide competency so that "the information wasn't really pertinent to the issues I was addressing." T 1248. Appellant was "extremely

[3] At page 64 of its brief, the state takes the opposite position, stating: "In fact, the evidence supports the conclusion that Appellant was a mature responsible adult who was a good father to his son."

depressed" at that time, T 1170, answering questions "simplistically", "essentially in a monotone", and "was not forthcoming in terms of information, although he was responsive to the questions that I asked." T 1171. He "did not give me a great deal of information." T 1248. Appellant told her "I have one child. I'm not sure how old. He's a boy.", and she did not pursue the matter "because it really wasn't pertinent in terms of the issues that I was there to determine." T 1249. Dr. Block-Garfield testified to a close relationship between appellant and his son. R 1211-12. The state's argument that he was not a good parent because he committed murder is inappropriate. Such an argument would mean that the circumstance could never apply to one convicted of murder. Cf. Nowitzke v. State, 572 So. 2d 1346, 1355 (Fla. 1990).

The state also faults the judge's finding that appellant is a hard worker.[4] Again, the judge considered all the evidence and resolved conflicts in it. He concluded, on the weight of the testimony, that appellant is a diligent worker, skilled in cabinetry. The contrary evidence to which the state points merely shows that during the time before the murder he was in a steep depression. Michael Blackwood testified that within a month of the murder appellant's house was a total mess, the door was unlocked, and appellant was curled in a ball in bed. T 1014. Although Mr. Petty testified that appellant "was fired from his former job he had for 15 years", he did not say whether this was for cause or for

[4] Again, the state's brief takes an opposite stance at page 64: "Appellant was not a drug user, graduated from high school, ran his own business and was known by his friends as a hard worker."

reasons unrelated to appellant's work performance. T 1007. Further, this testimony was in the context of saying that appellant rebounded from this setback through self-employment. Id.

At page 17, the state contends that the judge "reluctantly" gave some weight to appellant's low intelligence.[5] Needless to say, the record does not support this contention.

Page 18 cites cases with more aggravation and less mitigation than the case at bar. Unlike the present case, they involve repeat violent offenders. In Ferrell v. State, 680 So. 2d 390, 391 (Fla. 1996), Ferrell had a prior murder conviction, and the judge "assigned little weight" to the mitigators. The prior murder bore "many of the earmarks of the present crime". Likewise, the defendant in Duncan v. State, 619 So. 2d 279 (Fla. 1993) had a prior murder conviction, and was also convicted of aggravated assault on the victim's daughter. Although the judge "considered" fifteen mitigators, it apparently gave little weight to them. Compare Ferrell and Duncan to Blair v. State, 406 So. 2d 1103 (Fla. 1981) (sole mitigator was lack of significant history of prior criminal activity; death disproportionate where defendant murdered wife in order to conceal and prevent the reporting of sexual battery upon a minor female child). Beside the point are cases with more than one aggravator: Lemon v. State, 456 So. 2d 885 (Fla. 1984) (two aggravators, one mitigator; stabbing/strangulation of girlfriend where prior conviction was for assault with intent to

[5] As to Mr. Petty's testimony that appellant was intelligent, it is clear that this referred to his skill at cabinetry. T 1008.

commit first-degree murder for stabbing female victim), King v. State, 436 So. 2d 50 (Fla. 1983) (two aggravators, no mitigation; shooting of live-in girlfriend where prior conviction was for axe-slaying of common-law wife), and Harvard v. State, 414 So. 2d 1032 (Fla. 1982)(two aggravators, no mitigation;[6] shooting of second ex-wife where prior conviction was for aggravated assault in similar attack on first ex-wife and her sister).

Cardona involved one of the worst cases of child abuse ever seen by this Court. The judge gave "overwhelming and ... enormous weight" to the heinousness circumstance and little weight to the mitigation. In Arango v. State, 411 So. 2d 172 (Fla. 1982) the judge found only one mitigating circumstance, and it appears that the murder was related to drug-dealing. Arango was decided before Songer and Hitchcock, and appears that non-statutory mitigation was not considered.

The state's reliance at page 20 on Pope v. State, 679 So. 2d 710 (Fla. 1996) is puzzling since it involved two aggravators and the murder was committed for pecuniary gain rather than out of an emotional setting. While the state says that the judge at bar "found relatively inadequate mitigation", his order does not support that claim. The state is trying to rewrite the order to fit the result it seeks. It also cites cases with more aggravation and less mitigation than the one at bar: Pooler v. State, 704 So.

[6] Harvard's his death sentence was later set aside because the sentencer had not considered nonstatutory mitigation. Harvard v. State, 486 So. 2d 537 (Fla. 1986). Lemon also received post-conviction relief. Lemon v. State, 498 So. 2d 923 (Fla. 1986). There does not seem to be any subsequent history in King's case.

2d 1375 (Fla. 1997) (three aggravators), Cummings-El v. State, 684 So. 2d 729 (Fla. 1996) (four aggravators, no mitigation), and Spencer v. State, 691 So. 2d 1062 (Fla. 1996) (two aggravators).

The initial brief already discusses the cases at page 21 of the state's brief.

At page 22, the state says appellant "repeatedly characterizes this murder as a heated domestic confrontation"[7] and then argues that there is no per se domestic dispute exception to the death penalty. Appellant claims no per se exception. He argues that where, as here, the murder has arisen from a tangled and difficult emotional relationship, there is only one aggravating circumstance and no prior violence by appellant, and there is substantial mitigation, the death sentence is disproportionate.

The state misplaces reliance on Zakrzewski v. State, 717 So. 2d 488 (Fla. 1988). Zakrzewski killed his entire family (his wife and two children) pursuant to a well-thought-out plan. One of the murders was also especially heinous, atrocious or cruel. In its proportionality discussion, this Court specifically distinguished Klokoc v. State, 589 So. 2d 219 (Fla. 1991) on the ground that in Klokoc there was only one aggravating circumstance, and relied on Lemon because it involved more than one aggravator. 717 So. 2d at

[7] In fact, the word "domestic" occurs in appellant's initial brief only as follows: at pages 23 (quoting testimony that there had been no prior domestic altercations between appellant and the decedent), 30 (quoting from a case), 31 (same), 33 (summarizing facts in another case), 44 (quoting from a case regarding the heinousness circumstance), 44 (distinguishing facts of another case regarding the heinousness circumstance).

493-94. As to the state's reliance on Spencer at page 22 of its brief, appellant repeats that Spencer involved two aggravators and the judge did not give significant weight to any of the mitigation.

Where the killing was an out-of-character, isolated incident resulting from a tangled and difficult emotional relationship, there is only one aggravating circumstance and no prior violence by the defendant, and there is substantial mitigation, the death penalty is disproportionate.

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

Appellant does not dispute the state's general recitation of law at page 24 of its brief. He disagrees that DeAngelo v. State, 616 So. 2d 440 (Fla. 1993), cited at page 27, refutes his argument. DeAngelo made his wife take part as he readied to strangle Mary Anne Price. He took his wife to Price's room, put socks over his hands, told his wife to put a blanket over Price's face when he was ready to strangle her, flexed his hands in preparation, but then abandoned this "dry run". A week later, he again put socks on his hands, entered Price's room, and strangled her. This evidence utterly refuted his claim that he murdered her in a blind rage. In fact, the evidence showed heightened premeditation justifying use of the cold, calculated and premeditated aggravator. Id. 442.

In Thomas v. State, 456 So. 2d 454, 455-56 (Fla. 1984), Thomas said he killed Russell Bettis because Bettis had seen him kill another man. This refuted his claim that the Bettis murder was not premeditated. Thomas uses a presumption that Thomas intended the consequences of his actions. The presumption came from Rhodes v. State, 104 Fla. 520, 521, 140 So. 309 (1932) and Buford v. State, 403 So. 2d 943, 948 (Fla. 1981) which state: "If one person strikes another across the neck with a sharp knife or razor, and thereby inflicts a mortal wound, the very act of striking such person with such weapon in such manner is sufficient to warrant a jury in finding that the person striking the blow intended the result which followed.", Rhodes, and: "Where a person strikes another with a

deadly weapon and inflicts a mortal wound, the very act of striking such person with such weapon in such manner is sufficient to warrant a jury in finding that the person striking the blow intended the result which followed.", Buford. Thomas 456 So. 2d at 457. This presumption is of doubtful continuing validity: taken literally, it would mean that the evidence is always sufficient to show premeditation. The mere fact that someone has killed another person with a deadly weapon does not mean the murder was premeditated. E.g. Kirkland v. State, 684 So. 2d 732, 734-35 (Fla. 1996) (premeditation not proven where defendant beat victim with cane and stabbed him repeatedly); Coolen v. State, 696 So. 2d 738 (Fla. 1997) (victim stabbed six times in fight over beer case); and Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986) (premeditation not proven; defendant stabbed cousin with scissors).

The state next cites cases in which, unlike at bar, the evidence refuted the defense claim. In Holton v. State, 573 So. 2d 284 (Fla. 1990) Holton raped a woman and inserted a glass bottle into her anus. After strangling her, he set the house on fire to cover up the murder. He denied any involvement in the murder. Thus, there was ample evidence that he committed the murder to cover up his criminal act, refuting his claim that he was not involved. In Czubak v. State, 570 So. 2d 925 (Fla. 1990), Czubak strangled a woman, stole numerous items from her home, and told a friend that they did not have to worry about her any more. His claim was that someone else committed the murder. This Court held that the evidence supported a finding of premeditation because the

victim was strangled, and Czubak made remarks that they no longer needed to worry about the woman, "together with other evidence surrounding the crime". Id. 927. Although one cannot tell what the "other evidence" was, it is clear that the defense theory which the state had to meet was that another person committed the murder.

In Sochor v. State, 619 So. 2d 285 (Fla. 1993), Sochor abducted a young woman to a remote location and tried to rape her. As she resisted, he began strangling her. His brother, Gary, "interrupted Sochor who stopped assaulting her long enough to turn, look at Gary, and shout at him to get back in the truck. Sochor then resumed the attack. Thus, he had a sufficient period of reflection to contemplate the nature of his act. He could have stopped his assault at that point but chose to continue." Id. 288-89. At bar, there was no such abduction and no such interruption.

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

Appellant does not dispute that, under cases cited by the state at page 33, one may infer that strangulation of a conscious victim satisfies HAC. But these cases do not create a per se rule. An inference is not the same as proof beyond a reasonable doubt. Speculation cannot substitute for proof of HAC. See Knight v. State, 721 So. 2d 287, 298-99 (Fla. 1998). The judge "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).

At bar, the state did not meet its burden. The record does not show how long Ms. Thomas-Tynes was conscious, or even if she was conscious at all. The judge's only specific factual finding in its recitation of the facts on this circumstance was: "There were signs that the victim struggled for her life." R 1582-83. He then concluded, with no supported in the record: "During this entire ordeal, the victim was conscious and aware of her impending death." Id. The record does not support this conclusion.

At page 35 of its brief, the state says: "Throughout this ordeal Carolyn was conscious. (TVI 708)." Transcript page 708 has no such testimony. At most, the state's brief can point to several small scratches on the neck "indicating that she tried to remove the ligature from her neck." State's brief, page 35. However, the record does not show that this could be the only source of such

scratches. Lacking substantial competent evidence on this matter, the state's case relies on inconclusive circumstantial evidence.

At page 36, the state says: "In his brief, Appellant infers that Dr. Price testified that Carolyn lost consciousness after a few seconds. (Initial brief, p. 42)." Examination of the initial brief shows that appellant's argument was that Dr. Price's testimony was inconclusive.

At page 37, the state says the relationship was "more akin to a stalker and his victim, deserving no special pitying excuses for Appellant's actions." It is hard to see where this argument is going or how it bears on the issue here presented. The record does not show a stalking. It shows that the two had a long and troubled relationship, that on the day in question they had consensual sex. Appellant does not claim "special pitying excuses". His argument is that this circumstances does not apply because the evidence is unclear as to Ms. Thomas-Tynes' consciousness of impending death.

The state's reliance on James v. State, 695 So. 2d 1229 (Fla. 1997) and Doyle v. State, 460 So. 2d 353 (Fla. 1984) is misplaced: the victims there were fully aware of what was happening to them. In James, the defendant said that the child was awake and they made eye contact as he strangled her. In Doyle, the defendant"asked the victim to help him get his truck out of the mud and he attacked her, she fought back, and he then strangled her and had intercourse with her on the carpet in the grass." 460 So. 2d at 355. Likewise in Hildwin v. State, 727 So. 2d 193, 196 (Fla. 1998), there was "uncontroverted" evidence that it took "several minutes" for the

victim to lose consciousness. In Tompkins v. State, 502 So. 2d 415 (Fla. 1986), before she was killed, the 15-year-old victim was "struggling and hitting Tompkins who was on top of her attempting to remove her clothing", and cried out for a witness to call the police. Id. 418. Tompkins told a cellmate that he tried to force himself on her and she kicked him in the groin. Id. The record at bar does not contain such direct evidence of a desperate struggle.

The weakness of the state's argument is apparent from the final paragraph summarizing its position on this issue at page 39. With appellant's comments in brackets, it reads:

> As discussed above, this case involved several methods of strangulation. [This fact is irrelevant to the question of whether she was conscious.] In addition, the state presented evidence that Carolyn struggled to free herself from Appellant's grip. [The state cites to no evidence supporting this claim.] It is also apparent from the record that Carolyn was awake when Appellant entered her apartment. [This fact does not support the aggravator -- in fact the record shows that the entry into the home was completely consensual and that there was no fear associated with it.] Nothing suggests that she did not see Appellant coming. [It is hard to see what this means, although this double-negative fact is hardly positive proof supporting the aggravator.] In other words, she had foreknowledge of death and suffered extreme anxiety throughout this lengthy ordeal. [This is a non-sequitur; one cannot infer from Ms. Thomas-Tynes' not seeing appellant coming that she had foreknowledge of death or suffered extreme anxiety or that there was a lengthy ordeal.] Clearly, death under these circumstances is heinous, atrocious and cruel. Therefore, the trial court properly found this aggravating factor and this Court must affirm Appellant's sentence of death.

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

The state argues for the first time on appeal that appellant failed to proffer the reports. Having made no such argument below, it cannot now fault appellant. Cf. Baker v. American General Life & Accident Ins. Co., 686 So. 2d 731 (Fla. 1st DCA 1997) ("Appellees request us to uphold the dismissal based on arguments not addressed by the trial court. We decline to do so. Wassal v. W.H. Payne, 682 So. 2d 678 (Fla. 1st DCA 1996)."). In Hayes v. State, 581 So. 2d 121, 124, n.8 (Fla. 1991), the defense made a hearsay objection and the state argued that the hearsay was admissible under an exception to the hearsay rule. The judge overruled the defense objection. On the defendant's appeal, the state, as appellee, argued for the first time that the statement was admissible because it was not admitted to prove the matter asserted. This Court disapproved of this tactic, and noted:

> In order to enable parties to properly and timely debate evidentiary rules at trial, to seek limiting instructions where appropriate, and to facilitate judicial review, parties are admonished that when objecting or responding thereto, they should state their grounds with specificity if the specific grounds are not apparent from the context. See § 90.104, Fla.Stat. (1987).

See also Chung v. State, 641 So. 2d 942, 946 (Fla. 5th DCA 1994) ("Although not necessary for our holding in this case, we also find that by agreeing to the Allen charge and to the jury's further deliberation, and also by supplying a new verdict form, the state [appellee] waived any objection."), Cook v. State, 638 So. 2d 134 (Fla. 1st DCA 1994).

Section 90.104(1), Florida Statutes provides:

> (1) A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected and:
>
> ...
>
> (b) When the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked.

Thus there is no need for a proffer where the substance of the evidence is apparent from the context. Pacifico v. State, 642 So. 2d 1178, 1185 (Fla. 1st DCA 1994) (quoting statute and concluding: "Although a proffer was not made, we conclude the substance of the statements sought to be admitted was apparent from the context of the questions posed to appellant by his trial counsel." Hansen v. State, 585 So. 2d 1056, 1059, n.8 (Fla. 1st DCA 1991) states:

> We have not overlooked the state's contention that appellant failed to proffer the excluded evidence. While ordinarily an adversely affected party must make a proffer of excluded evidence, a proffer is unnecessary where the substance of the excluded testimony is apparent from the context within which it was offered. Reaves v. State, 531 So. 2d 401 (Fla. 5th DCA 1988). Here, the record is sufficient for us to rule on the propriety of the trial court's exclusion of the testimony.

See also Simmons v. Baptist Hosp. of Miami, Inc., 454 So. 2d 681, 682 (Fla. 3d DCA 1984) ("The plaintiff strenuously objected to the offending questions both on specific grounds and on grounds which were apparent from the context in which they were made."). Cf. DeSantis v. Acevedo, 528 So. 2d 461, 462 (Fla. 3d DCA 1988) (citing Simmons).

This Court articulated the rule as follows in Seeba v. Bowen, 86 So. 2d 432, 434 (Fla. 1956):

> ... . Appellants urge that inasmuch as there was no proffer of the testimony of Mr. Patterson, no error can be shown by the refusal by the trial court to allow him to testify. This court has said that where there is no proffer of excluded testimony and therefore no opportunity presented to this court to determine whether the testimony was competent, material or relevant, no error is shown. Atlantic Coast Line R. Co. v. Shouse, 83 Fla. 156, 91 So. 90. However, a proffer is unnecessary "where the offer would be a useless ceremony, or the evidence is rejected as a class, or where the court indicates such offer would be unavailing. * * * or that the witness is incompetent, * * *." 88 C.J.S., Trial, s 74, p. 180.

Accord O'Shea v. O'Shea, 585 So. 2d 405, 407 (Fla. 1st DCA 1991).

At bar, it is clear from the context that the reports detailed Dr. Block-Garfield's examination of appellant and his background, and findings as to mitigation. See the discussion at pages 41-42 of the state's brief. The judge rejected the evidence in toto as a class, so that a proffer would be unavailing. In these circumstances, the state cannot now make its puzzling claim that the reports should have been proffered for the judge too review in order to determine whether he would review them.

At page 41, relying on Blanco v. State, 452 So. 2d 520, 523 (Fla. 1984), the state contends that the abuse of discretion standard applies to decisions excluding evidence. In Blanco, the defendant sought to admit "speculative and irrelevant" evidence in support of a "far-fetched and unsupported" theory as to guilt. Id. 523. It did not involve the refusal to consider proposed mitiga-

tion. The sentencer does not have discretion to refuse to consider mitigation. Hitchcock v. Dugger, 481 U.S. 393 (1987).

The cases at page 42 of the state's brief are also beside the point. In Muehlman v. State, 503 So. 2d 310, 316 (Fla. 1987), the defense had already presented 15 character witnesses so that the court did not err in excluding additional character evidence. Coronado v. State, 654 So. 2d 1267 (Fla. 2d DCA 1995) did not involve exclusion of mitigating evidence. In Mendoza v. State, 700 So. 2d 670, 675 (Fla. 1997), the defense sought to introduce an asylum application prepared by an unknown person which the state had no chance to rebut. At bar, the documents were prepared by the witness and the state had an opportunity to rebut or refute anything contained therein, and could have recalled the witness if it thought it was necessary to do so. In Griffin v. State, 639 So. 2d 966, 970-71 (Fla. 1994), the author of a newspaper article testified to appellant's background and to the contents of the article. The defense then unsuccessfully sought to introduce the article itself into evidence. That case did not involve the reports of an expert prepared as part of an evaluation of a defendant in a capital case, as is the case at bar. Unlike newspaper articles, psychological reports are used by courts all the time in determining mitigation in various contexts. E.g. Engle v. State, 438 So. 2d 803, 813 (Fla. 1983) ("a trial judge may consider information, such as presentence and psychological reports, which were not considered by the jury during its sentencing deliberations. Swan v. State, 322 So. 2d 485 (Fla. 1975)").

See generally Barbera v. State, 505 So. 2d 413, 413 (Fla. 1987) (approving downward departure sentence on basis of psychological report), In re Norris, 581 So. 2d 578, 580 (Fla. 1991) ("Standing in sharp contrast to the fourth-hand, hearsay accounts of a destroyed photograph and the unfounded speculation regarding Judge Norris' personal life are the array of factual accounts, psychological reports, and testimonials that establish a very strong case for mitigation."), Darden v. State, 475 So. 2d 217 (Fla. 1985) (no error in considering psychological reports at capital sentencing).

It appears that the reports at bar contained nearly verbatim notes of the expert's discussions with appellant (see, for example, transcript page 1187) which would be especially helpful to the court in determining and weighing mitigation.

Although the state says at pages 43-44 that the judge considered all mitigation, the record shows that, by refusing to consider the expert's reports, he did not consider all mitigation proposed by the defense, as required by the Constitution. The state has made no showing that this constitutional error was harmless beyond a reasonable doubt. This Court should reverse the sentence.

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

Appellant relies on his initial brief.

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 state's brief misunderstands appellant's argument. Appellant argues that, while the trial court has discretion in deciding sentencing circumstances, it is not bound by the testimony of a witness who uses the wrong legal definition of a circumstance. There is constitutional error if a court indirectly relies on an ill-defined circumstance. See Espinosa v. Florida, 505 U.S. 1079 (1992) (by relying on jury penalty verdict, court relied on incorrect definition of aggravator used by jury). Lack of expert testimony that appellant was "extremely" disturbed does not dispose of this issue. Stewart v. State, 558 So. 2d 416, 420 (Fla. 1990).

Hence, Provenzano v. State, 497 So. 2d 1177 (Fla. 1986), Foster v. State, 679 So. 2d 747 (Fla. 1996), and Wuornos v. State, 644 So. 2d 1000 (Fla. 1994), cited at pages 54-55 of the state's brief, are inapt. There is no doubt that a judge has discretion if he uses the right legal standard. Here, however, the sentencing order does not show that the judge used the right standard. In fact, he apparently relied on the witness's incorrect standard.

At pages 55-56, the state says that appellant has cited no authority for the correct definition of the circumstance. In fact, his initial brief cites Wright v. State, 688 So. 2d 298, 301 (Fla.

1996), and State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973) at page 53 of his initial brief on this point.[8]

Finally, the state misunderstands appellant's reliance on Stewart. Appellant cited Stewart to show that the sentencer is not bound by expert testimony in deciding to find the circumstance. He did not cite it for the notion that the trial judge must find it.

What a trial judge is compelled to do is to apply the correct standard to the evidence. A court cannot exercise discretion if it uses a wrong standard. Ferguson v. State, 417 So. 2d 639, 645 (Fla. 1982) (reversing where judge "misconceived the standard to be applied in assessing the existence of [mental] mitigating factors"); Canakaris v. Canakaris, 382 So. 2d 1197, 1202 (Fla. 1980) ("appellate courts must recognize the distinction between an incorrect application of an existing rule of law and an abuse of discretion"). Failure to consider mitigation through application of an erroneous legal standard violates the eighth amendment.

[8] Oddly, the state's brief then cites State v. Dixon and Wright for the same proposition as in appellant's initial brief.

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

Without disputing appellant's legal position, the state says the judge made the required finding in a part of his order in which he rejected an argument that the death penalty is disproportionate for a domestic murder. Review of the quoted part of the order shows that the court was concerned only with rejecting appellant's per se rule that he could not be sentenced to death. This is far from a qualitative decision that the aggravator at bar, standing alone, justified the death penalty under section 921.141(3), Florida Statues.

The judge framed the issue he was deciding as follows:

> Does Florida prohibit the death penalty in all -- and I emphasis [sic] "all" -- cases involving a domestic or prior relationship killing where the only aggravator found is heinous, atrocious, or cruel? Since this question has not been specifically addressed in any case decided in Florida, this Court found no such prohibition to exist.

R 1587-89. Thus, he was concerned only with a narrow legal question -- whether there was a legal bar to the death penalty. He did not decide whether, under the circumstances at bar, the aggravator justified the death penalty. This Court should reverse the death sentence.

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

As the state's cases at page 63 show, the defense has the burden of putting on evidence and identifying proposed non-statutory mitigators. Statutory circumstances, on the other hand, must be considered by the sentencer. Section 921.141(3) provides that the judge is to impose sentence after "weighing the aggravating and mitigating circumstances". The state would rewrite the statute to say: "weighing the aggravating and proposed mitigating circumstances". This rewrite breaches the statutory and constitutional requirement of strictly construing the statute favorably to the defendant. Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990); § 775.021(1), Fla. Stat.; Dunn v. United States, 442 U.S. 100, 112 (1979), Bifulco v. United States, 447 U.S. 381 (1980).

While it is proper to consider age in the light of immaturity, senility, Mahn v. State, 714 So. 2d 391, 400 (Fla. 1998), or low emotional age, Scull v. State, 533 So. 2d 1137 (Fla. 1998) these are not the only factors to weigh. As the state notes at pages 64-65, there was ample mitigation (appellant is not a drug user, graduated from high school, ran his own business, is a hard worker and a good father) which can and should be used in considering this mitigator. The state's position seems to be that not being a drug user is a bad thing, or that a poor work record is praiseworthy. It offers no support for this position. In fact, such positive characteristics are very strong mitigators, indicating a very low likelihood of recidivism and good adjustment to society.

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

As in Point 1, the state argues for the first time on appeal that appellant failed to proffer evidence. Having made no such argument below, it cannot now fault appellant. Baker, Hayes, Chung, Cook, § 90.104(1), Fla. Stat., Pacifico, Hansen, Reaves, Simmons, Seeba, O'Shea.

At bar, the nature of the evidence is clear from the context:

Q. You spoke to [Carolyn] Wednesday before her death?

A. Yes, I did.

Q. Did you speak about Lynford?

A. I asked her how Lyn was doing and was he there, which was around 9 o'clock in the morning because I occasionally call her from work.

MR. LOE: I object. Been a lot of hearsay. Preliminary is find. It's just continuing. Objection to that.

THE COURT: Sustained.

Q. (By Mr. Ullman) you can't tell me what Carolyn said. You can tell me what you said.

A. I said I called her occasionally from work I spoke to her Wednesday, January, which would have been the 4th, 1995.

... .

Q. What was the subject of the conversation?

A. I called her because I normally called Carolyn we were friends. I would just call her to say how was she doing and sometimes she would call me. So I called her Wednesday from work because I specifically remember it was Wednesday and asked her how she was doing. She said fine.

MR. LOE: Objection.

Q. (By Mr. Ullman) You can't tell me what she said?

A. I'm sorry. Okay. I asked her, called her from work and talk to her.

Q. As a result of that conversation that you had with Ms. Thomas, did you do anything?

... .

A. When I spoke to her, I asked her how Lyn was doing?

Q. You got a reply?

A. Yes.

Q. Did you do anything? Did you run over to the shop, go to Lynford?

A. No, I didn't go over to the shop because I was at work. But I -- I asked her how Lyn was doing. I can't say what she said.

T 1066-67.

Q. ... Were they living together at some point in time?

A. Not to my knowledge. I know Carolyn would occasionally spend the night at Lynford's house.

Q. How do you know that?

A. How do I know?

Q. Yes?

A. Because she, whenever she would do my hair, we would talk; and she told me.

MR. LOE: Objection. Hearsay.

T 1069.

The above shows that the testimony was that, contrary to the state's position below and on appeal, Carolyn and appellant kept having sexual relations after the supposed breakup the previous fall, and that she would sometimes spend the night at his home. Such evidence refutes the position, at page 14 of the state's brief, that the relationship had ended months before the murder.

At page 68, the state relies on Lawrence v. State, 691 So. 2d 1068 (Fla. 1997). At Lawrence's resentencing, the judge let the state use a transcript of a witness's testimony from the original trial. This Court found that the trial court erred in finding the witness was unavailable, but ruled that the evidence "was hearsay only if Lawrence was not given a fair opportunity to rebut the testimony." Id. 1073. It ruled that, since Lawrence had cross-examined the witness at the original trial he had an opportunity to rebut the testimony by introducing the cross-examination into evidence. This Court also noted that he presented no other rebuttal. Hence, this Court held that there was no prejudice because he had had an opportunity to rebut the hearsay.

At bar, it was appellant who lost the opportunity to rebut hearsay: his proposed testimony would rebut the state's hearsay that Ms. Thomas-Tynes had ended the relationship in the fall. The state obviously could and already did rebut this evidence by presenting its hearsay version of the timing of the breakup. Hence, excluding the evidence at bar was error under Lawrence.

Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), appeal after remand 638 So. 2d 920 (Fla. 1994), refutes the state's position.

There, the state was allowed to introduce into evidence an officer's testimony to a witness's account of a prior violent felony committed by Rhodes. This Court held this hearsay admissible because Rhodes could cross-examine the officer about the incident. 547 So. 2d at 1204, 638 So. 2d at 925. At bar, the state could cross-examine Ms. Salmon.

Hitchcock v. State, 578 So. 2d 685 (Fla. 1990) is beside the point. There, the defense sought to present hearsay from several long-dead out-of-state witnesses about events in the defendant's past. The state had no way to rebut this testimony. At bar, of course, the state had the testimony of Ms. Thomas-Tynes' family members to challenge the defense testimony.

Exclusion of the testimony left the jury with the false belief that nothing rebutted the claim that the relationship ended long before the murder. It was unfair for the state to claim that the relationship ended months before, and then bar evidence that it continued through the week of the murder.

The state's reliance, at page 69, on Mendoza v. State, 700 So. 2d 670 (Fla. 1997) is also misplaced. There, the state could not rebut the hearsay since, at the state's brief concedes, it was unclear as to who the declarant was. The state could hardly rebut the statements of an unknown person about events in Mendoza's distant past in another country.

At pages 69-70, the state argues for the first time on appeal that the evidence was cumulative to appellant's statements to Dr. Block-Garfield about his relationship with Ms. Thomas-Tynes. The

state overlooks that the jury never heard Dr. Block-Garfield's testimony. Hence, the proposed testimony was not cumulative in the jury sentencing proceeding. Its exclusion was prejudicial as to the penalty verdict on which the judge relied. Further, since the proposed evidence did not come from appellant and, in fact, came from a friend of the deceased, it was much less subject to impeachment. See Dukes v. State, 442 So. 2d 316 (Fla. 2d DCA 1983); Livigni v. State, 725 So. 2d 1150, 1151 (Fla. 2d DCA 1998).

The state's brief concludes with a one-paragraph make-weight claim of lack of prejudice. It claims that the error was harmless because the judge found that the murder was borne out of a prior relationship, fueled by passion. This argument does not take into account the effect of the exclusion of the evidence on the jury's penalty verdict. Needless to say, error in the jury phase infects the final sentencing decision. Espinosa v. Florida, 505 U.S. 1079 (1992).

Since the state makes no other claim of lack of prejudice, much less that this constitutional error was harmless beyond a reasonable doubt, this Court should reverse for resentencing.

## CONCLUSION

This Court should vacate the judgment and sentence and remand with such instructions as the Court deems appropriate.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

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Gary Caldwell
Assistant Public Defender
15th Judicial Circuit of Florida
Florida Bar No. 256919
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

Attorney for Lynford Blackwood

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Marrett Hanna, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier May ___, 1999.

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Attorney for Lynford Blackwood