IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-2354

ANDREW RICHARD ALLRED,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

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STATEMENT OF THE CASE

Appellant was indicted on the following charges for crimes which occurred on September 24, 2007:

(1) Count I-First degree premeditated murder of Michael Ruschak;

(2) Count II-First degree premeditated murder of Tiffany Barwick;

(3) Count III-Armed burglary of a dwelling while inflicting great bodily harm or death;

(4) Count IV-Aggravated battery with firearm while inflicting great bodily harm or death;

(5) Count V-Criminal Mischief.

(V1, R35-37).[1]

At his first appearance on November 6, 2007, Allred pled not guilty and was appointed a public defender. (V5, R465-67).

On April 30, 2008, Allred withdrew his not guilty plea and a written guilty plea form was filed. (V1, R45-47). The trial judge conducted a complete plea colloquy and found Allred "was an alert and intelligent individual capable of exercising his best judgment." (V5, R472-82).

At the May 5, 2008, hearing, Allred filed a motion to compel production of records and investigations in the possession of the State Attorney's Office as they

[1] Cites to the pleadings and hearings are by volume number, "V___," followed by "R___" and the page number. The penalty phase record begins anew with number "1." Cites to the penalty phase transcripts are by volume number, "V___," followed by "PP___" and the page number.

related to an alleged sexual abuse allegation against Allred's grandfather, made by Allred's cousin. Allred's trial counsel was seeking potential mitigating evidence. The court ordered that Allred's counsel could view and copy the pertinent documents. (V5, R483-89).

At the May 15, 2008, hearing, Allred moved to waive a jury and waive his appearance for the penalty phase. The state objected. The court granted Allred's motions to waive the jury and his appearance as long as he was within close proximity to his counsel. (V5, R490-502).

At the August 14, 2008, hearing, Allred moved to fire the Public Defender's Office from representing him. The court stated it had not scheduled time to hear Allred's *ore tenus* motion but would " be happy to take it up with you, but not today." (V5, R510-13).

At the September 4, 2008, hearing, Allred agreed to continue with the public defender. (V5, R524-25).

The penalty phase was held September 22-24, 2008, before the Honorable O.H. Eaton, Jr. (V3, R1-200; V2, R201-400; V5, R401-463).

The *Spencer*[2] hearing was held October 2, 2008. (V5, R530-42). No additional evidence was presented. The parties filed sentencing memorandums. (V1, R177-179, 180-92).

[2] *Spencer v. State*, 615 So. 2d 688(Fla. 1993).

On November 19, 2008, Appellant was sentenced to death for the murders of Michael Ruschak and Tiffany Barwick. (V5, R543-48). The trial judge made detailed findings in a fifteen page sentencing order. (V2, R198-212). The following aggravating circumstances were addressed for the murder of Michael Ruschak:

> (1) Cold, Calculated, and Premeditated: written messages from Allred to victim Barwick, that he had purchased a .45 caliber pistol several days before the murders, and that he warned Ruschak that he was on his way to Ruschak's location - great weight (V2, R205);
>
> (2) During a Burglary: eyewitness accounts established this aggravator. However, the court found the burglary was incidental to the premeditated plan to kill Ruschak - little weight (V2, R205);
>
> (3) Prior Violent Felony: contemporaneous murder of Tiffany Barwick (V2, R205-06) - great weight;
>
> (4) Great Risk to Many Persons: the evidence established many shots were fired in the house and many people were present and took cover. However, it was Allred's intent only to kill Ruschak and Barwick. Allred did not aim or fire at anyone other than the two victims (V2, R206) - no weight.

The following aggravating circumstances were considered for the murder of Tiffany Barwick:

> (1) Heinous, Atrocious, or Cruel: Barwick made a 911 call during which she pled for help as she heard Ruschak being shot. The 911 operator heard Barwick repeatedly scream as she was shot by Allred numerous times. Barwick was terrorized before being shot and endured fear and emotional strain or mental anguish (V2, R207) - great weight;
>
> (2) Cold, Calculated, and Premeditated : written messages from Allred to Barwick, that he had purchased a .45 caliber pistol several days before the murders, and that he warned Ruschak that he was on

his way to Ruschak's location, he knew Barwick would be at the same location as Ruschak- great weight (V2, R207-08);

(3) Prior Violent Felony: contemporaneous murder of Michael Ruschak (V2, R208) - great weight;

(4) Great Risk to Many Persons: the evidence established many shots were fired in the house and many people were present and took cover. However, it was Allred's intent only to kill Ruschak and Barwick. Allred did not aim or fire at anyone other than the two victims (V2, R208) - no weight.

The following mitigating circumstances were considered:

(1) Appellant Accepted Responsibility-Pled Guilty to All Charges: the identity of the perpetrator was not in doubt. There were six eyewitnesses and Allred confessed. The guilty plea reduced the court's limited resources - little weight (V2, R209);

(2) Cooperation with Law Enforcement: Allred confessed - moderate weight (V2, R209);

(3) Extreme Emotional Disturbance at the Time of the Murders: Allred was emotionally disturbed as Barwick had broken up with him and was sleeping with his best friend. He was not incapable of conforming his conduct to the requirements of the law. The murders were the result of careful thought and planning. He was calm, cool, and in control during his confession to police. There is no indication of emotional disturbance. He was suffering from an emotional disturbance at the time of the murders but not an extreme emotional disturbance - moderate weight (V2, R209-10);

(4) Emotional Development Age at the Time of the Murders: Allred was 21 years old at the time of the murders. He was college-educated and proficient with computers. His IQ is 130. There is no evidence that his emotional age was less than his chronological age - no weight (V2, R210);

(5) Other Factors, i.e., Sexual Abuse as a Child, Developmental Problems, Ability to Develop Socially: there is no credible evidence

> that Allred suffered sexual abuse as a child. A developmental problem at age five appears to have hindered Allred's ability to develop socially. However, no evidence was established that impacted Allred's later education - little weight (V2, R210).

STATEMENT OF THE FACTS

Steven McCavour was celebrating his birthday with friends on September 24, 2007.[3] (V3, PP31-2). Late in the evening, he saw a large truck repeatedly crashing into another car in his neighbor's yard. (V3, PP32). He called 911. (V3, PP33). Allred got out of his truck and approached McCavour's neighbor's front door. He banged on the front door repeatedly before going to the back of the house. Within seconds, McCavour heard gunshots. He took cover and told the 911 operator he heard gunshots and to "step it up." (V3, PP36). After a five to ten second pause, he heard more gunshots, another pause, and more gunshots. He heard at least a total of eleven gunshots. (V3, T36-7). McCavour went to his front yard and saw his neighbor's open front door. People were "fleeing" ... "scattering into the woods and running down the street." (V3, PP37, 38, 39, 40). McCavour saw Allred standing in the neighbor's foyer holding a gun "firing." (V3, PP38). He took cover again as Allred got in his truck and left. (V3, PP39).

Laurie MacKillip was a guest at McCavour's party. (V3, PP138-39). Late in

[3] On the first day of testimony, Allred was not present in the courtroom but in a nearby holding facility. He had access to video and audio equipment. (V3, R11). On the second and third day, he request, and was permitted, to remain at the county jail. (V3, PP137, 340).

the evening, she heard what appeared to be fireworks and went into McCavour's front yard. At that point, she heard gunshots and saw several people running out of the neighbor's house. "They were screaming." (V3, PP139-40). She hid behind a fence as gunfire came in her direction. McCavour called 911 while the other guests took cover or lay on the ground. (V3, PP141). Allred was shooting at the people running out of Ruschak's house. (V3, PP144). "Somebody" got in a black truck and left. (V3, PP143-44).

Eric Roberts and Michael Ruschak were roommates. In September 2007, Tiffany Barwick was temporarily staying with them until she found her own place. (V3, PP42-3, 44). On the evening of September 24, Roberts, Ruschak, Barwick, and several of their friends planned to have dinner and watch television together. (V3, PP43, 45, 60). At one point, Ruschak told the group that Allred sent a text message that said he was coming over. (V3, PP60). They all discussed calling the police or Allred's mother, but no one called. (V3, PP61). Within a few minutes of hearing that Allred was coming over, Roberts heard a loud knocking at the front door. As he approached, the knocking stopped. The loud banging started at the glass door in his backyard. (V3, PP47, 48, 61). Roberts saw Barwick run down the hallway toward the main bathroom. (V3, PP66, 69). Allred, holding a gun, shattered the glass and entered the house. As he proceeded down the hallway, Roberts' friends were screaming. Some ran out of the house. (V3, PP49, 62).

Allred shot in Roberts' direction. (V3, PP50). He passed by Roberts and started shooting at Ruschak who was in the kitchen. Roberts grabbed Allred from behind and tried to pull him back. Allred shot Ruschak several times. (V3, PP50, 51). Allred repeatedly told Roberts in a "somewhat calm" manner, to let go of him. He shot Roberts in his calf. (V3, PP52-3, 64). Roberts continued to wrestle Allred down the hallway. (V3, PP54, 65). Roberts saw the shattered glass door and ran toward his neighbor's house. (V3, PP54, 55). As he ran past, he saw "someone" standing at his open front door, but did not know who it was. When he arrived at the neighbor's, he heard Allred get in his truck and speed off. (V3, PP55, 66). He did not know where all his friends were. (V3, PP65-6).

Roberts asked his neighbor to call 911. He returned to his house and saw Ruschak lying face down in the front doorway. (V3, PP56). He entered his bedroom, and knocked on the bathroom door where his friend Kathryn Cochran had been hiding. (V3, PP57). They walked through the house as police arrived. (V3, PP58).

Charles Bateman was at Ruschak's house on September 24, 2007. (V3, PP71). He had just arrived when he heard Allred banging on the door. (V3, PP73). Most of the group approached the kitchen area where Ruschak was cooking. Roberts came out of his bedroom to see what was going on. (V3, PP74-5). The front door was locked; Allred was yelling "let me in." (V3, PP74, 75). The banging

stopped, and the friends returned to the living room area. When Allred shattered the glass door, Barwick ran down the hallway. (V3, T75-6). Allred entered the house, "walked right past everybody, didn't say a word, came down the hallway ... rounded the corner, fired two shots" at Ruschak in the kitchen. (V3, PP77). Bateman ran out through the shattered glass door, into the woods, and called 911. (V3, PP78-9). During the call, he heard gunshots at different intervals, two to three shots at a time. (V3, PP79). When police arrived, he returned to the house and gave a brief statement. (V3, PP80).

Phillip Cammarata and Justin Kovacich were also at Ruschak's house on September 24, 2007. (V3, PP87, 96-7). They were conversing with friends when they heard Allred banging on the front door. (V3, PP89, 98). They saw Roberts go toward the kitchen area. (V3, PP98). Allred stopped knocking on the front door and went around to the back. He briefly knocked on the sliding glass door before shattering the glass and entering the house. (V3, PP89-90, 99). Ruschak was still in the front of the house. Barwick ran toward the bathroom. (V3, PP100). As Allred proceeded through the house with a gun, Cammarata and Kovacich ran to the front door, unlocked it, and ran out. (V3, PP90-1, 101). They heard gunshots as they ran down the street. (V3, PP91, 92, 101). Kovacich called 911 while Cammarata called his father. (V3, PP92, 102) The two returned to the house with Cammarata's father. By the time they got back, police had arrived and cordoned off the crime scene

area. (V3, PP92-3).

Kathryn Cochran had been invited to Ruschak's house on September 24, 2007. (V3, PP107, 1109). Sometime during the evening, Barwick was "talking" to Allred via her laptop. Barwick was concerned when she knew Allred was coming over to the house. Cochran said, "She was in full panic mode." (V3, PP115). Ruschak suggested calling Allred's mother but Barwick "didn't really know what to do." (V3, PP116, 124). When Allred arrived and started banging on the door, Ruschak locked it. (V3, PP117). Allred proceeded to the back glass door. Before he shattered the glass, Cochran ran into Roberts' room and hid. (V3, PP118-19). She heard "people yelling ... lots of gunshots ... people running to the front of the house." (V3, PP120-21). Barwick was screaming. Cochran heard more gunshots, and then it was quiet. (V3, PP121). Roberts returned to the house and told her Allred had left. Police arrived shortly thereafter. (V3, PP122, 123).

On September 24, 2007, Corporal David Kohn, Seminole County Sheriff's Office, was dispatched to investigate a suicidal individual who had shot two people. He found Allred and took him into custody. (V3, PP126-27, 130). Allred was talking on his cell phone. A weapon was located on the ground nearby. (V3, PP127). Allred told him, "I'm the guy you're looking for." Allred wanted to know "if the people were dead." Allred stated, "I knew I killed someone, I shot fourteen times." (V3, PP128, 132).

Det. Kelly Edwards and Det. Weaver interviewed Allred. (V3, PP149, State Exh. 12).[4]

After Allred was informed of his *Miranda* [5]rights, (V3, PP152) he explained that earlier that evening he ate dinner with Michael Siler at Outback's. He drank "a pint of Fosters" but it did not affect him. (V3, PP157, 191). He did not tell Siler what he was planning to do after dinner. (V3, PP158). He bought beer at Albertson's and then went home. He did not drink the beer. (V3, PP156-57). He drove his black Dodge Ram truck to Ruschak's home. When he got there, he "rammed [Tiffany's] car." (V3, PP155, 158). Then, "I went in and shot them." He said he did not plan to shoot them, he only wanted to ram Barwick's car. (V3, PP158).

Allred said he entered the house through the shattered sliding glass door after he shot it with his Springfield XP .45. (V3, PP159). He saw all the people in the house and knew who they were. (V3, PP159-60). He shot Ruschak in the kitchen area. (V3, PP161, 182). He was specifically looking for Ruschak. (V3, PP161). Then, "Eric jumped on me and tried to get the gun off me, he couldn't and then I shot Tiffany" after he found Barwick in the bathroom talking on the phone. (V3, PP161, 182-83). He described the incident as shooting his "ex- girlfriend,"

[4] The DVD of the interview was published for the court. (V3, PP150- 197).

[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Tiffany Barwick, and "ex-best friend," Michael Ruschak. (V3, PP154). He did not think he shot anyone else. (V3, PP162).

Allred shot a total of fourteen rounds, then left through the front door, got in his truck and went home. (V3, PP159). He called 911 and told them, "People were shot." (V3, PP169, 191-92). He felt like he "probably should have" killed himself because he was "gonna be in jail for a while." (V3, PP169, 192). When police arrived, he put the gun on the ground in his driveway. (V3, PP162-63).

Barwick ended her relationship with Allred a month before. (V3, PP163). They had talked since the breakup. Allred said he did not know why he shot her. (V3, PP164). He shot Ruschak because "he's an asshole" and "took her side" regarding their breakup. (V3, PP164, 170).

Allred had spoken to Barwick earlier that night via "instant messenger" on the computer. (V3, PP172). He knew she would be at Ruschak's because "she doesn't have anywhere else to be." He last spoke to Ruschak at his own birthday party when Barwick broke up with him. [6](V3, PP173). He and Ruschak messaged each other one time but had not spoken. (V3, PP175). Allred denied texting Ruschak and saying he was going to kill him. (V3, PP179).

Allred did not take any medication or drugs the night of the murders. He had used marijuana in the past. He was not being treated for any medical condition.

[6] Allred turned twenty-one on August 25, 2007. (V5, PP413).

(V3, PP190-91).

At the conclusion of the police interview, Allred consented to have his truck searched. He did not give consent to search his room or the contents on his computer. (V3, PP193-94). Det. Edwards searched Allred's truck and obtained a search warrant to search his home. (V3, PP197). Allred's room was locked with a deadbolt. His parents did not have a key so forced entry was used. Among some of the items collected by police were: computers, a digital camera, and Tiffany Barwick's social security card and passport. (V3, PP199).

Allred bought a Springfield XP .45 gun on September 7, 2007, after he turned twenty-one. (V1, R127-28, State Exh. 44). He did not plan to shoot Barwick. He wanted to use the gun for target practice. (V3, PP176-77). He admitted he e-mailed Barwick a picture of her and her friend with bullet holes in it. He "used it as a target" on the day he bought the gun. (V3, PP179-80; V4, PP293-94, State Exh. 49).

Gus Carbonell, general manager of Shoot Straight Gun and Ammo store, explained that a person intending to purchase a handgun must be twenty-one years old, have a Florida photo ID, and be subjected to an FDLE background check. (V4, PP248-49). Although there is no wait for the purchase of a "long gun," there is a three-day wait period for a handgun unless the purchaser has a concealed weapons permit. (V4, PP250).

Brandie Hartley, 911 operator for the Seminole County Sheriff's Office, received a call from Tiffany Barwick on September 24, 2007. The call was published for the court. (V4, PP257-58, 265-66, State Exh. 45).

Inv. Eric Zabik, Seminole County Sheriff's Office, computer forensic examiner, analyzed Allred's, Ruschak's, and Barwick's computers, digital camera, and/or media. (V4, PP268, 269, 272, 294). Zabik examined chat logs located on the hard drive of Allred's computer. (V4, PP211, 275, 282, 291, 301, 302, 303; State Exhs. 15, 46-48, 50-52). Allred's screen names were "Bomber166" and "AndrewAllred@gmail.com." (V3, PP80; V4, PP300). Ruschak's screen name was "Huma54." (V3, PP80-1, 300, 310). Michael Siler's screen name was "DrFreeze84." (V4, PP300). Tiffany Barwick's screen name was "CrazedIncuchic." (V4, PP285, 310).

Michael Siler was a friend of Allred's. (V4, PP298, 300).). On September 23, 2007, Siler and Allred conversed via instant message when Allred said "I pretty much just need to start killing people." (V1, R147; V4, PP302, State Exh. 51). On September 24, 2007, Siler and Allred conversed via instant message when Allred said "I'm pretty much gonna kill him ... and her." (V1, R145-46; V4, PP300, State Exh. 50).

Siler had been in Allred's room at home when it was painted black. (V4, PP304). He attended Allred's twenty-first birthday party and was there when

Barwick broke off her relationship with Allred. Allred kept a rifle in his room as well as the gun he bought subsequent to his twenty-first birthday. (V4, PP305). He showed Siler the handgun on September 1, 2007. (V4, PP306). On September 24, Siler and Allred went to dinner at Outback's. Siler said Allred "had this feeling of somebody who doesn't care about anything." He knew Allred had been fired from his job. (V4, PP307). After dinner, Allred brought Siler to his apartment. Siler was concerned about Allred's safety because he thought Allred was suicidal. (V4, PP309).

Dr. Predrag Bulic, medical examiner, performed the autopsies on Ruschak and Barwick. (V4, PP314-15, 316, 321). Michael Ruschak had multiple gunshot wounds. (V4, PP317). Dr. Bulic designated the gunshots as "A," "B," "C," and "D." This designation was not the order in which Ruschak was shot. (V4, PP320). Gunshot "A" was a wound to Ruschak's chest. It passed through his sternum, through his heart, exited the back of his heart, entered the lower lobe of the left lung, and exited through his back. Although this wound was lethal, it was not necessarily the first gunshot inflicted. (V4, PP319). Gunshot "B" entered Ruschak's back. (V4, PP320). The bullet travelled diagonally though his body and exited the left side of his abdomen. This was a fatal wound. Gunshot "C" was a non-fatal wound that grazed the skin on the left side of Ruschak's back and exited. (V4, PP320-21). Gunshot "D" entered Ruschak's left hip and "just skips through

the skin folds" and exited through Ruschak's left flank area. (V4, PP321). Dr. Bulic concluded Ruschak died as a result of the gunshot wound to his chest. (V4, R321).

Tiffany Barwick was shot multiple times. (V4, PP322). Dr. Bulic designated the gunshots as "A," "B," "C," and "D," "E," and "F." This designation was not the order in which Barwick was shot. (V4, PP331). Gunshot "A" was a non-lethal gunshot wound to the back side of Barwick's left wrist, which caused multiple fractures of the bones in the wrist joint. This gunshot was not necessarily the first gunshot. (V4, PP323). Gunshot "B" was a non-lethal gunshot inflicted to the back of Barwick's upper left arm, which exited on the inner side by her elbow. She would have been running away or facing away from the shooter in order to receive this type of wound. (V4, PP324, 328-29). Gunshot "C" was a non-lethal gunshot wound to the inner side of Barwick's right thigh. This was inflicted while she was running away or facing away from the shooter. (V4, PP324-25, 328-29). Gunshot "D" was a non-lethal gunshot wound which entered Barwick's right calf and exited through the outer side of her shin. (V4, PP325). Gunshot "E" entered Barwick's upper right chest, passed through her lung, and exited through her back. Without immediate medical attention, this was a lethal wound. (V4, PP325, 326, 330). At this point, Barwick would have been gasping for breath. (V4, PP326, 330). Gunshot "F" entered Barwick's left shoulder. It went diagonally through her body,

through all her major organs: lung, heart, diaphragm, abdomen, and liver. It did not exit. This was an immediately fatal wound. (V4, PP330, 331, 333, 336). Dr. Bulic concluded Barwick died as a result of this gunshot wound. (V4, PP327). Gunshot "F" could have occurred before gunshot "E," but Dr. Bulic could not determine. He said, "I cannot tell the order of these wounds." (V4, PP334).

Tora Allred, Allred's mother testified that, aside from gestational diabetes, there were no difficulties with Allred's pregnancy. He was a normal, happy baby. (V5, PP344, 346-47). At age six, his behavior "suddenly" changed. He became hyper and emotional, "just kind of a different child." (V4, PP347, 348). Allred's paternal grandparents lived in a mother-in-law suite attached to their home in Winter Park. They occasionally babysat Allred and his brothers. (V4, PP347, 348-49). When Allred's behavior changed, Tora took him to the pediatrician. The pediatrician thought Allred might have been sexually abused. (V4, PP351). Allred never claimed he had been sexually abused. (V4, PP387). Allred's paternal cousin William, who was fifteen years older than Allred, claimed he had been sexually abused by their paternal grandfather and great-uncle. (V4, PP361, 386). The grandfather and great-uncle denied the allegation. (V4, PP392).

The pediatrician referred Allred to a psychiatrist. (V4, PP349).The psychiatrist diagnosed Allred with a "well defined tic disorder" and "ADHD." Allred was prescribed Clonidine. (V4, PP350, 353). He has never been diagnosed

with a psychiatric disorder. (V4, PP387).

Allred did well when he first started school. (V4, PP354, 357). In third grade, it was determined Allred had a learning disability and was subsequently placed in learning disabled classes. (V4, PP358-59). After he tested with a high IQ, Allred was placed in gifted classes. (V4, PP359-60).

In 1996, at age ten, Allred's family moved to Oviedo. His paternal grandparents lived next door for five years. (V4, PP362-63). When Allred was twelve, he witnessed his parents engage in a physical altercation. His father David was drunk and said he was going to kill himself. When Tora Allred grabbed the shotgun from him, David kicked her. Allred called 911 and his father was arrested. (V4, PP369).

The Allred's kept shotguns in their home because they liked to shoot skeets and targets. (V4, PP371).

Allred's father has a drinking problem. He has been arrested several times for D.U.I.'s (V4, PP370).

After graduating high school, Allred had his own bedroom which he painted black with black window treatments. (V4, PP366, 367-68). Because he put a deadbolt on the door, his parents did not have access to the room. (V4, PP388). Allred is different than his brothers Ryan and Scott. He is a loner and less social. This became noticeable after he was placed in the gifted program. (V4, PP373).

Allred attended college and received a two-year degree in accounting. His job was to show people how to use software for car and RV dealerships. (V4, PP385).

After Allred started dating Barwick, she moved into their home. (V4, PP374). She lived there for four months until Allred's twenty-first birthday. (V4, PP375, 376). Tora said their relationship "Seemed great to me. They seemed happy, they were both working." (V4, PP375, 377). Allred and Barwick took a cruise together. (V4, PP381).

Tora Allred said that after his twenty-first birthday, Allred started drinking alcohol. (V4, PP379). Subsequent to the birthday party, Barwick told Tora that she had broken off the relationship. (V4, PP383). Allred was upset and even more withdrawn. (V4, PP384).

David Allred testified he has a drinking problem and has been arrested three times for D.U.I.'s (V4, PP398). He recalled one night when Allred was twelve and he and his wife got into an altercation. David kicked Tora and Allred called 911. David was arrested. (V4, PP399; V5, PP404).

David kept guns hidden in his room for recreational use. (V5, PP404, 411-12). The whole family liked to hunt and shoot skeet. (V5, PP404). Allred was quiet and less sociable than his brothers. (V5, PP405).

David's sister told him of the alleged sexual abuse of his nephew William by

their father, William's grandfather. It was reported to the police. (V5, PP406).

David said his son lived in a room underneath their home. He assumed it was painted black, "because of watching movies." (V4, PP396, 397-98). Barwick lived with the Allreds for a time. (V5, PP406). The day after their son's twenty-first birthday, Tora told David that Barwick and Allred broke up the day before. (V5, PP407). David was concerned that his son was suicidal. He and Tora tried to talk to him but Allred did not respond. (V5, PP408, 410). David did not contact police or attempt to "Baker Act" his son. He was not aware that Allred had purchased a gun. (V5, PP411). He did not do anything different with his own guns as they were hidden in his room, "where they always were." (V5, PP412).

Charles Allred, Allred's paternal grandfather, lived in a mother-in-law suite with David, Tora, and the family in Winter Park for 10 years. (V5, PP416, 419-20). He and his wife, Beverly, took care of their oldest two grandsons while David and Tora worked. (V5, PP420-21). David and Tora took good care of their three sons. They gave them, "just about anything they wanted ... they got about as good a care as any kids could get." (V5, PP422). After the Allreds moved to Oviedo, Charles and Beverly saw Appellant every day. He had a few friends, more than he did when they lived in Winter Park. (V5, PP423). Appellant studied frequently and liked to be on his computer. After Charles and Beverly moved away, Appellant visited monthly and brought his girlfriend, Tiffany Barwick. (V5, PP424).

Rose Davis taught Allred in the third grade. (V5, PP433-34). He made good grades but was tired all the time and fell asleep in class. He did not do his homework and was very withdrawn. He did not participate in class or interact with her or his classmates. (V5, PP435). She had a conference with Allred's mother, but she did not see an improvement. (V5, PP437).

Sue Leidner taught Allred in the gifted classes in sixth and seventh grade. (V5, PP441, 445). Allred was very quiet, "a gentle soul." (V5, PP445). He never took a leadership role. He was a loner and was not verbal. (V5, PP446). At times, the other students picked on him. (V5, PP449).

Susan Turner taught Allred in her web design class. (V5, PP429-30). He was an average student, quiet, and never had to be disciplined. He was different than other students. He was a loner and withdrawn and did not interact with his classmates. (V5, PP430).

The *Spencer*[7] hearing was held October 2, 2008. (V5, R530-42). The State called one witness, Charles Bateman. (V5, R535). Bateman said Allred and Barwick started dating shortly after Allred's twentieth birthday. (V5, R538). For his party that year, Barwick gave Allred a shirt that said "Failed," which was a catch phrase that Allred used for himself. Bateman said when Allred opened this gift from Barwick, he "smiled." (V5, R536-37, 540).

[7] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

The trial judge made extensive fact findings regarding the evidence presented at the penalty phase:

PROCEDURAL HISTORY

> On April 30, 2008, the defendant entered guilty pleas to two counts of first degree murder, one count of armed burglary of a dwelling while inflicting great bodily harm or death, one count of aggravated battery with a firearm while inflicting great bodily harm or death, and one count of criminal mischief . He waived a penalty phase jury and, later, waived his presence at the penalty phase hearing. The penalty phase hearing commenced on September 22, 2008, and was concluded on September 24, 2008. A Spencer hearing was subsequently scheduled but no additional evidence was received at the hearing. The attorneys elected to submit written arguments relating to the penalty to be imposed and the court has received and carefully considered them.

FACTUAL FINDINGS

> The facts of this case are not in substantial dispute. The defendant is a young man who had recently turned 21 before the day of the events that gave rise to this case. His early childhood appears to have been normal. He is the oldest of three children. According to his mother, he had a personality change at about age 6 and, while there is some speculation that sexual abuse by the defendant's grandfather caused or contributed to this personality change, there is no evidence of it. Ultimately, the defendant was diagnosed as having ADHD. He did well in school when he first started but that did not last. By the third grade it was thought that he had a learning disability and was placed into special classes for more one-on-one attention. After he took an l.Q. test it was learned that he had a high 1.Q. and was placed in the gifted program. His mother described him as "different from the other boys," "quiet," "gloomier," and "less social."
>
> Three of the defendant's teachers testified at the penalty phase hearing. Rose Davis taught the defendant in the 3rd grade. She remembers him as having good grades but was tired all the time and slept in class. He was "stand-offish" and had difficulty making friends. He had difficulty interacting with others, including her.

Sue Leidner taught the defendant at Jackson Heights Middle School in the 6th and 7th grade. She remembers him as having an I.Q. of over 130. He was a "very quiet, gentle soul" who never took a leadership role and had difficulty expressing himself. He had several other quiet friends but later he was more and more a loner. He sometimes wore the same clothes two days in a row and did not have a computer at home. The students in the gifted classes tended to be either "haves or have nots" economically, with the defendant in the latter group.

Susan M. Turner taught the defendant in her 10th grade web design class. She described him as "not like the others" and a loner who was withdrawn and who did not interact with the other students. He never participated in class.

There was some dysfunction in the family. The defendant's father "was going through some hard times" and there was physical violence between the defendant's father and mother. During this time the defendant's father drank excessively and picked up three D.U.I.'s. There was even an event where the defendant's father was arrested for domestic violence. However, the family problems seem to have been resolved long before September 24, 2007, the date of the events in this case.

The defendant received his high school diploma from Seminole Community College and received an A. A. from Florida Metropolitan College. He was still living at home on September 24, 2007. The house was two stories high. A room was added on the first floor and the defendant lived in that room from 2004 until the day of his arrest. He painted the walls and ceiling black. His room had a computer and a television set. He was quite proficient with the computer.

About a year before his arrest, the defendant started going with Tiffany Barwick, one of the victims in this ease. She moved into his room and stayed with him there for three or four months The defendant's mother described the relationship as "great." The relationship did not last. Tiffany broke up with the defendant on August 25, 2007, during his twenty-first birthday party at his house. The defendant was upset and threw her belongings out of the house. On September 1, 2007, the defendant bought a .45 caliber automatic

pistol.[1]

FN1. State exhibit 44.

There is evidence that Tiffany became involved with the other victim in this case, Michael Ruschak, who was the defendant's best friend in high school. This evidence is contained in the messages sent back and forth by Tiffany and the defendant after the break up.

Some of the messages are upsetting. The defendant shot holes in photographs of Tiffany and sent them to her.[2] The messages between Tiffany and the defendant show that he was most disturbed by the break up and his belief that Tiffany had taken up with Michael Ruschak. The messages relate the hatred the defendant felt for both of them. In one message between the defendant and Michael Siler (drfreeze84), the defendant threatened to kill both Tiffany and Michael Ruschak. And on September 24, 2007, the day of the murders, the defendant sent a message to Michael Ruschak that stated, "if i see you again, i will kill you, and yes that is a threat."[3] That same day the defendant told Tiffany he had hacked into her computer, deleted some files and transferred her savings to pay her credit card account.[4] A few minutes later, the defendant told Tiffany, "and rushak, if i ever see him again i will kill him."[5]

FN2. State's exhibit 49.

FN3. State's exhibit 46.

FN4. State's exhibit 48.

FN5. State's exhibit 47.

Michael Siler and the defendant went to the Outback Steak House for dinner early in the evening of September 24, 2008 (sic). Siler described the defendant at that time as not caring about anything. He had just lost his job and his girl friend. Siler was concerned about him and thought he might be suicidal.

Later that evening, there was a party at 100 Shady Oak Lane in Oviedo, Florida. Several people attended and it appears they all knew

each other and they knew the defendant. Most of them had attended the defendant's birthday party. Eric Roberts lived there and so did Michael Ruschak.

Tiffany had recently moved in on a temporary basis. The purpose of the party was to eat bar-b-que and watch a television show referred to by the witnesses as "Firefly." Charles Bateman, Phillip Camaratta. Justin Kovich, and Catherine Cockran were also present. There is evidence that the defendant sent a text message to Michael Ruschak announcing that he was on his way to the house.[6] Catherine Cockran testified that Tiffany was "in a panic mode" when she learned the defendant was on his way.

> FN6. The defendant denied sending such a message during his video statement at the Oviedo Police Department but Catherine Cockran's testimony was quite clear.

The house located at 100 Shady Oak Lane is a small three bedroom, two bath house. The kitchen and a small bedroom are located in the front of the house, along with a separate bathroom. As you enter the front door of the house, the kitchen is on the right and the bed room and bath room are on the left. As you travel down the hall, another small bedroom is located on the right and then there is the living room, which has a glass sliding door that opens to the back yard. On the left side of the living room, there is a doorway that leads to the largest bedroom, which has a private bathroom. This was Eric Robert's room.[7] This description of the layout of the house has been included in order to understand the events surrounding the murders and to locate just who was where and doing what at the time.

> FN7. State's exhibit 18.

By the time the defendant arrived on the scene, Eric Roberts was in his room, Michael Ruschak was in the kitchen and Charles Bateman, Phillip Camaratta, Justin Kovich, Catherine Cockran and Tiffany were in the living room. Tiffany's car was parked in the front yard near the front door.

The defendant arrived in his large Dodge pick-up truck and rammed

Tiffany's car in the rear several times, causing substantial damage.[8] A neighbor, Steven McCavour, saw the defendant ram Tiffany's car and called 911 to report it. He also saw the defendant approach the front door of the house and repeatedly slam the front door with his fist. The defendant then walked around the side of the house and disappeared.

FN8. State's exhibits 3-6.

Eric Roberts heard the banging on the front door and went to see who was there but by the time got there the banging had stopped. As he tried to figure out what was happening, he heard banging on the sliding glass door in the living room. As he started moving towards the door, the glass shattered and the defendant came through the door with a gun in his hand. The defendant passed Eric and went to the kitchen where he shot Michael Ruschak four times. Then the defendant turned towards the bathroom where Tiffany was hiding. Tiffany was on her cell phone with the 911 operator desperately pleading for help when the defendant shot her several times.[9] Eric, who is much larger than the defendant, grabbed him from behind. There was a struggle and the defendant shot Eric in the calf.[10] Eric released the defendant, who then left the house and drove off in his truck.[11]

FN9. The tape of the 911 call is in evidence as State's exhibit 45. It is the call listed to have lasted 1:17 minutes.

FN10. In his video statement to the Oviedo Police, the defendant states that he shot a total of fourteen rounds that evening, "thirteen in the clip and one in the chamber." See State's exhibit 12.

FN11. In his video statement to the Oviedo Police, the defendant claims Eric grabbed him after he shot Michael Ruschak but before he shot Tiffany Barwick. The 911 tape reveals no interruption in the events between the murder of Ruschak and the murder of Barwick.

Charles Bateman recalls seeing the defendant come through the door and could not believe what he was seeing. He saw Eric grab the defendant from behind after shots were fired and he turned and ran out

the back door and hid in the woods down the street.

Phillip Cammarata and Justin Kovich managed to run out the front door when the defendant entered the house. They ran down the street to a Publix and called 911 on a cell phone.

When the glass shattered, Catherine Cockran ran into Eric's room and hid under his computer desk. She heard people yelling and lots of gunshots. She ran into Eric's bathroom and heard more gunshots and Tiffany screaming. Then all was quiet. Eric came into the bathroom and told her the defendant had left.

Steven McCavour also heard a couple of gunshots, then a pause, and then many more gunshots, possibly seven or eight. He saw people scattering into the woods or running down the street. He saw the muzzle flash on the gun. He also saw the defendant get into his truck and drive away.

Shortly after the defendant left the scene, he contacted 911 to report the shootings and was taken into custody without incident. He gave a statement to the police describing the events as he saw them and basically admitted his crimes although he denied planning to kill anyone before he arrived at the house. He said his intent was just to ram Tiffany's car.

Dr. Bulic, the medical examiner, testified as to the autopsy results. Michael Ruschak was shot four times. The order in which the shots were fired could not be determined. However, the shots were fired in rapid succession. One of the shots pierced the heart and was lethal. Another shot, in the back, was also potentially lethal.

Tiffany Barwick was shot six times. One shot entered the back side of her left wrist. Another entered the back of her upper left arm. A third entered the back of her right thigh. None of these wounds were lethal. A shot to the right side of her chest was potentially lethal. The lethal shot was fired while she was bent over and entered her left shoulder. It pierced all of her major organs and was immediately lethal.

(V2, R198-205).

SUMMARY OF ARGUMENT

Claim I. The cold, calculated, and premeditated aggravating circumstance was proven beyond a reasonable doubt. Allred threatened the victims, came to the murder scene with a gun loaded with 14 rounds, was not dissuaded when the front door was locked, went around back and shot out the sliding glass door, selected the two individuals he wanted to kill, executed them with multiple gunshots, then calmly left the scene, returned to his residence, laid the gun on the ground, and waited for officers to arrive. Even if this aggravator were stricken, the two remaining aggravators as to Michael and the three remaining aggravators as to Tiffany would outweigh the mitigation in each case.

Claim II. The heinous, atrocious, or cruel aggravating circumstance was proven beyond a reasonable doubt as to Tiffany's murder. The mental anguish she endured when Allred threatened to come to the house, then arrived and rammed her car, beat on the front door, went around back and shot out the sliding glass door, stalked Michael and shot him multiple times, then stalked her and unloaded his gun into her body, was excruciating. Tiffany was on the phone with 911, and the trial judge described the call as "the most horrific piece of evidence this court has heard in a homicide case in nearly twenty-three years as a trial judge." The fear, emotional strain and mental anguish Tiffany endured during the time Allred stalked her and executed Michael in another room, combined with the multiple

gunshot wounds, establishes heinous, atrocious, or cruel aggravating circumstance, Even if this aggravator were stricken, the three remaining aggravators would outweigh the mitigation.

Claim III. The trial judge did not abuse his discretion in finding and weighing mitigating circumstances. His findings are supported by substantial competent evidence. This Court will not second guess or reweigh mitigation on appeal. This case is proportional to other death-sentenced defendants. This case involved a coldly planned execution of two people, the second of whom was on the phone begging for her life as the first was executed. This case involves a situation in which the victims were in the sanctity of their own residence when the glass door was shot out and their lives ended by Allred emptying his gun into their bodies. As to the sufficiency of the evidence, Allred's plea was voluntary.

POINT I

THE TRIAL COURT DID NOT ERR IN FINDING THE MURDERS WERE COLD, CALCULATED, AND PREMEDITATED

Allred argues that neither the murder of Tiffany Barwick, nor the murder of Michael Ruschak were cold, calculated, and premeditated. He bases this argument on the following arguments:

(a) Allred was publicly humiliated by Tiffany's rejection;

(b) Tiffany began a relationship with Allred's best friend, Michael, the second victim;

(c) Allred was in a rage the entire day of the murders;

(d) The murders were "hot blooded" and Allred simply exploded;

(e) Allred was fired from his job the day of the murders;

(f) Allred has no friends and no job;

(g) The murders were committed in a frenzy, panic, or rage;

(h) There was no plan or prearranged design;

The State responds to these arguments as follows:

(a) Tiffany broke up with Allred a month before the murders;

(b) The relationship with Michael had been ongoing for a month;

(c) Allred had dinner with a friend before the murders; the friend noted nothing close to a "rage."

(d) Allred texted both Michael and Tiffany before the murders. He told his friend, Siler, the day before the murders he intended to kill the

> victims. Shortly after Tiffany broke up with him, Allred purchased a gun which he took to the scene. He was locked out of the house, but rather than leave, he went around back and shot out the sliding glass door. He passed several persons while seeking out Michael in the kitchen and Tiffany in the bedroom. He executed them with multiple gunshots;
>
> (e) There was no evidence being fired from his job caused Allred to react violently or contributed to the murder which was not at his job location and did not involve anyone he worked with;
>
> (f) Allred went to dinner with one friend the night of the murders;
>
> (g) The facts are inconsistent with the frenzy/rage/panic theory;
>
> (h) Allred bought a gun, threatened to kill the victims, brought a weapon to the scene, pursued his plan even when the doors were locked, sought out and executed two victims in two separated rooms.
>
> The trial judge made separate fact findings as to each victim. As to Tiffany

Barwick, the trial judge found:

> The evidence, including the written messages from the defendant to the victim, to Michael Ruschak, and to Michael Siler, the fact that the defendant purchased the .45 caliber pistol several days before the murders, and the fact that the defendant warned Michael Ruschak that he was coming to his location, establishes this aggravating factor beyond a reasonable doubt. The court rejects the defendant's statement that he did not preplan the murders. He stated that he knew Tiffany Barwick would be there because she did not have anywhere else to be.

(V2, R 207-208).

As to Michael Ruschak, the trial court found:

> The evidence, including the written messages from the defendant to the victim, to Tiffany Barwick, and to Michael Siler, the fact that the defendant purchased the .45 caliber pistol several days before the

> murders, and the fact that the defendant warned the victim that he was on his way to his location, establishes this aggravating factor beyond a reasonable doubt. The court rejects the defendant's statement that he did not preplan the murders. The court assigns great weight to this aggravating circumstance.

(V2, R 205).

These findings are supported by competent substantial evidence. This Court's review of a trial court's finding regarding an aggravator is limited to whether the trial court applies the correct law and whether its finding is supported by competent, substantial evidence. *Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997); see also *Cave v. State*, 727 So. 2d 227, 230 (Fla. 1998).

The day of the murders, Allred e-mailed Michael "if I see you again, i will kill you, and yes that is a threat.[sic]" (V1, R129; State Exhibit 46). Shortly before the murders, Allred e-mailed Tiffany "and rushak, if I ever see him again I will kill him.[sic]" (V1, R133; State Exhibit 47). Allred also e-mailed his friend, Siler, that he was going to kill Michael and Tiffany. (V1, R145; State Exhibit 50).

The night of the murders, Allred brought a weapon to the scene; a weapon he purchased shortly after Tiffany broke up with him. After Allred could not enter the front door of the residence in which Michael and Tiffany lived, he went around to the back. He briefly knocked on the sliding glass door before shattering the glass and entering the house. (V3, PP89-90, 99). Allred entered the house, "walked right past everybody, didn't say a word, came down the hallway ... rounded the

corner, fired two shots" at Ruschak in the kitchen. (V3, PP77). When Roberts grabbed Allred and tried to detain him, Allred told Roberts several times to let him go. Roberts described Allred's manner as "somewhat calm." Allred then shot Roberts in the calf. (V3, PP52-3, 64).

During Allred's post-arrest statement, he admitted e-mailing Tiffany a picture of her and her friend with bullet holes in it. He "used it as a target" on the day he bought the gun. (V3, PP179-80; V4, PP293-94, State Exh. 49). He admitted he was looking for Michael when he entered the residence. (V3, PP161). After he shot Michael, he went looking for Tiffany. (V3, PP161, 182-83).

When Allred was arrested, he showed no signs of rage, frenzy or panic. In fact, he was talking on his cell phone and had placed his gun on the ground. (V3, PP127). Allred told officers, "I'm the guy you're looking for." Allred wanted to know "if the people were dead." Allred stated, "I knew I killed someone, I shot fourteen times." (V3, PP128, 132).

CCP can be indicated by the circumstances if they point to such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. *See Farina v. State*, 801 So. 2d 44, 53-54 (Fla. 2001); *Bell v. State*, 699 So. 2d 674, 677 (Fla. 1997). When a defendant has opportunities to abandon his crime but continues on to kill unresisting victim(s), the CCP aggravating circumstance is proper. *See McCoy v.*

State, 853 So. 2d 396, 407-408 (Fla. 2003); *Looney v. State*, 803 So. 2d 656, 678 (Fla. 2001) (applying CCP where "the defendants had ample opportunity to reflect upon their actions, following which they mutually decided to shoot the victims execution-style"), *cert. denied*, 536 U.S. 966, 122 S.Ct. 2678, 153 L.Ed.2d 850 (2002); *Alston v. State*, 723 So. 2d148, 162 (Fla. 1998) (sustaining the CCP aggravator where the defendant had ample opportunity to release the victim but chose to kill him); *Eutzy v. State*, 458 So. 2d 755, 757 (Fla. 1984) (sustaining CCP where there was no sign of struggle, yet the victim was shot execution-style).

Allred compares his case to *Evans v. State*, 838 So. 2d 1090 (Fla. 2002), and *Santos v. State*, 591 So. 2d160 (Fla. 1991), and argues that the cold, calculated aggravating circumstance is excused in domestic situations. (Initial Brief at 24).

Evans had nothing do with CCP as an aggravating circumstance. The quote cited by Allred referred to proportionality. In fact, *Evans* supports the State's position and discredits Allred's argument regarding domestic disputes:

> Upon review, we find that the imposition of the death penalty in this case is proportionately warranted. While the evidence reveals a close, almost familial type of relationship between Evans and Johnson, this factor alone does not render Evans' death sentence disproportionate. As we explained in *Spencer v. State*, 691 So. 2d1062 (Fla. 1996), "this Court has never approved a 'domestic dispute' exception to imposition of the death penalty." *Id*. at 1065; *see also Blackwood v. State*, 777 So. 2d399, 412 (Fla. 2000); *Zakrzewski v. State*, 717 So. 2d488, 493 (Fla. 1998).FN6 In some murders that result from domestic disputes, we have determined that the cold, calculated, and premeditated aggravating circumstance (CCP) was erroneously found because the heated passions involved were antithetical to "cold"

> deliberation. *See Santos v. State*, 591 So. 2d 160, 162-63 (Fla. 1991) (concluding that the CCP aggravator was not applicable where the defendant was involved in an ongoing, highly emotional domestic dispute with victim and her family, even though he had acquired a gun in advance and made previous death threats against victim; concluding that murder was not "cold" even though it may have appeared to be calculated); *Douglas v. State*, 575 So. 2d 165, 167 (Fla. 1991) (same as to killing that arose from a domestic dispute associated with a lover's triangle). "However, we have only reversed the death penalty if the striking of the CCP aggravator results in the death sentence being disproportionate." *Spencer*, 691 So. 2d at 1065. Instead, our proportionality analysis properly "focuses on whether death is a proportionate penalty after considering the totality of the circumstances in a particular case." *Blackwood*, 777 So. 2dat 412.
>
> > FN6. To the extent that the proportionality analysis in *Blakely v. State*, 561 So. 2d 560 (Fla.1990), and *Wilson v. State*, 493 So. 2d1019 (Fla. 1986), rests on a "domestic dispute exception to imposition of the death penalty" that this Court has disavowed in *Spence*r and subsequent cases, we recede from *Blakely* and *Wilson*.

Evans v. State, 838 So. 2d 1090, 1098 (Fla. 2002). More recently, this Court clarified that the domestic-violence "exception" to the death penalty is unfortunate history. *Floyd v. State*, 34 Fla. L. Weekly S359 (Fla. June 4, 2009).

Likewise, *Santos* is an older case which has been distinguished by subsequent cases which do not subscribe to the domestic dispute exception. *See Carter v. State*, 980 So. 2d 473 (Fla.), cert. denied, --- U.S. ----, 129 S.Ct. 400, 172 L.Ed.2d 292 (2008) (defendant drove to ex-girlfriend's home with weapon, demanded she answer questions about their relationship, and deliberately shot the ex-girlfriend and her boyfriend multiple times at close range); *Davis v. State*, 2 So.

3d 952, 960 -961 (Fla. 2008)(double homicide in which defendant carried weapon to victims' trailer, forced his way in, stabbed first victim then stopped when second victim entered room, persevered through multiple stabbings and obtained new knife when one broke, did not harm child).

The facts in this case fail to support frenzy, anger, passion or loss of control. Conversely, the totality of the facts show that Allred threatened the victims, told a friend he was going to kill them, took a weapon to the scene, persevered in entering the house past two locked doors by shooting out a sliding glass door, passed persons who were not the object of his calculated plan to kill Tiffany and Michael, calmly told Roberts to release him and shot him in the calf when he would not, left the home after dispatching his two victims, and calmly called “911” to report the shootings after which he placed his gun on the ground and waited for the officers.

POINT II

THE TRIAL COURT DID NOT ERR IN FINDING THE MURDERS WERE HEINOUS, ATROCIOUS AND CRUEL

Allred challenges the heinous, atrocious and cruel aggravating circumstance because Tiffany "died nearly instantaneously as the result of six gunshot wounds fired in a matter of seconds." (Initial Brief at 29). Allred acknowledges cases in which this Court held that mental anguish of the victim must be considered as it relates to HAC. Notwithstanding, Allred argues the HAC aggravating circumstance does not apply because:

(a) Allred threatened Tiffany previous, but "not of the previous threats had come to fruition" (Initial Brief at 29);

(b) Tiffany became aware of the final threat "only minutes before her fatal shooting" (Initial Brief at 30);

(c) Tiffany panicked when Allred said he was coming over, but there was no proof the threat was real (Initial Brief at 30);

(d) Allred announced his arrival by slamming into Tiffany's car, but she could not see what was happening (Initial Brief at 30);

(e) When Allred could not get in the front door, he went around back and shot out the sliding glass door; however, this only took a few seconds (Initial Brief at 30);

(f) Tiffany ran to hide when Allred appeared at the back door; however, there was no evidence "Tiffany saw nor realized what was happening other than hearing the sound of gunshots" (Initial Brief at 30);

(g) Allred killed Michael, shot Roberts in the leg when he attempted

> to stop Allred, then found Tiffany in the bathroom at the back of house (Initial Brief at 31);
>
> (h) Allred shot Tiffany "multiple times resulting in her almost instantaneous death" (Initial Brief at 31);
>
> (i) It was less than ten (10) minutes between the threatening message and the shootings (Initial Brief at 31).

Ironically, these facts support not only the State's argument in Point I regarding the cold, calculated aggravating circumstance, but also the trial judge's findings on HAC:

> Generally, shooting deaths do not qualify as HAC because they are instantaneous, or nearly so, and, unless the shooting is accompanied by additional acts resulting in mental or physical torture to the victim, the Supreme Court has consistently held HAC not to apply. *Diaz v. State*, 860 So. 2d 960,966-967 (Fla. 2003); *Rimmer v. State*, 825 So. 2d 304, 327-328 (Fla. 2002); *Robertson v. State*, 611 So. 2d 1228, 1233 (Fla. 1993). However, this aggravating circumstance will apply in cases where the victim is terrorized before being shot or endures fear and emotional strain or the infliction of mental anguish. *Lynch v. State*, 841 So. 2d 362, 369 (Fla. 2003). All of these exceptional factors are present in this case and are forever memorialized in the 911 tape in evidence, during which the listener can hear the helpless victim anticipate her own death after hearing the other victim being shot, her pleas for assistance to the 911 operator, and her screams as she is repeatedly shot time and time again. This piece of evidence is the most horrific piece of evidence this court has heard in a homicide case in nearly twenty-three years as a trial judge. The fright and terror suffered by the victim during that 1:17 minute telephone call is difficult to imagine yet it is plainly evident on the recording.
>
> The court finds HAC to have been proven beyond all doubt and assigns great weight to this aggravating circumstance. Cases such as *Bonifay v. State*, 626 So. 2d 1310 (Fla. 1993) can be distinguished. In *Bonifay*, while the victim was helpless and pleading for his life, the victim was quickly dispatched without witnessing the death of another

> before it became his turn. In *Hutchinson v. State*, 882 So. 2d 943 (Fla. 2004), HAC was approved where the victim suffered substantial mental anguish by witnessing the defendant murder his mother and two siblings and was shot multiple times. The situation here is much more like the situations in *Lynch* and *Hutchinson* than *Bonifay*.

(V2, R206).

Allred had threatened to kill Tiffany and Michael. When he announced his arrival at their residence by slamming into her car, Tiffany knew the violence had begun and Allred was going to make good on his threats. This was confirmed by the banging on the front door, followed by Allred shooting out the glass door in the back. Tiffany could hear gunshots and Allred coming for her. As the trial judge held, the recording of the 911 call was "the most horrific piece of evidence this court has heard in a homicide case in nearly twenty-three years." Although Allred focuses on the duration of the tape as 1:17 minutes, this Court has held that even 30 to 60 seconds of terror supports the HAC aggravating circumstance. *See Rolling v. State*, 695 So. 2d 278, 296 (Fla. 1997). This Court recently explained:

> With respect to the HAC aggravator, this Court has held that "fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel." *James v. State*, 695 So. 2d1229, 1235 (Fla.1997). This Court has also held that "the HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death." *Brown v. State*, 721 So. 2d 274, 277 (Fla.1998). Furthermore, "the victim's mental state may be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances." *Swafford v. State*, 533 So. 2d 270, 277 (Fla.1988); see also *Lynch v. State*, 841 So.2 d 362, 369 (Fla. 2003) ("[T]he focus should be upon the victim's

> perception of the circumstances...."). And, in *Buzia v. State*, 926 So. 2d 1203, 1214 (Fla. 2006), this Court upheld the finding of the HAC aggravator and stated: "Whether this state of consciousness lasted minutes or seconds, he was 'acutely aware' of his 'impending death.'" We have upheld the HAC aggravator where the victim was conscious for merely seconds."

Aguirre-Jarquin v. State, 9 So. 3d 593, 608-609 (Fla. 2009).

In *Aguirre-Jarquin*, the defendant argued that, because he stabbed the victim in the heart and she died instantly, the murder was not HAC. This Court considered the fear and emotional strain of a wheelchair-bound woman listening to her daughter be killed in another room and upheld the HAC aggravating circumstance. Similarly, in this case, Tiffany was not only aware of her impending death, but she could hear Allred murder Michael in the other room as she begged the 911 operator for help. It is important to note that this Court has upheld a finding of HAC where the medical examiner has determined that the victim was conscious for merely seconds. *See Francis v. State*, 808 So. 2d 110, 135 (Fla. 2001) (sisters killed in presence of each other could have remained conscious for as little as a few seconds and for as long as a few minutes); *Rolling v. State*, 695 So. 2d 278, 296 (Fla. 1997) (upholding HAC where medical examiner concluded that victim was conscious anywhere between 30 and 60 seconds after she was initially attacked); *Peavy v. State*, 442 So. 2d 200, 202-03 (Fla.1983) (upholding finding of HAC where medical examiner testified that victim lost consciousness within seconds and bled to death in a minute or less and there were no defensive

wounds).

The heinousness aggravator is also supported by this Court's decisions in *Farina v. State*, 801 So. 2d 44 (Fla. 2001), *Wyatt v. State*, 641 So. 2d 1336 (Fla. 1994), and *Hannon v. State*, 638 So. 2d 39 (Fla. 1994). Those cases, like this one, were gunshot murders which were preceded by a period of time in which the victim was terrorized before being murdered.

When reviewing a trial court's finding of an aggravator, it is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt-that is the trial court's job. Rather, the task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding. *Willacy v. State*, 696 So. 2d693, 695 (Fla. 1997). The trial judge's findings are supported by competent substantial evidence. The trial judge also distinguished the cases cited by Allred both at the trial level and on appeal.

POINT III

FLORIDA'S DEATH PENALTY STATUTE IS NOT UNCONSTITUTIONAL .

In this point, Allred raises a series of constitutional claims which will be addressed individually.

A. Whether the trial court erred in weighing mitigating evidence. Allred claims the trial judge "glossed over" mitigation and:

(1) assigned little weight to the guilty plea (Initial Brief at 39);

(2) classified Allred's emotional disturbance as a non-statutory mitigator rather than statutory: Allred claims the emotional disturbance was "extreme" (Initial Brief at 41);

(3) rejected sexual abuse (Initial Brief at 42);

(4) gave little weight to developmental problems at age 5 or 6 (Initial Brief at 42);

(5) failed to mention Allred's father's drinking problems and domestic violence in the home (Initial Brief at 44);

(6) rejected age of 21 as mitigation (Initial Brief at 44).

Allred also disputes the factual basis for the findings.

1. Weight assigned guilty plea. The trial judge held:

> THE DEFENDANT ACCEPTED RESPONSIBILITY BY ENTERING A PLEA OF GUILTY TO ALL THE CHARGES IN THE INDICTMENT.
>
> This mitigating circumstance has been established. The question of whether the entry of a guilty plea should be given significant weight depends upon several factors. First, was the crime solved by entry of

> the plea? In other words, was the identity of the perpetrator in doubt? That is certainly not the case here. There were at least six eye witnesses or near eye witnesses to the murders in this case and the defendant confessed. Second, did the guilty plea substantially reduce the use of the court's limited resources? In this case, it did to some extent. There was no jury trial on the guilt phase and that was a savings. However, the state was required to put on the same case in the penalty phase as it would have presented in the guilty phase, so the only savings there was the fact that the matter was presented without a jury. Accordingly, the court assigns little weight to this mitigating circumstance.

(V2, R208-09). These findings are supported by substantial competent evidence. Allred murdered Michael and Tiffany in front of five other people and two neighbors saw him drive up and smash Tiffany's car. He was clearly identified to 911 dispatch, and when the officers arrived at his house, Allred told them he was the person they were looking for. The murder weapon was lying at his feet. Allred confessed. The evidence of guilt was overwhelming, so that fact Allred entered a plea was unremarkable. The trial judge's assessment of reduction of labor and costs was also supported by the record. The State presented a full penalty phase to establish aggravating circumstances beyond a reasonable doubt. Fifteen witnesses were called in the State's case.

This Court reviews the weight the trial court ascribes to mitigating factors under the abuse of discretion standard and will not reweigh these mitigators. *See Smith v. State,* 998 So. 2d516, 527 (Fla.2008). This Court defers to the trial court's determination "unless no reasonable person would have assigned the weight the

trial court did." *Rodgers v. State*, 948 So. 2d655, 669 (Fla. 2006).

2. Emotional disturbance. The trial judge held:

> THE DEFENDANT WAS SUFFERING FROM EXTREME EMOTIONAL DISTURBANCE AT THE TIME OF THE MURDERS.
>
> The defendant was emotionally disturbed by the fact that Tiffany Barwick broke up with him and started sleeping with his best friend. However, the court is not convinced that he was incapable of conforming his conduct to the requirements of law as defense counsel suggests in the Defendant's Sentencing Memorandum. The murders in this case were the result of careful thought and planning. The defendant selected an opportunity to kill the victims in this case, knowing others would be present, in order to carry out his vendetta with maximum effect. The video of the defendant's statement at the Oviedo Police Department, which was taken shortly after the murders, is most telling. The defendant presents himself during the statement as being calm, cool, and in control of himself. There is no indication of an extreme emotional disturbance. Therefore, the court finds that the defendant was suffering from an emotional disturbance at the time of the murders but not an extreme emotional disturbance. The court assigns moderate weight to this mitigating circumstance.

(V2, R209-210). These findings are supported by substantial competent evidence. Allred planned to commit the murders, drove to the scene with his gun fully loaded, skillfully executed his plan and two persons, called 911 to report his feat, then announced to officers who came to arrest him that he was the person they were looking for. The facts support the trial court findings that, although Allred was upset about Tiffany and Michael, this was not an all-consuming rage which reached the level of "extreme." Allred was completely in control of the events and himself.

This Court reviews the weight the trial court ascribes to mitigating factors under the abuse of discretion standard and will not reweigh these mitigators. *See Smith v. State,* 998 So. 2d516, 527 (Fla.2008). This Court defers to the trial court's determination "unless no reasonable person would have assigned the weight the trial court did." *Rodgers v. State*, 948 So. 2d655, 669 (Fla. 2006).

3. Reject sexual abuse. The trial judge held:

> OTHER FACTORS IN THE DEFENDANT'S RECORD AND BACKGROUND AS WELL AS OTI-IER FACTORS RELEVANT TO THE CIRCUMSTANCES OF THE CRIMES, INCLUDING LIKELY SEXUAL ABUSE AS A CHILD, DEVELOPMENTAL PROBLEMS AT THE AGE OF FIVE OR SIX THAT IMPACTED HIS EDUCATIONAL ABILITIES AND HIS ABILITY TO DEVELOP SOCIALLY.
>
> There is no credible evidence that the defendant suffered sexual abuse as a child. No witness testified that the defendant was sexually abused and the suggestion that he was is speculative at best. The developmental problem at age five or six appears to have hindered the defendant's ability to develop socially and that may have contributed to his reaction to his break-up with Tiffany Barwick and to that extent, the court finds this mitigating factor to have been established. There is no evidence that this developmental problem caused impact to his later education. The defendant obtained a high school diploma, an A.A. degree and a high level of skill in computer technology. The court assigns little weight to the defendant's developmental problem.

(V2, R210-211).

The trial judge did not abuse his discretion in rejecting the proposed mitigation of sexual abuse because there was no competent evidence to support that mitigator. The only testimony regarding this issue was from Allred's mother

who said that around age 6 Allred became hyper and emotional, "just kind of a different child." (V4, PP347, 348). Allred's paternal grandparents lived in a mother-in-law suite attached to their home in Winter Park. They occasionally babysat Allred and his brothers. (V4, PP347, 348-49). When Allred's behavior changed, Tora took him to the pediatrician. The pediatrician thought Allred might have been sexually abused. (V4, PP351). Allred never claimed he had been sexually abused. (V4, PP387). Allred's paternal cousin William, who was fifteen years older than Allred, claimed he had been sexually abused by their paternal grandfather and great-uncle. (V4, PP361, 386). The grandfather and great-uncle denied the allegation. (V4, PP392).

A trial judge does not abuse his discretion when the evidence does not support mitigation. *See Frances v. State*, 970 So. 2d 806, 819 (Fla. 2007). It is within the trial court's discretion to decide whether a mitigating circumstance is proven. *Pardo v. State*, 563 So. 2d 77, 80 (Fla.1990); *Scull v. State*, 533 So. 2d 1137, 1143 (Fla.1988); *Teffeteller v. State*, 439 So. 2d 840, 846 (Fla.1983). As the trial judge found, the evidence of sexual abuse was speculative.

4. Weight given developmental problems. This argument involves the sexual abuse argument in #3 above. The trial judge held:

> OTHER FACTORS IN THE DEFENDANT'S RECORD AND BACKGROUND AS WELL AS OTHER FACTORS RELEVANT TO THE CIRCUMSTANCES OF THE CRIMES, INCLUDING LIKELY SEXUAL ABUSE AS A CHILD, DEVELOPMENTAL

> PROBLEMS AT THE AGE OF FIVE OR SIX THAT IMPACTED HIS EDUCATIONAL ABILITIES AND HIS ABILITY TO DEVELOP SOCIALLY.
>
> There is no credible evidence that the defendant suffered sexual abuse as a child. No witness testified that the defendant was sexually abused and the suggestion that he was is speculative at best. The developmental problem at age five or six appears to have hindered the defendant's ability to develop socially and that may have contributed to his reaction to his break-up with Tiffany Barwick and to that extent, the court finds this mitigating factor to have been established. There is no evidence that this developmental problem caused impact to his later education. The defendant obtained a high school diploma, an A.A. degree and a high level of skill in computer technology. The court assigns little weight to the defendant's developmental problem.

(V2, R210-211).

This Court reviews the weight the trial court ascribes to mitigating factors under the abuse of discretion standard and will not reweigh these mitigators. *See Smith v. State,* 998 So. 2d516, 527 (Fla.2008). Although Allred disputes the trial court's fact findings, these findings are supported by the record.

As to the developmental problems at age 5 or 6, Allred's mother testified he was a normal, happy baby. (V5, PP344, 346-47). At age six, his behavior "suddenly" changed. He became hyper and emotional, "just kind of a different child." (V4, PP347, 348). When Allred's behavior changed, the mother took him to a pediatrician. (V4, PP351). The pediatrician referred Allred to a psychiatrist. (V4, PP349).The psychiatrist diagnosed Allred with a "well defined tic disorder" and "ADHD." Allred was prescribed Clonidine. (V4, PP350, 353). He has never been

diagnosed with a psychiatric disorder. (V4, PP387).

Rose Davis taught Allred in the third grade. (V5, PP433-34). He made good grades but was tired all the time and fell asleep in class. He did not do his homework and was very withdrawn. He did not participate in class or interact with her or his classmates. (V5, PP435). She had a conference with Allred's mother, but she did not see an improvement. (V5, PP437).

Sue Leidner taught Allred in the gifted classes in sixth and seventh grade. (V5, PP441, 445). Allred was very quiet, "a gentle soul." (V5, PP445). He never took a leadership role. He was a loner and was not verbal. (V5, PP446). At times, the other students picked on him. (V5, PP449).

Susan Turner taught Allred in her web design class. (V5, PP429-30). He was an average student, quiet, and never had to be disciplined. He was different than other students. He was a loner and withdrawn and did not interact with his classmates. (V5, PP430).

The trial court found that Allred's developmental difficulties affected him socially and may have contributed to his reaction when Tiffany broke up with him. These findings are supported by the record.

As to the impact developmental problems had on his education, Allred's mother testified that Allred did well when he first started school. (V4, PP354, 357). In third grade, it was determined Allred had a learning disability and was

subsequently placed in learning disabled classes. (V4, PP358-59). After he tested with a high IQ, Allred was placed in gifted classes. (V4, PP359-60). Allred attended college and received a two-year degree in accounting. His job was to show people how to use software for car and RV dealerships. (V4, PP385). The trial court finding that developmental problems had no significant impact on Allred's later education is supported by the record.

The trial judge did not abuse his discretion in finding and weighing these mitigating circumstances. This Court defers to the trial court's determination "unless no reasonable person would have assigned the weight the trial court did." *Rodgers v. State*, 948 So. 2d655, 669 (Fla. 2006).

5. Fail to mention father's alcohol problems and domestic disputes.

Allred claims the trial judge failed to consider this mitigation, but provides no record cite to support this argument. The trial judge addressed verbatim each mitigating circumstance presented in Defendant's Sentencing Memorandum in Support of a Life Sentence. (V1, R180-181). The trial judge did mention the fathers alcohol abuse in the narrative history part of the sentencing order. Alcoholism was never presented as an independent and separate mitigating factor. Allred's developmental age, developmental problems, and ability to develop socially were all considered. There is nothing in *Campbell* that requires a trial judge to list every fact presented. The trial judge complied with *Campbell* and

addressed each mitigator presented in the sentencing memo. Error, if any, was harmless considering the detailed sentencing order and minimal significance of this mitigation compared to the aggravating circumstances. *Doorbal v. State,* 837 So. 2d940, 960 (Fla. 2003); *Hurst v. State*, 819 So. 2d689, 699 (Fla. 2002).

6. Reject age of 21 as mitigation. The trial judge found:

> THE DEFENDANT'S EMOTIONAL AND DEVELOPMENTAL AGE AT THE TIME OF THE MURDERS.
>
> The defendant was 21 years of age at the time of the murders. He was a high school graduate who held an A.A. degree and was proficient with computer technology. He had a high I.Q. of approximately 130. There is no credible evidence that would establish the defendant's emotional age was less than his chronological age. The defendant did not present any evidence that he had undergone a mental evaluation and no expert testified that he was less than 21 years of age emotionally. Accordingly, the court finds this mitigating circumstance not to have been established. *Lebron v. State*, 982 So. 2d 649 (Fla. 2008).

(V2, R210).

As this Court recently summarized with regard to the mitigating circumstance of age:

> [W]here the defendant is not a minor, as in the instant case, "no per se rule exists which pinpoints a particular age as an automatic factor in mitigation." [*Shellito v. State*, 701 So. 2d837, 843 (Fla.1997)]. The existence and weight to be given to this mitigator depends on the evidence presented at trial and the sentencing hearing. *See id*. For example, this Court has held that age twenty, in and of itself, does not require a finding of the age mitigator. *See Garcia v. State*, 492 So. 2d360, 367 (Fla.1986).
>
> In *Gudinas v. State*, 693 So. 2d953 (Fla.1997), we held, "Although

> Gudinas is certainly correct that he had a troubling past and had always been small for his age, there was no evidence presented that he was unable to take responsibility for his acts and appreciate the consequences thereof at the time of the murders." *Id*. at 967. In that case, we found that there was substantial, competent evidence in the record to support the trial court's finding "that Gudinas was mentally and emotionally mature enough that his age should not be considered as a mitigator." *Id*.

Floyd v. State, 34 Fla. L. Weekly S359 (Fla. June 4, 2009), *quoting Nelson v. State*, 850 So. 2d514, 528-29 (Fla.2003). In *Nelson*, this Court upheld the lower court's rejection of the age mitigator and concluded that evidence demonstrated the maturity of the defendant based on the following considerations:

> [H]e obtained and temporarily held a job; he provided his child's mother with money to buy necessities when she was visiting; Nelson did not have a home of his own, but arranged to stay with [others]; and Nelson did not have a driver's license or a car, yet was able to travel places on his own.

Nelson at 529. This Court has further expounded on the age factor:

> The determination of whether age is a mitigating factor depends on the circumstances of each case, and is within the trial court's discretion. *Scull v. State*, 533 So. 2d1137, 1143 (Fla.1988). Under our review for abuse of discretion, we will uphold the trial court's determination unless it is "arbitrary, fanciful, or unreasonable," so that no reasonable person would adopt the trial court's view. *Canakaris v. Canakaris*, 382 So. 2d1197, 1203 (Fla.1980). This Court has frequently held that a sentencing court may decline to find age as a mitigating factor in cases where the defendants were twenty to twenty-five years old at the time their offenses were committed. *See Garcia v. State*, 492 So. 2d360, 367 (Fla.1986); *Mills v. State*, 476 So. 2d172, 179 (Fla.1985). The court found that Caballero committed the crime at the age of twenty. The court considered Caballero's age in light of the evidence presented, including the results of psychological tests. The court concluded that Caballero did not demonstrate a lack of

> mental or emotional maturity, nor did Caballero demonstrate that he was unable to take responsibility or appreciate the consequences of his acts. In light of the record below, we conclude that the trial court did not abuse its discretion by rejecting Caballero's age as a mitigating factor.

Caballero v. State, 851 So. 2d655, 661 -662 (Fla. 2003).

The trial judge did not abuse his discretion by considering the evidence and finding age was not mitigating. *See Frances v. State*, 970 So. 2d 806, 819 (Fla. 2007). It is within the trial court's discretion to decide whether a mitigating circumstance is proven. *Pardo v. State*, 563 So. 2d 77, 80 (Fla.1990); *Scull v. State*, 533 So. 2d 1137, 1143 (Fla.1988); *Teffeteller v. State*, 439 So. 2d 840, 846 (Fla. 1983).

B. Proportionality. Allred claims his death sentence is not proportional. (Initial Brief at 47). In deciding whether a death sentence is proportionate, this Court must consider the totality of the circumstances and compare the case with other capital cases. *See Sexton v. State*, 775 So. 2d 923, 935 (Fla. 2000). This analysis "is not a comparison between the number of aggravating and mitigating circumstances." *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990). Instead, this Court must look to the nature of and the weight given to the aggravating and mitigating circumstances. For purposes of proportionality review, this Court accepts the jury's recommendation and the trial judge's weighing of the aggravating and mitigating evidence. *Bates v. State*, 750 So. 2d 6, 12 (Fla. 1999).

Allred argues that his death sentence is not proportional because the murders were the product of a domestic dispute. (Initial Brief at 49). Allred acknowledges that this Court has repeatedly held that there is no "domestic dispute" exception to the death sentence. As this Court has explained:

> Upon review, we find that the imposition of the death penalty in this case is proportionately warranted. While the evidence reveals a close, almost familial type of relationship between Evans and Johnson, this factor alone does not render Evans' death sentence disproportionate. As we explained in *Spencer v. State*, 691 So. 2d 1062 (Fla. 1996), "this Court has never approved a 'domestic dispute' exception to imposition of the death penalty." *Id*. at 1065; see also *Blackwood v. State*, 777 So. 2d 399, 412 (Fla. 2000); *Zakrzewski v. State*, 717 So. 2d 488, 493 (Fla. 1998).FN6 In some murders that result from domestic disputes, we have determined that the cold, calculated, and premeditated aggravating circumstance (CCP) was erroneously found because the heated passions involved were antithetical to "cold" deliberation. *See Santos v. State*, 591 So. 2d 160, 162-63 (Fla. 1991) (concluding that the CCP aggravator was not applicable where the defendant was involved in an ongoing, highly emotional domestic dispute with victim and her family, even though he had acquired a gun in advance and made previous death threats against victim; concluding that murder was not "cold" even though it may have appeared to be calculated); *Douglas v. State*, 575 So. 2d 165, 167 (Fla. 1991) (same as to killing that arose from a domestic dispute associated with a lover's triangle). "However, we have only reversed the death penalty if the striking of the CCP aggravator results in the death sentence being disproportionate." *Spencer*, 691 So. 2d at 1065. Instead, our proportionality analysis properly "focuses on whether death is a proportionate penalty after considering the totality of the circumstances in a particular case." *Blackwood*, 777 So. 2d at 412.
>
> FN6. To the extent that the proportionality analysis in *Blakely v. State*, 561 So. 2d 560 (Fla. 1990), and *Wilson v. State*, 493 So. 2d1019 (Fla. 1986), rests on a "domestic dispute exception to imposition of the death penalty" that this Court has disavowed in *Spence*r and subsequent cases, we recede from

Blakely and *Wilson*.

Evans v. State, 838 So. 2d 1090, 1098 (Fla. 2002). More recently, this Court clarified that the domestic-violence "exception" to the death penalty is unfortunate history. *Floyd v. State*, 34 Fla. L. Weekly S359 (Fla. June 4, 2009).

This case involves a double homicide. The trial judge found three aggravating circumstances for the murder of Michael Ruschak: cold, calculated, and premeditated; during a burglary; and prior violent felony (contemporaneous murder of Tiffany Barwick) (V2, R205-06). The trial judge found four aggravating circumstances for the murder of Tiffany Barwick: heinous, atrocious, and cruel; cold, calculated, and premeditated; during a burglary; and prior violent felony (contemporaneous murder of Michael Ruschak) (V2, R206-208). The trial judge gave little weight to acceptance of responsibility, and sexual abuse/developmental difficulties/social development. The trial judge gave moderate weight to cooperation with law enforcement and emotional disturbance.

Both the HAC and CCP aggravators are "two of the most serious aggravators set out in the statutory sentencing scheme." *Buzia v. State*, 926 So. 2d 1203, 1216 (Fla. 2006). Similarly, the prior violent felony aggravator is regarded as one of the weightiest aggravators. *See Jones v. State*, 998 So. 2d573 (Fla. 2008). In the present case, that prior violent felony was murder.

This case is proportionate to other homicides involving two victims and

similar aggravating and mitigating circumstances. *See Aguirre-Jarquin v. State*, 9 So. 3d 593 (Fla. 2009); *Buzia v. State*, 926 So. 2d 1203, 1216 (Fla. 2006); *Reynolds v. State*, 934 So. 2d 1128 (Fla. 2006); *Lynch v. State*, 841 So. 2d 362, 378 (Fla. 2003); *Smithers v. State*, 826 So. 2d 916, 931 (Fla. 2002); *Morton v. State*, 789 So. 2d 324, 328-29 (Fla. 2001). The State also notes that this Court has upheld death sentences where the prior violent felony aggravator was the only one present. *See, e.g.*, *Rodgers v. State*, 948 So. 2d 655 (Fla. 2006); *LaMarca v. State*, 785 So. 2d 1209, 1217 (Fla. 2001); *Ferrell v. State*, 680 So. 2d 390, 391 (Fla. 1996).

C. Sufficiency of the evidence. Although not raised by Allred, this Court will always review the record of a death penalty case to determine whether the evidence is sufficient to support the murder conviction. *Winkles v. State*, 894 So. 2d 842, 847 (Fla. 2005). In the present case, Allred pled guilty. When a defendant has pled guilty to the charges resulting in a penalty of death, this Court's review shifts to the knowing, intelligent, and voluntary nature of that plea. *Id.* (*quoting Lynch v. State*, 841 So. 2d 362, 375 (Fla. 2003). There is no claim the guilty plea was involuntary or the plea colloquy was deficient.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Appellee respectfully requests that all requested relief be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Christopher S. Quarles**, Assistant Public Defender, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118 on this ___ day of September, 2009.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Times New Roman 14 point.

BARBARA C. DAVIS
ASSISTANT ATTORNEY GENERAL