IN THE SUPREME COURT OF FLORIDA

ANDREW ALLRED,	)	
	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER SC08-2354
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY, FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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	)	
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_____	)	

STATEMENT OF THE CASE

On October 23, 2007, a grand jury indicted Andrew Richard Allred, the Appellant, with two counts of first-degree premeditated murder of Michael Ruschak and Tiffany Barwick. The grand jury also charged Allred with 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. (I 33-37) The state filed a notice of their intent to seek the death penalty on October 25, 2007. (I 38)

On April 30, 2008, Appellant signed a written plea agreement withdrawing his previously entered pleas of not guilty and tendered pleas of guilty to all five counts as charged. There was no agreement with the state as to sentence. (I 45-

47; IV 472-482)

On May 15, 2008, Appellant requested the court to approve his waiver of a jury for the impending penalty phase. Appellant also asked that he be excused from the penalty phase trial itself. These requests were made against the advice of counsel and over the objection of the state. After conducting a colloquy, the trial court granted both of Appellant's requests. (I 52-53;V 490-502)

At a pretrial conference on August 14, 2008, the Appellant first indicated that he wanted to fire the Office of the Public Defender as his counsel. The trial judge indicated that he would address Appellant's request at a subsequent date. (V 512) Appellant subsequently acquiesced in the continued representation by his public defenders, if the trial could occur sooner rather than later. (V 517-526)

The penalty phase was held on September 22 - 24, 2008. (III 1-200; IV 201-400; V 401-463) In addition to testimony and evidence, the trial court heard two victim impact statements. (V 451-459)

The trial court conducted a ***Spencer***[1] hearing on October 2, 2008. (I 173-174; V 530-542) The state filed written closing argument. (I 177-179) Appellant filed a sentencing memorandum in support of life sentences. (I 180-192) The state filed a written closing argument. (I 177-179)

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

On November 19, 2008, the trial court sentenced Appellant to death on each count of first-degree murder. (I 197; V 543-548) The trial court filed a sentencing order setting forth his findings regarding the aggravating and mitigating circumstances. (II 198-212) The trial court found that both murders were committed in a cold, calm, calculated and premeditated manner with any pretense of moral or legal justification. In each case, the trial court gave this particular factor great weight. The trial court also used the contemporaneous murder of each of the two victims to satisfy the prior violent felony conviction aggravating circumstance for each murder. The trial judge gave great weight to this aggravating factor in both cases. Additionally, the trial court found that the murder of Tiffany Barwick was especially heinous, atrocious, or cruel which he assigned great weight. Finally, the trial court found that the murder of Michael Ruschak was committed while the defendant was engaged in a burglary. However, since the burglary was merely incidental to Appellant's premeditated plan to kill Michael Ruschak, the court gave this factor little weight. The trial court neglected to find this particular aggravator for the murder of Tiffany Barwick. The trial court rejected the state's proposed aggravator that Appellant knowingly created a great risk to many persons. (II 205-208)

The trial court found the following mitigating circumstances:

(1) Appellant accepted responsibility by entering a plea of guilty to all charges in the indictment (little weight);

(2) Appellant cooperated with law enforcement by immediately confessing to both murders (moderate weight);

(3) Appellant suffered from emotional disturbance at time of the murders, although that disturbance was not extreme (moderate weight); and

(4) Appellant suffered from developmental problems at a young age (little weight).

(II 208-210) The trial court rejected Appellant's age as mitigation and also stated there was no credible evidence that Appellant suffered sexual abuse as a child. The trial court found such a suggestion speculative at best. (II 210)

The trial court sentenced Appellant to natural life for counts three and four and five years imprisonment on count five. (II 213-220) Appellant filed a timely notice of appeal on December 11, 2008. (II 236-237) This brief follows.

STATEMENT OF THE FACTS

Introduction

Love, commitment, rejection, jealousy, and rage; these are the facts of this case. The facts surrounding the events of September 24, 2007, are relatively straight forward and undisputed. Andrew Allred was somewhat of a social misfit. He was a loner who had few friends. Even those friends thought he was a bit odd.

But Andrew Allred got lucky. He met Tiffany Barwick, an attractive young women. The couple fell in love and Tiffany moved into Andrew's room that was attached to his family home. Tiffany and Andrew remained happy for several months. Their relationship lasted approximately one year.

On August 25, 2007, the couple celebrated Andrew's 21st birthday. They had a birthday party at the Allred family home. At that party, Tiffany Barwick suddenly and publicly ended her relationship with Andrew Allred. Understandably, Andrew Allred became extremely upset and distraught. In front of the party guests, Andrew went into a rage and began throwing Tiffany's clothes from the closet out into the front yard. Ultimately, the police were called to this domestic disturbance, but no arrests were made.

After Tiffany left Andrew and moved out, she became romantically

involved with Andrew's best friend, Michael Rushack. In the month that followed, Andrew stewed about the break up and Tiffany's subsequent involvement with his former best friend. During those thirty days, Andrew and Barwick, and Ruschak had emotional exchanges during internet chats, emails, and text messages. The exchanges became extremely hostile on the day of the murders. (I 129-143; State's Exhibits 46, 47, 48) Appellant also had an on-line conversation with a male friend indicating his frustration. (I 145-146; State's Exhibit 50) His anger began when he discovered the sexual relationship between Barwick and Ruschak.

(I 159-161; Defense Exhibit 1)

The Murders

On September 24, 2007, Steven McCavour and Eric Roberts were hosting a social gathering at their home at 130 Shady Oak. Michael Ruschak was also living at the house. Tiffany Barwick was also staying at the house on a temporary basis. Several other friends had gathered to watch a favorite television show and to cook some ribs. (III 30-44)

At some point in the evening, Michael Ruschak received a message from Andrew Allred. Ruschak announced to the group that Andrew was leaving his

house and heading over to 130 Shady Oak Lane.[2] Since Tiffany and Michael knew that Allred was upset about their new relationship, some people in the group became fearful. There was a short discussion about what action to take. Some wanted to call the police, but they were unsure if Allred's threat was real or yet another empty one. Someone suggested calling Allred's mother to determine if had actually left his home. (III 105-106, 110-115, 124-125)

Within a matter of minutes (certainly less than ten) the group heard a loud banging in the front yard. The sound was Andrew Allred ramming Tiffany Barwick's car that was parked in the driveway. A minute later, the group heard Allred attempting to enter the front door. When that was unsuccessful, Allred went to the back of the house where he shot out the glass of the sliding back door. (III 45-50, 73-76, 105, 120-121)

The group began to scatter. Allred walked through the living room and found Michael Ruschak in the kitchen. Allred immediately fired four shots killing Ruschak instantly. (IV 316-321) At that point, Eric Roberts grabbed Allred from behind in a vain attempt to prevent further carnage. After a heated verbal exchange, Allred freed himself from Roberts' grasp by shooting Roberts in the back the calf. (III 50-55)

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[2]Tiffany apparently also received an instant message from

Allred then went to the bathroom off the back bedroom where he found Tiffany Barwick standing in the tub talking on her cell phone with the 911 operator. Allred immediately fired six shots in rapid succession, killing Barwick instantaneously. (IV 321-327) Two of the bullets entered Barwick's back. (IV 327-333) The order of the shots and resulting wounds could not be determined for either victim. (IV 329-331) In both cases, the shots were fired in very fast order with no delay between each shot. (IV 333)

Appellant's Arrest

After fleeing the scene, Appellant called the Seminole County Sheriff's Office indicating that he was going to commit suicide. The department dispatched Deputy Kohn. Kohn found Appellant walking on a dirt road toward Allred's home at 1235 Oklahoma Street. Appellant's cell phone and weapon were found on the ground next to him. Appellant told the deputy, "I'm the guy you are looking for." (III 128) After Kohn arrested Appellant, Allred asked Kohn if the people were dead. Kohn replied that he could not provide that information and that there was a pending investigation. Once he was secured in the back of the police car, Allred stated, "I knew I killed someone, I shot fourteen times." (III 128, 183)

Appellant indicating that he was coming over. (III 110)

Allred's Confession

Following his arrest, Allred waived his constitutional rights and agreed to an interview with Detectives Weaver and Edwards of the Oviedo Police Department. (III 148-53) Before giving a statement, Appellant first wanted to know the condition of the people who were shot. (III 153-54) When asked, Appellant stated that he thought that only Tiffany Barwick and Michael Ruschak had been shot. (III 154) The detectives told Appellant that they were investigating the victims' condition. Appellant explained that Tiffany Barwick was his ex-girlfriend and that Michael Ruschak was his ex-best friend. (III 154) Appellant candidly admitted shooting both of them that day using a Springfield XB .45. (III 155)

Appellant told police that earlier that evening, Appellant went to dinner at Outback with a friend. He had one beer with dinner. He then went to Albertson's and bought some beer, which he claimed he did not drink. (III 156-57) Allred revealed that he had been fired from his Sea World computer corporate training job that same day. (III 167-168) Allred went home but soon decided to go over to the house where Tiffany Barwick was staying. Appellant drove his truck to that house where he preceded to ram Tiffany's white Cavalier automobile. Appellant explained that he went to the house specifically to

accomplish this goal and not to shoot anyone. (III 158) Appellant could not explain why or exactly when he decided to go into the house to shoot Barwick and Ruschak. (III 159)

Appellant was able to enter the house when he shot out the glass in the sliding glass door in the rear of the home. (III 159) When he entered the living room, he saw several people, all of whom he knew. In addition to Tiffany Barwick and Michael Ruschak, Appellant saw Eric Roberts, whose father owned the house, Phillip Cammarata, Justin Kovacich, and another girl whom Appellant knew only as Lyla. (III 159)

Once he entered the house, Appellant searched out and found Michael Ruschak in the kitchen. Allred fired several shots in rapid succession killing Ruschak with a bullet to his chest. (III 161) At that point, Eric Roberts jumped on Appellant and tried to take his gun away. (III 160-61) Appellant then found Tiffany Barwick hiding in the bathroom where he shot her. (III 161-62) When the detectives asked, Appellant replied that he did not think that he shot anyone other than Michael or Tiffany. (III 162) Appellant left the house through the front door, got into his black Dodge Ram, and drove home with the gun inside the center console of the truck. (III 162-63) As he drove home following the shooting, Appellant called 911 and reported that people had been shot. (III 168-

69)

Allred explained to the detectives that Ruschak was his best friend from high school. (III 170-71) Appellant had hosted his own birthday party with Tiffany on August 25. Approximately fifty people attended. Much alcohol was consumed. Tiffany broke up with Appellant at that birthday party. This angered Appellant and he began to throw her personal belongings out into the street. It became so contentious that the police were called. (III 173-74) Their relationship had lasted one year. (III 174)

Allred told the detectives that after the shootings, he thought about suicide. Everything seemed to catch up with him at one time. He had no girlfriend, no friends, and had lost his job. (III 192) The interview concluded with Appellant again asking for information about the condition of the victims. (III 196-97)

The Case for Mitigation

The trial court concluded that the evidence established that Andrew Allred accepted responsibility for his actions. He entered a plea of guilty which saved the state of Florida at least some resources and money. (II 209-210) However, the trial court noted that the only real savings to the state was the fact that Appellant waived his right to a jury at the penalty phase after pleading guilty. Hence, the trial court gave little weight to this mitigating factor. The trial court

failed to weigh that Appellant cooperated with police and immediately confessed. The court noted that, since the crimes had been committed in the presence of numerous witnesses, the case would not have been difficult to solve. (II 208-209) However, the trial court did assign moderate weight to the mitigating circumstance that Appellant cooperated with law enforcement when he immediately admitted shooting both victims. (II 209)

The trial court also accepted the fact that Appellant suffered from an emotional disturbance at the time of the murders. (II 209-210) Specifically, Appellant had been extremely distraught ever since Tiffany Barwick had rejected him be ending their year-long relationship. Tiffany then became involved in a romantic, sexual relationship with Appellant's best friend and first victim, Michael Ruschak. (II 209) The trial court did not consider the emotional disturbance to be extreme (thus qualifying as non-statutory rather than statutory mitigation). The court based his conclusion on the "careful thought and planning" of the murders as well as Appellant's demeanor during his videotaped confession. (II 209-210) As a result, the trial court assigned only moderate weight to this mitigating factor. (II 209-210)

In rejecting Appellant's emotional and developmental age at the time of the murders, the trial court relied on Appellant's chronological age of 21 at the

time of the murders; the fact that Appellant was a high school graduate who had earned a associate's degree; Appellant's proficiency with computer technology; and Appellant's high IQ of 130. (II 210)

The trial court did accept the fact that Appellant suffered developmental problems at the age of five or six which hindered his ability to develop socially. The trial judge accepted the fact that these problems may have contributed to his reaction to his break-up with Tiffany Barwick. (II 210) However, the trial court found no evidence that his developmental problems impacted his later education. The court based this conclusion on Appellant's ability to earn a high school diploma as well as an associate's degree.

Although the trial court made no mention of the evidence in his findings of fact, defense counsel presented evidence of Andrew's difficult childhood and family situation. (IV 344-400; V 404-450) Andrew was a happy baby. However, Appellant became a sad, withdrawn child with behavior problems when he was approximately six years old. (IV 346-348) Andrew also developed a well-established tic disorder. Andrew constantly licked his hand and then rubbed his eye. (IV 350) A psychiatrist confirmed the diagnosis.

A trip to the pediatrician followed. The pediatrician believed that Andrew had been sexually abused. (IV 351) The timing of all of these problems

corresponded with Andrew's close proximity to his paternal grandfather who was subsequently accused of sexually abusing other young male relatives. (IV 348-349, 360-363; V 405, 416-424) The allegation were serious enough, that police became involved. (IV 363) The trial court rejected the alleged sexual abuse as mitigating evidence, calling it "speculative" at best. (II 210)

About this same time, a psychiatrist diagnosed Andrew with attention deficit hyperactivity disorder. (IV 353) The doctor prescribed Clonidine rather than the usually prescribed Ritalin. Children who took Ritalin sometime suffered a tic disorder. Since Andrew already suffered from a significant tic disorder, the doctor chose a different medication. (IV 353)

Andrew's father admitted that he had a drinking problem. (IV 396-399) His alcohol abuse led to domestic violence in the home. When Andrew was approximately twelve years old, his father came home intoxicated and began to wield a rifle. Andrew called 911, and the police were dispatched. His father was subsequently arrested and charged with battery. (IV 368-372)

In the third grade, Andrew's school performance declined. His teachers believed that he might have some type of learning disability. (IV 357-358) Subsequent testing revealed that he had a high IQ and he was eventually placed in the gifted program. (IV 359-3060)

When Andrew was in middle school, his surrounding community changed. Many families associated with the University of Central Florida moved into the area. This resulted in a socio-economic divide between the rural students, such as Andrew, and the more affluent, intellectual families. During this time period, Andrew became more withdrawn and more of a loner. Additionally, he discontinued his participation in the gifted classes. (V 440-448) The more affluent students tended to pick on Andrew. They ridiculed him for wearing the same clothing two days in a row. Additionally, Andrew had no computer at home, which prevented him from completing his homework assignments. (V 449)

Andrew went to Oviedo High School through the eleventh grade. He then left high school and eventually obtained his high school diploma at Seminole Community College. (IV 363-364) Andrew's high school teacher noticed that he was very withdrawn. He did not interact with other children in his class at all. She called him a loner. "He was not like the other students." (V 430) This same teacher reacted with surprise when told that Andrew had been in gifted classes prior to being in her class. (V 431) Andrew's third grade teacher testified that, although Andrew made good grades, he was tired all the time. She worried when he slept through class and did not complete his homework. She described him as

very withdrawn, very standoffish, with little participation in class and no interaction with other people, including the teacher. (V 435) She attempted to help Andrew, but noticed little change. (V 436-437)

After Andrew finished school, he lived in a room underneath his parents' home. His room was unusual, to say the least. There were no windows to let in light. The walls, ceiling, and floor were all painted black. People described it as very similar to a cave. (IV 365-368)

SUMMARY OF THE ARGUMENT

Appellant contends that the neither murder was committed in a cold, calculated, premeditated manner, without any pretense of moral or legal justification. Appellant shot and killed his estranged girlfriend and his former best friend who was dating Appellant's former love interest. Tiffany Barwick suddenly and publicly ended her year-long relationship with Appellant.

After stewing for a month, Appellant exploded. He had been fired from his job that day. At dinner, shortly before the murders, Appellant appeared suicidal. Later that night, Appellant drove the few minutes to the victims' locale, where he repeatedly rammed his ex-girlfriend's car with his truck. In a fit of rage, Appellant vainly attempted to enter the front door. He then entered the sliding back door by shooting out the glass. Ignoring numerous other guests, Appellant found Michael Ruschak, his former best friend, and immediately shot him to death. Appellant then went to the back bathroom where he shot his Tiffany Barwick numerous times, killing her immediately.

Both of these murders were the product of rage and jealousy. Neither murder was the product of the calculated type of killing required for this aggravating factor to apply. Neither murder was the result of cool, calm reflection which is also required before this aggravating factor applies.

The Appellant also contends that the murder of Tiffany Barwick was not especially heinous, atrocious, or cruel. She died instantly from multiple gunshot wounds. She had only seconds to reflect on her dire circumstances. Although undoubtedly scared, her fear was short lived and filled with uncertainty. She was hiding in the back of the house and, although she heard gunshots, she could not be sure what was happening out of her sight.

Appellant also contends that the trial court erroneously rejected his age of twenty-one as valid mitigation. The trial court also ignored other valid, compelling mitigation. This is especially true in light of Appellant's dysfunctional childhood, social awkwardness and lack of any prior criminal history prior to that fateful day. Appellant called 911 immediately after the shootings telling the operator that he had just shot two people. A proper weighing of the valid aggravating circumstances against the substantial mitigating evidence should result in sentences of life imprisonment without possibility of parole. Certainly, Appellant's case does not present the most aggravated and least mitigated first-degree murder case.

ARGUMENTS

POINT I

THE TRIAL COURT ERRED IN FINDING THAT THE MURDERS OF TIFFANY BARWICK AND MICHAEL RUSCHAK WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

In finding this aggravating factor applicable to both murders the trial court wrote:

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. The court assigns great weight to this aggravating circumstance.

(II 205, 207-8)

Standard of Review

At trial, the state had the burden of proving aggravating circumstances beyond reasonable doubt. ***Robertson v. State***, 611 So.2d 1228, 1232 (Fla. 1993) Moreover, the trial court may not draw "logical inferences" to support a finding of particular aggravating circumstance when the state has not met its burden. ***Clark v. State***, 443 So.2d 973, 976 (Fla. 1983) Most recently, this Court has stated that it will not re-weigh the evidence to determine whether the state proved

each aggravating circumstance beyond a reasonable doubt. "Rather, our 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.2d 693, 695 (Fla. 1997) (Footnote omitted). ***See also***, ***Way v. State***, 760 So.2d 903, 918 (Fla. 2000).

Applicable Law

To establish the CCP aggravator, the State must prove beyond a reasonable doubt that:

> [1] the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), ... [2] that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), ... [3] that the defendant exhibited heightened premeditation (premeditated), and [4] that the defendant had no pretense of moral or legal justification.

Evans v. State, 800 So.2d 182, 192 (Fla. 2001)(quoting ***Jackson v. State***, 648 So.2d 85, 89 (Fla.1994)). "[T]he facts supporting CCP must focus on the manner in which the crime was executed, e.g., advance procurement of weapon, lack of provocation, killing carried out as a matter of course." ***Lynch v. State***, 841 So.2d 362, 372 (Fla.2003) (quoting ***Looney v. State***, 803 So.2d 656, 678 (Fla.2001)).

In ***Lynch***, this Court further defined each of the elements of the CCP aggravators as follows:

This Court has held that execution-style killing is by its very nature a "cold" crime. See ***Walls v. State***, 641 So.2d 381, 388 (Fla.1994). In Looney, this Court noted the significance of the fact that the victims were bound and gagged for two hours, and thus could not offer any resistance or provocation. 803 So.2d at 678. Further, the defendants in that case had "ample opportunity to calmly reflect upon their actions, following which they mutually decided to shoot the victims execution-style in the backs of their heads." ***Id***....

As to the "calculated" element of CCP, this Court has held that where a defendant arms himself in advance, kills execution-style, and has time to coldly and calmly decide to kill, the element of "calculated" is supported. See ***Hertz v. State***, 803 So.2d 629, 650 (Fla.2001); see also ***Knight v. State***, 746 So.2d 423, 436 (Fla.1998)....

The third element, "heightened premeditation," is also supported by competent and substantial evidence. This Court has "previously found the heightened premeditation required to sustain this aggravator where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder." ***Alston v. State***, 723 So.2d 148, 162 (Fla.1998); see also ***Jackson v. State***, 704 So.2d 500, 505 (Fla.1997)....

The final element of CCP is a lack of legal or moral justification. "A pretense of legal or moral justification is 'any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide.' " ***Nelson v. State***, 748 So.2d 237, 245 (Fla.1999) (quoting Walls, 641 So.2d at 388).

Lynch v. State, 841 So.2d 362, 372-73.

Neither Murder Qualifies for this Aggravating Circumstance

The murders of Tiffany Barwick and Michael Ruschak were tragic without a doubt. However, neither murder qualifies for this aggravator under the stringent, limited definition set forth in this court's jurisprudence. To find this aggravator applicable to these murders would call into question the

constitutionality of Florida's death penalty scheme. The purpose of aggravating factors is to narrow the class of first-degree murders to ones justifying the ultimate sanction. Andrew Allred had been publicly humiliated by Tiffany Barwick's rejection. She then committed the ultimate insult by commencing a sexual relationship with Michael Ruschak, Andrew's best friend. This Court can read the internet chat sessions between Andrew and Tiffany. (I 130-143) These conversations began that morning, built with rage throughout the day, and culminated with the murders.

Andrew's actions that day in killing Barwick and Ruschak were classic "hot blooded" murder. Andrew's pent-up rage exploded that day. His rage was exacerbated by the fact that he was fired from his job that day. Andrew had no friends, no girlfriend, no best friend, and no job. These murders were clearly not the product of "cool and calm reflection". In fact, the murders were clearly "prompted by emotional frenzy, panic, or a fit of rage." As such, neither murder can be calculated as "cold."

Andrew clearly had no "careful plan or prearranged design to commit murder before the fatal incident." The trial court seems to place much stock in the fact that Allred purchased the murder weapon "several days" before the murders. (II 205, 207) The trial court's finding is a misstatement of the

evidence. Allred purchased the gun on September 1, 2007, more than three weeks before the murders, not "several days." (I 127-128; State Exhibit 44) The record clearly documents that he purchased the hand gun on September 1, 2007, a few days after his twenty-first birthday. Because of the three day waiting period he was not able to take possession of the gun until September 7, 2007, more that two weeks before the murders. (I 127-128; III 176, 181; V 411; State Exhibit 44) Andrew told police that he bought the gun at that time, because "he could". (III 176,181)

More importantly, the testimony of Appellant's parents made it abundantly clear that Andrew had access to at least two shotguns and a rifle which had been owned by the family for years. (IV 305-306; V 404, 412) The trial court's misplaced reliance on the wrong purchase date of the gun cannot support this aggravating circumstance.

Additionally, the trial court, without explanation rejected Allred's statement to police that he did not plan the murders. (II 205) In so doing, the trial court "cherry picked" from Allred's voluntary, detailed and candid confession. Allred called the authorities shortly after the murders and, for all intents and purposes, turned himself in. He waived his constitutional rights and gave a detailed confession. He candidly told the detectives that he went to the house

specifically to ram Tiffany's automobile with his truck. (III 158) He could not explain why nor exactly when he decided to go into the house to shoot Barwick and Ruschak. (III 159) The trial court had absolutely no basis to reject this one, minute part of Allred's voluntary, full confession given immediately following the murders.

Additionally, evidence of an ongoing domestic dispute can help a defendant avoid a finding of the cold, calculated, and premeditated aggravating circumstance (CCP). ***See Evans v. State***, 838 So.2d 1090, 1098 (Fla.2002) ("In some murders that [have] result[ed] from domestic disputes, we have determined that CCP was erroneously found because the heated passions involved were antithetical to 'cold' deliberation."); ***Santos v. State***, 591 So.2d 160, 162-63 (Fla.1991) (CCP inapplicable where the defendant was involved in an highly emotional domestic dispute with victim and her family, even though defendant had acquired a gun in advance and made previous death threats against victim; murder was not "cold," even though it may have been calculated).

Appellant's actions that day were anything but "cold" and "calculated". There was no calm reflection. There was only pent-up rage, that exploded in the murders of two people whom he used to love. The application of this aggravating factor to these murders is unfathomable. ***Amend. VI, VII, and XIV, U.S. Const.;***

Art. I, 9 and 16, Fla. Const.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OF TIFFANY BARWICK WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

In finding this particular aggravating circumstance, the trial court wrote:

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 (Fla. 2003) All of these exceptional factors are present in this cases 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.***

(II 206-7)

Standard of Review

At trial, the state had the burden of proving aggravating circumstances beyond reasonable doubt. ***Robertson v. State***, 611 So.2d 1228, 1232 (Fla. 1993) Moreover, the trial court may not draw "logical inferences" to support a finding of particular aggravating circumstance when the state has not met its burden. ***Clark v. State***, 443 So.2d 973, 976 (Fla. 1983) Most recently, this Court has stated that it will not re-weigh the evidence to determine whether the state proved each aggravating circumstance beyond a reasonable doubt. "Rather, our 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.2d 693, 695 (Fla. 1997) (Footnote omitted). ***See also***, ***Way v. State***, 760 So.2d 903, 918 (Fla. 2000).

Applicable Law

As Chief Justice Pariente so eloquently stated in a concurring opinion, "many first-degree murders by definition would initially appear 'especially heinous, atrocious or cruel.' However, under our death penalty law, the purpose of aggravating circumstances is to determine which murders are set apart from all

other murders so as to subject those defendants to the death penalty." ***Hutchinson v. State***, 882 So.2d 943, 961 (Fla. 2004)

This Court has held that "an instantaneous or near-instantaneous death by gunfire does not satisfy the aggravating circumstance of heinous, atrocious, or cruel," ***Robinson v. State,*** 574 So.2d 108, 112 (Fla. 1991). However, this Court has also indicated that such deaths can satisfy this aggravator if the state has presented other evidence to show some physical or mental torture of the victim. ***See Hartley v. State,*** 686 So.2d 1316, 1323 (Fla. 1996)**.** The determining factor is whether or not the entire sequence of events demonstrates that the victim suffered **substantial** mental anguish. See, e.g., ***Henyard v. State,*** 689 So.2d 239, 254 (Fla. 1996) (finding HAC where two children saw their mother shot and raped before they were each killed with a single gun shot wound to the head). In determining whether HAC applies, the trial court must consider the circumstances of the murder from the "unique perspective of the victim." ***Banks v. State***, 700 So.2d 363,367 (Fla. 1997). The victim's "[f]ear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous." ***Preston v. State***, 607 So.2d 404, 410 (Fla. 1992). The focus must be on the victim's perception of the circumstances, as opposed to those of the perpetrator. ***See Farano v. State***, 801

So.2d 44, 53 (Fla. 2001). 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***, ***Hutchinson v. State,*** 882 So.2d 943, 958, (Fla. 2004).

Circumstances of Tiffany Barwick's Death

Tiffany Barwick died nearly instantaneously as the result of six gunshot wounds fired in a matter of seconds. (IV 321-327) Even the state admitted in their written argument allegedly in support of this factor that Barwick "**knew her impending death was just seconds away**". (I 177) Therefore, Barwick's fear and apprehension before her shooting is the only factor that this Court must now consider.

It is undisputed that Tiffany Barwick had been threatened, through text messages, on-line chat and emails, during the month following her rejection of Appellant. None of the previous threats had come to fruition. Tiffany Barwick became aware of the final threat on that fateful day only minutes before her fatal shooting. However, Allred's final messages indicated only that he was coming over. There was no indication that he threatened any violence. When she received the message, Tiffany began to panic. Tiffany and her friends took the time to discuss whether the threat was real this time and what action they should

take. They discussed calling the police. They discussed calling Appellant's mother to find out if he had left the house. (III 115-116, 124-125)

The group took no action whatsoever. In fact, they had little time to do anything. Appellant arrived at the house in matter of minutes. Appellant announced his arrival by ramming Tiffany's parked car with his truck. However, Tiffany and her friends could not see what was happening. They could only hear loud noises. Within a minute or two, they became aware of someone trying to enter the front door, which was locked. Within a matter of seconds, Appellant appeared at the back door, shot the sliding glass door to obtain entry, and entered the house. When appellant appeared at the back door, Tiffany ran from the living room to hide in the back bedroom. From that point in time, there is no evidence that Tiffany saw nor realized what was happening other than hearing the sound of gunshots. (III 45-50, 73-76, 105, 120-121)

In a matter of seconds, Appellant shot and killed Michael Ruschak. Appellant shot Eric Roberts in the leg when Roberts attempted to stop Appellant by grabbing him from behind. Appellant then found Tiffany Barwick in the bathroom at the back of the house, where he proceeded to shoot her multiple times resulting in her almost instantaneous death. Although Barwick was undoubtably terrified, the sequence of events beginning with Appellant's

threatening message and concluding with Tiffany Barwick's death lasted only a matter of minutes, certainly less than ten.. All of the witnesses who were present testified that it was only a matter of minutes before Allred arrived at the house following his texted threat. Both Google and Mapquest indicate a nine-minute drive time from Appellant's house to the scene of the crimes, which was less than four miles away. In his extremely agitated state, one can assume that Allred did not obey the speed limit during his drive over to Shady Oak Lane. This conclusion is supported by time estimates from the witnesses at the scene. (III 61-62, 73-78, 90-91, 118-122)

Once Allred arrived at the Shady Oak Lane house, the events became even more frenetic. The testimony and circumstances indicate that Tiffany Barwick ran into the back bathroom and called 911 when she realized Allred had arrived and gained entry. The 911 recording of Barwick's call was clearly a very short one. The entire call lasted one minute and seventeen seconds. (I 207, IV 265-266; State's Exhibit 45)

Additionally, once ensconced in her hiding place in the bathtub, Tiffany could not be certain what was happening in the other parts of the house. Clearly she heard gunshots, but she could not be certain what was happening. She could have believed that her friends were shooting Allred or that Allred could have shot

himself after shooting at others.[3] Tiffany Barwick could not be absolutely sure that her death was imminent until Allred appeared in the bathroom where she hid. Thus, in realty, Barwick's fear of impending doom was literally a matter of **seconds** rather than minutes.

Comparison to Other Gunshot Murders

It is helpful to look at other cases where this Court has upheld the finding of this particular aggravating factor (HAC), in cases dealing with instantaneous gun shot killings. In ***Wainwright v. State***, 2 So. 3d 948, 951-52 (Fla. 2008), the victim endured thirty minutes of terror at the murder site before her murder which was accompanied by strangulation before being shot to death. In ***Hudson v. State***, 992 So.2d 96 (Fla. 2008), the victim exhibited panic and fear for at least forty-five minutes before his death by gunshot. The evidence established that the victim knew of his impending death for a significant period of time preceding his murder.

See also Lynch v. State, 841 So.2d 362, 371 (Fla. 2003) (concluding that the thirteen-year-old victim "surely experienced terror at the thought of her own

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[3]This court can be even more sure of this fact because of the testimony of Kathryn Cochran, a friend who also hid in a different bathroom during the shootings. She described in great detail the screams, the shots, and the ensuing quiet. She expressed her own confusion and ignorance about what was happening in the house while she hid. (III 120-122)

impending death" while being held at gunpoint for thirty to forty minutes and after witnessing her mother being shot numerous times); ***Henyard v. State***, 689 So.2d 239 (Fla.1996) (finding HAC where victims witnessed rapes and shooting of their mother before victims were driven to another location and shot); ***Douglas v. State,*** 575 So.2d 165 (Fla.1991) (finding HAC where defendant "said he felt like blowing our ... brains out," forced the victim to perform various sexual acts at gun point and, during the attempt to comply, fired the rifle into the air, and hit victim so forcefully in the head with the rifle that the stock shattered, before shooting victim in the head); ***Parker v. State***, 476 So.2d 134 (Fla.1985) (finding HAC where defendants told victim she would be killed so that she could not identify them, victim pleaded during "13-mile death-ride" not to be hurt, victim's bladder was completely voided "consistent with her being in great fear prior to her death," victim had large chunks of her hair torn out by the roots, and was stabbed in the stomach before being shot execution-style); ***Routly v. State***, 440 So.2d 1257 (Fla.1983) (finding HAC where victim was bound during robbery, carried from his own house, thrown into trunk of his own car, and driven out of town through back roads in middle of night before being shot).

In ***Walker v. State***, 957 So.2d 560, 580-81 (Fla. 2007), this Court concluded that the physical evidence established that the victim died in fear,

extreme anxiety and horror as a result of slow torture, humiliation and intense pain, all of which were unnecessary. The victim suffered from multiple blunt-force injuries, strangulation, and multiple gunshot wounds. ***Perez v. State***, 919 So.2d 347 (Fla. 2005), involved an abduction at gunpoint from a convenience store, a fifteen minute ride to an isolated area during which the victim begged for her life, and a stabbing before finally being shot to death.

In contrast, this Court has disapproved HAC for gunshot murders that were not accompanied by other circumstances showing that the killing was conscienceless or pitiless and unnecessarily torturous to the victim, i.e., committed in a manner exhibiting utter indifference to or enjoyment of the suffering of another. ***See, e.g.***, ***Diaz v. State***, 860 So.2d 960, 967 (Fla.2003) (determining that competent, substantial evidence did not support HAC finding for murder carried out quickly and without intent to inflict a high degree of pain or otherwise torture the victim); ***Rimmer v. State***, 825 So.2d 304, 328 (Fla.2002) (finding that evidence did not support HAC where the record did not reveal that the defendant tortured the victims or subjected them to pain and suffering); ***Ferrell v. State***, 686 So.2d 1324, 1330 (Fla.1996) ("Execution-style killings are not generally HAC unless the state has presented other evidence to show some physical or mental torture of the victim."); ***Robinson v. State***, 574 So.2d 108, 112

(Fla.1991) (holding that the trial court erred in finding HAC because the fatal shot to the victim "was not accompanied by additional acts setting it apart from the norm of capital felonies, and there was no evidence that it was committed ‘to cause the victim unnecessary and prolonged suffering' "). This Court has repeatedly stated that "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not [especially] heinous, atrocious, or cruel." ***Lewis v. State***, 398 So.2d 432, 438 (Fla.1981).

Although Tiffany Barwick’s death was certainly tragic, it does not fall within the limited, distinct class of murders that are especially heinous, atrocious, or cruel with any pretense of justification. The entire sequence of events, from Appellant’s message until the shooting, was only a few minutes. Aggravating factors are intended to narrow the class of all first-degree murders to those that are deserving of the ultimate sanction. To uphold its application to Appellant’s case would call into question the constitutionality of Florida’s death-penalty scheme. ***Amend. VI, VII, and XIV, U.S. Const.; Art. I, 9 and 16, Fla. Const.***

POINT III

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE FEDERAL AND FLORIDA CONSTITUTIONS.

Introduction

Allred's sentence of death must be vacated. Appellant has already addressed the trial court's errors in finding that both murders were committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification in Point I. Appellant has also pointed out the error in finding that Barwick's murder was especially heinous, atrocious, or cruel in Point II. Additionally, the trial court made factual errors in its sentencing order and abused its discretion by failing to consider (or improperly minimizing the weight given to) highly relevant and appropriate mitigating circumstances and in finding that the aggravating circumstances outweighed the mitigating factors. These errors render the defendant's death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Art. I, §17 of the Florida Constitution.

Standard of Review

Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court must find as mitigating that factor. Review of

the weight given to mitigation is subject to the abuse-of-discretion standard. ***Merck v. State*** 975 So.2d 1054, 1065-1066 (Fla. 2007); ***Cole v. State***, 701 So.2d 845, 852 (Fla. 1997). Factual errors in a sentencing order are subject to a harmless error analysis. *See* ***Merck v. State***, *supra* at 1066 n. 5; ***Lawrence v. State***, 846 So.2d 440, 450 (Fla. 2003); ***Hartley v. State***, 686 So.2d 1316, 1323 (Fla. 1996). It is submitted that this Court's proportionality review, being a question of law, must be *de novo*. ***See Blanco v. State***, 706 So.2d 7 (Fla. 1997) (whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court); ***Harvard v. State***, 375 So.2d 833 (Fla. 1977) ("When the sentence of death has been imposed, it is this Court's responsibility to *evaluate anew* the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." [*citing* ***State v. Dixon***, 283 So.2d 1 (Fla. 1973)]).

Applicable Law

In ***Campbell v. State***, 571 So.2d 415 (Fla. 1990), this Court reiterated the correct standard and analysis which a trial court must apply in considering mitigating circumstances presented by the defendant, reminding courts that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. ***See Eddings v. Oklahoma***, 455 U.S. 104, 114-115 (1982); ***Rogers v.***

State, 511 So.2d 526 (Fla. 1987). Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court *must* find it as mitigating. In ***Trease v. State***, 768 So.2d 1050 (Fla. 2000), though, this Court recognized that there are some circumstances where a mitigating circumstance may be found to be supported by the record but, for additional reasons or circumstances unique to that case, be entitled to no weight. However, it still must be considered by the sentencer and its findings detailed as to the reasons for the lack of weight.

For a trial court's weighing process and its sentencing order to be sustained, that weighing process must be detailed in the findings of fact and must be supported by the evidence. The trial judge should expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. The court *must* find as a mitigating circumstance each proposed factor that is mitigating in nature. This is a question of law. ***Campbell v. State***, *supra*. This Court summarized the ***Campbell*** standards of review for mitigating circumstances:

> (1) Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court;
>
> (2) Whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard;

> (3) The weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard.

Blanco v. State, *supra*; ***Cave v. State***, 727 So.2d 227 (Fla.1998).

The Trial Court's Analysis and Weighing of Mitigating Evidence

The trial court's sentencing order here totally fails to meet this standard necessitated by the capital sentencing scheme. The trial court was mistaken in its recollection of facts, glossed over the statutory and non-statutory mitigating factors and improperly rejected them or abused its discretion in giving them only little or moderate weight, with no explanations why. Without some particularized and specified analysis by the trial court, appellate review is hampered in determining whether the court abused its discretion in assigning little weight to these factors. ***See Trease v. State***, *supra*.

Allred's Guilty Plea and Cooperation

The trial court assigned little weight to the substantial mitigating factor that Andrew Allred accepted responsibility by entering a plea of guilty to all charges in the indictment. The trial court questioned the cost savings that resulted. The trial court found that the only savings to the system was that Appellant's trial was completed without a jury.

Although Appellant confessed and pleaded guilty to all charges, the trial

court questioned the mitigating nature of this action. The judge obviously believed that the case would have been easily solved based on the number of witnesses and that a conviction would be easy to obtain. The trial judge pointed out that the state still had to present its case for guilt at the penalty phase. (II 208-209)

Appellant contends that the costs of Appellant's prosecution was enormously reduced. A full-blown capital trial with a jury is a very expensive proposition, even where the case may be a "slam dunk" for the state. The costs of death-qualifying a jury for a capital trial is substantial, to say the least.

More importantly, Andrew Allred took complete responsibility for his actions, called 911 and turned himself in, confessed immediately, agreed to a search of his vehicle, pleaded guilty, and absented himself from his trial. The trial court makes no mention of the obvious remorse felt by Andrew Allred. This remorse is clear from his acquiescence and cooperation with the state's imposition of two death sentences in his case. Andrew Allred is practically a volunteer who asked for his death sentences. This is valid mitigation and should be given more than "little weight."

Allred's Emotional Disturbance

Additionally, the trial court found that Appellant was suffering from an emotional disturbance at the time of the murders, although he categorized it as less

than extreme. As such, the court assigned moderate weight to this mitigating circumstance. (II 209-210)

The trial court's conclusion that Appellant was emotionally disturbed by the fact that Tiffany broke up with him and started sleeping with his best friend is a valid conclusion. However, the court remained unconvinced that Allred was incapable of conforming his conduct to the requirements of law. Instead, the trial court concluded that the murders were a result of "careful thought and planning." (II 209) The trial judge described Appellant's video confession as "calm, cool and in control." ***Id.***

The trial court's acceptance that Appellant was suffering an emotional disturbance at the time of the murders flies in the face of his conclusion that Allred committed the murders in a cold, calculated, and premeditated manner without an pretense of any legal or moral justification. See Point I. His conclusion on these two related issues is incongruous at best.

Allred's Sexual Abuse and Developmental Problems

In rejecting any other non-statutory mitigation, the trial court wrote:

> There's 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.

(II 210)

The trial court's rejection of the sexual abuse that, in all likelihood Appellant endured, is unwarranted. The trial judge called such evidence speculative. However, the record clearly reflects that Andrew's developmental problems occurred at a time when he became exposed to his paternal grandfather on a regular basis for a period of approximately ten years. Andrew Allred went from being a happy child to becoming a dysfunctional social misfit. The trial court appears to apply a much more stringent standard to the requisite proof required for the establishment of a mitigating circumstance. As this Court is well aware, the standard of proof required is much less for mitigating evidence than that required

to establish aggravating circumstances.

Additionally, the trial court recognizes that Andrew's developmental problems hindered his ability to develop socially and may have contributed to his reaction to his break-up with Tiffany Barwick. However, the trial court gives short schrift to this valid mitigating factor because there is "no evidence that this developmental problem caused impact to his later education." (II 210) Yet, in the proceeding sentence, the trial court recognizes the possibility that Andrew's developmental problems probably did directly impact the very cause of the murders. Allred's break-up with Barwick was the beginning of the end. As such, this mitigation should be viewed as absolutely critical and given great weight.

Additionally, the trial court's conclusion has no basis in the record. The court erroneously states that his developmental problems did not impact his later education by noting that Andrew obtained his high school diploma and associate's degree, and attained a high level of skill in computer technology. (II 210) Although this sounds like the normal progression of a bright student, such was not the case. Andrew Allred left high school in the eleventh grade only to subsequently receive his high school diploma at the Seminole Community College. (IV 363-364) Additionally, the trial court was incorrect in his conclusion in one other way. In middle school, Appellant slowly dropped out of the gifted program

and took regular classes. He became very withdrawn and had little participation in class and no interaction with other people. (V 430-449)

Although he did earn an associate's degree and was clearly extremely conversant with computer technology, these are the type of activities that are frequently the traits of social misfits and loners. Andrew Allred is the classic computer geek with few friends and no girlfriend. This type of situation has an enormous impact on a developmentally challenged but highly intelligent twenty-one-year-old.

Finally, the trial court's findings did not even mention the fact that Andrew's father had a severe drinking problem and that Andrew was the product of a home with documented domestic violence. There is no explanation why the trial court completely omitted any reference to these critical areas of valid mitigation.

Allred's Young Age and Immaturity

In rejecting Appellant's age of twenty-one as valid mitigation, the trial court wrote:

> The defendant was 21 years of age at the time of the murders. He was a high school graduate who held a AA degree and was proficient with computer technology. He had an 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).

(II 210)

In contrast to the trial court, the prosecutor was clearly concerned about Allred's young age. At a pretrial hearing, the court asked the prosecutor for the State's stand on Allred's request to waive the penalty phase jury, as well as his request to absent himself from the trial proceedings. The prosecutor placed his concerns on the record:

> Judge, the State would object to the issue as to the jury waiving. **Because the mitigation at this point would appear to be the Defendant's age**.... Because he in essence allowing the jury to make a decision and to have never seen the Defendant and never know who he is and once again **because of his age as in mitigation** he could come back later and say, well, **because of my youth** I made a stupid decision against the counsel of my attorneys because **I was simply foolish and immature, young**.
>
> So I think because of **his unique position, his age** he could use that as a ruse to gain additional appeals that he might have not otherwise had if you deny these motions. Because he would not be able to abuse discretion if you deny them both.
>
> THE COURT: He's twenty-one years old.

(X 497-498) (Emphasis added).

With regard to the mitigating circumstance of age, this Court has held:

> [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.2d 837, 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.2d 360, 367 (Fla.1986).

Nelson v. State, 850 so.2d 514, 528-29 (Fla. 2003)

At the time of the murders, Andrew had a chronological age of twenty-one years and one month, Appellant contends that his age, under the circumstances, should be valid mitigation. It could have been said at one point that this mitigating circumstance only deserved substantial weight if the defendant were eighteen years old or younger. However, this mitigator should be seen in a new light now that the United States Supreme Court has decided juveniles are not eligible for the death penalty. ***Roper v. Simmons***, 543 U.S. 551 (2005). The record reflects that Andrew suffered from a developmental disability and did not receive adequate treatment. His social abilities were severely limited. His very actions on the day of the murders demonstrate his immaturity. Andrew's chat sessions with Tiffany during the month following their break-up clearly demonstrate Andrew's

immaturity.

Andrew Allred is a social misfit. For one year of his short twenty-year-old life, he was happy. He had a girlfriend who loved him and he loved her. Tiffany Barwick publicly humiliated Andrew when she ended their relationship at his twenty-first birthday party. The humiliation became even more severe when she began a sexual relationship with his best friend, Michael Ruschak . Andrew's rage built up over the thirty days following Tiffany's rejection of him. On that fateful day, Andrew snapped, drove the few minutes to the Shady Oak Lane house, and shot Barwick and Ruschak in a matter of minutes in front of a slew of witnesses. These murders were the classic hot-blooded crimes of passion that have endured in every society for centuries. Although Andrew Allred deserves to spend the rest of his life in prison without any possibility of parole, he does not deserve the ultimate sanction.

Andrew Allred's Death Sentences Are Disproportionate

As this Court repeatedly has stated, the death penalty must be limited to the most aggravated and least mitigated of first-degree murders. ***See e.g.***, ***Offord v. State***, 959 So.2d 187 (Fla. 2007); ***Almeida v. State***, 748 So. 2d 922 (Fla. 1999) (crime must fall "within the category of both the most aggravated and least mitigated of murders"); ***Terry v. State***, 668 So. 2d 954, 965 (Fla. 1996)

("Consequently, its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist"); ***Kramer v. State***, 619 So. 2d 274, 278 (Fla. 1993) ("Our law reserves the death penalty only for the most aggravated and least mitigated murders"); ***State v. Dixon***, 283 So. 2d 1, 7 (Fla. 1973) (death penalty is reserved for "the most aggravated and unmitigated of most serious crimes").

Proportionality review is not merely a comparison between the number of aggravating and mitigating circumstances. Proportionality review "requires a discrete analysis of the facts, entailing a *qualitative* review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." ***Urbin v. State***, 714 So. 2d 411, 416 (Fla. 1998) (quotations and citation omitted; emphasis in original); ***Offord v. State***, *supra* at 191. Proportionality analysis requires the Court to "consider the totality of circumstances in a case," in comparison to other capital cases. ***See Porter v. State***, 564 So. 2d 1060 (Fla. 1990). The Court must compare "similar defendants, facts, and sentences." ***Brennan v. State***, 754 So. 2d 1, 10 (Fla. 1999). The standard of review is *de novo*. ***See Larkins v. State***, 739 So. 2d 90 (Fla. 1999); ***Urbin***, *supra*.

When it comes to proportionality review, a case-by-case analysis is not a realistic approach. Every case has unique facts. Every two-aggravator case in a

domestic situation does not necessarily compare to any other. Appellant contends that Andrew Allred's case is not the most aggravated, least mitigated of first-degree murders in this state. This was a hot-blooded crime of passion. This Court has previously taken the position that a killing under circumstances resulting from an ongoing and heated domestic dispute may render a death sentence not proportionate, provided the defendant had not been convicted of a prior similar violent crime. ***See Blakely v. State***, 561 So.2d 560, 561 (Fla.1990); ***see also Garron v. State***, 528 So.2d 353, 361 (Fla.1988) ("[W]hen the murder is a result of a heated domestic confrontation, the penalty of death is not proportionally warranted."). This Court later clarified that it "does not recognize a domestic dispute exception in connection with death penalty analysis," ***Lynch v. State***, 841 So.2d 362, 377 (Fla.2003). Nevertheless, a proper weighing of the valid aggravators and the substantial mitigation, both recognized and unrecognized by the trial court, should result in the conclusion that Andrew Allred is not a candidate for the death penalty.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to vacate both death sentences and remand for imposition of sentences of life without the possibility of parole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Bill McCollum, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, and mailed to Andrew Allred, DC#130930, Florida State Prison, 7819 N.W. 228th St., Raiford, FL 32026, this _____ day of August, 2009.

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
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