IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 67,721

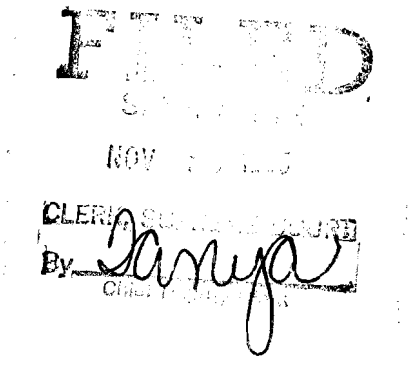
SAM WILSON, JR.

Appellant

vs.

STATE OF FLORIDA

Appellee



BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

The defendant, Sam Wilson, Jr., was charged by indictment, with premeditated murder of his father (Count I), premeditated murder of his cousin (Count III), and attempted first degree murder of his "common law stepmother" (Count III). After trial by jury, the defendant was found guilty of all three counts.

A jury trial on sentencing was held, and the jury recommended the death penalty on Counts I and II. At sentencing, the trial court found three aggravating circumstances, to wit: that the defendant had been previously convicted of a felony involving the use of violence; that the crime was especially heinous, atrocious and cruel; and that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The trial court stated that no statutory mitigating circumstances applied, and sentenced the defendant to the death penalty on Counts I and II.

On direct appeal, defendant's judgments of conviction and sentence were affirmed. The majority found one of the aggravating circumstances on Count I (cold and calculated) to be invalid, and two of the aggravating circumstances on Count II (heinous, atrocious and cruel; cold and calculated) to be invalid. Since the majority held that no mitigating factors were presented in the record before the trial court, the sentences of death were affirmed.

Thereafter, the defendant filed a Petition for Writ of

Habeas Corpus in this Court, and a Petition for Relief under Florida Rules of Criminal Procedure, Rule 3.850 in the trial court. After the trial court denied the post conviction motion, the appeal from the denial of the Petition for Relief Under Florida Rules of Criminal Procedure, Rule 3.850 and the Petition for Writ of Habeas Corpus were consolidated.

On August 15, 1985, this court entered its opinion granting defendant's Petition for Writ of Habeas Corpus based upon ineffective assistance of appellate counsel. Pursuant to said order, this new direct appeal on the merits of the defendant's convictions and sentences is herein presented.

The facts presented at trial were as follows:

On October 8, 1980, at about 9:30 p.m., the defendant visited his friend, Jimmie Wilson (unrelated) (R. 349). The defendant was the godfather of J. Wilson's two-month old child, often visited J. Wilson's home, and that day came to see about J. Wilson's injury at Morrison's cafeteria, where he and the defendant worked (R. 349, 356). After talking with J. Wilson, J. Wilson's girlfriend, and J. Wilson's son for about an hour and a half, the defendant proceeded to his father's house approximately five or six blocks away, to spend the evening, where he frequently stayed (R. 349, 357, 359). The defendant was not nervous, unhappy or upset, and appeared normal (R. 357), and did not possess a pistol or weapon (R. 357).

After the defendant left, J. Wilson walked his girlfriend to her house, and came home and went to bed (R. 358).

He was awakened to the defendant's banging on the door at about 2:00 a.m. (R. 350, 359). The petitioner was standing outside J. Wilson's house, wearing only a pair of underwear, and requested J. Wilson to call the police (R. 360). J. Wilson had no phone and no change for a pay phone.

The defendant was upset and nervous, and said somebody had been shot (R. 359, 362). The defendant was not clear in his nervous explanation of what had happened, and J. Wilson could not recall whether the defendant said it was his father who had been shot (R. 359-60). The defendant had a pistol and had blood on him (R. 351).

J. Wilson told the defendant to go to the defendant's brother Bobby's house, not far away, and gave the defendant some clothing to wear so that he would not run ten blocks through the streets semi-nude (R. 351, 362). Defendant went into J. Wilson's house, leaving the pistol outside, and J. Wilson heard water running inside (R. 360-1). J. Wilson did not have an automobile, and the defendant left on foot, headed for his brother's house (R. 364).

At 2:32 a.m. on October 8, 1980, Michael Moniz, a City of Fort Lauderdale Police Officer, was dispatched to 400 Northwest 18th Avenue, Fort Lauderdale, to investigate a "sick or injured person" (R. 311-2). The defendant and his brother, Bobby Lee Wilson, were outside the residence when Moniz arrived. Officer Moniz testified that the defendant told him some shots had been fired, and that there was an injured person

inside the house (R. 312-3). Bobby Wilson said that he had called the police from inside the house. Moniz entered the house through the open front door, and observed Sam Wilson, Sr., seated on the floor, leaning against a recliner chair (R. 313). After Moniz looked at Sam Wilson, Sr., the defendant told him that "Earline, my mother, is still here", and Moniz started looking for her but was unable to find her immediately (R. 316). Moniz described the house as having three bedrooms off the hall leading from the living room. He left the living room, and saw Jerome Hueghley on the bed in the middle bedroom (R. 316-7). He noticed that another bedroom, the "master bedroom" was in "total disarray" (R. 324). Furniture was thrown all over the place, closet doors were torn out, and a large amount of blood was on the walls and floor (R. 324-5). The middle bedroom, where Jerome was found, was not in disarray. The living room was. Blood was in the hall. Moniz testified that at some point when he was in the house, defendant said that there had been a black male in the house, shots had been fired, and the black male left through the back door (R. 318).

After backup units arrived, Moniz and other law enforcement personnel were in the front portion of the house and heard a disturbance to the rear of the house. They went around to the back and, according to Moniz, saw Earline Wilson come out of a utility room, injured, and fall into the arms of an officer (R. 3318-9). She was very nervous and upset and, according to Moniz, a supervisor asked her, "Who did this?",

and she said, "Junior, Sam, Jr.", and she pointed to the defendant (R. 320). According to Moniz, the defendant was then taken into custody (R. 3321). Moniz recalled that a hammer, with what appeared to be blood on it, was found in the hallway.

The real evidence offered by the State at trial was a pair of scissors (Exhibit 69), a hammer (Exhibit 72), a .22 caliber revolver with six empty shell casings (Exhibit 74), three "slugs" or projectiles (Exhibits 75, 76, 77), a Derringer and two bullets (Exhibit 79), some ammunition (Exhibit 79), a bent knife (Exhibit 78), defendant's clothing (Exhibit 81), the victim's clothing (Exhibits 82-5), and 67 photographs. Testimony explained the condition of the physical evidence when found and explained scientific tests conducted on the evidence.

The pair of scissors, found lying on the ground below a window at the residence (R. 378), had blood stains, but the State serologist could neither type the blood nor say whether it was human or animal blood (R. 1047). The State introduced no evidence regarding fingerprints on the scissors. The hammer was found in the hallway of the residence (R. 321, 389), and it had blood on it consistent with the defendant's, Jerome's, Earline's, and Sam Wilson, Sr.'s (R. 1071). The .22 caliber revolver was recovered when the defendant took police to where he had left it (R. 399). It had six spent cartridges in it (R. 399). No fingerprints were recovered from the .22 (R. 417). The three fired projectiles were found in the closet in the master bedroom (R. 388), and they may have been fired from the

.22 (R. 558). The Derringer was found on a table outside the residence (R. 379), with two live rounds in the Derringer and four live rounds on the table. There were no fingerprints lifted from the Derringer (R. 419). The bent knife was found in the kitchen, (R. 381), at the sink, and had human blood on it (R. 1055).

According to medical testimony, Sam Wilson, Sr., died as a result of brain damage caused by a bullet wound (R. 537). There were abrasions below the gunshot wound, which could have been caused by anything hitting the skin hard enough to break the skin, including furniture or the floor. While a hammer would be consistent with the abrasions, it merely "might inflict a similar abrasion" (R. 551). This was true of other abrasions and lacerations on Mr. Wilson, Sr.'s head, shoulders and hands (R. 544). Abrasions to the back of his hands were called "defense" wounds (R. 545-6), simply because they were on the back of the hands. The gunshot wound reflected no tatooing or powder burns, and there was evidence by way of opinion that the weapon which caused the wound was fired from a distance of at lease three feet (R. 550, 557).

Earline Wilson died of pneumonia, secondary to her having undergone surgery for cancer (R. 432). Before surgery, she had recovered from any injuries she had received on October 8, 1980. Her autopsy revealed that at some earlier time she had suffered blood head trauma and multiple gunshot wounds (R. 435). The blood head trauma might have been caused by a ham-

mer; it might not have (R. 437). At some point, she had been shot five or six times (R. 439).

Jerome Hueghley was found lying in bed at the residence. He died from a stab wound to the chest (R. 531). The wound was consistent with having been caused by a knife or scissors (R. 535). Jerome had one tiny abrasion on his abdomen (R. 552).

Although Earline Wilson had indicated that Sam, Jr. "did it", she did not indicate how the killing occurred. Other than the statements of the defendant, there was no evidence presented at trial relating to this unanswered question.

The day after the defendant was arrested for murder, and after he had been appointed an attorney, (R. 1077), the defendant voluntarily spoke to two police officers about what had happened at the residence in the early morning hours of October 8, 1980. He had given a statement to the officers the day before, shortly after he was arrested, and just before he voluntarily took the officers to where he had left a .22 caliber pistol. The statements were tape recorded, and played for the jury (R. 471, 498).

In both statements, the defendant emphasized that the two deaths were accidents, which occurred during a family dispute at his father's house. In the statement recorded the morning of October 8, 1980, the officers told the defendant that, "You told us that you had fights before with your mother (sic) and father and stepmother. . ." and that "You fought with

her quite a bit?" which the defendant acknowledged (R. 484). The defendant stated that his "stepmother" (unmarried to but living with his father) was hostile to him because he would not refer to her as his stepmother (R. 490), and that she would do things to make him feel unwelcome in his father's house (R. 484, 490).

The detectives told the defendant during this statement that it was their understanding that the incident all started because of an argument between the defendant and his stepmother (R. 475). The defendant went to his father's house that night, took a shower, and started to make a phone call (R. 474). While he was making a phone call, he looked into the refrigerator for something to eat (R. 474). Earline came into the kitchen and told him not to eat any of the food in the refrigerator.

In his statement, the defendant said that Earline made a smart remark and went into the bedroom. The defendant picked up a hammer that was beside the stove and started into the bedroom. Earline hollered for the defendant's father to come. When the defendant asked Earline what she had said, she mumbled something, "and at that time I didn't even think of anything, I just hit her" (R. 476). The defendant said he hit Earline on the shoulder and then in the head with the hammer (R. 476).

When Sam Wilson, Sr., entered the bedroom, he immediately attacked the defendant in a spontaneous fight (R. 477). The two "tussle(d) in the bedroom. We fought from the hallway

back into the bedroom, back in the bedroom, back through the hallway, and at that time he (Sam Wilson, Sr.) was telling Earline to get the gun and shoot, you know." (R. 483).

While they were fighting, the defendant somehow got a knife. The father reached to pick the hammer off the floor. The defendant got the hammer away from his father and hit him in the head and somewhere else on the body (R. 477-8). Then his father grabbed a lamp (R. 479).

"We was fighting in some kind of way, Jerome got in the way. . . .Eventually he was trying to stop me and my father from fighting." (R. 479). Jerome was "right between us" and

> The knife was in both our hands cause he had my hand and I had his hand. And his hand was on the knife, well, on my arm, really, and I had the knife in my hand.
>
> Question: Okay, let me -- let me just get this straight so I know that I am sure of what I am hearing. The knife was in your hand, and your father had a hold of your arm and this is when the boy got knifed?
>
> Answer: Yes, sir.

(R. 480). The defendant said he then "wanted to get help (for Jerome), but my father didn't want to tear loose of me. So I believe Earline had put him to bed" (R. 480).

Earline came in with a gun in a paper bag; the defendant took it from her. Defendant's father grabbed the gun and "some kind of way the gun went off -- I don't know, once or twice, but it did go off. I probably hit him in the chest some kind of way, in the stomach" (R. 478).

During the first statement, the defendant told detectives that after his father was shot, he ran to Jimmie Wilson's, then to his brother, Bobby's house, and then back to his father's house (R. 480). He also told them where he had left the .22 and took them to it, (R. 488), and admitted that the "black man running out the back of the house" version he had related at the scene was false (R. 483).

In his first taped statement, the defendant said that his father had said that, "I am going to kill you" when he grabbed the gun (R. 478). In the statement recorded the next day, the defendant volunteered that his father had not in fact said that (R. 493). Also in the first statement, the defendant denied that Earline had been shot, (R. 487), and admitted in the second statement that he did shoot at her after his cousin was hurt and "his father had got shot and was hurt very badly, [and] that he was [then] trying to get at Earline" (R. 495). The defendant also said in his second taped statement that it "had to be the scissors [not the knife] on the floor that me and my father was tussling to get away from one another and Jerome had got in the way of the scissors and got stabbed". (R. 302).

There were other minor inconsistencies between the two tape-recorded statements. The changes in the second statement were, according to the detectives, because "Since the other day when we took that statement, you have remembered certain things and you have other things you want to tell us. . ." (R. 500).

The second statement was taken after the detectives "asked if he would be willing to give a taped statement like he did the first day and he readily stated he would" (R. 496).

In the first taped statement the defendant said that "It was an accident" (R. 483). In his second taped statement, he said that the .22 was the gun with which he "accidentally shot my father" (R. 506).

Subsequent to the jury returning guilty verdicts on all three counts, evidence was presented on the issue of the appropriateness of the death penalty. Based upon the evidence presented, the jury recommended the imposition of the death penalty on Counts I and II.

Based upon the foregoing facts presented at trial, and based upon this Court's order permitting the defendant a new direct appeal on the merits, this appeal follows.

SUMMARY OF ARGUMENT

No evidence was presented at trial to contradict the defendant's two pre-trial confessions that the murders of his father and cousin were accidental; that he was involved in a heated family confrontation which was escalated to deadly proportions by the victim father. In the absence of direct evidence of premeditation, a conviction may not be sustained based upon circumstantial evidence which is consistent with both the State's theory of guilt and the defendant's theory of reasonable hypothesis of innocence.

Furthermore, a conviction of first degree murder cannot stand based upon the doctrine of transferred intent and felony murder, since Florida Statute 782.04(4) declares the murders committed herein to be murders in the third degree: i.e., the felony allegedly being perpetrated upon the defendant's stepmother Earline was not one of the enumerated felonies which would have established first degree felony murder.

In the absence of evidence establishing the defendant's premeditation and his desire to inflict pain upon his father, the trial court's finding of the aggravating circumstance heinous, atrocious and cruel must be overturned. A finding of heinous, atrocious and cruel does not apply to family confrontations and situations of mutual combat.

The trial court committed reversible error in failing to properly instruct the jury as to their right to consider non-statutory mitigating circumstances. The inclusion of ref-

erences to non-statutory mitigating circumstances in the Florida Standard Jury Instructions was mandated by this Court on April 16, 1981. As such, the defendant was entitled in his August, 1981 trial to such an instruction. The trial court's failure to properly instruct the jury resulted in the jury's non-consideration of non-statutory mitigating circumstances.

In addition to the jury's failure to consider non-statutory mitigating circumstances, the trial court likewise failed to consider such factors. Such a failure to consider non-statutory mitigating circumstances was crucial in the case at bar, since this Court, on direct appeal, found several of the aggravating circumstances not to apply. If but a single mitigating circumstance had been found to exist, resentencing would have been mandated by this Court's ruling.

In light of the lack of premeditation, in light of the lack of aggravating circumstances other then previous felony conviction and in light of the existence of mitigating circumstances, the death penalty is not proportionately warranted under the circumstances of this case.

The prosecutor and the trial court improperly left the trial jury with the impression that their recommendation of life or death was unimportant, since said recommendation could either be accepted or rejected. The defendant is entitled to a jury which has been properly instructed on the importance of their recommendation so that they will view their task as the serious one of determining whether a specific human being

should die at the hands of the State. A juror should not take the attitude, as a result of prosecutorial and judicial comments and instructions, that the issue of life and death "is not my decision to make".

ARGUMENT

ISSUE I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO GRANT DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL BASED UPON THE INSUFFICIENCY OF EVIDENCE ON COUNTS I AND II RELATING TO FIRST DEGREE MURDER.

The defendant's two convictions for first degree murder and two death sentences are singly predicated on one crucial fact requiring proof beyond a reasonable doubt, to wit: that the murder of Sam Wilson, Sr., resulted from a settled and well-defined purpose and intention to kill him. The defendant was convicted of Jerome's death (Count II) purely on the theory of transferred intent, that he accidentally killed Jerome while premeditatedly trying to kill his father. The trial court, upon Motion for Judgment of Acquittal, recognized that there was no evidence "that would indicate that he set out with an intention to kill this boy, but I think the law is. . .attempted homicide of one person and killing another, that is still first degree murder" (R. 571). Thus, two convictions and two death sentences depend on whether and when the defendant formed the intent to kill his father and whether the killing, even if intentional and premeditated, was justifiable and/or excusable.

"Premeditation is the one essential element which distinguishes first degree murder from second degree murder". Tien Wang v. State, 426 So.2d 1004 (Fla. 3 DCA 1983). A premeditated design to effect the death of a human being is more

than simply an intent to commit homicide", Littles v. State, 384 So.2d 744 (Fla. 1 DCA 1980) and "more than an intention to kill must be proved to sustain a first degree murder conviction." Tien Wang v. State, supra.

> It must be proven that before the commission of the act which results in death that the accused had formed in his mind a distinct and definite purpose to take the life of another human being and deliberated or meditated upon such purpose for a sufficient length of time to be conscious of a well-defined purpose and intention to kill another human being.

State v. Wilson, 436 So.2d 908 (Fla. 1983) (McDonald, J., dissenting, quoting Snipes v. State, 17 So.2d 93 (Fla. 1944).

The only direct testimony as to the events on the night of the offense were the statements given by Sam Wilson, Jr., to the police on the following morning and afternoon, tapes of which were produced by the State and admitted into evidence. Mr. Wilson, in giving these statements, never denied his involvement in the conflict that led to the deaths, but rather painted a picture of a pitched battle, which ultimately resulted in the death of his father and young cousin, but which could have just as easily ended in the defendant's own death. Nothing in the evidence introduced by the State contradicts Mr. Wilson's statements; to the contrary, the physical and circumstantial evidence introduced at trial uniformly supports his description of the passion-inflamed struggle which resulted in the accidental deaths of his father and young cousin.

As Mr. Wilson related, after the original altercation

between he and Earline had begun, his father spontaneously lept into the fray when he heard Earline cry out (R. 477). The struggle between he and his father which then ensued carried them throughout the house, pursuing their deadly combat through the hallway, back into the bedroom, back through the hallway, and back into the living room (R. 483). The condition of the house after the fight bears silent testimony in support of the defendant's description of the violent nature of the fight. The only conclusion to be drawn from the cumulative impact of the evidence as to the state of total disarray in which the house was found is that the deaths occurred as the result of a sudden, spontaneous, and violent domestic quarrel.

The defendant consistently referred to the deaths as accidents. He certainly did not have to discuss the case with police, but he voluntarily did so, describing a history of bad blood between himself and Earline, erupting finally over very little and tragically, but not premeditatedly, escalating into a household fracas with unintended consequences.

The physical, as opposed to verbal and psychological, battle between Earline and the defendant was initiated by the defendant, who said "at that time I didn't even think or anything, I just hit her" (R. 476). His father came in and "[I]t was spontaneous. He just came after me, just fighting" (R. 477). They fought all over the house. While they were fighting and before the defendant's father was shot, Jerome was accidentally stabbed with a pair of scissors. The State has

never argued that Jerome's death resulted from premeditation. After Jerome was hurt, the defendant "wanted to go help him, but my father didn't want to tear loose of me" (R. 478).

After that, Earline brought in a gun for which the father had been hollering. The defendant took it from her, his father grabbed it, and in "some kind of way the gun went off . . ." (R. 478).

Immediately after the occurrence of the events in question, the defendant, in an obvious state of shock, ran through the streets in his underwear to his best friend's house in an attempt to get help. When his friend Jimmie Wilson refused to get involved by calling the police, as Sam had asked him to do, the defendant borrowed some clothes and ran to his brother's house, still seeking help for his injured father and cousin. They then returned to the house where, at the bequest of the defendant, his brother finally called the police. At no point during this frantic and unsettled eposodic attempt to get help did the defendant attempt to hide his identity or to conceal the fact that deaths had occurred at the house.

Without the defendant's statement, the jury would be left with nothing but conjecture as to what happened. The statement explains what happened, and it was not premeditated murder.

Florida case law supports the defendant's position. The evidence in this case is simply "not legally sufficient to exclude a reasonable doubt as to the existence of a premedi-

tated design of the accused" to take his father's life. Forehand v. State, 171 So.2d 241 (Fla. 1936). It is much more likely that the defendant's father died when he and the defendant were struggling over the gun the father had introduced into the fray than that "[A]ppellant then procured a gun and shot his father in the head," as this Court's majority opinion describes the action in the Statement of the Facts. See, State v. Wilson, supra, at 909.

This Court, and other Florida courts, carefully reviewed findings of premeditation, particularly when the homicide is the result of a struggle or fight between family members. For example, in Forehand v. State, supra, a case very similar to the defendant's, this Court found that the killing of a law enforcement officer who intervened in a fracas between two brothers was second, not first degree murder. In Forehand, a deputy sheriff entered a violent altercation involving the defendant, his brother, and a number of other persons. The murder occurred when the sheriff attempted to remove one of the brothers from the area. Defendant struck the officer in the face, the officer returned the blow with a blackjack, and the brother and officer fell to the ground. Defendant grabbed the officer's pistol and shot him. This Court held that, even though it was clear that defendant intended to kill the officer, the evidence was "not legally sufficient to exclude a reasonable doubt as to the existence of a premeditated design of the accused to take the life of" the officer.

Here, the defendant was fighting with his stepmother, when a third party intervened. The intervenor, defendant's father, like the Sheriff in Forehand, began fighting with him. The defendant stated that the pistol went off accidentally. The jury apparently disbelieved this explanation, although the defendant would respectfully submit that there is a reasonable doubt as a matter of law regarding whether the gun accidentally discharged. Even if it was constitutionally acceptable for the trial jury to disregard the "accident" statement, and factually acceptable for the jury to find that the defendant intended to kill his father, there is no more evidence of premeditation in this case than presented in Forehand.

Rather the evidence presented at trial negates the finding of premeditation due to the actions having taken place in a heat of passion.

> [T]he evidence in this case, although not necessarily establishing the defendant acted "in the heat of passion," is as consistent with that hypothesis as it is with the hypothesis that the defendant acted with premeditated design.

Tien Wang v. State, supra. See also, Whidden v. State, 64 Fla. 165, 59 So. 561 (1912). When, as here, the intent of an accused is sought to be established by the actions of the accused, the circumstancial evidence rule applies. Circumstantial evidence cannot support a conviction if it, likewise, is consistent with a reasonable hypothesis of innocence. McArthur v. State, 351 So.2d 972 (Fla. 1977). Relying upon such a stan-

dard, it cannot be held that the State has met its burden in this case.

In addition, the defendant would respectfully submit that the concept of premeditated first degree murder does not apply to an individual who is involved in a confrontation where the deadly weapon is brought into the fray by another. Under such circumstances, the elevation of the confrontation is not of the defendant's making and does not constitute premeditated murder. Forehand v. State, supra.

Lastly, the defendant would submit that the doctrine of felony murder renders him liable for less than first degree murder. In the case at bar, there was no evidence presented with which the jury could determine that the defendant had manifested premeditated intent to kill his stepmother, Earline. At best, it could be stated that the confrontation was accelerated due to the intervention of the defendant's father, Sam Wilson, Sr. The defendant's liability for the deaths of his cousin and father is premised upon a transferred intent under the doctrine of felony murder due to his actions in relation to his stepmother; Florida Statute 782.04 mandates a reduction of his conviction.

Florida Statute 782.04(4) specifically provides that "the unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the preparation of, or in the attempt to perpetrate, any felony other than: (a) trafficking offenses prohibited by S. 893.135(1); (b)

arson; (c) sexual battery; (d) robbery; (e) burglary; (f) kidnapping; (g) escape; (h) aggravated child abuse; (i) aircraft piracy; (j) unlawful throwing, placing or discharging of a destructive device or a bomb; or (k) unlawful distribution of opium or any synthetic or natural salt, compound, derivative or preparation of opium by a person 18 years of age or older, when such drug is proven to be the approximate cause of the death of the user, is murder in the third degree." Since the defendant's aggravated assault and battery on his stepmother is not one of the enumerated felonies which would render felony murder a felony in the first degree, Florida Statute 782.04(4) provides that said felony murder shall be murder in the third degree.

It should further be noted that the doctrine of transferred intent cannot be utilized at all in evaluating the death of the defendant's father after the death of the defendant's cousin. Even if premeditation did exist as to the cousin based upon felony murder/transferred intent, the defendant's desire and intent upon that accident was to go and help the child. It was the father, and not the defendant, who continued the altercation thereafter (R. 480). There is nothing in the record to indicate that the defendant, with premeditation, attempted to kill the father after the accidental stabbing of the cousin.

Thus, the defendant would respectfully submit that the evidence and testimony presented at trial failed to establish a premeditated design to murder Sam Wilson, Sr. and Jerome Huegh-

ley. In addition, the introduction of the deadly weapon by Sam Wilson, Sr. and the escalation of the fight by him further negates the finding of premeditated design by the defendant. See, Forehand v. State, supra. Such escalated fights constitute less than murder in the first degree where the defendant's theory of events is rationally supported by the evidence. Tien Wang v. State, supra. In addition, the doctrine of transferred intent, under Florida Statute 782.04 renders the killings herein murder in the third degree. For any of these reasons, insufficient facts, reasonable hypothesis of innocence, escalation by third party, or statutory definition, defendant's Motions for Judgment of Acquittal as to Counts I and II relating to first degree premeditated murder should have been granted.

ISSUE II

THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY ON COUNTS I AND II UNDER THE FACTS PRESENTED.

The trial court found three aggravating circumstances applicable to both Counts I and II: prior conviction of a felony involving violence; heinous, atrocious and cruel; and cold calculating. This Court ultimately ruled on direct appeal that the cold and calculating standard did not apply to either Count I or Count II. This Court further held that the murder of Jerome Hueghley was not heinous, atrocious and cruel.

Thus, on direct appeal, this Court found the existence of two aggravating circumstances as to the death of the defendant's father and one as to the death of defendant's cousin. The defendant would herein respectfully submit that the concept of heinous, atrocious and cruel does not apply to the death of his father in Count I.

As stated in this Court's original opinion, the majority believed the facts established at trial to be that, "This victim had been beaten with a hammer. . . .Appellant then procured a gun and shot his father in the head." These simply were not the facts presented at trial.

There was a mutual struggle between the defendant and his father. The house was a shambles from the struggle. Defendant hit his father as a result of the battle, but did not "beat him" as that term is commonly interpreted. He also did not procure a gun and shoot him. -- The firearm discharged

accidentally after the father grabbed it from Earline. Moreover, it was Earline, at the request of defendant's father, who introduced the firearm into the fracas, not the defendant.

Case law on heinous, atrocious and cruel shows few, if any, findings of that aggravating circumstance where, as here, the victim and the defendant were engaged in mutual combat at the time of the killing.

It is generally true that where a vicious beating precedes the death of a victim, heinous, atrocious and cruel is supported. Thus, in Ross v. State, 386 So.2d 1191 (Fla. 1980), when the victim sustained a "severe beating to her head and face" and was "stabbed to death", the circumstance was sustained. It was affirmed in Adams v. State, 341 So.2d 65 (Fla. 1976), where the victim was beaten "past the point of submission and until his body was grossly mangled". See, also, O'Callaghan v. State, 429 So.2d 691 (Fla. 1983) and Stano v. State, 378 So.2d 765 (Fla. 1980). In all those cases, the beatings were severe and not "mutual combat", and the finding of aggravating circumstance was proper.

In this case, the Court found the factor proper, despite death being caused by a single blow, because this Court noted that the victim "had numerous abrasions on his body, including the head region, which were consistent with hammer blows." The Court believed that the trial court "could properly believe" the circumstance applied. Defendant's position is that the circumstance does not apply, that the Court's stan-

dard of review for affirming is constitutionally incorrect and that if heinous, atrocious and cruel does encompass this case, it is an unconstitutionally vague and overbroad aggravating circumstance, and is unconstitutional as written and applied.

The reason the standard should not apply is that the "heinousness" does not rise to the level of any of the other Florida beating cases, see, for example, Ross, O'Callaghan and Stano, supra, and is significantly less than that found insufficient in other cases. See, Halliwell v. State, 323 So.2d 557 (Fla. 1975) (defendant beat victim's skull with 19-inch breaker bar, fracturing skull, then bruising and cutting, literally beating victim to death -- not applicable); and Rembert v. State, 445 So.2d 337 (Fla. 1984) (beating elderly victim on head with club insufficient). If this aggravating circumstance is to be genuinely and thus constitutionally consistent, then the finding here must be reversed.

In any event, the inquiry is not whether the trial court could "properly believe" facts which would make the circumstance applicable. The inquiry is whether the State has proven the circumstance beyond a reasonable doubt, Jackson v. Virginia, 443 U.S. 307 (1979), and the above analysis indicates that it was not so proven.

Finally, if this aggravating circumstance applies in this case, then it does not "genuinely narrow the class of persons eligible for the death penalty", and is unconstitutional as applied to the defendant. Zant v. Stephens, 462 U.S. 862,

103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). See, Mello, "Florida's 'Heinous, Atrocious, or Cruel' Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller", 13 Stetson Law Review 523 (1984).

Furthermore, this Court found, because not presented by appellate counsel, that no mitigating factors were present. As more fully set forth infra, the jury, the trial court, and this Court, were denied the opportunity of considering non-statutory mitigating circumstances to determine the appropriateness of the death penalties imposed. (See Issues III and IV, infra.)

Thus, the defendant would respectfully submit that as to Count I, the aggravating circumstance of heinous, atrocious and cruel does not apply. Furthermore, since the trial court found three statutory aggravating circumstances upon which to justify the imposition of the death penalty in Counts I and II; since this Court found inapplicable two of the statutory aggravating circumstances as to the defendant's cousin (Count II); since this Court found inapplicable one statutory aggravating circumstance previously on direct appeal as to the defendant's father (Count I); since the statutory aggravating circumstance of heinous, atrocious and cruel does not apply to the defendant's father's death (Count I); and since as to each of these deaths, only one statutory aggravating circumstance remains, to wit: prior felony conviction, reconsideration of the death penalty by jury and trial court is appropriate. "We cannot know

whether [the trial court's] reasoned judgment would have been different if the trial judge had considered only one instead of three aggravating circumstances. . . ." Randolph v. State, 463 So.2d 186 (Fla. 1984). The capital sentencing procedure

> is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

State v. Dixon, 283 So.2d 1 (Fla. 1973).

In light of the trial court's having improperly considered aggravating circumstances which did not exist as a matter of law, and in light of the trial court's having failed to consider non-statutory mitigating factors (see Issues III and IV, infra), resentencing is mandated.

ISSUE III

THE TRIAL COURT ERRED BY REPEATEDLY INSTRUCTING THE JURY THAT THE MITIGATING CIRCUMSTANCES THEY COULD CONSIDER AT SENTENCING WERE LIMITED TO THE STATUTORY MITIGATING CIRCUMSTANCES.

During voire dire, the trial judge instructed the potential jurors that "[W]hen I give you the second set of legal instructions, I am going to read to you nine aggravating circumstances and seven mitigating circumstances. . . .You are going to be properly instructed as to what you should take into account before you make a recommendation." (R. 216-7).

Before sentencing, the trial judge instructed the jury that "You will be instructed on the factors in aggravation and mitigation." (R. 684). Thereafter, the trial judge instructed the jury during the sentencing phase of the trial that:

> The mitigating circumstances which you may consider, if established by the evidence, are these: (a) that the defendant has no significant of prior criminal activity; (b) that the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance; (c) that the victim was a participant in the defendant's conduct or consented to the act; (d) that the defendant was an accomplice in the events for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor; (e) that the defendant acted under extreme duress or under the substantial domination of another person; (f) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; (g) the age of the defendant at the time of the crime.

These instructions specifically did not make reference to the jury's right to consider non-statutory mitigating circumstances.

Perhaps the most firmly settled and closely enforced eighth amendment mandate applicable to capital sentencing is that the process for determining the appropriate punishment be individualized. It is clear that there can be no restriction, either expressly or by statute, Lockett v. Ohio, 438 U.S. 586 (1978), or as applied in a particular case, Eddings v. Oklahoma, 455 U.S. 104 (1982); Green v. Georgia, 442 U.S. 95 (1979), upon the consideration of mitigating factors by judge or jury. The settled nature of this mandate places its critical importance beyond question, for it is at the heart of that which is required of the capital sentencing process.

This requirement that capital sentencing be based upon an individualized determination which accords full and fair consideration to the mitigating features, as well as the aggravating features, of each case has emerged as the central principle of the Court's eighth amendment jurisprudence. See, Zant v. Stephens, supra, ("What is important at the selection stage is an individualized determination. . . ." This is so because

> A statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

Lockett v. Ohio, supra. This risk is "incompatible with the

commands of the Eighth and Fourteenth Amendments."

Accordingly, the complete consideration of the mitigating features of a case is the single most important safeguard for assuring reliability in the capital selection process. Where such features are excluded, the risk of mistake is too high to be constitutionally tolerable, thus the Court must "remove any legitimate basis for finding ambiguity concerning the [mitigating] factors actually considered. . ." Eddings v. Oklahoma, supra.

At the time of defendant's trial, Lockett applied with full force. As such, the jury should have been instructed as to the applicability of non-statutory mitigating circumstances.

More importantly, however, the trial court in the case at bar did not utilize the Florida Standard Jury Instructions as they existed on the date of trial. On April 16, 1981, the Florida Standard Jury Instructions were amended to comply with the dictates of Lockett v. Ohio, supra, by adding the following "statutory" mitigating circumstance: "8: any other aspect of the defendant's character or record, and any other circumstance of the offense." For some reason, this instruction was not given to the jury in August, 1981, and the judge did not consider the above-cited "mitigating circumstance" in his findings and imposition of sentence.

Thus, since the trial jury was improperly instructed under the wrong jury instructions as they existed on the date of trial, and since they were not instructed to be permitted to

consider non-statutory mitigating factors, the jury was in effect instructed to disregard multiple non-statutory mitigating factors and circumstances, including:

> a) The cousin's death was not intentional, but happened accidentally as a result of the struggle between defendant and his father; b) Defendant cooperated with police, giving them three tape-recorded statements; c) defendand voluntarily directed police to a .22 caliber pistol involved in the incident; d) the deaths resulted from a domestic disturbance that did not involve any other underlying felonies; e) the defendant wished to help his cousin after he was hurt but could not get away from his father; f) the defendant attempted to contact police and had his brother do so after the incident; g) the defendant expressed concern for his father's well being by going to his brother while in a state of shock and asking his brother to help; h) the defendant was remorseful about the incident as reflected by his continuous sobbing and upset condition throughout his first tape-recorded statement; i) defendant was not normally a violent person; j) defendant actually loved and cared for children and had no ill feelings for his cousin; and, k) defendant was normally a nice, respectful and kind-hearted individual.

The error in the trial court failing to permit the jury to consider these non-statutory mitigating factors is especially crucial in the case at bar, since on direct appeal this Court previously found inapplicable certain aggravating circumstances, and since the defendent herein raises the inapplicability of certain aggravating circumstances. If the jury had found to exist but one non-statutory mitigating circumstance, this Court's having ruled certain aggravating circumstances to be inapplicable, would have mandated a new sentencing proceeding.

The defendant was entitled to be sentenced on this most crucial issue of life and death by a jury that was properly instructed to consider such non-statutory mitigating circumstances.

ISSUE IV

THE TRIAL COURT ERRED BY REFUSING TO CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES WHEN SENTENCING DEFENDANT TO DEATH.

The trial court, in its sentencing order, precluded consideration of non-statutory mitigating circumstances:

> As to any mitigating circumstances: A. That the defendant has no significant history of prior criminal activity, I find that this circumstance does not apply in this case as to either count, Mr. Wilson having had an extensive record of criminal activity. B. That the crime for which the defendant is to be sentenced was committed while the defendant was under influence of extreme mental or emotional disturbance. I find that it does not apply. C. That the victim was a participant in the defendant's conduct or consented to the act, this mitigating circumstance does not apply. D. That the defendand was an accomplice to, an accomplice in the offense for which he is to be sentenced but the offense was committed by another person, that mitigating circumstance does not apply. E. That the defendant acted under extreme duress or under the substantial domination of another person. This mitigating circumstance does not apply. F. That the capacity for the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired does not apply. G. The age of the defendant at the time of the offense, this mitigating circumstance does not apply.

In summary, the trial court found three of the nine aggravating circumstances to be applicable, and furhter found none of the statutory mitigating circumstances to apply.

At no time did the trial court indicate on the record that he had or was willing to consider non-statutory mitigating circumstances. In addition, in the order above cited, no ref-

erence was made to non-statutory mitigating circumstances. As noted in the prior issue, the defendant is entitled to such consideration.

The defendant would specifically cite Herzog v. State, 439 So.2d 1372 (Fla. 1983), a case in which this Court reversed the death sentence previously imposed by Judge Coker, the same trial judge herein, because:

> However, there is no indication in the sentencing order that the court considered non-statutory mitigating circumstances. We find evidence in the record that the jury could have considered in finding nnon-statutory mitigating circumstances, e.g. 1) the heated argument between the victim and the defendant which culminated in the defendant's decision to kill the victim, 2) the domestic relationship that existed prior to the murder. . . .

Due to the similarity of non-statutory mitigating circumstances specified in Herzog v. State, supra, to the case at bar and because of the existence of non-statutory mitigating circumstances as specified in the previous issue, the defendant would respectfully submit that the death penalty imposed below must be reversed due to the trial court's failure to consider non-statutory mitigating circumstances and to make reference thereto in the Court's order.

ISSUE V

THE DEATH PENALTY IMPOSED BELOW IS NOT PROPORTIONATELY WARRANTED UNDER THE FACTS AND CIRCUMSTANCES PRESENTED.

Although the Record on Appeal may contain sufficient evidence to sustain a jury's verdict of first degree murder, it remains for this Court to determine whether the death penalty is proportionately warranted under the circumstances of this individual's case. Ross v. State, ___ So.2d ___ (Fla. 1985) (10 FLW 405) and Blair v. State, 406 So.2d 1103 (Fla. 1981).

As set forth in Issue I, the defendant would respectfully submit that his pre-trial confessions relating to the accidental deaths of his father and cousin remain uncontradicted by the State's evidence. No evidence was presented by the State to indicate that the deaths were caused other than as a direct result of Sam Wilson Sr.'s escalation of the confrontation and Jerome Hueghley's accidental intervention.

Nor was any evidence presented by the State to establish that the deaths were caused other than as a result of a heated confrontation between the participants. The record presents no indication beyond a reasonable doubt of the defendant's premeditated desire to bring about the death of his father and cousin.

Furthermore, as set forth in Issue II, the only aggravating circumstance which exists as to the death of defendant's cousin, Jerome Hueghley, is the defendant's prior felony conviction. As to the death of defendant's father, Sam Wilson,

Sr., the trial court improperly found to exist the aggravating circumstance heinous, atrocious and cruel. The record is totally devoid of any intent on the part of the defendant to cause the death of his father in a heinous, atrocious or cruel manner.

The defendant would further submit that the jury, as a result of jury instructions, and the trial court, failed to consider the following non-statutory mitigating factors:

> a) The cousin's death was not intentional, but happened accidentally as a result of the struggle between defendant and his father; b) Defendant cooperated with police, giving them three tape-recorded statements; c) defendand voluntarily directed police to a .22 caliber pistol involved in the incident; d) the deaths resulted from a domestic disturbance that did not involve any other underlying felonies; e) the defendant wished to help his cousin after he was hurt but could not get away from his father; f) the defendant attempted to contact police and had his brother do so after the incident; g) the defendant expressed concern for his father's well being by going to his brother while in a state of shock and asking his brother to help; h) the defendant was remorseful about the incident as reflected by his continuous sobbing and upset condition throughout his first tape-recorded statement; i) defendant was not normally a violent person; j) defendant actually loved and cared for children and had no ill feelings for his cousin; and, k) defendant was normally a nice, respectful and kind-hearted individual.

Based upon the lack of premeditation, the lack of significant aggravating circumstances, and the existence of non-statutory mitigating circumstances, the imposition of death herein is not proportionately warranted under the circumstances.

ISSUE VI

THE STATE AND TRIAL COURT DIMINISHED IN THE JURORS' MINDS THE IMPORTANCE OF THE RECOMMENDATION AT SENTENCING.

Juries are an integral and fundamental part of capital sentencing in Florida: A jury recommendation under our trifurcated death penalty statute should be given great weight. Tedder v. State, 322 So.2d 908 (Fla. 1975). As such, before a judge can override a jury recommendation, the facts suggesting a sentence of death should be "so clear and convincing that virtually no reasonable person could differ".

Notwithstanding the recognized importance of jury recommendations, the prosecutor and trial judge herein informed and instructed the jurors that their sentencing recommendation was unimportant, since it was but a recommendation which the judge could accept or reject.

Before trial, potential jurors were told by the judge that "The jury renders an advisory sentence to the court. . . . The Court is not required to follow the advice of the jury . . . ." (R. 87).

In addition, the following colloquy occurred between a potential juror and the Court:

> JUROR: Well, will he be executed? That's the question.
>
> THE COURT: That is going to be my decision ultimately. Jurors do not impose sentences. Judges impose sentences.

(R. 111).

The following additional colloquy occurred between the State and a potential juror:

> Q. What was your response about capital punishment? I am sorry, I don't --
>
> A. . . .I mean, if it really comes down to - that is not really my decision to make, if I served on a jury anyways.

(R. 234-5).

In instructions to the jury at the guilt/innocence phase of the trial, the trial judge told the jury that, "When you have determined the guilt, or innocence, of the accused, you have completely fulfilled your solemn obligation under your oaths." (R. 657). Thereafter, during the sentencing phase of the trial, the trial judge informed the jurors that, "Final decision as to what punishment shall be imposed rests solely with the judge of this Court; however, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant."

In Caldwell v. Mississippi, ___ U.S. ___ (1985) (June 11, 1985), the United States Supreme Court ruled that the prosecutor's request that the jury not view itself as determining whether the defendant would die, because a death sentence would be reviewed for correctness by the State Supreme Court, was, "inconsistent with the Eighth Amendment's need for reliability in the determination that death is the appropriate punishment in a specific case."

"This Court's Eighth Amendment jurisprudence has taken

as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State". Caldwell, supra. Jurors who do not wish to be burdened with the responsibility of recommending a death sentence would be "very receptive to the prosecutor's assurance that it can more freely err because the error may be corrected on appeal," or, similarly, by the trial judge.

The prosecutor's and trial court's actions in this case have the same effect as those in Caldwell, supra: "It depicted the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform." The proper function of a Florida sentencing jury is not that which was announced by some of the jurors in this case: "That is not my decision to make". (R. 234-5).

CONCLUSION

Based upon the foregoing cases, citations, authorities, reasons and theories, the defendant would respectfully request this Honorable Court to reverse the judgment, conviction and sentence entered below.

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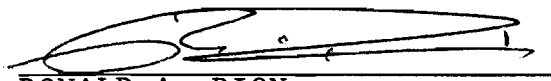
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, Palm Beach County Regional Service Center, 111 Georgia Avenue, Room 104, West Palm Beach, Florida, 33401, this 19th day of November, 1985.



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