IN THE SUPREME COURT OF FLORIDA

SAM WILSON, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 67,721

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee was the prosecution in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, and Appellant was the defendant, respectively. The parties will be referred to as they appear before this Honorable Court.

The symbol "R" will refer to the Record on Appeal. All emphasis is supplied by the Appellee, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Appellee accepts the Appellant's Statement of the Case and Facts, to the extent that it is non-argumentative and supported by correct references to the record, subject to the following additions:

The opinion of this Court granting the Appellant a new appeal affirmed the trial court's denial of post-conviction relief. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985).

The Appellant was uninjured when he was observed at the crime scene (R 336), and no injuries were seen on him when he gave his statements to the police, nor did he complain of any (R 507). The Appellant told his friend, Jimmie Wilson, whose home he went to before calling the police, that he was not hurt (R 350).

In his initial oral statement to the police at the scene, the Appellant claimed an unknown black male had fired shots in the residence (R 318, 454). After Earline Wilson identified the Appellant as the person responsible, he gave a taped statement (R 460-461). In this first statement, he denied shooting Earline Wilson (R 482), although admitting he hit her with a hammer and cut her with a knife (R 481). However, in a subsequent statement, the Appellant admitted that after he shot his father, he continued his attack on Earline. She had locked herself in a bedroom, so he ran around outside the

house, climbed in the bedroom window, and fired shots at her in the closet where she was hiding, emptying the gun (R 495, 503-504). A neighbor, Willie Cunningham, Jr., heard three or four shots fired in quick succession (R 342-343).

The doctor who performed an autopsy on Sam Wilson, Sr., testified the fatal shot to his head ran in a downward direction (R 546), and there was no tattooing so the gun was probably more than three feet away when it was fired (R 548). This latter opinion was confirmed by Dennis Grey, a criminologist who is trained in firearm identification (R 554, 559).

During the penalty phase of the Appellant's trial, the prosecution presented evidence that the Appellant had a 1976 criminal conviction for attempted armed robbery with a knife (R 684-691, 706). The prosecutor argued the existence of two statutory aggravating factors: the Appellant had a previous conviction of a violent felony (R 706), and the manner of the victims' death was heinous, atrocious and cruel (R 707).

The defense presented evidence that the Appellant was employed at Morrison's Cafeteria (R 693, 697), and he normally was kind to children (R 694-695, 698, 701, 703). The thrust of the defense closing argument was the homicides were committed on one unfortunate night in the Appellant's life and he was usually a good person (R 713).

POINTS INVOLVED

POINT I

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL?

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SUMMARY OF THE ARGUMENT

The trial court properly denied the motions for judgment of acquittal and allowed the jury to convict the Appellant of first degree murder. As to Sam Wilson, Sr., the Appellant's unprovoked attack on Earline Wilson with a hammer, which brought his father to her aid, the weapons used in attacking Mr. Wilson, the fatal gunshot wound to the head and numerous other injuries inflicted all are relevant to show premeditation. The additional facts that the Appellant was uninjured and he made efforts to escape detection as the perpetrator further establish the death of Sam Wilson, Sr. was premeditated. The death of the five-year-old boy, Jerome, was first degree murder based on the legal principle of transferred intent.

The trial court correctly found the aggravating factor that the murder of Sam Wilson, Sr., was heinous, atrocious and cruel. The evidence showed the victim was severely beaten and cut and had tried to defend himself before he was shot in the head. Even if the court finds this factor inapplicable, the sentences should be affirmed because there remains a valid aggravating factor and there are no mitigating circumstances.

The Appellant's failure to object to the penalty phase instructions bars appellate review. There is no fundamental error, because the instructions given have been authoritatively construed as non-limiting and there

were no restrictions on the defense attorney's presentation of evidence and argument.

The trial court's reference to the statutory mitigating circumstances in its sentencing order does not establish its consideration was restricted since no limiting references were made and the Appellant's attorney presented evidence and argument pertaining to non-statutory mitigating circumstances.

In view of the applicable aggravating factors and lack of mitigation, the death sentences were properly imposed. The facts of this case are similar to other domestic murder cases wherein the death penalty has been upheld by this Court.

The penalty phase instructions in this case correctly informed the jury its role would be advisory. The Florida statutory requirement that the trial judge impose sentence has been approved by the United States Supreme Court. The decision in Caldwell v. Mississippi, ___ U.S. ___, 86 L.Ed.2d 231 (1985), thus has no application to the present case.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE ADDUCED WAS SUCH THAT THE JURY COULD CONCLUDE THE APPELLANT COMMITTED FIRST DEGREE MURDER.

The Appellant contends the trial court should have reduced the charges against him, on his motion for judgment of acquittal. The Appellee maintains the State established its case of first degree murder, and the trial court correctly permitted the jury to resolve the factual issue of premeditation.

In reviewing this matter, the test is not whether in the opinion of the trial court or the appellate court the evidence fails to exclude every reasonable hypothesis of innocence but whether the jury must reasonably so conclude. Stated another way, the test is whether the jury, as trier of fact, might reasonably conclude the evidence excludes every reasonable hypothesis but guilt. Lowery v. State, 450 So.2d 587 (1DCA Fla. 1984); Brown v. State, 424 So.2d 950 (1DCA Fla. 1983); Green v. State, 408 So.2d 1086, 1089 (4DCA Fla. 1982).

The question of whether the killings were premeditated (there is no question the Appellant was the perpetrator) can be determined from the circumstances, and whether the evidence shows a premeditated design to

commit murder is a question of fact for the jury. Preston v. State, 444 So.2d 939, 944 (Fla. 1984). The appellate courts have recognized a defendant's mental intent is hardly ever subject to direct proof; it must be shown from the circumstances, and a trial judge should rarely if ever grant a motion for judgment of acquittal based on the State's failure to prove intent. Brewer v. State, 413 So.2d 1217, 1219-1220 (5DCA Fla. 1982) (en banc), discr. rev. denied, 426 So.2d 25 (Fla. 1983).

With these standards in mind, the Appellee will discuss the facts of the instant case. The police were called to the Wilson residence on October 8, 1980, at about 2:30 a.m. (R 211). The Appellant and his brother, Bobby Wilson, met them outside and the Appellant stated shots were fired and an injured person was inside (R 312, 330). The police found Sam Wilson, Sr. and Jerome Hueghley, both deceased (R 316). The Appellant, who was uninjured (R 336), stated an unknown black male had caused the deaths (R 318, 335). Just then, Earline Wilson stumbled out of the utility room, injured and bleeding (R 318-319). Someone asked who "did it" and she said "Sam, Jr." and pointed to the Appellant (R 320, 332). At that point the Appellant was arrested (R 321).

A friend of the Appellant's, Jimmie Wilson, testified the Appellant came to his house around 2:00 a.m. wearing only his shorts (R 350). He wanted to call the

police but Jimmie Wilson had no telephone and so suggested the Appellant go to his brother's house (R 350). The Appellant borrowed some clothes and went inside Jimmie's house and took a shower (R 351). He had a gun with him (R 360), which he took when he left (R 364).

Detective Cone processed the crime scene (R 371). Photographs were introduced. Sam Wilson, Sr.'s body was found in the living room (R 382) and Jerome was on one of the beds in the middle bedroom (R 380). A hammer was found in the hall (R 381), a pair of scissors on the ground by the window (R 378) and a bent knife with red stains on it by the kitchen sink (R 381). Three spent projectiles were in the closet. George Duncan, a serologist, testified there was blood on the scissors (R 1051-1052), the hammer (R 1054), and the knife (R 1055).

The autopsy of Earline Wilson (who died about a month after the incident of unrelated causes) disclosed she had a depressed area in her left forehead from a skull fracture and in this area of her skull there were injuries from at least three blows from a blunt object, consistent with a hammer (R 435, 437). She also had been shot at least five times (R 439). Jerome Hueghley died from a single stab wound in the middle of his chest (R 530-531). Sam Wilson, Sr. died from a gunshot wound to the head (R 537). The direction of the wound was backward, downward, and slightly to the right (R 546). In addition

to the wound there were numerous abrasions on his head which were not consistent with injuries caused by a fist but would be consistent with hammer blows (R 540). There were also abrasions on his body and lacerations on the scalp (R 541) and numerous injuries on his right hand indicating defensive wounds (R 544, 546). There was no tattooing from gunpowder around the gunshot wound (R 548), meaning the gun was fired from at least three feet away (R 559).

The Appellant gave varying statements to the police. In a patrol car at the scene, he stated he had been asleep and heard a shot, found his wounded father in the living room and saw an unknown black male leaving, whereupon he went to get help (R 454). Once at the police station, he repeated this story but added the little boy was uninjured when he left the residence (R 460). Finally, he admitted the killings and gave a statement. The Appellant stated he became angry when Earline Wilson told him not to eat the food in the refrigerator so he picked up a hammer and hit her with it in the shoulder and head (R 474, 476). Earline called for Sam Wilson, Sr., and he and the Appellant started fighting, and Mr. Wilson, Sr. was also hit with the hammer (R 478). Earline got a gun and the Appellant grabbed it away from her (R 478). Jerome got in the middle of the fight and was stabbed (R 479). The Appellant claimed in fighting with his father over the gun it went off (R 475), and he denied

shooting Earline (R 482).

The following day, the Appellant reviewed his statement and made a few changes. He admitted his father had not threatened to kill him as he had stated, and he admitted he had shot Earline (R 493, 495). She had locked herself in the bedroom and he climbed in through the window and fired at her in the closet where she was hiding, emptying the gun (R 503).

In view of this evidence, the State established the killing of Sam Wilson, Sr. was premeditated, i.e., a fully formed purpose to kill existed in the Appellant's mind long enough to permit reflection. Sireci v. State, 399 So.2d 964, 967 (Fla. 1981). As this Court has held in numerous cases, premeditation can be inferred from the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. See, e.g., Sireci v. State, supra, Griffin v. State, 474 So.2d 777 (Fla. 1985); Welty v. State, 402 So.2d 1159 (Fla. 1981).

The evidence was clear the Appellant instigated the entire criminal episode by attacking Earline Wilson with a hammer because she told him not to take any food from the refrigerator. Sam Wilson, Sr. came to her aid after she called for help. The Appellant obtained the gun by taking it away from Earline; there is no evidence

Sam Wilson, Sr. ever had possession of it. The fatal wound to his head was fired in a downward direction from at least three feet away, giving the lie to Appellant's assertion that it went off during a struggle. Additionally, Mr. Wilson sustained numerous lacerations and abrasions. The Appellant's murderous intentions were apparent from the fact he pursued Earline to the closet where she had taken refuge and shot her after his father and cousin were dead. This fact belies Appellant's claim that he wanted to help the boy, Jerome, but could not get away from his father, since after his father was killed he gave no thought to Jerome but tried to kill Earline. Thinking there were no living witnesses, and being uninjured, the Appellant attempted to cover up his deeds by washing, changing clothes, and telling the police an unknown intruder was responsible.

In cases factually similar to this one, first degree murder convictions have been upheld. In Buford v. State, 403 So.2d 943 (Fla. 1981), the defendant dropped a concrete block on the head of a child, killing her. The court affirmed, holding that where a person strikes another with a deadly weapon and inflicts a mortal wound, the act of striking is sufficient to warrant a jury in finding the person intended the result which followed. Likewise, in Washington v. State, 432 So.2d 44 (Fla. 1983), the defendant struggled with a police officer and shot him four times. The court held that where the eyewitnesses agreed

the defendant's arm and hand were free when he fired the shots, this was sufficient to show the shooting was intentional and to support the conclusion that the murder was premeditated. In Preston v. State, 444 So.2d 939, 944 (Fla. 1984), this Court held the deliberate use of a knife and multiple stab wounds to the victim constituted sufficient circumstantial evidence of premeditation. In Ross v. State, 474 So.2d 1170 (Fla. 1985), the court held premeditation could be inferred from the defendant's brutal beating of his wife while she tried to defend herself.

The injuries caused to Mr. Wilson, Sr. in this case are similar to the cases cited, and thus suffice to prove premeditation. Additionally, in Spinkellink v. State, 313 So.2d 666, 670 (Fla. 1975) and Herzog v. State, 439 So.2d 1372 (Fla. 1983), this Court has held that attempts to cover up involvement in crime and making exculpatory statements to authorities supports a finding of premeditation. See also, Andreasen v. State, 439 So.2d 226 (3DCA Fla. 1983) [false exculpatory statements may be considered as substantive evidence]. Thus, the Appellant's efforts to conceal his responsibility for the crimes are additional evidence of premeditation.

This case is distinguishable from Forehand v. State, 171 So. 141 (Fla. 1936) and Tien Wang v. State, 426 So.2d 1004 (3DCA Fla. 1983), cited by the Appellant. Of course, as this Court observed in McArthur v. State,

351 So.2d 972, 976 (Fla. 1977), the nature and quality of the evidence is unique in each case. In Forehand, the court reviewed the evidence and found that the accused had become enraged from an earlier quarrel, to the point that he fired at two persons on the ground, one of whom was his own brother, and there was no evidence of any ill will towards his brother. Here, there was a protracted criminal episode and the Appellant attacked his family members, not in a single instant, but with different weapons and he ultimately fired a shot from a distance of more than three feet at his father's head.

In Tien Wang, the homicide came after the defendant had made frantic efforts for a full day to persuade his wife to return to him, an effort which was frustrated by the victim, her stepfather. The court found the defendant's mental state was such that he did not have the premeditation required for first degree murder, though he did have the intent to kill necessary to establish second degree murder. By contrast, in the present case the Appellant instigated and carried out the murder of his family in the absence of any provocation.

The evidence presented by the State therefore was inconsistent with any reasonable hypothesis of innocence concerning the death of Sam Wilson, Sr. As to the death of Jerome, the Appellant claimed Jerome was stabbed when he tried to break up the confrontation between Appellant

and Sam Wilson, Sr. The first degree murder charge was based on transferred intent, for as a matter of law, the original malice is transferred from the one against whom it was entertained to the person who suffered the consequence of the unlawful act. Pressley v. State, 395 So.2d 1173 (3DCA Fla. 1981). As this Court explained in Lee v. State, 141 So.2d 257, 259 (Fla. 1962):

> . . . One who kills a person through mistaken identity or accident, with a premeditated design to kill another, is guilty of murder in the first degree . . . the law transfers the felonious intent in such a case to the actual object of his assault, and the homicide so committed is murder in the first degree.

Accordingly, since the evidence was sufficient on the issue of premeditation concerning the death of Sam Wilson, Sr., it was likewise sufficient as to Jerome.

Based upon the foregoing, the Appellee maintains the trial court properly denied the motions for judgment of acquittal. Since the record contains competent substantial evidence from which the jury could conclude the Appellant was guilty of first degree murder, the ruling should be affirmed. Ross v. State, supra; Rose v. State, 425 So.2d 521 (Fla. 1982).

POINT II

THE TRIAL COURT DID NOT ERR IN FOLLOWING THE JURY'S RECOMMENDATION AND IMPOSING THE DEATH PENALTY IN COUNTS I AND II.

The Appellant asserts the trial court improperly found the death of his father was heinous, atrocious and cruel, Fla. Stat. §921.141(5)(h), because the death resulted from a "mutual struggle." Appellee would point out the "struggle" was entirely one-sided. The Appellant emerged unscathed, while his father sustained multiple abrasions and lacerations on his head and body (R 540-541), as well as injuries on his right hand which indicate defensive wounds (R 544, 546). The injuries to the head were consistent with hammer blows (R 540). The fatal gunshot wound to his head (R 537), was therefore not the first one, for the other injuries were sustained while Mr. Wilson was alive and trying to defend himself. It should also be pointed out the "struggle" was entirely unprovoked by Mr. Wilson, for he was coming to aid Earline Wilson after the Appellant viciously attacked her with a hammer. The extent of Mr. Wilson's injuries is depicted in the photographs which were introduced into evidence and are included in the Record on Appeal: State's Exhibits 1, 15, 16, 70 and 71.

In numerous capital cases where the facts are similar to the facts of the instant case, this Court has held the finding of heinous, atrocious and cruel to be

proper. For example, in Heiney v. State, 417 So.2d 210, 215-216 (Fla. 1984), the finding was approved where the victim was beaten in the head with a hammer and there were defensive wounds. In Waterhouse v. State, 429 So.2d 301, 307 (Fla. 1983), the victim received numerous bruises and lacerations which were inflicted with a sharp instrument; defensive wounds showed she was alive and conscious when attacked. In Arango v. State, 411 So.2d 172 (Fla. 1982), the victim was beaten with a blunt instrument, a towel stuffed in his mouth, wire was wrapped around his neck, and there were two shots to his head.

A case very close to this one on the facts is Ross v. State, 474 So.2d 1170 (Fla. 1985). In Ross, the evidence showed the defendant beat his wife with an unknown blunt instrument and there was a bloody scene and defensive wounds so her death was not instantaneous. Thus, based on these decisions, the trial court appropriately found the murder was heinous, atrocious and cruel where Mr. Wilson was severely beaten and tried to defend himself before his death and the Appellant was uninjured.

In the alternative, even if this Court finds there is only one aggravating factor, the prior conviction of a violent felony, Fla. Stat. §921.141(5)(b), in the absence of mitigating factors, the sentence of death should be affirmed. The Appellant had a full opportunity to present evidence in mitigation, but it was within the province of

the judge and jury to decide the weight to be given the evidence. Byrd v. State, 10 FLW 599 (Fla. op. filed 11/14/85). The jury and judge are not compelled to resolve mitigating evidence in favor of the defendant's position. Hargrave v. State, 366 So.2d 1 (Fla. 1978); Riley v. State, 413 So.2d 1173 (Fla. 1974).

Thus, in this case where there is a valid aggravating factor and no mitigating factors, the death penalty is presumed to be appropriate. Armstrong v. State, 429 So.2d 287 (Fla. 1983); Christopher v. State, 407 So.2d 198, 203 (Fla. 1981); State v. Dixon, 283 So.2d 1, 9 (Fla. 1979). As stated in Francois v. State, 407 So.2d 885, 891 (Fla. 1981), "where the consideration of erroneous aggravating circumstances does not interfere with the weighing process prescribed by statute because there are no mitigating circumstances to weigh, no resentencing is required."

POINT III

THE UNOBJECTED TO PENALTY PHASE INSTRUCTIONS DID NOT LIMIT THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES.

The Appellant's contention that the trial court's instructions to the jury at the sentencing phase of his trial limited their consideration of mitigating factors to those enumerated in the statute has not been preserved for appeal as no objection was made at the trial level. It is well settled that objections to jury instructions must be timely made in order to raise the issue on appeal. Fla. R. Crim. P. 3.390(d); Vaught v. State, 410 So.2d 147 (Fla. 1982). Thus, in White v. State, 446 So.2d 1031, 1036 (Fla. 1984), this Court held a failure to object to sentencing phase instructions in a capital case bars appellate review unless there is fundamental error.

In the present case, no such error has been shown. The instructions given were the standard instructions which have been authoritatively construed by this Court as not limiting the circumstances in mitigation. In Armstrong v. State, 429 So.2d 287 (Fla. 1983), and Peek v. State, 395 So.2d 492 (Fla. 1981), this Court held the instructions direct, but do not limit, scrutiny to those areas of mitigation considered vital by the legislature in determining the fairness of a life or death sentence. See also, Jackson v. State, 438 So.2d 4, 6 (Fla. 1983). The jury certainly understood

their consideration was not limited, for they were instructed at the outset of the sentencing phase the evidence they would hear would be relevant to their recommendation (R 683-684). The defense then presented witness testimony concerning non-statutory mitigating circumstances. Four witnesses testified that the Appellant was normally good to children and he had a job at Morrison's Cafeteria (R 692-695, 696-698, 699-702, 702-704). In his argument, defense counsel discussed non-statutory mitigating evidence (R 708-714). No limitations were placed on the defense presentation of evidence and argument.

Appellant asserts the April 16, 1981, amended sentencing instructions should have been given at his August, 1981, trial, for these instructions specifically advise the jury to consider any aspect as mitigating. In the absence of an objection, this is not a basis for reversal because the instructions given were non-limiting. In Rembert v. State, 445 So.2d 337, 340 (Fla. 1984), this Court held that a failure to give an amended sentencing phase jury instruction is not reversible error unless there was an objection at trial. Moreover, in the Fla. R. Crim. P. 3.850 motion hearing (which denial was approved on appeal, Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985)), defense counsel stated he and the prosecutor agreed not to use the 1981 instructions because they wanted to be able to argue all the aggravating and mitigating circumstances as opposed

to having the trial judge make a determination of which ones would be given in the instructions to the jury.[1]

Thus, it is apparent the jury's consideration of mitigating circumstances was not limited. The jury chose not to find mitigating factors, which was within its province.

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[1]See transcript of post-conviction relief hearing, filed in Wilson v. State, FSC No. 67,204, pages 29-30.

POINT IV

THE TRIAL COURT DID NOT REFUSE TO CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES.

The Appellant asserts that because the trial court's sentencing order lists the statutory mitigating circumstances and finds them inapplicable but does not refer to the non-statutory mitigating evidence, the trial court failed to consider such evidence in mitigation. Appellee maintains the record establishes the trial court considered all the evidence presented.

First, Lockett v. Ohio, 438 U.S. 586 (1978), was decided three years before the Appellant's trial so it is reasonable to conclude the trial court followed its mandate. The trial judge did not restrict the presentation of mitigating evidence. Appellant's defense counsel pointed out in his argument prior to sentencing that the court was not restricted to statutory mitigating circumstances (R 743). In the sentencing order, the trial court stated, ". . . that as of the nine aggravating circumstances, three were applicable in this case," and then "as to the mitigating circumstances, none applied . . ." (R 749, 1266). The court went on to state its "additional opinion that no mitigating circumstances exist . . ." (R 749, 1266). The trial court thus clearly referred to the nine statutory aggravating factors while making no such limiting references to mitigating factors.

In Palmes v. State, 725 F.2d 1511, 1523 (11th Cir.), cert. denied, ___ U.S. ___, 105 S.Ct. 227 (1984), the Eleventh Circuit Court of Appeals held that the fact a trial court's sentencing order discussed only statutory mitigating factors did not warrant a conclusion that the other evidence in mitigation was not considered, in view of the fact that the defense attorney was given an unrestricted opportunity to present mitigating evidence.

In the present case the trial judge did not refuse to consider mitigating evidence; rather, it is clear he decided the evidence did not rise to the level of mitigation. Lusk v. State, 446 So.2d 1038, 1043 (Fla. 1984). This is certainly permissible, for there is no requirement that a court must find anything in mitigation. Porter v. State, 429 So.2d 293, 296 (Fla. 1983); Daugherty v. State, 419 So.2d 1067, 1071 (Fla. 1982); Lemon v. State, 456 So.2d 885, 887 (Fla. 1984).

The decision relied upon by the Appellant, Herzog v. State, 439 So.2d 1372 (Fla. 1983), is inapposite, for Herzog concerns the entirely different matter of review of a trial court's override of a jury recommendation of life. In the present case, the jury recommended death, and the trial court, after a careful review of the aggravating and mitigating factors, followed its recommendation. Herzog has no bearing on the present claim.

POINT V

THE DEATH SENTENCES IN THIS CASE ARE PROPORTIONATE TO DEATH SENTENCES IMPOSED IN OTHER CASES WITH SIMILAR FACTS.

The Appellant contends this Court should find the death penalty is not warranted in this case, based on a comparison to other decisions in capital cases. The Appellee maintains a proportionality review should result in affirmance of the sentences in Counts I and II.

An aggravating circumstance applicable to both counts is the Appellant's prior conviction of a violent felony, an attempted armed robbery with a knife. As stated in the presentence investigation, "In that crime, Sam Wilson, Jr. threatened the victim, a motel clerk, by holding a large knife to his throat and driving him backwards several feet to the wall." (R 1260). Thus, the brutal attack on his family members was not the Appellant's first violent encounter. Further, the murder of Sam Wilson, Sr., was heinous, atrocious and cruel (see Point II). The deaths did not result from a mutual struggle, but occurred as a direct result of the Appellant's unjustified attack on Earline Wilson (see Point I).

Against these valid aggravating factors, the trial court found nothing in mitigation. The Appellant has suggested several non-statutory mitigating factors, which Appellee maintains do not suffice to require reduction

of the sentence. Certainly, reasonable persons could differ as to whether these alleged mitigating circumstances exist. For example, the fact the Appellant had his brother call the police after the incident may be true, but this call was not made until after the Appellant attempted to conceal his role as the perpetrator of the homicides. The Appellant did not cooperate with the police and admit his responsibility until after Earline Wilson identified him. The Appellant's alleged effort to help his cousin Jerome is based on a self-serving statement he made; the evidence is to the contrary. It is clear there were no underlying felonies, but this serves to negate an aggravating factor and does not amount to a mitigating factor.

This case is not the type of domestic dispute/ murder in which death sentences have been reduced by this Court in its proportionality review. In both Blair v. State, 406 So.2d 1103 (Fla. 1981) and Halliwell v. State, 323 So.2d 557 (Fla. 1975), the defendants were Vietnam veterans who had no prior history of criminal activity. By contrast, this Appellant had a violent past. Likewise, in Ross v. State, 474 So.2d 1170 (Fla. 1985), the defendant had no prior violent crimes and he had a drinking problem, while in this case there is no evidence of alcohol or any other type of impairment. Proportionally, this case is similar to Lemon v. State, 456 So.2d 885 (Fla. 1984), King v. State, 436 So.2d 50 (Fla. 1983) and Harvard v. State,

414 So.2d 1032 (Fla. 1982). These cases all involve the defendants killing family members after a previous conviction for a violent offense, and the sentences of death were upheld. Pursuant to these decisions, the death sentence imposed upon the Appellant was proportionate.

POINT VI

THE JURY WAS CORRECTLY ADVISED OF ITS ADVISORY FUNCTION AND IN NO WAY WAS THE IMPORTANCE OF ITS RECOMMENDATION DIMINISHED.

In Caldwell v. Mississippi, ___ U.S. ___, 86 L.Ed.2d 231, 239 (1985) the United States Supreme Court held, ". . . it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." The sentencer in Caldwell was, pursuant to the law of Mississippi, the jury, and it was misled by the prosecutor who stated the ultimate decision as to the death penalty would be made by an appellate court.

In the present case, pursuant to the law of Florida, the jury was correctly told its role is advisory and the sentencer would be the trial judge (R 714-721); Fla. Stat. §921.141(2)(b). The instructions given to the jury and the prosecutor's comments accurately portrayed the jurors' advisory role and in no way implied that said function was meaningless. The jury was informed, pursuant to the Florida Standard Jury Instructions, its duty was to advise the court as to the appropriate punishment (R 714) and told the majority finding requirement should not be an invitation to "act hastily or without due regard to the gravity of

these proceedings." (R 719). The instructions further impressed upon the jury the relevance and significance of its deliberation and recommendation, by advising, "before you ballot, you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment" in deciding whether to recommend death or life imprisonment (R 719).

In Spaziano v. Florida, ___ U.S. ___, 82 L.Ed.2d 340 (1984), the Supreme Court expressly approved the Florida sentencing scheme wherein the trial judge imposes sentence and held jury sentencing in capital cases is not required by the Sixth Amendment to the United States Constitution. Id. at 350-355. Thus, the Supreme Court has recognized the jury in Florida is not the sentencer, so its decision in Caldwell has no application to the instant case, since the sentencer here, the trial judge, was clearly aware of his responsibility.

CONCLUSION

Based upon the foregoing argument, supported by the circumstances and authorities cited therein, Appellee would respectfully request that this Honorable Court affirm the judgments and sentences of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Appellee has been mailed to Ronald A. Dion, Esquire, of ENTIN, SCHWARTZ, DION, SCLAFANI AND CULLEN, 1500 Northeast 162nd Street, North Miami Beach, FL 33162, this 18th day of December, 1985.

Of Counsel