IN THE SUPREME COURT OF FLORIDA

WILLIAM T. TURNER,)
Appellant)
vs.) CASE NO. 67,987
STATE OF FLORIDA,)
Appellee)

REPLY BRIEF OF APPELLANT

On Appeal From the Circuit Court of
the Fourth Judicial Circuit of
Florida, In and For Duval County

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1/12/88

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STATEMENT OF FACTS

The government's statement of the facts warrants reply in several respects.

1. Appellant submits that the record is unclear as to whether the Appellant left the house in pursuit of his daughter or in pursuit of Joyce Brown. Appellee strongly disagrees. (AB 3). In reply, Appellant submits that the transcipt of a telephone call to the police reflects that Joyce Brown called to Anetra Turner to come to the telephone booth where she comforted the child. A moment later, the Appellant left the house and encountered both Anetra Turner and Joyce Brown at the telephone booth. (See Appendix to Initial Brief).

2. The government on appeal states "Appellant's statement that multiple stab wounds are more frequently associated with homosexual murders [IB 4] in view of the record here, was a gratuitous and pointless remark." (AB 4). In reply, Appellant calls the government and the Court's attention to the testimony of the Chief Deputy Medical Examiner:

[Defense Counsel]:	Now, Dr. Floro, you used the term with [an assistant state attorney], I believe your word was over-kill.
Dr. Floro :	Yes, sir.
Defense Counsel:	Does the word over-kill have a place or your practice as a forensic pathologist?
Dr. Floro :	Well, let's put it this way. Most of those, if not all of my stab wound cases, do come to me as a multiple stab

> wounds, two or more. Now, in some of these cases that I have done, which were all stab wounds, many of them come to me with not two or more, but twenty or fifty of more. I have seen this more frequently in the so-called homosexual death, those killed by homosexuals, for example. (T 549). [Emphasis supplied].

From this, Appellant submits that this court cannot take credence to the State's Answer Brief for it is evident that the brief is deficient in regards to the facts as well as the law[1].

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[1] The State's Answer Brief contains numerous comments which attack not the merits of the Appeal but the integrity and the personality of the Appellant's counsel. For example, in one argument, the government charges that the Appellant, although not unethical at the trial below, is promoting unethical conduct for trial attorneys representing defendants in future capital cases. (AB 13).

It is not the substance but the tenor of the accusations that gives rise to this comment. In addition, it appears to be a common criticism of the government's work. (See e.g., Motion to Strike, Charles M. Knight v. State of Florida, Case No. 65,749, Supreme Court of Florida).

This court, in Garvin v. Baker, 59 So.2d 360 (Fla. 1952), established the limits of acceptable advocacy in appellate advocacy.

> Every brief filed in this court should contain a dignified and orderly presentation by counsel of the law and facts of the case, without criminations and recriminations against opposing attorneys or the court, whether any personal offense is intended thereby or not. This requirement should not be lost sight of in the commendable enthusiasm of partisan advocacy usually found where counsel feel a real interest in the result of their arguments."

Id. at 365, (Emphasis added), quoting, Jones v. Griffin, 138 So.38, 40 (Fla. 1931). See also, Shotkin v. Cohen, 163, So.2d 330 (Fla. 3d DCA 1964).

(Footnote continued)

(Footnote continued)

An even more fundamentally objectionable feature of the Answer Brief is the torrent of abusive remarks aimed, not at argument, but at the personalities of Appellant's counsel. The appellate courtroom is not a forum for personal criticism, attack on opposing counsel, or other acts of stringency. As an officer of the court, and a member of the bar, a lawyer is to avoid indulging in invective. The Oath of Admission to the Florida Bar provides, in pertinent part:

"I will abstain from all offensive personalities and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged."

Despite this admonition, counsel for the State constantly characterizes the argument advanced by Appellant as lies. The State argues that a legal argument is either the truth or counsel is lying. There is no room for differences of opinion, arguments in the alternative, apparent paradoxes, errors in reasoning, or different perceptions based on the same facts. The greatest asset of any attorney is his or her reputation. By accusing counsel of intentional misrepresentation before this court, the State strikes the lowest blow possible.

The repeated personal attacks by the State upon the Appellant's attorney impermissibly interferes with the Appellant's right to counsel, in that counsel is forced to defend himself and not his client. In a criminal justice system premised on adversarial conflict, a certain amount of over-zealousness in the advocacy of one's cause is to be expected. There is a point, however, at which even the thickset legal skin is penetrated, and a response is demanded.

Counsel for the Appellant does not contend that the improper elements of the Answer Brief will have the slightest effect upon this Court's deliberations regarding the issues raised in this capital case. It should not be the task of this tribunal, however, to sift through the various assertions advanced by the Appellee to determine which should be considered and which ignored. It is properly the duty of the advocate to offer the Court appropriate legal argument on material issues, which leaving aside vituperation and vilification. Baiting one's adversary is common in competitions among nonprofessionals, but it has no place in a capital appeal.

The burning desire in this adversary process to accomplish a certain result may often precipitate remarks which, in retrospect, might better be left unsaid. When those comments are reduced to writing and communicated to the Court by an officer of the Court and an agent of the government, I feel it obligatory to reply.

ARGUMENT

I. APPELLANT WAS DENIED DUE PROCESS OF LAW BY HIS INVOLUNTARY ABSENCE FROM THE VOIRE DIRE CONFERENCE AND CHARGE CONFERENCE

This is a capital case on appeal. The record does not reflect the Appellant's presence at the venire conference or charge conference.

The government has cited no new or compelling applicable legal authority which should induce this court to alter its holdings in Garcia v. State, ____ So.2d ____ (Fla. Case No. 64, 841) 11 F.L.W. 251 (June 13, 1986) or Francis v. State, 413 So.2d 1175 (Fla. 1982). In addition, the government has made no argument as to the harmlessness or that the state met its burden to show beyond a reasonable doubt the absence of prejudice suffered by the Appellant. Unlike Garcia, in the case at bar, William Turner was involuntarily absent during two crucial stages of the proceedings: the jury selection, contrary to Rule 3.180(a)(4) Fla. R. Cr. P., and in addition, the charge conference. Although defense counsel waived the Appellant's presence at the charge conference, such waiver was ineffective as it was not ratified or acquiesced by the Appellant. Amazon v. State, 487 So.2d 8 (Fla. 1986).

The government on appeal argues that requiring the Defendant's presence will invite fraud by defendants and/or defense counsel. (AB 14). However, the government has failed to offer any indication that there was fraud in this

cause or that there have been other causes in which defense counsel committed fraud on the court in order to produce reversible error.

The absence of the Appellant frustrated the fairness of the lower court proceedings and constituted reversible error. The conviction must be reversed and remanded for new trial.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE INTRODUCTION INTO EVIDENCE OF FORTY-THREE GRUESOME PHOTOGRAPHS AND A TAPE RECORDING OF A CONVERSATION MADE BY VICTIM TO THE POLICE AS SHE WAS REPEATEDLY STABBED TO DEATH

A. The prejudicial impact of forty-three gruesome photographs outweighed its probative value.

The trial court below admitted forty-three photographs into evidence. Nine photographs portrayed the bloodied body of Shirley Turner. Twenty three photographs portrayed the bloodied body of Joyce Brown. The jury recommended a sentence of life for the homicide of Shirley Turner and a sentence of death for the homicide of Joyce Brown.

The relationship of gory, inflammatory, or gruesome photographs and the issue of law or fact to which they support or address is crucial for the determination of their admission in the evidence. State v. Wright, 265 So.2d 361 (Fla. 1972). See also Funchess v. State, 341 So.2d 762, 764 (Fla. 1977) (England, J., concurring with opinion). The

government argues that the photographs en mass are necessary to depict identity, injuries and intent/premeditation. (AB 20). However, the government has not articulated which photographs or enumerated how many photographs were necessary to prove identity, the nature of the victims' injuries, or premeditation.

In the case at bar, the state's case consisted of testimony of eyewitness and testimony of the deceaseds' family as to the homicide by the Appellant. The government did not need forty-three photographs to identify the decedents. The forty-three photographs in question did not prove or tend to prove the identity of the Appellant as being the perpetrator of the crime. The indictment charged first degree murder by premeditation. The bald facts showed conclusively an unlawful homicide. But whether there was one or a hundred stab wounds on the body, forty-three photographs would not prove that the hand that yielded such stabs wounds, cuts and blows was that of the William Turner. However, the prejudicial gruesomeness of the pictures would remain indelibly in the minds of the jury. See, e.g., Wright v. State, 250 So.2d 333 (Fla. 2d DCA 1971).

The detailed photographs shocked the jury and colored their perception of the defense. The trial court erred in admitting the gruesome photographs in the evidence. The judgment and sentence must be reversed and remanded for a new trial.

B. The number of gruesome photographs constituted prejudicial error

The trial court abused its discretion in admitting such gruesome photographs, particular in large numbers. The excessive number of gruesome photographs constituted unfair prejudice because there was no relevance, either independently or as corroborative of other evidence. Young v. State, 234 So.2d 341, 348 (Fla. 1970).

This Court has held that "necessity" may be a consideration where a large number of cumulative photographs of a gruesome nature are offered into evidence. Henninger v. State, 251 So.2d 862 (Fla. 1971). However, in the case at bar, there was no necessity in the large number of gruesome photographs being admitted into evidence. The government contends that the number of photographs were not disproportionate with the number of wounds involved. (AB 21) However, the government has failed to meet the Henninger standard and explain the necessity in introducing forty-three gruesome photographs. The medical examiner could have testified as to the cause of death from a single photograph. The medical examiner could have testified as to the location of the wounds and the cause of death from diagrams and drawings. See, e.g., Straight v. State, 397 So.2d 903 (Fla. 1981).

It is evident that the forty-three gory and gruesome photographs inflamed the jury. The excessive number of photographs were improperly and erroneously

admitted into evidence. The judgment and sentence must be reversed and remanded for a new trial.

C. The prejudicial value of the tape recording outweighed its probative value.

The tape recording was admitted over objection into evidence and played twice for the jury. The admission of the tape recording was an abuse of discretion as the prejudicial value outweighed its probative value and aroused the emotions of the jury into recommending a sentence of life in count one (Shirley Turner) and death in count two (Joyce Brown).

On appeal, the government does not address the prejudicial nature or the probative value of the tape recording but attacks Appellant's counsel as to whether a stipulation was offered as to the issue of premeditation. In reply, Appellant submits that the trial is not clear as to specific issues a stipulation might have addressed at trial.

More importantly, the government did not address the prejudicial nature of the tape recording. There is no question that the horrible screams of Joyce Brown, alone, as well as in combination with the excessive number of gruesome photographs of the mutilated bodies, led at least one member of the jury, after voting in the penalty stage for life in count one, to change his vote to death in count two for the homicide of Joyce Brown. There is no other explanation.

Although the government identifies particular reasons: identity of the assailant, motive, manner of death (AB 24-25) to sustain the probative value of the tape recording, the government has not articulated any argument in support of these reasons. The government would claim that the tape recording is necessary for identity of the assailant. However, the government points out that the record reflects defense counsel's offer to stipulate as to identity of the assailant (T 617). The government would claim that the tape recording is necessary for the motive of the killing. (AB 24). However, the State Attorney at trial did not offer it for motive (T 618-19). A review of the tape recording does not contain any reference to any motive. The government would claim that the tape recording is offered for the statements made by the Appellant to Joyce Brown for messing up his family. (T 617). However, the transcript does not reflect any such statements other than a repeated psychotic phrase: "You're the one".

In summary, the government cannot articulate any reasons that would overcome the prejudicial value in admitting the tape recording. The government's reliance on Echols v. State, 484 So.2d 568 (Fla. 1985) is misplaced. In Echols the Defendant made inculpatory statements regarding his participation in a murder which was tape recorded by an informant. This court did not address the issue at hand: the prejudicial nature which colors rational thinking and arouses the emotions.

The tape recording was so inflammatory as to create an undue prejudice in the minds of the jury and detract them from a fair and unimpassioned consideration of the evidence. The conviction and sentence must be reversed and remanded for a new trial.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING ADMISSION INTO EVIDENCE OF THE BAKER ACT ORDER AND EXAMINATION FOR MENTAL ILLNESS AND DISEASE

At the trial below, the sole defense was insanity. Defense counsel twice attempted to introduce into evidence the Baker Act Order and Examination. The exclusion of the Banker Act material deprived the Appellant a fair trial by precluding his ability to prove that he was insane at the time of the offense. See, e.g., United States v. Sims, 637 F.2d 625 (9th Cir. 1980). In order to establish his defense of insanity, the Appellant was required to prove that he was insane at the time of the offense. Chatman v. State. 199 So.2d 475 (Fla. 1967). The defense is entitled to present evidence of insanity in order to rebuke the presumption of sanity. Simonds v. State, 304 So.2d 525 (Fla. 2d DCA 1974).

The government ridicules the Appellant's counsel and cites but general case law regarding the decision to admit material into evidence as being within the discretion of the trial court. However, the government has cited no new or compelling applicable legal authority which should induce this court to alter current case law which holds that all

evidence relevant or pertinent to the issue of the issue of the Defendant's insanity should be admitted. United States v. McRary, 616 F.2d 181 (5th Cir. 1980) (citing Fla. law).

In Gurganus v. State, 451 So.2d 817 (Fla 1984), this court found the exclusion of psychiatrists' testimony regarding insanity; deprived mind; and intent, constituted error. Moreover, this court was unable to find the testimony harmless beyond a reasonable doubt. See also, Johnson v. State, 408 So.2d 813 (Fla. 3d DCA 1982) (exclusion of evidence regarding insanity is not harmless error despite the presence of other medical testimony that the Defendant was insane).

The trial court erred in excluding the Baker Act Order and Examination for mental illness and disease. The conviction and sentence must be reversed and remanded for new trial.

IV. THE STATE FAILED TO MEET ITS BURDEN OF PROVING BEYOND REASONABLE DOUBT THAT THE APPELLANT WAS SANE AT THE TIME OF THE CRIME

Appellant will rely upon his initial brief herein.

V. THE TRIAL COURT ERRED IN ADJUDICATING THE APPELLANT GUILTY AS THERE WAS INSUFFICIENT PROOF OF PREMEDITATION TO SUPPORT THE VERDICT OF GUILTY OF FIRST DEGREE MURDER

To convict an individual of premeditated murder, the state must prove, among other things, a "fully-formed conscious purpose to kill, which exists in the mind of the

perpetrator for a sufficient length of time to permit of reflection, and in pursuant of which an act of killing ensues." Sireci v. State, 399 So.2d 964, 967 (Fla. 1981), cert. den. 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). See also Snipes v. State, 154 Fla. 262, 17 So.2d 93 (1944); Chisolm v. State, 74 Fla. 50, 76 So.329 (1917).

The government states that Joyce Brown's daughter "recalled for the court an earlier statement by Appellant that he would kill Shirley and Joyce. (T 578)." (AB 32). This is a gross mischaracterization of the testimony at trial. The transcript reflects that the daughter - after much leading by the prosecution and hearsay - stated "[William Turner] said, you and Shirley won't live to tell nobody about it" (T 578). The daughter also testified that this comment was made approximately three to four months before the homicides; (T 580); and that the Appellant frequented the home about ten or eleven times after making that statement. (T 580). Such a comment, if actually made, cannot be considered a threat to constitute premeditation. Assuming arguendo that the statements recalled by the daughter constituted a threat, it was a dated and veiled threat which could not provide the element of specific intent to kill at the time of the offense.

The evidence shows that the Appellant, a Viet Nam veteran, attempted to create a diversion in order to rescue his daughter from what he perceived to be evils of

prostitution and narcotics. The Appellant had previously taken his daughter away from the house. There was no preconceived plan to kill Shirley Turner or Joyce Brown. The evidence was insufficient to sustain the conviction for first degree murder upon the theory of premeditated murder.

VI. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE DOCTRINE OF FELONY MURDER

The trial court erred in instructing the jury on the doctrine of felony murder in specifying Joyce Brown as the victim of the burglary. First, there was insufficient evidence that Joyce Brown owned or was in possession of the structure to constitute all of the elements of burglary. Furthermore, the prejudice in naming only Joyce Brown and not both women or the phrase "the victim" was undoubtedly a factor in the jury's decision recommending a life sentence as to the death of Shirley Turner but a death sentence for the death of Joyce Brown. Finally, the evidence advanced at trial indicates that Joyce Brown was assaulted outside the house rendering the charge of burglary inapplicable to the case at bar.

The giving of an erroneous felony murder instruction is reversible error. Wright v. State, 250 So.2d 333 (Fla. 2d DCA 1971); McEver v. State, 352 So.2d 1213 (Fla. 2d DCA 1977).

VII. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY, PURSUANT TO APPELLANT'S REQUEST, ON TWO STATUTORY MITIGATING CIRCUMSTANCES, THEREBY RENDERING APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

A. Evidence of extreme duress

Appellant will rely upon his initial brief herein.

B. Evidence of the Defendant's age at the time of the crime.

The government argues that age per se is not a mitigating factor yet admits that age coupled with other aspects of Appellant's psychological make-up, might have some bearing on certain cases. (AB 40). Such an admission is consistent with this court's opinion in Echols v. State, 484 So.2d 568, 575 (Fla. 1985) addressing, inter alia the mitigating factor of age:

> [I]t should be recognized that age is simply a fact, every murderer has one, and it can be considered under general instruction that the jury may consider any aspect of the Defendant's character or the statutory mitigative factor, section 921.141(6)(g), Florida, Statues (1981). However, if it is to be accorded any significant weight, it must be linked with some other characteristic of the Defendant or the crime such as immaturity or senility.

In the case at bar, the record is complete with evidence which links the mitigating factor of years to Appellant's psychological state. The records reflect a Viet Nam veteran, a Catholic facing the loss of his wife and two children in a contested divorce, who on the Appellant's 39th birthday, perceived his wife to be a prostitute and user of

narcotics, having intercourse with another man[2]. The expert psychological testimony about William Turner's borderline intelligence, immaturity and emotional stage regarding divorce, prostitution and narcotics is such that the jury could have properly found age a mitigating factor. See, e.g., Amazon v. State, 487 So.2d 8, 13 (Fla. 1986).

The trial court improperly refused to consider the Appellant's age in connection with his psychosocial stressor. The sentence should be reversed and remanded for re-sentencing.

C. The failure to instruct the jury on requested statutory mitigating circumstances was error

Appellant will rely upon his initial brief herein.

VIII. THE TRIAL COURT ERRED IN FINDING THE MURDER OF JOYCE BROWN WAS: COLD, CALCULATED AND PREMEDITATED; HEINOUS, ATROCIOUS, AND CRUEL; AND IN REJECTING THE EVIDENCE OF STATUTORY AND NON-STATUTORY MITIGATING CIRCUMSTANCES TO JUSTIFY THE IMPOSITION OF THE DEATH PENALTY

A. Aggravating Factors

(i) The trial court erred in finding the homicide occurred during commission of a Burglary. F.S. 921.141(5)(d).

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[2] The government goes to great length to discredit Appellant's counsel regarding Dr. Stinson's testimony. (AB 42). In reply, Appellant submits that a careful reading of Dr. Stinson's testimony on pages 788, and 825-26 support counsel's argument that the psychosocial stress that triggered the events was on the night of his birthday, having reached middle age, William Turner perceived his life before him and behind him, his estranged wife having intercourse with another man and the ensuing loss of his family. The fact that Dr. Stinson did not mention the fact that the observation occurred on the Appellant's 39th birthday is not important because the age of the Appellant was known by all three psychiatrists. (See, e.g., Dr. Miller (R 118); Dr. Barnard (R 121, 248).

The Appellant was not indicted or charged with the charge of burglary. The jury verdicts do not represent a finding that the Appellant committed burglary. In addition, as the husband of Shirley Turner, the Appellant had a legal right to be with his wife on the subject premises at the time of the entry. Vazquez v. State, 350 So.2d 1094 (Fla. 3d DCA 1977) cert. den., 360 So.2d 1250 (Fla. 1977). Finally, the state contends that the Appellant left the house, chased after Joyce Brown, and murdered her in a telephone booth. Under such circumstances, this aggravating factor cannot apply because the homicide of Joyce Brown did not occur during the commission of the burglary of the dwelling.

(ii) The trial court erred in finding the capital felony was heinous, atrocious or cruel. F.S. 921.141(5)(h).

In Bundy v. State, 471 So.2d, 27 (Fla. 1985), this court explained heinous, atrocious or cruel citing State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. den., 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile, and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

This case does not involve abduction, methodical torture, or sexual battery and does not fit in with previous decisions in which this court has found the manner of the killing to be the conscienceless or pitiless

type of killing which warrants a finding that the capital felony was especially heinous, atrocious or cruel. See, e.g., Smith v. State, 424 So.2d 726 (Fla. 1982), cert. den., 462 U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983) (victim was abducted, confined, and sexually abused by the Defendant and then lead into a wooded area and killed execution-style by three shots to the back of her head); Bolender v. State, 422 So.2d 833 (Fla. 1982), cert. den., 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983) (victims held at gunpoint and ordered to strip, methodically beatened and tortured throughout the evening before being killed).

(iii) The trial court erred in finding the homicide of Joyce Brown was committed in a cold calculated, and premeditated manner without pretense of moral or legal justification. F.S. 921.141(5)(i).

The "cold, calculated, and premeditated" component of this aggravating circumstance requires some sort of heightened premeditation, something in the perpetrator's state of mind beyond the specific intent required to prove premeditated murder. Jent v. State, 408 So.2d 1024, 1032 (Fla. 1981), cert. den., 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982). Heightened premeditation and advance planning are the kinds of factors that properly bear on the "cold, calculated" circumstance. C.f., McRary v. State, 416 So.2d 804, 807 (Fla. 1982) (circumstance ordinarily applies to "executions or contract murders"). The factor places a limitation on the use of premeditation as an aggravating circumstance in the absence

of some quality setting the crime apart from mere ordinary premeditated murder. Combs v. State, 403 So.2d 418, 421 (Fla. 1981), cert. den., 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982). See also, Brown v. State, 473 So.2d 1260 (Fla. 1985).

This crucial added quality of heightened premeditation was not shown here. The frenzied nature of the attack, the fury with which it was pressed and the very publicness of the killing all belie any assertion of cold calculation on the Appellant's part. The evidence, rather than establishing that the offense was committed in an especially cold and calculated manner without pretense of moral justification, tends to show a killing in the heat of passion.

B. Mitigating Factors

(i) The trial court erred in failing to consider in mitigation the Appellant's lack of a significant history of prior criminal activity. F.S. 921.141(6)(a).

The trial court judge determined the Appellant's prior criminal record to be significant based upon his 1982 arrest and nolo contendere pleas to battery as stated in the pre-sentence investigation (R 305-6). (The P.S.I. in pertinent portion, is attached in the Appendix). This court has not interpreted this mitigating factor. C.f. Salvatore v. State, 366 So.2d 745 (Fla. 1979) (Trial court found that prior conviction of burglary did not constitute significant history of criminal activity; affirmed). In Elledge v. State, 346 So.2d 998 (Fla. 1977), this court held

the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the Defendant warrants the death penalty. In Elledge, this court held that prior convictions rather than prior crimes were required as an aggravating factor under F.S. 921.141(5)(b). This court should find no less a requirement for the denial of the mitigating factor. See also Ruffin v. State, 397 So.2d 277 (Fla.) cert. den., 454 U.S. 882 (1981) (prior convictions were properly considered as the basis for rejecting this mitigating factor).

In the cause before the court, the Appellant's criminal records reveals that the Appellant pled: (1) no contest to attempted grand larceny twelve years before the instant offense; and (2) no contest to battery, allegedly on his spouse, three years before the instant offense. Appellant submits that these actions do not constitute a significant history of violent criminal history to negate this mitigating factor.

(ii) Extreme emotional disturbance

The trial court erred in failing to consider the existence of any mental disturbance as a significant statutory mitigating factor. The trial court cannot rule out this statutory mitigating factor simply on the ground that the Defendant was not found to be legally insane. The trial court must examine and consider virtually any mental disturbance, without application of the M'Naughton test for

legal insanity. Ferguson v. State, 417 So.2d 631 (Fla. 1972). The Defendant's level of emotional disturbance must be considered by the trial court, even though "less than insanity but more than the emotions of an average man, however enclaim". State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). A Defendant may be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state. Perri v. State, 441 So.2d 606, 609 (Fla. 1983)

This court has specifically recognized mental or emotional disturbance resulting from emotional strain over a "love triangle" or divorce proceedings. Adams v. State, 412 So.2d 850 (Fla. 1982); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Hollowell v. State, 323 So.2d 557 (Fla. 1975). Although expert psychiatric evidence is not required to support a finding of this mitigating circumstance, Taylor v. State, 294 So.2d 648 (Fla. 1975), both in the trial and advisory sentencing proceedings, the Appellant elicited testimony even from the state's own psychiatrists regarding the extreme emotional disturbance resulting from the break-up of the Defendant's family. Doctors Stinson, Barnard, and Miller all testified that the Defendant was distraught over being separated from his two children, and that the Defendant had repeatedly attempted to achieve a reconciliation with his wife rather than proceed with the

dissolution of marriage initiated by the deceased. The Defendant's father and brother testified at the advisory sentencing proceedings regarding the Defendant's strong religious convictions, and his upbringing in a closely-knit Catholic family. The Defendant's statements to all of the mental health experts regarding the disturbance and stress produced by the break-up of his family was uncontradicted.

IX. APPELLANT'S DEATH SENTENCE IS UNCONSTITUTIONAL, IN VIOLATION OF THE EIGHT AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE IT IS FOUNDED UPON AN IMPROPER DOUBLING OF AGGRAVATING CIRCUMSTANCES

Appellant will rely upon his initial brief herein.

X. THE TRIAL COURT ERRED IN ADOPTING THE JURY ADVISORY RECOMMENDATIONS IN BOTH COUNTS AND SENTENCING THE APPELLANT TO A TERM OF LIFE IN COUNT ONE AND DEATH IN COUNT TWO

A. The trial court improperly imposed sentence of death in count two for it is inconsistent with the sentence of life imprisonment in count one occurring under substantially similar circumstances

This court is delegated the responsibility to review capital cases to ensure that the death sentence is imposed consistently under similar circumstances. Proffit v. Florida, 428 U.S. 242 (1976); White v. State, 403 So.2d 331 (Fla. 1981); State v. Dixon, 283 So.2d 1 (Fla. 1973).

The issue of inconsistency in a capital case in the penalty phase has not been previously addressed by this

court. This court has reviewed numerous capital cases where on man committed two or more homicides and received the death penalty for each homicide. See, e.g., Ferguson v. State, 417 So.2d 639 (Fla. 1982). However, this court has not reviewed capital cases where one man under substantially similar circumstances committed two homicides a few minutes apart and received life for one homicide and death for the other.

In the absence of precedence, Appellant suggests a review of capital cases in which co-perpetrators received inconsistent sentences under substantially similar circumstances. In Malloy v. State, 382 So.2d 1190 (Fla. 1979), this court reduced the death sentence of a Defendant as inconsistent with the life sentence imposed on his equally culpable accomplice. Similarly, in Slater v. State, 316 So.2d 539 (Fla. 1975), this court reduced the death sentence of a Defendant when the trigger man received a life sentence.

In the case at bar, the death penalty has not been imposed on the Appellant, in count two, consistent with the equal administration of justice. In count one, the Appellant's moral and legal culpability was not greater than in count two. The mitigating factors which the jury found in count one, and which the judge adopted, did not vanish to preclude their consideration in count two.

B. The trial court erred in failing to provide a written finding of life imprisonment in count one.

The trial court adopted the jury recommendation as each count. The trial court did not provide a finding of fact and law as to the imposition of life imprisonment. The error violates the principle established in State v. Dixon, 283 So.2d 1, 8 (Fla. 1973) that a finding of life imprisonment be imposed rather than death be supported in writing by the trial judge. This error contributes to the inconsistency of sentences under substantially similar circumstances.

The sentence in count two must be reversed. The sentence in count one must be reversed with instructions to provide a finding of law and fact.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Honorable Court to Vacate the Judgments of Conviction and Sentence of Death in the above styled cause.

Respectfully submitted.

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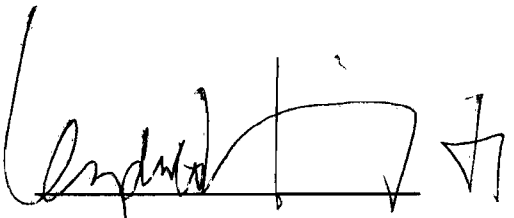
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by US mail to the Attorney General's Office, The Capital, Tallahassee, Florida, this 9th day of July 1986.



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