IN THE SUPREME COURT OF FLORIDA

GEORGE PORTER, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 72,301

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The Appellant's statement of the procedural history of the case is accepted.

The Appellant's statement of the facts is generally accepted but the Appellee (hereafter the State) would rely upon the following additions and corrections:

Facts: Point One (Guilty Plea)

Judge Antoon was careful to monitor the Appellant's physical and mental condition throughout the trial. (R 647, 654, 893-894, 1034-1035, 1040, 1185, 1467).

The Appellant, despite his limited education, appeared competent to the court and to Dr. Wilder, who attended the trial over Porter's objection (R 346) and monitored Porter's behavior. (See R 1706). Porter argued for the retention of a "Witherspoon" juror (R 250), objected to being tried in shackles (R 347), was adamant that he was still a "detainee" (not a convict) until found guilty (R 348), actively cross-examined the State's witnesses, raised appropriate objections (see i.e., R 586, 1173) and, of course, withstood multiple "Faretta" inquiries. (R 1574, 1487).

Mr. Porter was demonstrably manipulative. At one point, Porter complained about the prejudicial impact of having extra security people in the court, only to be reminded by the judge that the security people were in court at Porter's request. (R 347). Porter also complained about the prospect of being seen in

cuffs or shackles (R 347), causing the judge to state on the record that Porter was neither cuffed nor shackled. (R 348).

Porter did not plead until the trial was into its sixth day (Saturday morning) and the State was nearly through with its case. Porter conferred with counsel at length prior to entering his plea. (R 1487). Porter was not affected by drugs (R 1488), was alert and competent (R 1487, 1489) and swore he had not been coerced, threatened or promised anything in making his decision to plead. (R 1488).

Again, being manipulative, Porter had "no comment" on the fairness of his trial. (R 1493).

Mr. Porter stated that he was entering a plea of "no contest" because it was in his best interests to do so. (R 1500). Then Porter attempted to disclaim guilt by stating that his memory was "all fuzzy" (see R 1501) and denying premeditation. (R 1502).

At that point, the trial judge refused to accept Mr. Porter's plea. (R 1503).

Faced with the prospect of trial, Porter, on his own, elected to plead "guilty" rather than nolo contendere. (R 1504). While doing so, Porter again stated he would not stipulate to the State's factual basis for its prosecution. (R 1505).

After the State proffered its case, Porter was asked again to agree with or reject the "facts". (R 1513). At first Porter said "no comment" (R 1513), then he withdrew the remark (R 1513) and said he was guilty as charged. (R 1513). Porter also agreed that the jury could convict him on the basis of the State's

evidence even if he personally did not feel he was guilty. (R 1514).

The Appellant was asked, under the circumstances, why he was pleading. Porter said he just wanted to get the case over with. (R 1521).

At no time did Porter tell the court, the State, or his own attorney (Mr. Bardwell) about any threat to his son.

On January 14, 1988, Porter asked to withdraw his plea and resume trial. Porter claimed he was depressed when he pled (R 1656) and that his son's life had been threatened (R 1657). Porter related the story of how he allegedly tried to kill himself by jumping (three times, he claimed) off a fourteen foot balcony or catwalk in the jail. (R 1658-1660). Porter broke his leg on the third jump. (R 1660).

On cross, Porter refused to name the officer who conveyed the threat (R 1661) despite an order from the bench. (R 1661). Porter wanted to "protect" the officer. (R 1661). Porter also refused to name the inmates who conveyed the same threats. (R 1663).

Porter knew that in order to die he would have to land on his head, but he was never able to do this. (R 1665).

Porter allegedly received the threat on Friday night (R 1669, et seq.), but did not attempt suicide at that time. Rather, he pled guilty on Saturday morning and did not attempt suicide until late Saturday night.

Margaret Heaslet, a guard ordered to watch Porter, stated that Porter acted normally on Saturday prior to his fall. (R

1686 . In fact, Porter watched television and chatted normally with the other inmates all afternoon and evening. (R 1686).

When Dr. Wilder, a psychiatrist, went to see Porter at the hospital, Porter would not be candid. (R 1709). Wilder said that Porter was not depressed or mentally ill. (R 1711-1713). Porter claimed he jumped to protect someone and to die now rather than sit through years of appeals. (R 1716).

The Court refused to let Porter withdraw his plea. The Court noted that Porter originally denied the existence of threats and that Porter would not name the source of the alleged threats on his son. (R 1769-1773). The Court found that Porter's son had not been threatened at all and that no basis in fact existed for any motion to withdraw Porter's plea. (R 1769-1773).

Facts: Point II (Caldwell Claim)

The jury was correctly advised as to its advisory role. This issue was preserved by appropriate objections. (R 1787, 2059).

Facts: Point III (Heinous, Atrocious, Cruel)

The constitutionality of Section 921.141(5)(h) was not challenged below and is not at issue on appeal.

The record shows that Mr. Porter terrorized his victim (Evelyn Williams) and subjected her to extreme mental torture

prior to actually entering her home and killing her. (See R 584, 635, 1348, 1812, for mention of attacks and their effect on the victim). Evelyn Williams was afraid for her life. She was afraid to even go to work alone. Her car had been rammed by the Appellant, her family had received telephonic threats and her tires had been slashed. Porter inflicted a reign of terror on this poor woman which culminated in her death - as promised. Her actual death was slow and tortuous as well, as she crawled from room to room as Porter shot at her. Finally, she bled to death.

Facts: Point IV
(Cold, Calculated, Premeditated)

The evidence at trial showed that Porter planned the murder of Evelyn Williams in advance. While Porter's four point-blank shots into the victim establish his premeditation, the record also shows us that Porter contemplated and planned his attack in advance of October 9. Lora Meyer testified to Porter's cruising through Evelyn's neighborhood the day before the murder. (R 669). Porter's activity was also reported by Joan Harkins (R 1030 and Thad Crane (R 1043).

Porter, days before the murder, indicated to Nancy Sherwood that she would be reading about him in the newspaper. (R 1351).

During the penalty phase Dennis Gardner testified that Porter asked to borrow a gun prior to killing Evelyn Williams and Mr. Burrows. (R 1928). Gardner refused to lend Porter his Jennings pistol, (R 1928) but the gun subsequently vanished from his home. (R 1929).

The State thus theorized that Porter intended to kill Ms. Williams, threatened her life, "cased" here neighborhood, stole a friend's gun, entered Williams' home and shot her four times. His getaway vehicle (the brown van) was disposed of by selling it (prior to the murder) to Lawrence Litus, who took delivery of the van just after the murder. (R 1367-1373).

Facts: Point V

No factual development is required.

Facts: Point VI

No factual development is required.

SUMMARY OF ARGUMENT

The Appellant is not entitled to relief on any ground presented in his brief.

The trial court did not abuse its discretion in refusing to allow Porter to withdraw his plea. The prejudicial timing of his plea and his motion, plus the unsubstantiated claim of "coercion" did not entitle Porter to relief.

The advisory jury was told the truth regarding its function.

The trial court did not err in applying either the "heinous, atrocious or cruel" or "cold, calculated and premeditated" aggravating factors to Porter's murder of Evelyn Williams.

Porter's sentence of death was "proportionate" and, of course, the death penalty is constitutional.

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN EXERCISING ITS DISCRETION NOT TO PERMIT WITHDRAWAL OF APPELLANT'S GUILTY PLEA

The Appellant contends that the trial court erred both in accepting his plea of guilty and in refusing to permit him to withdraw the plea a month later. Mr. Porter submits that his refusal to stipulate to any factual basis for the plea and the spectre of coercion (due to threats against his son's life) combine to compel relief on appeal.

The record clearly shows that Judge Antoon was unwilling to take any plea from Porter as long as Porter maintained his innocence. In fact, at one point the judge exclaimed that "half-a-day" had been wasted and tried to restart the trial. (R 1502). It was Porter who insisted upon pleading. (R 1504).

During the second plea colloquy Porter said "no comment" when asked to stipulate to a factual basis. (R 1513). Porter then withdrew the comment. (R 1513). Finally, while not confessing his guilt, Porter agreed that the State could produce evidence and testimony sufficient, if accepted by the jury, to convict him. (R 1514).

On appeal, Porter seems to take the position that his guilty plea is invalid simply because he did not stipulate to the factual basis for his guilt. If this is Porter's contention, it is wrong.

In accepting a guilty plea, the trial court can rely upon the evidence and testimony before it without relying solely upon

the defendant's "confession". Williams v. State, 316 So.2d 267 (Fla. 1975); Williams v. State, 13 F.L.W. 2713 (Fla. 4th DCA 1988); Monroe v. State, 318 So.2d 571 (Fla. 4th DCA 1975); North Carolina v. Alford, 400 U.S. 25, 27 L.Ed.2d 162 (1970).

The evidence in this case was overwhelming. Porter's threats, his "casing" of the area, the eyewitness testimony of Amber Williams, his apparent theft of a Jennings pistol and his incriminating comments, combined with the physical evidence, all pointed to Porter's guilt. This information was known to Judge Antoon by virtue of witnesses who testified at the trial and the State's proffer at the time of his plea.

Porter goes on, however, to allege that he pled guilty due to threats on is son's life. The fact that controls this appeal, however, is the finding by Judge Antoon that this story is false. As this Court held in Lopez v. State, 13 F.L.W. 723 (Fla. 1988):

> The credibility of witnesses testifying as to withdrawal of a plea is in the trial judge's hands.

Id., at 724; see also Tibbs v. State, 397 So.2d 1120 (Fla. 1981).

Porter claimed that a guard and some inmates conveyed the threats to him, but refused to name them. Porter alleged that he became depressed, but did not attempt suicide until late Saturday night (after being warned on Friday) after a night of socializing and watching television with other inmates. Even his suicide attempt was unreal (he took three jumps of only fourteen feet and never had the nerve to actually land head first, even on his first try when no one interfered).

Porter was known to be manipulative as well as cunning (see i.e., his comments about being "shackled and cuffed"). Porter swore his plea was uncoerced, free and voluntary and that he just wanted to end the trial. A month later, Porter changed his mind. Porter also knew that the State would be disadvantaged because the jury, having been told he pled, would have to be replaced and the trial begun anew. We submit that the fabricated story about his son, his dubious attempted suicide and the perceived tactical advantage of retrying the case all support the court's finding that Porter was simply not to be believed.

Of course, while not necessarily controlling, we note that an innocent defendant can enter a plea of guilty for strategic reasons, or even in response to third party pressures **not** attributable to the State. **Scarborough** v. **State,** 278 So.2d 657 (Fla. 2nd DCA 1973); **North Carolina** v. **Alford,** 400 U.S. 25, 27 L.Ed.2d 162 (1970); **LoConte** v. **Dugger,** 847 F.2d 745 (11th Cir. 1988). In fact, a guilty plea entered to protect a family member is a valid plea. **LoConte, supra; Martin v. Kemp,** 760 F.2d 1244 (11th Cir. 1985); **Allen** v. **Rodriguez,** 372 F.2d 116 (10th Cir. 1967).

A strategic plea of guilty is acceptable even in capital cases. See **Agan** v. **State,** 445 So.2d 326 (Fla. 1983); **Lopez** v. **State, supra.**

From **a** factual standpoint, we find in sum that there was an evidentiary basis for a finding of guilt, no coercion and the prospect of a strategic guilty plea (to force, if possible, a new trial). Now we look to "prejudice".

As this Court held in **Lopez, supra,** the decision to permit withdrawal of (Porter's)plea was a matter of discretion. The burden of showing an abuse of that discretion is on Porter. **Lopez, supra: Mikenas v. State,** 460 So.2d 359 (Fla. 1984); **Adams** v. **State,** 83 So.2d 273 (Fla. 1955). This Porter has failed to do. Porter is demonstrably guilty and his son's life was not threatened, as alleged.

In **United States** v. **Rogers,** 2 F.L.W. Fed. C 835 (11th Cir. 1988), a discussion of the federal standards for permitting withdrawal of a guilty plea appears which seems appropriate. In the federal courts, three factors may be considered: to-wit:

(1) Whether the defendant has counsel.

(2) Whether the plea was knowing, intelligent and voluntary.

(3) The conservation of judicial resources.

See **United States v. Gonzalez-Mercado,** 808 F.2d 796 (11th Cir. 1987).

Mr. Porter, though appearing **pro se,** in fact had the active assistance of a very capable attorney. Porter's plea was knowing, intelligent and voluntary (as attested to by the psychiatrist who examined Porter and watched the trial and the plea).[1] Finally, Porter's game of disrupting the trial, tainting

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[1] Self serving, post plea statements of innocence or coercion are not binding. See **United States** v. **Hauring,** 790 F.2d 1570 (11th Cir. 1986). Any self serving statements to a psychiatrist are, of course, facially suspect and presumptively false. United **States** v. **Makris,** 535 F.2d **899** (5th Cir. 1976); **United States v. Mota,** 598 F.2d 995 (5th Cir. 1979). We note that Dr. Wilder interviewed Porter after the bogus "suicide" attempt and found that Porter was not "candid". (R 1709).

the jury and forcing a whole new trial certainly could stand as a waste of judicial resources.

We submit that no basis in law, fact or even "equity" exists to permit Porter to abuse the system with his cat-and-mouse plea tactics. Absent some abuse of discretion, his plea should stand.

ARGUMENT

II

THE APPELLANT IS NOT ENTITLED TO RELIEF UNDER **CALDWELL** V. **MISSISSIPPI, 472 U.S. 320** (1985)

Mr. Porter opens this second argument by referring to the decision in **Caldwell** v. **Mississippi, 472 U.S. 320** (1985). Porter's brief says:

> . . . the Supreme Court held that any suggestion to a **capital sentencing** jury that the ultimate responsibility for sentencing rests elsewhere violates the Eighth and Fourteenth Amendments. (emphasis added).

(Brief, page 17).

The problem for Mr. Porter is that Florida does not utilize a "capital sentencing jury".

Florida's system of independent judicial sentencing after rendition of a purely advisory "verdict" was upheld in **Proffit** v. **Florida, 428 U.S. 242** (1976), and again in **Spaziano** v. **Florida, 468** U.S. 447 (1984). Put succinctly, the constitution does not require "jury" sentencing. If the constitution does not require jury sentencing, it assuredly does not require courts to mislead or deceive jurors by telling them they are "sentencers" when in fact they are not. The right to due process does not include a "right" to mislead the jury or to compel others to do so just because of a perceived benefit to the defense.

An example of this principle can be found in **Spaziano, supra.** Along with his "override" issue, Spaziano complained that the trial court erred in not instructing the jury, in the guilt phase, about any lesser degrees of homicide. (As the law stood

at the time, the statute of limitations had run as to all lesser offenses so the court refused to tell the jury about them).

In denying relief, the United States Supreme Court agreed that the trial judge, despite the general requirement to instruct on lesser offenses, had no legal obligation to mislead Spaziano's jury into thinking they could convict him of a lesser offense when, in fact, a verdict on a lesser offense would actually serve as an acquittal. Justice and respect for the system of justice are not served by trickery and deception, the court said.

The same holds true here. Porter's jury was correctly apprised of its advisory role. **Caldwell**, which explicitly **refused** to reverse **California v. Ramos**, 463 **U.S.** 992 (1983), clearly permits the giving of correct information to a jury.

The Appellant's claim that telling the truth somehow violates the constitution has, of course, already been rejected. **Pope v. State**, 496 So.2d 798 (Fla. 1986); **Foster v. Dugger**, 518 So.2d 901 (Fla. 1987); **Banda v. State**, 13 F.L.W. 451 (Fla. 1988); **Cave** v. **State**, 13 F.L.W. 455 (Fla. 1988); **Preston v. State**, 13 F.L.W. 341 (Fla. 1988); **Grossman v. State**, 13 F.L.W. 127 (Fla. 1988).

Mr. Porter's jury was correctly instructed that its role was advisory. Like the jury in **Spaziano**, it should not have been told it was sentencing Porter when in fact it was not. In fact, had the jury been so told, what impact would Porter's eventual life sentence (an override) have had on the jury's respect for the system?

Finally, the State rejects the notion that a jury will blithely and carelessly "sentence" a man to die if it knows that ultimate responsibility rests elsewhere. This theory fails to ascribe any humanity to jurors and, frankly, stems from the debunked suspicion that "Witherspoon qualified" jurors are somehow "prosecution biased". We submit that sentencing someone to death is so unpleasant a task that jurors are more likely to vote for "life" and leave the unpleasantness to the judge. (Indeed, the vast majority of "overrides" in this state involve death sentences imposed after a life recommendation). Thus, the basic, speculative premise behind Porter's Caldwell claim in untenable.

Mr. Porter's sentence was clearly supported by the record and there is nothing before us to indicate either that the jury was misled or that his death sentence was improper. Absent error or prejudice, relief must be denied.

ARGUMENT

III

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL

Mr. Porter's challenge to the application of Section 921.141(5)(h), Florida Statutes, can be broken down into three parts:

(A) The constitutionality of the statute.

(B) The propriety of the instruction given to the advisory jury.

(C) The application of this factor to this case.

Each of these questions will.be addressed in order.

(A) The Constitutionality of §921.141(5)(h), Florida Statutes

Mr. Porter correctly concedes that this issue was not raised at trial and was therefore not preserved for appellate review. **Clark** v. **State,** 363 So.2d 331 (Fla. 1978); **Steinhorst** v. **State, 412** So.2d 332 (Fla. 1982); **Mitchell** v. **State,** 13 **F.L.W.** 330 (Fla. 1988).

Without waiving this default, the State submits that Porter's claim is nonetheless without merit.

Porter relies heavily upon the recent United States Supreme Court decision in **Maynard** v. Cartwright, ____ U.S. ____, 100 L.Ed.2d 372 (1988). While Porter is correct in stating that the Court criticized Oklahoma's (then) existing "Heinous-Atrocious-Cruel" (hereafter "H.A.C") aggravating factor, his brief fails to

correctly analyze the case. It also fails to note that Oklahoma has retained a properly channeled "H.A.C." factor which the high court did not strike.

In Oklahoma, sentencing is handled by the jury rather than the trial judge. The jury in **Maynard**, as sentencer, was told it could sentence the defendant to death if his crime was especially heinous, atrocious or cruel but offered the sentencers no guidance. The Supreme Court said:

> Since **Furman**, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement.

Id., at 380.

Thus, the "sentencer", the jury, had no guidance either in the form of statutory definitions or interpretive caselaw. This, of course, was the same problem confronted in **Godfrey** v. **Georgia**, 446 U.S. 420 (1980).

It is important to note, however, that **Maynard**, **supra**, at 381 compares the **Godfrey** case to **Proffit** v. **Florida**, 428 **U.S.** 242 (1976), noting its approval of the Florida "H.A.C." statute. **Godfrey** itself, of course, cites **Proffit** with approval and even recognized that Georgia's "H.A.C." statute was facially constitutional (it was merely unconstitutional as applied). See **Godfrey**, **supra**, at 446 U.S. 422.

In **Barclay** v. **Florida**, 463 U.S. 939 (1983), Florida's application of its "H.A.C." statute was subjected to a Godfrey analysis and the Supreme Court found that Florida's statute was constitutional both as written **(Proffit, supra)** and as applied.

Mr. Porter forgets (as is obvious by his meritless **Caldwell** claim), that **Maynard, Godfrey, et al,** require channeling of the **sentencer's** discretion. The sentencer in Florida is the judge, not the jury, **Spaziano** v. **Florida,** 468 **U.S.** 447 (1984), and in announcing his sentencing decision on the "H.A.C." factor, Judge Antoon clearly was guided by the decisional law of the Court as well as the statute. (R 2440-2443). Indeed, Judge Antoon applied this factor to Evelyn's murder but not to the murder of Mr. Burrows, thus proving careful application of the aggravating factor.

(B) The Propriety of the Jury Instruction

Here, again, Porter did not preserve the issue for appellate review by offering an objection. **Clark, supra; Steinhorst, supra.**

Mr. Porter could arguably analogize the relationship between the statute and jury instruction at bar to that of the statute and jury instruction addressed in **Hitchcock** v. **Dugger,** 481 U.S. ____, 95 L.Ed.2d 347 (1987), in a effort to avoid default. There are several reasons why this argument must fail:

(1) Unlike **Hitchcock,** here the State is asserting its procedural defenses.

(2) Unlike **Hitchcock,** here both the statute and its application have been upheld without confusion or equivocation.

(3) Unlike **Hitchcock,** the record of what the sentencer did (and his compliance with the constitutional standard) is complete.

Hitchcock was characterized as being "new law" due to the fact that there was confusion among the lower courts, prior to 1979, as to whether non-statutory mitigating evidence could be considered. Due to the spectre of error, this Court elected to undertake a case-by-case harmless error analysis.

In our case, while interpretations of the record may vary, the standards governing the "H.A.C." factor are known and undisputed.

The advisory jury, of course, does not make specific findings regarding the applicability of any statutory or non-statutory aggravating or mitigating factors. We do not know if Porter's jury agreed with the judge, or if it applied "H.A.C." to both murders, or whether it applied it to either murder. That is pure speculation and conjecture. Since we do not reverse **binding** verdicts on speculation, **Sullivan v. State,** 303 So.2d 632 (Fla. 1974), we assuredly should not reverse a valid sentence simply because of speculation regarding a **non-binding** recommendation to the final sentencer.[2]

Therefore, we suggest that even if the jury instruction at bar did not sufficiently guide the **non-sentencer,** any such error is harmless even though this is a capital case. See e.g., **Grossman v. State, 13** F.L.W. 127 (Fla. 1988).

Again, the State does not waive the procedural defense at bar, but it would suggest in all candor that the Court revisit

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[2] We would further note the presence, in this case, of a "downward" jury override regarding Mr. Burrows. Thus, Porter cannot argue that the judge was obliged to rubber-stamp the jury due to the "Tedder" rule.

its standard jury instruction and possibly expand it to avoid future appeals, or worse, a **Hitchcock** style flood of collateral proceedings.

(C) The Application of H.A.C. to this Case

The State agrees with Mr. Porter that **State** v. **Dixon**, 283 So.2d 1 (Fla. 1973), provides both the sentencer and this Court with the "channeling" necessary to apply "H.A.C." in a constitutional manner and thus must be followed. Obviously, for H.A.C. to apply the crime must not be "ordinary" but must have special or unique attributes which heighten or elevate it beyond the so-called "norm".

Judge Antoon's order, we submit, satisfies this test.

Porter subjected Evelyn Williams to a protracted reign of terror: slashing her car's tires, ramming her car with his own, smashing car windows and telephoning death threats against her and her daughter.

When Porter killed Evelyn, he shot her several times. He watched her crawl for her life from room to room, he cornered her in her den, he stood over her as she pleaded "Oh my God" and shot her, inflicting "defensive" wounds and non-fatal body-shots that caused a slow and agonizing death over as much as ten minutes.

When Amber Williams got to her mother, Evelyn reached out to her with her hand. As Amber called for help, her mother was conscious and struggling to breathe.

In his brief, Porter sloughs off this agony with a blithe reference to dying "in just minutes". To imagine her agony, one need just try to go without air, while in pain and scared, for even "a few minutes". it cannot be done.

Mr. Porter attempts in vain to equate this case with a number of easily distinguishable cases, which the State shall dispose of in order:

In **Lewis** v. **State,** 398 So.2d 432 (Fla. 1981), the defendant fired a shotgun into a house and then fled. There was nothing in the record to distinguish this sniper attack.

In **Kampff** v. **State,** 371 So.2d 1007 (Fla. 1979), the female victim, though shot three times, died instantly from a shot to the head.

In **Menendez** v. **State,** 368 So.2d 1278 (Fla. 1978), a shopkeeper was found dead and there was no evidence regarding the circumstances of his suffering, if any.

In **Lewis** v. **State,** 377 So.2d 640 (Fla. 1979), the victim was shot while trying to escape but, again, the record is undistinguished.

In **Simmons** v. **State,** 419 So.2d 316 (Fla. 1982), the victim was **not** female, as Porter alleges. The victim was the woman's husband, who died instantly from an axe-blow to the head. The victim never knew what hit him.

In **Teffeteller** v. **State,** 439 So.2d 840 (Fla. 1983), there was no record evidence of fear anticipation or torture, even though the victim died slowly.

In **Herzog** v. **State,** 439 So.2d 1372 (Fla. 1983), the victim did not suffer at all. She died while unconscious.

The threats, fear, torture, anticipation of death and slow death documented at bar compares more with the following cases in which "H.A.C." was found and upheld:

In Ruenoanno v. **State,** 13 F.L.W. 401 (Fla. 19881, the slow poisoning of the victim over two weeks distinguished the crime.

In **Turner** v. **State,** 13 F.L.W. 427 (Fla. 19881, an ex-husband burst into his ex-wife's home and stabbed her to death, then he pursued her roommate to a telephone booth and killed her. The roommate's flight, terror and attempt to save herself met the test for "H.A.C."

In **Hildwin v. State,** 13 F.L.W. 528 (Fla. 19881, the victim endured a sexual battery and pled for her life.

In **Harvey v. State,** 13 F.L.W. 399 (Fla. 1988), the robbery victims were executed after having to listen to the defendant discuss having to shoot them. The female victim was shot, but left alive until the defendant returned to finish her off.

The facts of this case, again, fall squarely within this distinctive category.

ARGUMENT

IV

THE MURDER WAS COLD, CALCULATED AND PREMEDITATED

This aggravating factor is not limited to "contract killings", **Turner v. State**, 13 F.L.W. 427 (Fla. 1988); **Lamb** v. **State**, 13 F.L.W. 531 (Fla. 1988), and is clearly present in this case.

As noted above, the victim was repeatedly threatened. **Turner v. State, supra.** Porter procured his weapon in advance and was prepared to kill when he arrived. **Lamb v. State, supra; Huff v. State,** 495 So.2d 145 (Fla. 1986); **Davis v. State,** 461 So.2d 67 (Fla. 1984); **Harvey** v. **State, supra.** Porter even planned an alibi in advance (the delivery and sale of his van to Litus). See **Huff v. State, supra.**

This murder was devoid of the spontaneity of those cases relied upon by the Appellant. Still, Porter tries to allege the murders were unplanned by noting his "failure" to shoot Amber, the fact that he threatened Amber and John Williams "the most", the fact that he shot Evelyn rather than "cut her up", and finally the "fact" that the mere procurement of a gun, standing alone, proves simple premeditation and not more.

We respond by noting that killers are not required to "guarantee" either the cause of death or the total number of victims in order for this factor to apply. We do not know if Amber would have died because Mr. Burrows interfered with Porter's attack, thus saving Amber's life. Porter did more than

just get a gun. Porter cased Evelyn's neighborhood, drove the escape route, told at least one witness she would "read about it in the papers", arranged an alibi (with a criminal attorney, yet) for 7 a.m. on the day of the crime and at the same time arranged for disposal of his get-away vehicle!

More planning went into this crime, we submit, than the Appellant cares to admit.

ARGUMENT

V

THE APPELLANT'S DEATH SENTENCE FOR THE MURDER OF EVELYN WILLIAMS SHOULD BE AFFIRMED REGARDLESS OF THE OUTCOME OF THE ARGUMENTS IN POINTS III AND IV

Two wrongs do not make a right. The Appellant's improper life sentence for the Burrows murder should not require a similar sentence for the Williams murder in the event that Porter, somehow, prevails on counts three and four of his appeal.

Two aggravating factors and no mitigating factors apply to these murders even if "heinous, atrocious or cruel" and "cold, calculated and premeditated" are removed. (This fact is conceded by Mr. Porter). In addition, the advisory jury recommended a death sentence in both murders. The jury's recommendation is subject to analysis under the standards of **Tedder v. State,** 322 So.2d 908 (Fla. 1975), **even** when the recommendation is death. **Grossman v. State,** 525 So.2d 833 (Fla. 1988), **revised,** 13 F.L.W. 349 (Fla. 1988); Ross **v. State,** 386 So.2d 1191 (Fla. 1980); **LeDuc** v. **State,** 365 So.2d 149 (Fla. 1978). Death, presumptively, was the appropriate sentence for both murders. **State** v. **Dixon,** 283 So.2d 1 (Fla. 1973); **Foster v. State,** 369 So.2d 928 (Fla. 1979).

Judge Antoon gave Porter a life sentence for the Burrows murder simply because he disagrees with the statutory aggravating factors that are "technical" in nature. Judge Antoon's personal feelings do not meet the Tedder standard, but unfortunately they

are not, once erroneously applied, appealable. See **Brown** v. **State,** 521 So.2d 110 (Fla. 1988).[3]

The question before this Court, therefore, is whether the concept of "proportionality" requires the **compounding** of judicial error simply for the sake of "proportionality". This suggestion is unrealistic and unsupportable.

In order to provide Porter relief, the Court will basically be required to "abolish" the statutory aggravating factors of "prior conviction of a violent felony" and "murder during the commission of a felony". See §921.141(5)(b)(d), Florida Statutes, since "proportionality" would not be limited to just Mr. Porter's two sentences but, rather, would apply to everyone on death row. [The other approach, to simply exempt Mr. Porter from the provisions of the statute by himself is, of course, too meritless to consider].

A sentence of death on the basis of the two aggravating factors noted above, without any mitigating factors, would be proportionate to the sentences upheld in **Alderidge** v. **State,** 351 So.2d 942 (Fla. 1977); **Jackson** v. **State,** 359 So.2d 1190 (Fla. 1978). In **Alderidge,** the court "disregarded" a challenged application of "H.A.C." and said death was proper even if only two factors (murder by one under sentence and murder during a robbery), both "technical", were applied. Both of Carl Jackson's

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[3] For this reason we have not pursued our cross-appeal. This office does not know whether the State Attorney could have petitioned for certiorari, as suggested by **Brown,** because it is not known whether he had notice that Judge Antoon intended to violate **Tedder.** It would seem, by now, that the Burrrows sentence is untouchable.

death sentences were supported by "technical" grounds (i.e., "during a robbery, during flight, during kidnapping, avoiding

ARGUMENT

VI

THE DEATH PENALTY IS CONSTITUTIONAL

Mr. Porter candidly confesses that his collection of arguments regarding capital punishment are without merit and have been rejected. No further briefing is required except that the State does not waive any defense of "failure to object" or failure to preserve these issues below.

CONCLUSION

The judgment and sentence at bar should be affirmed.

Respectfully submitted,

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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 Mr. Michael S. Becker, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32014, this 28 of February, 1989.

MARK C. MENSER
Assistant Attorney General

OF COUNSEL