IN THE SUPREME COURT OF FLORIDA

GEORGE PORTER,

Defendant/Appellant,

vs.

STATE OF FLORIDA,

Plaintiff/Appellee.

CASE NO. 72,301

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER
112-A Orange Avenue
Daytona Beach, Florida 32014
(904)252-3367

ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE

On October 28, 1986, the grand jury in and for Brevard County returned an indictment charging Appellant, George Porter, Jr., with the first degree murders of Evelyn Williams and Walter Burrows in violation of Section 782.04(1)(a)1, Florida Statutes (1987), armed burglary with a firearm in violation of Sections 810.02(1) and (2)(b), Florida Statutes (1987) and aggravated assault with a firearm in violation of Section 784.021(1)(a), Florida Statutes (1987). (R2578-2579) The trial court appointed Dr. J. Lloyd Wilder and Dr. David Greenblum to examine Appellant pursuant to Rules 3.210 and 3.211, Florida Rules of Criminal Procedure, in an effort to determine his competency to stand trial. (R2662-2664) Dr. Constance Kay was also appointed to determine Appellant's competency to stand trial. (R2671-2673)

Appellant proceeded to jury trial on the charges on December 1, 1987, with the Honorable John Antoon, Circuit Judge, presiding. (Rl-1453) On December 5, 1988, Appellant announced his intention to enter pleas of guilty to all charges. (R1469, 2752,2753-2755) After conducting an inquiry, Judge Antoon determined that the pleas were freely and voluntarily made, that Appellant was alert, able and intelligent and that a factual basis existed for the pleas. (R1522-1523) Judge Antoon accepted the guilty pleas. (R2751,1523,2755)

On December 10, 1987, pursuant to motion by the state, Judge Antoon again appointed Doctors Wilder and Kay to examine Appellant to determine his competency. (R2758-2760) On January 4, 1988, Appellant filed a motion to withdraw his guilty pleas. (R2761) On January 14, 1987, Judge Antoon conducted a hearing on Appellant's motion and denied the same. (R1652-1775,1780-1781, 2766-2767)

On January 21, 1988, Appellant proceeded to trial in the penalty phase. (R1776-2280) Following deliberations, the jury returned advisory verdicts recommending imposition of the death penalty for both murders. (R2764-2765) On March 4, 1988, Appellant appeared before Judge Antoon who adjudicated him guilty of all four offenses and imposed the following sentences:

Count I, first degree murder of Evelyn Williams - death;
Count 11, first degree murder of Walter Burrows - life imprisonment with a mandatory minimum 25 years before parole eligibility;
Count III, armed burglary - life imprisonment;
Count IV, aggravated assault - five years in prison.

(R2452-2460,2775-2786,2787-2792) Judge Antoon filed written findings of fact in support of the imposition of the death

penalty. **(R2775-2786)** Judge Antoon also filed written reasons for departure from the recommended guideline sentence. **(R2793-2795)**

Appellant filed a timely notice of appeal on March **8, 1986. (R2773)** The state filed a notice of cross-appeal on March **10, 1986. (R2774)** Appellant was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. **(R2772,2798)**

STATEMENT OF THE FACTS

In 1985, Appellant met Evelyn Williams at a dance at the Royal Motor Lodge in Melbourne. (R658) Eventually they became involved in an intimate relationship and Appellant moved into Williams' home. (R1831) However, virtually from the start of this relationship, Appellant did not get along with Williams' daughter, Amber, or her sons Glen and John. (R562,1840) In October, 1985, Williams went to visit her sister. (R703) Although Appellant had permission to stay in the house, Amber Williams locked him out. (R1832-1834) An altercation ensued during which Amber threatened Appellant with a .357 Magnum and Appellant was forced to leave the house. (R563-564,703-704,1834-1835) When Evelyn Williams returned, she resumed her relationship with Appellant and at one point moved in with him for approximately one month. (R565-566,705) An incident occurred in April, 1986, which caused Williams to contact the police. (R706) After that, Williams moved back to her own home and she and Appellant never cohabitated again. (R566,706)

In July, 1986, further problems arose between Appellant and Williams. (R583,707) Appellant damaged Williams' car and windows while she was at work. (R1973-1974) Appellant telephoned various members of Williams' family and threatened to kill Williams and the entire family. (R707-709,660-665,817-821) Shortly after these incidents, Appellant moved to Michigan and no one in the Williams family had any further contact with him until October, 1986. (R587,666,713,1014,1926) During this time

period, Williams began a relationship with Walter Burrows. (R587-588,713)

In early October, 1986, Appellant returned to Brevard County and stayed for a couple of days with Ron Adams and Nancy Sherwood. (R1324-1325) Two or three days before Williams' death, Appellant telephoned Williams' mother (Lora Mae Meyer) and asked her to call Williams and see if she would talk to him. (R667) Appellant told Meyer he had a gift for Williams. (R668) Meyer told Appellant that Williams wanted nothing from him and did not want to see or talk to him. (R668) Meyer called Williams and when Appellant again called Meyer, she confirmed that Williams would not accept a gift from Appellant. (R669) On October 8, 1986, the day before Williams was killed, Meyer observed Appellant driving a brown van through the trailer park where she lived. (R669-670) Appellant was also observed driving by Williams' house the two days prior to her death. (R1030,1043-1044)

On October 8, 1986, Appellant made contact with Williams which resulted in Williams filing a report against Appellant with the police. (R714) Because Williams feared Appellant, she arranged to have Burrows take her to work the next morning. (R717) On the evening of October 8, 1986, Appellant was observed at the Rocket Bar in the early hours. (R1196,1218) Appellant was in a good mood and did not appear to be intoxicated. (R1197-1198,1219) Later, Appellant went to the Memory Lane Lounge where he negotiated to sell his van to Lawrence Litus, the owner. (R1363,1367) Litus gave Appellant $100 deposit and arranged to

meet Appellant at the bar the following morning to complete the transaction. (R1369) Appellant spent the night at the home of a friend, Lawrence Jury. (R1014-1015,2081) According to Jury, Appellant was quite drunk by 11:00 p.m. (R2081)

Amber Williams awoke on October 9, 1986 at approximately 5:30 a.m. when she heard two gunshots. (R728) Amber ran down the hallway to the kitchen and fell to the floor. (R728,730) As she fell, Amber saw Appellant standing over the body of her mother. (R730,1800) Appellant came toward Amber, pointed a small gun at her head and said "boom, boom, you're going to die." (R732-734,1801) As Amber ducked her head in fear, Burrows came in and struggled with Appellant forcing him outside. (R734-735,1801-1804) Amber heard a shot, ran to her mother and then ran to the door and shut it. (R1804,734) Amber's mother's eyes were open in a fixed stare. (R742,1805) Amber believes that her mother was still alive because she moved her arm towards her. (R741,1805) After locking the door, Amber called 911. (R742,1807)

John Williams, who lived three houses away from his mother, awoke at 5:30 a.m. and heard three gunshots. (R589) He got dressed and went outside to find police cars arriving in front of his mother's house. (R590) John went to his mother's house and saw Burrows lying face down in the front lawn. (R591) As John arrived, Amber came outside crying hysterically. (R591-592) John took Amber to his house where she gave a statement to the police concerning Appellant. (R592,746-748,910)

When the police arrived, neither Williams nor Burrows were alive. (R871-872) The medical examiner performed autopsies

on both bodies. (R931-932) Evelyn Williams died of massive hemorrhaging caused by gunshot wounds to the right chest. (R954-955) There were four distinct entrance wounds in Williams' body caused by three or four shots. (R941,943) Williams lived only minutes. (R954-955) Walter Burrows died from massive internal bleeding caused by a gunshot wound to the left back. (R962) Burrows died shortly after being shot. (R961)

At 6:10 a.m. Marian Litus observed a brown van driven by Appellant pull up to the Memory Lane Bar. (R1258) She observed Appellant apparently cleaning up the van. (R1261) Appellant walked from the van, to the dumpster and back to the van. (R1262) When the bar opened at 7:00 a.m., Appellant came to the walk-up window and bought a bottle of liquor and a bottle of beer. (R1264-1265) Lawrence Litus arrived about 7:05 a.m. and paid Appellant the balance he owed for the van. (R1370) Appellant asked Litus for a ride which he gave him. (R1370) Appellant arrived at Karen Noland's house between 8:00 a.m. and 8:30 a.m. and had coffee. (R1421) Appellant told Noland he had to hang some doors that morning, (R1421) Appellant did not appear intoxicated. (R1422) She left him about 8:45 a.m. when she left for work. (R1422)

Later that morning, Appellant went to the American Legion where he ordered a sandwich and a beer. (R1434,1440,1450) He appeared normal and not intoxicated. (R1441,1451) Appellant got up from the bar and walked to the windows where he saw several police cars gathering outside. (R1443,1453) Appellant went back to the bar, took a bite of his sandwich and walked out.

(R1443,1453) As Appellant left, the bartender yelled to him that she would see him later to which Appellant responded "No, I don't think you will." (R1444)

SUMMARY OF ARGUMENTS

POINT I: Although a defendant may enter a plea of guilty to a capital offense, such pleas should not be accepted where the accused denies facts which are essential to the commission of the crime. Prior to sentencing a defendant should be permitted to withdraw a guilty plea upon proper motion if the evidence shows that such plea was entered under mental weakness, fear or other circumstances affecting the defendant's rights. The evidence shows that Appellant entered his plea as a direct result of threats against his son if Appellant persisted with the trial. Under such circumstances Appellant should be permitted to withdraw the pleas.

POINT 11: The standard jury instructions in the penalty phase are misleading and erroneous in that they diminish the importance of the jury's role in the sentencing process. Over Appellant's timely objection, the trial judge improperly instructed the jury thus tainting the jury recommendation.

POINT 111: Section 921.141*(5)*(h), Florida Statutes (1987) which provides that a court may find as an aggravating circumstance that the murder was heinous, atrocious and cruel is unconstitutionally vague. This circumstance fails to adequately inform juries what they must find to impose the death penalty and thus allows for the imposition of the death penalty in an arbitrary and capricious manner.

Assuming, arguendo, that (5)(h) is constitutional the evidence in the instant case fails to show that the capital

felony was accompanied by such additional acts so as to set the crime apart from the norm of capital felonies. There is no evidence that Appellant tortured his victim or that she suffered in a great deal of pain.

POINT IV: In order to sustain a finding that the capital felony was committed in a cold, calculated and premeditated manner the state must prove a careful plan or prearranged design to effect the death of the victim. While the evidence showed that Appellant may have threatened the victim some three months prior to the actual killing, such threats were not part of a carefully designed plan to commit murder.

POINT V: Even assuming the existence of valid aggravating circumstances and the absence of mitigating circumstances, the death penalty is inappropriate if under the totality of circumstances the death penalty would be disproportionate to the crime for which it is imposed. In the instant case, the trial judge has stated on the record that the existence of two aggravating circumstances not challenged herein do not warrant imposition of the death penalty.

POINT VI: Although this Court has previously objected numerous attacks to the constitutionality of the death penalty in Florida, Appellant urges reconsideration particularly in light of the evolving body of caselaw which in some cases has served to invalidate the very basic premises on which the death penalty was upheld in the State of Florida.

POINT I

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 22 OF THE FLORIDA CONSTITUTIONS THE TRIAL COURT ERRED BY ACCEPTING APPELLANT'S GUILTY PLEAS AND DENYINS HIS MOTION TO WITHDRAW HIS GUILTY FLEAS.

Appellant's jury trial began on December 1, 1987. On December 5, 1987, Appellant abruptly announced to the Court his desire to immediately terminate the trial by entering guilty pleas to all the charges. (R1469-1475) Judge Antoon first determined that Appellant was competent to make this decision without benefit of counsel, pursuant to Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). (R1486-1491) Judge Antoon then conducted a plea colloquy. He determined that Appellant was 54 years old and had a third grade education. (R1492) Appellant can read, write, speak and understand the English language. (R1493) Appellant was not under the influence of drugs or alcohol. (R1493) Appellant refused to comment on the treatment he had received by the court or court personnel or on whether he felt the proceedings had been conducted in a fair manner. (R1493) Appellant acknowledged that he read, understood and signed a petition to enter a plea of guilty to the charge. (R1494-1496,2753-2755) Appellant understood the nature of the charges and the maximum and minimum penalties for the charges. (R1496-1499) Appellant stated that no one had used threats, force, pressure or intimidation to persuade him to enter the pleas and no one had promised him anything in return. (R1499) He was pleading guilty to the murder of Evelyn Williams because

he felt it was in his best interests to do so. (R1499-1500) When it came time to establish a factual basis for the pleas, Appellant states "I'm not saying that I didn't kill Mr. Burrows, I probably did; but I didn't kill Mrs. Williams, this I do know.'' (R1501-1502) At that point Judge Antoon indicated an unwillingness to accept the plea. (R1502-1503) After consulting with his stand-by counsel, Appellant indicated his insistence on pleading guilty but informed the court that he would not supply a factual basis for the charges (R1504-1505) The state then supplied the factual basis. (R1507-1509) Appellant understood the rights he was giving up by entering his pleas. (R1514-1518) Appellant stated he decided to change his plea because he was tired and wanted to get it over with. (R1521) Judge Antoon accepted Appellant's pleas after determining Appellant was alert, able and intelligent and understood the nature of the charges and the consequences of the pleas. (R1522-1523)

On December 8, 1987, the State of Florida petitioned the court to appoint psychiatrists to examine Appellant to determine his competency because "the defendant's demeanor and conduct cast doubts upon his present mental condition." (R2756-2757) The trial court granted the motion and Appellant was examined by Dr. Constance Kay and Dr. J. Lloyd Wilder. (R2758-2760,2800,2802-2803)

On January 4, 1988, Appellant filed a motion to withdraw his plea alleging that on the day he entered the pleas he had received threats of reprisals against his son and he was severely depressed and suicidal. (R2761) On January 14, 1988, Judge

Antoon held a hearing on the motion to withdraw the plea. (R1652-1775)

Appellant testified that on the night before he entered the pleas, he was told by some jail guards and an inmate that if he continued with the trial, something bad would happen to his eleven year old son who resides with his mother in Palm Bay. (R1661-1664) Appellant became quite depressed and decided to commit suicide. (R1656) When he got to court the next day he decided to change his plea *so* he could get back to the jail and commit suicide, (R1656) That night Appellant threw himself head first from the second level onto the concrete floor. (R1659) He tried twice but succeeded only in breaking his leg. (R1659-1660) Officer Heaslet was the first to reach Appellant and at first Appellant told her he fell down the steps. (R1688-1689) However, that did not appear possible and a short while later, Appellant admitted he had jumped. (R1689,1693)

Dr. Lloyd Wilder examined Appellant in the hospital after he attempted to commit suicide. (R1707) Despite the suicide attempt, Appellant did not appear depressed or mentally impaired. (R1710-1711) Appellant told Dr. Wilder that he entered the pleas because if he had continued someone he loved would have been hurt. (R1715) Dr. Wilder did not think Appellant was imagining this. (R1717) While Appellant may have been sad or disappointed, Dr. Wilder believed that Appellant was still able to make a knowing and intelligent entry of a plea. (R1712)

Judge Antoon denied the motion to withdraw pleas. (R1780-1781,2766-2767) Judge Antoon found that Appellant had

entered the pleas freely with no threats or coercion. Appellant's decision to enter the plea was unimpaired by mental illness. No good cause was shown for allowing Appellant to withdraw his plea. (R2766-2767)

A defendant may enter a plea of guilty to a capital offense. Chatman v. State, 225 So.2d 576 (Fla. 2d DCA 1969); Washington v. State, 362 So.2d 658 (Fla. 1978). However, a guilty plea should not be accepted where an accused denies facts which are essential to the commission of the crime even though the facts may be presented elsewhere in the record. Thacker v. State, 313 So.2d 426 (Fla. 2d DCA 1975) cert. denied, 327 So.2d 35 (Fla. 1976). A trial court has the discretion to reject a plea of guilty where the same is not voluntary by one competent to know the consequences, or is induced by fear, misapprehension, persuasion, promises, inadvertence or ignorance. Reyes v. Kelly, 224 So.2d 303 (Fla. 1969). In the instant case, the record of the change of plea hearing reveals that although Appellant stated he wanted to plead guilty, he maintained he did not kill Evelyn Williams. (R1501-1502) Judge Antoon recognized the impropriety of accepting a plea under those circumstances. (R1502-1503) Appellant insisted upon pleading guilty but refused to supply any factual basis for the pleas. (R1504-1505) While appreciating the trial court's position, Appellant maintains that in light of Appellant's responses and demeanor during the plea hearing, the trial court should not have accepted the pleas.

In Scarborough v. State, 278 So.2d 657 (Fla. 2d DCA 1973) the court affirmed the conviction following entry of a

guilty plea despite the fact that at the plea hearing the defendant testified he was innocent. However, the court noted that by entering the plea, the defendant successfully avoided the death penalty. The court held:

> Even where a defendant pleads guilty to avoid a death sentence and upon entering his plea testified that he is innocent, such a plea is not involuntary where, upon the advice of counsel, he was pleading guilty to limit the penalty he might receive.

Id. at 658-659. No such motivation exists in the instant case.

Even if no error is perceived in the acceptance of the pleas, the trial court should have granted Appellant's motion to withdraw his plea. Rule. 3.170(f), Florida Rules of Criminal Procedure provides that at any time prior to sentencing the trial court "may in its discretion, and shall upon good cause" permit a defendant to withdraw a guilty plea. Appellant recognizes that a motion to withdraw a plea is a matter left to the sound discretion of the trial court. Reyes v. Kelly, *224* So.2d 303 (Fla. 1969). However, a motion to withdraw a plea should be liberally construed in favor of the defendant. Adler v. State, 382 So.2d 1298 (Fla. 3d DCA 1980). The law inclines toward a trial on the merits. Morton v. State, 317 So.2d 145 (Fla. 2d DCA 1975). A defendant should be permitted to withdraw a plea "if he files a proper motion and proves that the plea was entered under mental weakness, mistake, surprise, misapprehension, fear, promise, or other circumstances affecting his rights. Baker v. State, 408 So.2d 686, 687 (Fla. 2d DCA 1982)(emphasis added); Accord Yesnes v. State, **440** So.2d 628 (Fla. 1st DCA 1983).

In the instant case, it is clear that despite the plea colloquy Appellant was motivated to enter his pleas by fear that his son would be hurt if he persisted with the trial. As a result of these fears, he became depressed and suicidal. These fears and suicidal tendencies manifested themselves the very night after Appellant entered his pleas, when he tried to kill himself by hurling himself head first from the second floor onto a concrete floor. Even Dr. Wilder testified that he did not think Appellant was imagining the danger to his son. Appellant showed good cause to withdraw his plea. The denial of his motion was clearly an abuse of discretion. Appellant is entitled to a new trial

POINT II

IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION, APPELLANT WAS DENIED DUE PROCESS WHEN THE TRIAL COURT, OVER OBJECTION, INSTRUCTED THE JURY IN SUCH A MANNER WHICH DIMINISHED THE IMPORTANCE OF THE JURY'S ROLE IN SENTENCING.

In Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), 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. The Court noted that a fundamental premise supporting the validity of capital punishment is that the sentencing jury is fully aware of the magnitude of its responsibility.

> [An] uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Caldwell, 472 U.S. at 333. Although a Florida jury's role is to recommend a sentence, not impose one, the reasoning of Caldwell is applicable. See, Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987), cert. granted, Dugger v. Adams, 42 Cr.L. 4181 (March 7, 1988). A recommendation of life affords the capital defendant greater protections than one of death. Tedder v. State, 322 So.2d 908 (Fla. 1975). Consequently, the jury's decision is critical, and any diminution of its importance violates Caldwell. Adams; Mann

v. Dugger, 817 F.2d 1471, 1489-1490 (11th Cir. 1987) on rehearing, 844 F.2d 1446 (11th Cir. 1988).

In the instant case, the trial court instructed the jury as follows:

> THE COURT: Ladies and gentlemen of the jury, it is now your duty to advice [sic] the Court as to what punishment should be imposed upon the defendant for his crime of first degree murder.
>
> As you've been told the final decision as to what punishment should be imposed is the responsibility of the Judge. However, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty. (R2262-2263)

The trial court had previously instructed the jury at the outset of the penalty phase of the advisory nature of their decision. (R1798) Trial counsel objected to both instructions. (R1787, 2059-2060)

The instructions are incomplete, misleading and misstates Florida law. Contrary to the court's assertion, the sentence is not solely his responsibility. The jury recommendation carries great weight and a life recommendation is of particular significance. Tedder, supra. The instructions failed to advise the jury of the importance of its recommendation. The instructions failed to mention the requirement that the sentencing judge must give the recommendation great weight. Finally, the instructions failed to mention the special significance of a life recommendation under Tedder. The instructions violate Caldwell. Appellant realizes that this Court has ruled unfavorably to his

position. E.g. Combs v. State, 525 So.2d 971 (Fla. 1988); Aldridge v. State, 503 So.2d 1257 (Fla. 1987). However, he urges this Court to reconsider its ruling and reverse his death sentence.

POINT III

IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE IN PART UPON A FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

In imposing the death penalty for the murder of Evelyn Williams, Judge Antoon found that the murder was especially heinous, atrocious and cruel as provided by Section 921.141(5)(h), Florida Statutes (1987). Appellant contends that this particular aggravating circumstance is unconstitutionally vague because the jury is not given adequate instruction in how to determine which murders qualify. Alternatively, Appellant argues that even if this aggravating circumstance is held to be constitutional, the facts of the instant case do not qualify for its application. As such, Appellant's death sentence can not stand.

A. SECTION 921.141 (5)(h), FLORIDA STATUTES (1987) IS UNCONSTITUTIONALLY VAGUE.

Initially, Appellant recognizes that this argument was not presented to the trial court. However this Court may still consider it. This error is a sentencing error apparent from the face of the record which requires no objection to preserve it for appeal. State v. Whitfield, 487 So.2d 1045 (Fla. 1986). Moreover, in capital cases, this Court always takes a fresh look at the evidence to insure that it supports the trial court's findings. Harvard v. State, 375 So.2d 833 (Fla. 1977). Because this Court does undertake a de novo review of the sufficiency of the evidence

in capital cases, capital defendants on direct appeal may advance de novo objections to the sufficiency of the evidence and to the legal standard that the evidence must satisfy.

Section 921.141(5)(h), Florida Statutes (1987) authorizes the jury and the trial court in a capital case to consider as an aggravating circumstance whether the killing was especially heinous, atrocious, or cruel. The difficulty with this circumstance is that "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" Maynard v. Cartwright, 486 U.S. __, 108 S.Ct. 1853, 100 L.Ed.2d 372, 382 (1988). Because this aggravating circumstance can characterize every first degree murder, Section (5)(h) is unconstitutionally vague. It "fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-end discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972)." Maynard v. Cartwright, 100 L.Ed.2d at 380.

Since Furman, the Court has "insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Id; Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). For example, in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the jury sentenced the defendant to die, and the Georgia Supreme Court affirmed, based solely on a finding that the murder was

"outrageously or wantonly vile, horrible and inhuman." The United States Supreme Court, however, reversed, finding that:

> nothing in these few words, standing alone, . . . implie[d] any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of [this aggravating circumstance]. In fact, the jury's interpretation of [this circumstance] can only be the subject of sheer speculation.

446 U.S. at 428-429.

Similarly in Maynard v. Cartwright, supra, the Court applied Godfrey to Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance. This language was identical to that used in Florida's section (5)(h). A unanimous Supreme Court found that this language was unconstitutionally vague:

> [T]he language of the Oklahoma aggravating circumstance at issue -- "especially heinous, atrocious, or cruel" -- gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman' language that the jury returned in its verdict in Godfrey.... To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous."

Maynard v. Cartwright, 100 L.Ed.2d at 382.

In the instant case, in accordance with Section (5)(h), the Court instructed the penalty phase jury:

> As to Count 1, the murder of Evelyn Meyer Williams, the aggravating circumstances that you may consider are limited to any of the following that is establish by the evidence.
>
> * * *
>
> 3. The crime for which the defendant is to be sentenced is especially wicked, evil, atrocious, or cruel. (R2263-2264)

As in Godfrey, the court read to the jury no other limiting instruction on the subject. As in Maynard v. Cartwright, the instruction did not limite the jury's or the trial court's discretion in any significant way. In fact, the instruction was virtually the same as the one condemned in Maynard v. Cartwright. Accordingly, allowing Appellant to be sentenced to die under this unconstitutionally vague law is error.

B. THE EVIDENCE DOES NOT PROVE BEYOND A REASONABLE DOUBT THAT THE KILLING OF EVELYN WILLIAMS WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

In State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) this Court held:

> . . . that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Recognizing that all murders are heinous, in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court further refined its interpretation of the legislature's intent that this aggravating circumstance only applies to crimes especially heinous, atrocious and cruel. In Lewis v. State, 398 So.2d 432 (Fla. 1981) this Court stated the principle that "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious and cruel."

In Kampff v. State, 371 So.2d 1007 (Fla. 1979) this Court reversed a finding of heinous, atrocious and cruel where the defendant had brooded for three years over his divorce from his wife. He then procured a gun and shot his wife three times, the last of which was a point blank shot to her head. In several other cases this Court has reversed a finding of heinous, atrocious and cruel in situations involving worse scenarios than the instant case. See, e.g. Menendez v. State, 368 So.2d 1278 (Fla. 1978)[defendant shot victim twice as he stood with his arms raised in a submissive position]; Lewis v. State, 377 So.2d 640 (Fla. 1979) [defendant shot the victim in the chest and then shot him several more times as he tried to escape]; Simmons v. State, 419 So.2d 316 (Fla. 1982)[defendant attacked the victim in her home and killed her by two hatchet blows to her head]; Teffeteller v. State, 439 So.2d 840 (Fla. 1983)[victim suffered shotgun blast to the abdomen, lived for several hours in undoubted pain and knew he was facing death]; Rembert v. State, 445 So.2d 337 (Fla. 1984)[victim beaten with a club one to seven times and lived for

several hours]; Herzog v. State, 439 So.2d 1372 (Fla. 1983)[female victim induced by defendant to take drugs, after which she was gagged, placed on a bed and smothered with a pillow and ultimately dragged into the living room where she was successfully strangled to death with a telephone cord].

An example of the valid finding of this aggravating circumstance can be found in Gardner v. State. 313 So.2d 675 (Fla. 1975) where the female victim suffered at least one hundred bruises on her body, numerous cuts and lacerations, and severe injury to her genitals and internal organs due to a sexual battery performed with a broom stick, bat or bottle. ~~See also~~ Lucas v. State, 376 So.2d 1149 (Fla. 1979) where the defendant shot the victim, pursued her into the house, struggled with her, hit her, dragged her from the house and finally shot her to death as she begged for her life. This aggravating circumstance should be reserved for murders such as the ones in Gardner and Lucas which were "accompanied by such additional acts as to set the crime apart from the norm." Herzog, supra at 380. It ill serves the continued viability of the death penalty in Florida if the aggravating circumstance can be upheld under the facts of the instant case; the facts simply do not comport with a finding of an especially heinous, atrocious and cruel murder.

The evidence shows that Evelyn Williams was shot three times in relatively quick succession. There is absolutely no evidence to show that prior to the actual shooting, that Williams suffered any kind of torture. Rather the evidence indicates that the shooting was intended to kill Williams. That she survived

for as long as four minutes is inconsequential. See Teffeteller, supra and Rembert, supra. While she *may* have been conscious, a fact not necessarily conceded, there is no evidence of her awareness that her daughter Amber was being threatened. While the murder of Evelyn Williams was indeed senseless and horrible, it does not meet the test for being especially heinous, atrocious or cruel. This factor must be stricken.

POINT IV

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT IMPOSED THE DEATH PENALTY UPON AN ERRONEOUS FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

The "cold, calculated, and premeditated" aggravating factor "is frequently and appropriately applied in cases of contract murder or execution style killings and 'emphasizes cold calculation before th murder itself."' Perry v. State, 522 So.2d 817 (Fla. 1988). See also Garron v. State, 528 So.2d 353 (Fla. 1988)(heightened premeditation aggravating factor was intended to apply to execution or contract-style killings). This Court has recently made it clear that this factor requires proof of "a careful plan or prearranged design". Rogers v. State, 511 So.2d 526, 533 (Fla. 1987); Mitchell v. State, 527 So.2d 129 (Fla. 1988). As stated in Preston v. State, 444 So.2d 939, 946 (Fla. 1984):

> [The cold, calculated, and premeditated] aggravating circumstance has been found when the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator. See, e.g., Jent v. State, (eyewitness related a particularly lengthy series of events which included beating, transporting, raping, and setting victim on fire); Middleton v. State, 426 So.2d 548 (Fla. 1982)(defendant confessed he sat with a shotgun in his hands for an hour, looking at the victim as she slept and thinking about killing her): Bolender v. State, 422 So.2d 833 (Fia. 1982), cert. denied, U.S. __, 103 S.Ct. 2111, 77 L.Ed.2d 315

(1983)(defendant held the victims at gunpoint for hours and ordered them to strip and then beat and tortured them before they died).

In its findings of fact in support of this aggravating circumstance, the trial court concluded that Appellant had begun planning to kill Evelyn Williams some three months prior to the actual killing as evidenced by his threats to her made in July 1986. (R2780-2781) Appellant maintains such a conclusion is illogical and erroneous.

Appellant and Evelyn Williams were involved in an intimate and often volatile relationship. This relationship suffered because Appellant did not get along with Williams' children. In fact, at a time when Appellant lived with Williams and had a right to be at the house, Amber and John Williams forced him to leave at gunpoint. (R1832-1835) These threats to the Williams family were a direct result of the unfair treatment which Appellant felt he received from the family. There is simply no logical basis for concluding that Appellant began his carefully designed plan to kill Evelyn Williams in July, 1986. First, Amber Williams testified that the threats were primarily directed to herself and her brother John. (R1836) Certainly, if Appellant's actions in October were in furtherance of his plan begun in July, the question which immediately comes to mind is why he did not similarly carry out his "plan" with regard to Amber, against whom he had more animosity. Second, according to Evelyn Williams' mother, Appellant's threat in July was to cut Williams and her family into pieces. (R665) Obviously this "plan" was never carried out. Third the fact that Appellant

secured a gun was essential to the crimes for which he was convicted: first degree murder with a firearm, armed burglary, and aggravated assault with a firearm. If this factor is indicative that the murder was cold calculated and premeditated, then virtually every felony murder with a firearm would automatically have an aggravating factor.

In Rogers v. State, 511 So.2d 526 (Fla. 1987) the defendant and codefendant secured two .45 caliber firearms, drove to St. Augustine and "cased" a store which they subsequently robbed and in the course of the robbery, a person was killed. This Court ruled that the murder was not cold calculated and premeditated. The instant case is factually similar to Rogers in that Appellant secured a gun, "cased" Williams' house and eventually killed her. The fact that three shots were fired does not mean that the murder was cold, calculated and premeditated. This Court in Rogers, also specifically receded from Herring v. State, 446 So.2d 1049 (Fla. 1984) with respect to the sufficiency of proof of the cold, calculated and premeditated factor. In Herring this Court upheld this factor where the evidence showed that the defendant fired a second shot into the victim as he lay on the ground. In Rogers, this Court recognized that the mere fact of a second, unnecessary blow to the victim was irrelevant in proving whether the defendant acted from a prearranged design. Therefore, the fact that Appellant shot Evelyn Williams three times offers no proof whatsoever that the murder was cold calculated and premeditated.

In summary, the evidence is insufficient to prove that the murder of Evelyn Williams was cold, calculated and premeditated. This factor must be stricken.

POINT V

IN ACCORDANCE WITH THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION **17** OF THE FLORIDA CONSTITUTION, THE DEATH SENTENCE MUST BE REVERSED ON THE GROUNDS THAT IT IS DISPROPORTIONATE.

Appellant contends that the trial court erroneously concluded that the murder of Evelyn Williams was heinous atrocious and cruel (See, Point 111, supra) and that it was committed in a cold calculated and premeditated manner (See Point IV, supra). Appellant concedes the validity of the remaining two aggravating circumstances. (Appellant was previously convicted of a prior felony involving violence and the murder was committed in the course of a burglary). However, despite the presence of these aggravating factors, Appellant maintains that the death penalty is disproportionate and thus inappropriate.

In State v. Dixon, **283** So.2d 1 (Fla. **1973)** and Holsworth v. State, 522 So.2d **348** (Fla. **1988)** this Court recognized that the death penalty, unique in its finality and total rejection of the possibility of rehabilitation, was intended by the legislature to be applied to only the most aggravated and unmitigated of most serious crimes. Accordingly, this Court has not hesitated to reverse a sentence of death, even where the jury has recommended death and the trial court found the aggravating factors outweigh the mitigating, if under the totality of the circumstances, the ultimate penalty is not proportionally warranted. See, e.g., Rembert v. State, **445** So.2d **337** (Fla. **1984);** Caruthers v. State, **465** So.2d **496** (Fla. **1985);** Ross v. State, **474** So.2d **117** (Fla.

1985); Wilson v. State, 493 So.2d 1019 (Fla. 1986); Proffitt v. State, 510 So.2d 896 (Fla. 1987); Livingston v. State, 13 FLW 187 (Fla. March 10, 1988); and Lloyd v. State, 524 So.2d 396 (Fla. 1988). An additional reason why the death penalty should be vacated in this case is because the trial court would clearly have imposed a life sentence in the absence of two aggravating circumstances. Appellant was convicted of the murder of Walter Burrows and the jury recommended the death penalty by a vote of 10-2. The trial court found two aggravating circumstances present as to the Burrows murder and no mitigating circumstances. However, the trial court sentenced Appellant to life imprisonment for the Burrows murder and held:

> The aggravating circumstances found to exist in Count II are technical in nature and do not require imposition of the death penalty. (R2784)

This Court must reduce Appellant's penalty to life imprisonment or alternatively vacate the death sentence and remand to the trial court for resentencing.

POINT VI

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form in recognition that this Court has specifically or impliedly rejected each of these challenges to the constitutionality of the Florida statute and that detailed briefing would be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (Fla. 1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to arbitrary and capricious imposition of the death penalty.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, supra; Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980)(England, J. concurring). Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984)(Ehrlich, J. concurring in part and dissenting in part).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

The failure to provide the defendant with notice of the aggravating circumstances which make the offense a capital crime and on which the state will seek the death penalty deprives the defendant of due process of law. See Gardner v. Florida, 430 U.S. 349 (1977); Argersinger v. Hamlin, 407 U.S. 25 (1972); Amend. VI and XIV, U.S. Const.; Art. 1, §§9 and 15(a), Fla. Const.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore cruel and unusual punishment. Amend. VIII, U.S. Const.

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone and denies the righ to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968).

The Elledge Rule [Elledge v. State, 346 So.2d 998 (Fla. 1977)], if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the Eighth and Fourteenth Amendments to the United States Constitution.

Section 921.141(5)(d), Florida Statutes (1985)(the capital murder was committed during the commission of a felony), renders the statute unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution, because it results in arbitrary application of this circumstance and in death being automatic in felony murders unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating.

Additionally, a disturbing trend has become apparent in this Court's decisions and its review of capital cases. This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, 459 U.S. 895 (1982)(Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

In rejecting a constitutional challenge to the statute, the United States Supreme Court assumed in Proffitt v. Florida, 428 U.S. 242 (1976), that this Court's obligation to review death

sentences encompasses two functions. First, death sentences must be reviewed "to insure that similar results are reached in similar cases." Proffitt, supra at 258. Secondly, this Court must review and reweigh the evidence of aggravating and mitigating circumstances to determine independently whether the death penalty is warranted. Id. at 253. The United States Supreme Court's understanding of the standard of review was subsequently confirmed by this Court when it stated that its "responsibility [is] to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate.'' Harvard v. State, 375 So.2d 833, 834 (Fla. 1978) cert. denied 414 U.S. 956 (1979)(emphasis added).

In two recent decisions, this Court has recognized previous decisions were improperly decided. In Proffitt v. State, 510 So.2d **896** (Fla. 1987) this Court reduced a death sentence to life despite having previously affirmed it on three prior occasions in Proffitt v. State, 315 So.2d 461 (Fla. 1975) affirmed 428 U.S. 242 (1976); Proffitt v. State, 360 So.2d 771 (Fla. 1978); and Proffitt v. State, 372 So.2d 1111 (Fla. 1979). The basis of the holding was this Court's duty to conduct proportionality review. Similarly in King v. State, 514 So.2d 354 (Fla. 1987) this Court invalidated a finding of the aggravating factor that the defendant caused a great risk of death to many persons despite having approved it in King's direct appeal in King v. State, 390 So.2d 315 (Fla. 1980). In so doing, this Court acknowledged that the factor had not been proven beyond a reasonable doubt. What these two cases clearly

demonstrate is that the death penalty as applied in Florida leads to inconsistent and capricious results.

The Florida death penalty statute discriminates against capital defendants who murder whites and against black capital defendants in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 17 of the Florida Constitution. McClesky v. Kemp, 481 U.S. __, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)(dissenting opinion of Brennan, Marshall, Blackman and Stevens, JJ.)

In view of this Court's abandonment of its duty to make an independent determination of whether or not a death sentence is warranted, the constitutionality of the Florida death penalty statute is in doubt. For this and the previously stated arguments, Appellant contends that the Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Based on the foregoing reasons and authorities Appellant respectfully requests this Honorable Court to grant the following relief:

As to Point I, vacate the conviction and sentence of death and remand for a new trial;

As to Points 11, III and IV, reverse the death sentence and remand the cause for a new sentenceing proceeding;

As to Point V, to vacate the sentence of death and remand the cause for imposition of a life sentence, or alternatively remand for a new sentencing proceeding;

As to Point VI, to declare Florida's death penalty statute unconstitutional.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Michael S Becker

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER
112-A Orange Avenue
Daytona Beach, Fla. 32014
(904)252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Fla. 32014 and to Mr. George Porter, #110825, P.O. Box 747, Starke, Fla. 32091 on this 1st day of February 1989.

Michael S. Becker

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER