IN THE SUPREME COURT OF FLORIDA

BOBBY LEE DOWNS,

Appellant,

v.

CASE NO. 73,877

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The Appellant's chronological summary of the course of proceedings is accepted.

The evidence showed the following:

Bobby Lee Downs was married to Nicole Downs and was the father of their two children. The two of them were separated.

The Appellant usually slurred his words when he spoke (TR 509, 1355), even when sober, because his brother (Mike) had kicked his teeth out in a fight (TR 1355).

On April 20, 1988, Downs began preparing for the murder of Nicole by carefully burglarizing the home of Oscar Sprouse. Downs broke into the Sprouse home, located Sprouse's gun, searched and found a box of ammunition from the other side of the room and left the home undetected by Mrs. Sprouse, who was asleep in the home at the time (TR 750-757).

Linda Chewning encountered Downs, who had run out of gas, en route to Nicole's house (TR 946). Although he smelled bad, she did not think Downs was drunk (TR 952).

Downs arrived at Nicole's with the now-loaded gun concealed in his pants. Ostensibly, Downs had come to get his clothes and see his children (TR 526). There was no reason for him to arm himself since, in the past, he had frequently visited Nicole's home for similar reasons (TR 465).

When Nicole, who was terrified of Downs and would never see him "alone" (TR 480), spotted Downs' gun, she attempted to call the police (TR 559). Downs shot the telephone out of Nicole's hand (TR 559). Downs then pointed his gun at Terry Strickland, warning him not to try anything (TR 567).

Downs now tried to entice Nicole to let go of the children whom she had clutched. Nicole refused and ordered Downs to leave (TR 568). Nicole was screaming in terror, begging Terry Strickland and Michelle LeClerc not to take the children from her as Downs had ordered (TR 568).

Downs put the gun away to induce Nicole to drop the children (TR 569). Michelle left (TR 569). Nicole refused to give up the babies so Downs took out the gun, went up to Nicole, grabbed her hair and shot her three times - once fatally (TR 570-571). Down then fired a warning shot (into the wall) (TR 576), and went outside. Downs warned Strickland to stay put because he'd be back (TR 578).

Downs casually drove away (TR 578).

Downs was sober and lucid the entire time (TR 587-588).

Downs encountered Michelle up the street as he left (TR 666-667). Downs pulled over and told Michelle, calmly, that he and Nicole had some problems but there was nothing to worry about (TR 667).

Around 12:42 p.m. that day, a sober Bobby Downs was pursued and eventually captured by Nassau County Sheriff's Lieutenant George Lee (TR 710). Downs was not drunk (TR 744). Downs, after exiting his car, made a suicidal comment and went for his gun (TR 729). In a move that probably saved Lee's life, Lee grabbed Downs' gun and put his own gun to Downs' chin (TR 730). Downs suddenly lost the desire to die and surrendered.

At trial, Downs' counsel conceded the fact that his client murdered Nicole (TR 443), and never raised an insanity defense.

In his closing, counsel also stated that he was not relying upon the defense of "intoxication" (TR 1102), although, he said, alcohol "was a factor." The only defense was as to the degree of murder (TR 457).

On appeal, Downs raises five issues. The facts relevant to each are set forth in order:

Facts: Issue I
(Exclusion of "State of Mind" Evidence)

Mr. Downs attempted to introduce various (hearsay) "statements" that he had allegedly made prior to the murder as proof of his state of mind at the time of the actual killing. Again, Downs did not raise an insanity defense.

The statements in question were disallowed at (TR 831, 843, 859, 867, 873, 885, 891, 981, 998). These nine statements are summarized here:

(1) William Downs (TR 831), the defendant's brother, would have testified to the content of an allegedly drunken telephone call made to him, by the defendant, between 11:00 p.m. and 12:30 a.m., on the night of April 19-20, 1988. The State argued that the testimony conflicted with that of other witnesses to the defendant's activities (TR 836), and that any pre-murder statement by the defendant was not trustworthy (TR 836). Finally, since premeditation could have taken place during the intervening (twelve or so) hours until the killing, this hearsay was not relevant (TR 837).

The court sustained the State regarding the content of the call but agreed that William could testify to getting the call and to the defendant's intoxication (TR 840).

(2) Glenda Smith (TR 843), Downs' aunt, also alleged that she received a phone call on the evening of April 19, 1988. She said Downs was drunk and she told him to sleep it off (TR 845-846). She also saw Downs on April 20, 1988, shortly after the murder (TR 846).

In partially sustaining the State's objection (the court allowed her to testify to her observations of his mental state (TR 848)), the court held that Downs' telephonic predictions about the course of any divorce or custody matters did not qualify under any exception to the hearsay rule (TR 853-854).

(3) J.D. Johnston (TR 859). Officer Johnston was proffered to testify that Downs flagged down his patrol car on April 20, 1988, "to talk" and later met him again to discuss marital problems (TR 861). These meetings took place between 1:45 a.m. and 3:15 a.m.

Curiously, Johnston did not arrest Downs for "DUI" and in fact deemed him fit to drive home (TR 864).

Defense counsel argued that these sessions meant that Downs "lacked intent", but the court noted that Downs burglarized the Sprouse home, got the gun and murdered Nicole hours later (TR 865). Thus, no linkage existed between the meetings and the murder (TR 865).

(4) D.W. Blank (TR 867). This officer met Downs pursuant to a dispatch and allegedly would have testified that Downs asked him to accompany him to Nicole's home at 2:30 a.m. on April 20, 1988 (TR 867). This officer, too, did not think Downs was drunk even though he had been drinking (TR 870-871). The same ruling was made regarding Officer Blank.

(5) Tape (TR 873). A dispatcher's tape was proffered which contained Downs' request to meet an officer. The voice on the tape accused Nicole of kidnapping and misconduct (TR 874). The trial judge disallowed the tape but permitted Downs to tell the jury that he had called the police. The parties disagreed over whether the tape "demonstrated" intoxication (TR 878).

(6) Michelle LeClerc (TR 885). The victim's sister was asked to relate conversations between her and Downs regarding Nicole and Kenny Ray (the last one being on April 19, 1988) (TR 887-889). The court was told by defense counsel that this testimony would demonstrate that Downs was confused and roamed around town on April 19, 1988 (TR 889-890). The court held that the contents of the defendant's questions were irrelevant (TR 890).

(7) Linda Chewning (TR 891). Downs proffered Linda Chewning's testimony that she saw Downs between 11:20 a.m. and 11:30 a.m. on April 20, 1988, with his disabled car. She helped Downs buy gas and noticed that he smelled like alcohol (TR 892-893). This testimony was **allowed** by the court, due to observations of "confusion" and odor (TR 894).

(8) Susan Pulsifer (TR 981). Downs proffered the testimony of a friend (a store clerk) who also saw him on the night of April 19-20, 1988 and talked to Downs. Oddly, on cross, Susan testified that Downs "made a move on her", kissed her hand and said he and Nicole were through TR 987). This undermined the "loving husband" defense.

The court disallowed any hearsay but permitted Downs to put on testimony that he was drinking (TR 989).

(9) Leeds Gallagher (TR 998). Downs' final proffer was that of a friend whom Downs attempted to rouse out of bed on April 20, 1988, shortly after midnight, to go with him to Nicole's (TR 998-1000).

No witness testimony was **proffered** regarding Downs' mental state during the hours encompassing the Sprouse burglary and the murder. The State, of course, produced the two witnesses who were present for the final confrontation between Nicole and Bobby Lee Downs.

During the penalty phase, evidence regarding Downs' mental state (and discussions) was admitted including most of this proffered evidence. (See TR 1281-1286, 1288-1291, 1294, 1351-1353, 1360).

Facts: Issue II
(Statements of Victim)

Mr. Downs put the victim's state of mind before the jury as part of his overall defense.

The first comment (TR 486) was only admitted because, during cross examination of Judith LeClerc, defense counsel "opened the door" by eliciting testimony that Nicole was not scared of Appellant sufficiently to seek any court orders against him (TR 479) and that Appellant made idle threats that, impliedly, no one believed (TR 482). Thus, the State was able to elicit testimony that Nicole left Bobby out of fear (TR 486-487).

The second comment (TR 526) involved testimony by Terry Strickland, who witnesses the murder, regarding a comment Nicole made (over the phone) to Downs in his presence. (The comment by Nicole essentially said that Downs had pulled a gun on her once and would not be allowed to do it again) (TR 526-527).

The court apparently agreed that this testimony was relevant to the victim's state of mind on the morning she died (TR 532-533), and, again, broached a topic opened by Downs himself.

Facts: Issue III

(A) Heinous-Atrocious-Cruel

The victim at bar was held captive in her living room at gunpoint. She had her children clutched to her and was undoubtedly terrified for them as well as herself. A phone had already been shot from her hand. Nicole suffered the full terror of impending death.

While the fatal shot caused an instantaneous death, the sequence of the three shots is not known, thus, the two nonfatal wounds were possibly inflicted first, further aggravating Nicole's torture.

(B) Cold-Calculated-Premeditated

Downs did more than repeatedly threaten to kill Nicole (TR 465, 467, 495, 503, 506). On the morning of April 20, 1988, this "loving husband" prepared to "visit" his wife by burglarizing the home of Oscar Sprouse, stealing a pistol and a box of ammunition.

Sprouse's trailer door was pried open (TR 753). The gun was taken from atop his television (TR 750). The bullets were in a box in another part of the room (TR 750-751).

The gun was unloaded (TR 747). To load this particular weapon, Downs had to unscrew a small pin and physically remove the cylinder to insert the bullets (TR 785). Thus, Downs had ample time to contemplate his conduct.

Neither Downs nor anyone testifying on his behalf offered any reason why Downs would steal a gun and bring it to Nicole's house other than to use it.

Facts: Issue IV
(Proportionality)

No factual development is required.

Facts: Issue V
(Override)

The Appellant's brief lists a number of mitigating factors which allegedly supported the jury's recommendation. The trial judge, as sentencer, weighed and rejected this "evidence" (TR 1856-1863).

Downs never raised an "insanity" defense, thus strategically denying the State access not only to Dr. Miller's report (which was confidential and never used by Downs), but also to Dr. Krop (TR 162).

The penalty phase evidence put on by Downs was as follows:

Ken Ray Robinson testified that Nicole helped his sister-in-law with her new baby (TR 1255-1257). Nothing "mitigating" was asked or provided.

Terry Turnkett described Downs as a good worker (TR 1266), and a friend and confidant (TR 1266) of many years. (This testimony would later conflict with Dr. Krop's evaluation).

Joe White offered inconsequential testimony verifying that they sometimes worked out of town.

Officer Blank (now) gave the testimony excluded before, regarding Downs' conversations about his marriage and, indirectly, his ability to converse, listen to advice, and respond on April 19, 1988 (TR 1288-1291). The same held true for the testimony of Officer Johnston.

Jacquelyn Downs, the Appellant's mother, testified that he had a bout with meningitis as a child but fully recovered (TR 1304, 1324), that he was a problem child and a dropout (TR 1314) and that he committed aggravated assault in 1981 (TR 1314-1315).

Then, contrary to Krop's predictions, she also said Downs was close to her and some family members (but no her husbands), sending nice valentines (TR 1315); that he was active in the prison Jaycees and won awards (TR 1318); how he was a good father and how he often wrote letters (TR 1321-1322); how, as a child, he received presents, love and affection from her and Glenda (TR 1325); and how the family supported Downs while he was in jail.

She claimed ignorance of the fact that Downs beat up Nicole (TR 1329), or put a gun to her head (TR 1330).

Dick Morris testified that Downs shot a prior victim and was charged with attempted murder but was able to plea bargain it down to aggravated assault (TR 1340).

Mike Downs really hurt the Appellant by testifying that Bobby **always**, drunk or sober, has "slurred speech" because Mike kicked out Bobby's teeth in a fight (TR 1355).

Glenda Smith also undermined Dr. Krop. She noted how Downs lived with his grandparents and what a good influence his grandfather was (TR 1366), even though Downs disliked his stepfathers.

Glenda also testified that Downs skipped school (TR 1369-1373), got into fights, carried brass knuckles to school and went to reform school (TR 1369-1373). She saw Downs on April 20, 1988 and did not think he was drunk (TR 1381-1382).

Nancy Gill, a "PTA" volunteer, called Downs a student who got into trouble every day in school (TR 1384). However, a lot of kids at his school regularly got into trouble (TR 1388). She felt Downs had poor clothes and was an "outsider" (TR 1389).

Next came Dr. Krop.

Krop is a psychologist, not a psychiatrist. He claimed to have testified for the defense twenty-five (25) times in capital cases (TR 1397). In a recent deposition, however, he alleged ninety-five (95) appearances (TR 1399-1400). Krop claimed he guessed at the deposition but is correct now (TR 1400). Krop denied testifying at clemency proceedings (TR 1401-1402), yet in the deposition claimed he had testified forty-five (45) times (TR 1401-1402). Krop has never testified for the State in a capital case (TR 1550).

Krop did not suspect that his client was a malingerer (TR 1449) even though Downs' first MMPI test had to be rejected due to an apparent attempt to fake incompetence (TR 1505). (Krop would not agree Downs "faked" anything. He would only say the test was "invalid") (TR 1505).

Krop alleged that Downs' "IQ" was only a 71 (verbal 67, performance 76) (TR 1433), and that Downs suffered from:

(1) Borderline retardation.

(2) Schizoid Personality Disorder.

(3) Alcohol and Drug Abuse.

Dr. Krop attached no significance to any facts inconvenient to his theory. Thus, he discounted reports that Downs was sociable in prison when he was unaware of being watched (playing cards, basketball and watching T.V.) as "superficial" (TR 1453). Krop, who is not a doctor, never consulted with two available psychiatrists (Miller and Innocent) (TR 1469). Krop opined that Downs played basketball to avoid being punished for not playing (TR 1467).

Peculiarly, Krop discounts genetics, stating that he believes that behavior is purely "learned" and a function of our environment (TR 1441, 1475). Also, Krop let slip two other admissions:

(1) Downs was not out of touch with reality (TR 1445).

(2) A psychological disorder is not a mental disease (TR 1474).

Krop's testimony became more ludicrous as it was tested with his own reference source, the DSM III R.

To truly qualify as "schizoid", Downs had to meet four of these criteria (TR 1482, et seq.):

(1) Lack of close family relationships. (Disproven by mother, aunt, brother and his children).

(2) Preference for solitary activity. (Disproven by trips to beach, cards, basketball).

(3) Inability to express emotions. (Disproven by police, by Turnkett, by family members).

(4) Lack of sexual desire. (Downs was married and had kids, made "moves on" Susan Pulsifer).

(5) "Indifferent to Praise" (Krop, at TR 1486, only called Downs "indifferent at times").

(6) Absence of close friends. (Belied by Turnkett, Pulsifer).

(7) Aloof or cold personality. (Belied by letters, cards, play with children, helping elderly neighbor with yard work, begging Nicole and talks with Mrs. LeClerc).

Krop adamantly tried to rationalize these factors to help his client (TR 1483-1489).

When Krop's "retardation" theory was challenged by Downs' letters, Krop opined that Downs may have gotten the words someplace else (TR 1495). Krop then said that even retarded defendants can read the self-administered tests he performed (TR 1497-1498).

Marilyn Fowler, a social worker, testified to medications given to Downs in jail for depression and self-reported hallucinations. She also said Downs was highly motivated to help himself (TR 1572), and, based upon at least thirty-eight (38) meetings with him, felt Downs was **not** "schizoid" (TR 1578), as Krop did.

Reginald Touchton, a substance abuse therapist, said Downs volunteered for his class and did all homework assignments accurately and promptly (TR 1586).

SUMMARY OF ARGUMENT

Mr. Downs is not entitled to relief as to either his conviction or his sentence.

The court's discretionary evidentiary rulings were clearly supported by the law and the record.

The sentence of death is the result of a valid override of a baseless and unreasonable jury suggestion of life. All aggravating factors were properly applied.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN EXCLUDING DOWNS' HEARSAY EVIDENCE

Downs proffered evidence from nine sources regarding his conduct on the day and evening before the murder. Downs alleged that his conduct, particularly his attestations of love for his children, somehow "diminished" his intent. None of Downs' "evidence", however, was relevant to the issue of his propensity for violence. Not once did Downs proffer evidence of any "statements of intent" surrounding the burglary. Not once did Downs offer evidence that the actual murder was unintended.

The State opposed the admission of Downs' proffered evidence on the grounds that the statements were made long before the crimes at bar (and were not **res gestae**) and that Downs could have formed the requisite intent in the ensuing hours after he returned home, slept off the beer, had breakfast and set out on his burglary/murder spree. The State also suggested that Downs could even have spent the night "building a defense" by visiting potential witnesses and protesting his concern for his kids while intending to kill Nicole all along.[1]

Since this is an appeal, all facts and all inferences from the facts must be taken in favor of the lower court's decision. **Shapiro v. State**, 390 So.2d 344 (Fla. 1980); **Gilvin v. State**, 418

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[1] The plausibility of this theory is enhanced by Downs' post-murder conduct, such as his statements to Michelle, and to his conduct in jail of portraying symptoms of illness to his doctors but, when he thought he was unobserved, behaving normally, playing cards and basketball and watching T.V.

So.2d 996 (Fla. 1982); **Spinkellink v. State**, 313 So.2d 666 (Fla. 1975). No matter how Appellant chooses to interpret his evidence, this Court cannot reverse on speculation. **Sullivan v. State**, 303 So.2d 632 (Fla. 1974). Therefore, we rely upon the position that Downs, no matter what he may have said twelve to twenty-four hours before the murder, had the time to form the requisite intent to commit first degree murder. We also rely upon the fact that none of Downs' comments to witnesses on April 19-20, 1988, disavow or refute in any way his intent to murder Nicole. We submit that Downs' unrealistic late night conversations with the police (for an escort to barge in on Nicole after midnight), even if valid as requests, were offset by Downs' failure to seek police help on the (late) morning of April 20th, his burglary of the Sprouse home and his shooting of the telephone when Nicole tried to call the (same) police.

In his brief, Downs alleges that the trial court was compelled to admit his hearsay evidence because it was relevant to issues of "intent" or "explanation of later conduct". Neither position is tenable.

In **Correll v. State**, 523 So.2d 562 (Fla. 1988), this Court upheld the admission of hearsay testimony regarding threats the defendant made against his wife and family prior to killing them. The relevancy of Correll's statements, however, was clear. Correll said he was going to kill the victims and then he did so. These statements carried an indicia of reliability not present in our case and were, in fact, corroborated by Correll's subsequent conduct.

By contrast, Downs never stated that he had "no intention" of hurting Nicole (in fact, he said he loved her and threatened to kill her to the same witnesses). Downs' "state of affection" was not the same thing as his "intent" to kill. One can commit the first degree murder of a loved one.

In **Peede v. State**, 474 So.2d 808 (Fla. 1985), the issue was kidnapping and the victim's fear of abduction manifested to her daughter **as she left to meet** the defendant. Thus, the statement had a temporal connection which is not present at bar **and** carries indicia of mental state and reliability not present in our case.

In **Jenkins v. State**, 422 So.2d 1007 (Fla. 1st DCA 1982), the defense of self-defense was raised and the comment in question was a threat made by the victim against the defendant. Again, the statement's relevance and trustworthiness was clearly different than the case at bar.

In **Morris v. State**, 530 So.2d 61 (Fla. 1st DCA 1988), a witness confessed to another witness that he was "setting up" Morris for a bust. Since the defense was entrapment, the relevance was (again) obvious.

In contrast, the caselaw is equally clear that self serving declarations by a defendant that are **not** part of the **res gestae** are clearly inadmissible as an exception to the hearsay rule. **Lowery v. State**, 402 So.2d 1287 (Fla. 5th DCA 1981); **Fagan v. State**, 425 So.2d 214 (Fla. 4th DCA 1983); **Overton v. State**, 429 So.2d 723 (Fla. 1st DCA 1983); **Logan v. State**, 511 So.2d 443 (Fla. 5th DCA 1987); **Morris v. State**, 530 So.2d 61 (Fla. 1st DCA 1988). The courts, in reviewing these questions, have

consistently cited to the discretionary nature of the trial judge's decision and to the untrustworthiness of "exculpatory comments" made by a non-testifying defendant.

As noted before, none of Downs' statements addressed "intent". All of Downs' comments were uttered long before the murder. Downs never relied upon an intoxication defense. No matter his feelings at 3:00 a.m., Downs went home. Slept, ate breakfast, committed a burglary, loaded a weapon, shot his wife, and calmly departed the area after stopping to make a brief, misleading, statement to Michelle LeClerc in an effort to delay detection of his crime and facilitate his escape over the state line.

It is abundantly clear that Downs' proffered evidence was untrustworthy and irrelevant to the intent issue, was not part of the **res gestae** and in no way, shape or form explained his future conduct.

Taking the facts and all inference therefrom in favor of the court's discretionary ruling, and considering the settled caselaw, Mr. Downs is not entitled to relief.

ISSUE II

THE TRIAL COURT DID NOT ERR IN ADMITTING RELEVANT EVIDENCE OF THE VICTIM'S STATE OF MIND WHERE THE DEFENDANT HIMSELF PUT THE MATTER BEFORE THE JURY

While in the ordinary case the victim's state of mind may not be relevant, **Correll v. State**, 523 So.2d 562 (Fla. 1988), the rule is not absolute and, in addition, is subject to a harmless error analysis. **Correll, supra.**

Downs contends that testimony from Judith LeClerc on re-direct examination and subsequent testimony from Terry Strickland, on direct examination, improperly advised the jury of the victim's terror of Downs and, thus, her "mental state". Mr. Downs, however, has gingerly sidestepped the operative facts.

First, we must remember that Downs sought to mislead and deceive the jury regarding his relationship with Nicole. Downs attempted to portray their marital problems as merely transitory. Downs tried to tell the jury that he and Nicole still had a good relationship, that they saw each other (willingly) every day, that they took the kids on trips, that Nicole spent the night with Downs at least once, and that Nicole brought about her own death by virtue of her fickle attitude and her torment of poor, love-struck "Bobby". This story thus elevated Nicole's mental state to relevance as an extension of Downs' own mental state. Her "fickle" conduct was offered as the "cause" which led to the "effect" of Downs' criminal act of murder. This approach persists on appeal.

The Appellant cross examined Judith LeClerc along these lines and, in fact, induced Judith to testify that Nicole was terrified of Bobby (TR 480-481). Defense counsel did not object to the response and clearly opened the door to the topic of Nicole's fear. See **Lambrix v. State**, 494 So.2d 1143 (Fla. 1986).

When, on redirect, the State adduced the comments cited in Downs' brief, the cat was already out of the bag and defense counsel's objections were properly overruled. **Tribue v. State**, 106 So.2d 630 (Fla. 2nd DCA 1958); **Lambrix v. State, supra.** The same held true for Strickland's subsequent testimony.

Downs cannot object to the admission of evidence which clarified and explained his own proffered "victim's mental state" evidence. Downs was not entitled to mislead or confuse the jury. The State's evidence, admitted only after Downs himself had opened the topic, was clearly admissible. Even if the State's evidence was not admissible, under **Correll**, any error in admitting it was harmless.

ISSUE III

THE SENTENCER DID NOT ERR IN DETERMINING THAT THIS MURDER WAS "HEINOUS, ATROCIOUS AND CRUEL" AND "COLD, CALCULATED AND PREMEDITATED"

(A) Heinous-Atrocious-Cruel ("H.A.C.")

Bobby Lee Downs put Nicole through over fifteen minutes of prolonged screaming terror. Downs shot a telephone from her hand. Then, after failing to induce her to let go of their children, he shot her three times despite her plea for life.

This is an appeal. The trial judge, as sentencer, weighed the evidence and arrived at the appropriate result. Downs is not entitled to appellate resentencing from a cold transcript. Yet, Downs wishes to put this Honorable Court to the dark task of gauging whether or not Nicole "suffered enough" before her murder to "qualify" for justice.

Mr. Downs contends that the fatal shot caused nearly instantaneous death and presumes it was the first shot of the three fired into Nicole. By limiting his focus to the lethal act itself, Downs contends that the crime was not "heinous, atrocious or cruel" and coldly dispatches the victim's anguish as follows:

> This is not a case where the victim suffered physically and mentally for a significant period of time before the fatal shot. [citations] Although Bobby pulled a gun on Nicole for a time before the shooting, there was no fear of impending death during this confrontation . . . Just before the shooting the victim did beg Bobby not to shoot, but this does not evidence the prolonged mental terror or suffering necessary . . .

(Brief of Appellant, at 37).

These cold assumptions of fact are rejected by the State just as they were by the sentencer. More to the point, they suggest that this Court should speculate as to what was going through the victim's mind and then engage in **de novo** sentencing. That is not an appellate function. Again, all facts and all inferences from the facts must be taken in favor of the judgment.

It is undisputed that the mental anguish of a victim facing impending death, even an "instantaneous shooting death", can support a finding of "H.A.C." **Phillips v. State**, 476 So.2d 194 (Fla. 1985); **Clark v. State**, 443 So.2d 973 (Fla. 1983); **Huff v. State**, 495 So.2d 145 (Fla. 1986); **Henderson v. State**, 463 So.2d 196 (Fla. 1985).

In **Harvard v. State**, 414 So.2d 1032 (Fla. 1982), the finding of "H.A.C." was upheld in a case where the defendant's harassment of his ex-wife culminated in a drive-by shotgun slaying as she was leaving work. Though her death was instantaneous, this court examined the crime in context. Downs and Nicole were separated. Nicole had been threatened with a gun before. Her fear of death **was so real** that on April 10, 1988, she **hid a pipe wrench** in the couch **for self defense**. We wonder whom Downs is trying to kid when he says Nicole was not terrified.

While Nicole's fear of impending death, and undoubted fear for her children, means nothing to Downs, it was a valid factor for the sentencer to consider and is to be considered on appeal.

Thus, "H.A.C." was upheld in **Huff v. State**, 495 So.2d 145 (Fla. 1986), as to both victims when they were suddenly shot by their own son. While Mrs. Huff was beaten and shot, Mr. Huff was simply executed, yet the court noted his terror and shock at being killed by his own son.

In **Adams v. State**, 412 So.2d 850 (Fla. 1982), the nearly instantaneous death of a kidnapped little girl did not offset her terror over her impending fate. Indeed, as noted in **Knight v. State**, 338 So.2d 201 (Fla. 1976), the fact that death was "nearly instantaneous" is **not controlling** in these cases. The fear, sense of impending harm and mental anguish of the victim, however, must be considered as supporting "H.A.C." **Squires v. State**, 450 So.2d 208 (Fla. 1984) (victim wounded, then finished off with pistol shot to head); **Henderson v. State**, 463 So.2d 196 (Fla. 1985) (victims executed one at a time); **Mills v. State**, 462 So.2d 1075 (Fla. 1985) (mental anguish of victim while transported to murder site); **Jackson v. State**, 522 So.2d 802 (Fla. 1988); **White v. State**, 403 So.2d 331 (Fla. 1981); **Knight v. State**, 338 So.2d 201 (Fla. 1976).

Indeed, in **Harvey v. State**, 529 So.2d 1083 (Fla. 1988), a finding of "H.A.C." was upheld where the two doomed victims had to listen to the defendant mull over whether or not to kill them. Thus, the fact that Nicole may have been unsure what Downs would do does not defeat a finding of "H.A.C."

Downs and Nicole did not get along. Downs mistreated and terrified Nicole to the point that she would not see him unless a third person was present. She was so terrified that she hid a pipe wrench in the couch just before Downs arrived. There was no "heated argument". Nicole saw that Downs was armed and ordered him to leave. She tried to call the police and Downs shot the phone. As she clutched her children and screamed in terror, Downs let her ponder her fate and tried to induce her to give up the children. Downs then shot her as she begged for life.

Downs then coolly left the scene.

In **Hargrave v. State**, 366 So.2d 1 (Fla. 1978), this Court upheld on "H.A.C." finding where the defendant murdered a store clerk who could not get a cash register to open. Hargrave wounded the clerk, stopped while a customer entered and left the store, then executed the clerk who, like Nicole Downs, had a few minutes to ponder imminent death.

Clearly, the trial court did not err.

(B) Cold-Calculated-Premeditated ("C.C.P.")

While Downs had terrorized Nicole in the past, there was no evidence that Downs was ever in fear of anyone or in any danger of physical harm from any source.

Downs promised Judith LeClerc he would take care of Nicole "his way".

Demonstrating heightened premeditation, Downs **specifically** burglarized the Sprouse household for a gun, ammunition, and nothing else. Thus, this was not simply a prior crime. It was a calculated act in furtherance of his plan to kill Nicole.

Once Downs obtained the gun, he had to dismantle and load it, then reassemble it. This gave him still more time for reflection. See **Swafford v. State**, 533 So.2d 270 (Fla. 1988).

The fact that Downs demonstrated the heightened premeditation of stealing and bringing a loaded gun is a well settled supporting fact which the sentencer can rely upon in applying "C.C.P." This act of procurement has been upheld as proof of "C.C.P." in **Huff v. State, supra;** citing **Davis v. State**, 461 So.2d 67 (Fla. 1984); **Eutzy v. State**, 458 So.2d 755 (Fla. 1984). Downs cannot hide behind the fact that he shot his wife. **Turner v. State**, 530 So.2d 45 (Fla. 1987). Indeed, but for Nicole's decision not to step outside with Downs, this murder would have been almost identical to **Koon v. State**, 513 So.2d 1253 (Fla. 1987), wherein the husband armed himself in advance and "C.C.P." was upheld.

Finally, if we analyze all of the evidence in a manner supporting the judgment as required, we could find even greater proof of premeditation.

Downs left an unsatisfactory meeting with Judith LeClerc (on April 19, 1988), promising or threatening to take care of Nicole "his way". Downs made a big show of parading around on the night of April 19-20, 1988, proclaiming his concern for his marriage (stopping only to flirt with a friend's wife) and drinking beer but **not** getting **drunk**. Having built his track record, Downs soberly and professionally burglarized the Sprouse home while Mr. Sprouse was away but Mrs. Sprouse was inside, asleep. Downs never wakened Mrs. Sprouse and left almost no trace of his

crime - which was not immediately detected. Downs erred, however, by only taking the implements needed for the murder. Had Downs simply stolen money or jewelry as well, he could have concealed his intent. His single-mindedness gives him away.

It is beyond dispute that Downs demonstrated - to the actual sentencer - the heightened premeditation needed for a finding of cold, calculated and premeditated murder.

ISSUE IV

APPELLANT IS NOT ENTITLED TO RELIEF UNDER HIS PROPORTIONALITY THEORY

Downs somewhat oddly contends that statutory aggravating factors cannot support a sentence of death. This assertion is so clearly incorrect as to negate the need for further reply.

The actual sentencer below found four valid statutory aggravating factors:

> (1) Downs had two prior convictions for aggravated assault with a firearm (uncontested).
>
> (2) This murder took place during an armed burglary (uncontested).
>
> (3) Heinous, atrocious and cruel murder.
>
> (4) Cold, calculated and premeditated murder.

No mitigating factors were found to offset these factors, meaning that death is presumptively appropriate even if factors three and four are stricken.

Mr. Downs contends that recent caselaw governing "violent lover's quarrels" exempts him from any appropriate punishment. A survey of his cited cases shows why he is in error.

In **Amoros v. State**, 531 So.2d 1256 (Fla. 1981), the sentence of death was vacated because the only two statutory aggravating factors found by the trial court were stricken.

In **Garron v. State**, 528 So.2d 353 (Fla. 1988), the death penalty was vacated after all four "statutory" aggravating factors were stricken leaving nothing in aggravation against a defendant who was twice declared incompetent even to stand trial.

In **Fead v. State**, 512 So.2d 176 (Fla. 1987), two aggravating factors were found, while only one non-statutory mitigating factor was found, when in fact numerous mitigating factors were established by the evidence. Fead, unlike Bobby Downs, was under the influence of blood alcohol estimated by Dr. Mhatre at .25. Fead, unlike Downs, had evidence of being a model prisoner and a hard worker. Fead, unlike Downs, was a good husband and father and actually supported his children. Fead's crime was attributed to jealousy magnified by his intoxication. Downs planned to kill Nicole, armed himself for that purpose and killed Nicole without first fighting with her (beyond just refusing to leave).

In **Wilson v. State**, 493 So.2d 1019 (Fla. 1986), the defendant attacked his step-mother with a hammer just because she told him to get out of the refrigerator. When his father intervened, the fist fight escalated until a five year old child was accidentally jabbed in the chest with scissors, killing said child. The step-mother then procured a gun (at the father's request) but Wilson wrestled the gun free and shot his dad in the head. Although two aggravating factors (H.A.C. and prior conviction) were upheld, the bizarre nature of this violent fight

led the court to reverse the sentence of death. No bizarre combat existed in our case. This murder was fully preplanned.

The State would rely upon **Lemon v. State**, 456 So.2d 885, 888 (Fla. 1984), in distinguishing **Blair v. State**, 406 So.2d 1103 (Fla. 1981), and **Kampff v. State**, 371 So.2d 1007 (Fla. 1979), to-wit:

> Appellant argues that the sentence of death is disproportional to his crime. In support of this contention he relies upon **Blair v. State**, 406 So.2d 1103 (Fla. 1981); **Kampff v. State**, 371 So.2d 1007 (Fla. 1979); and **Chambers v. State**, 339 So.2d 204 (Fla. 1976). Those cases, however, are distinguishable. In **Blair**, wherein several aggravating factors had been improperly found and there was a mitigating factor, this court remanded for imposition of a life sentence because the death sentence was disproportional in that particular case. The defendant had killed his wife by shooting her after she threatened to tell the police about the defendant's relationship with her daughter. The mitigating factor in that case was that the defendant had no significant history of prior criminal activity. The only valid aggravating factor was that the felony was committed either for the purpose of preventing a lawful arrest or to disrupt or hinder the enforcement of law in concealing and preventing the reporting of sexual battery upon a minor female child.
>
> [7] In **Kampff**, wherein the defendant killed his former wife by shooting her, there were mitigating circumstances and no proper aggravating circumstances. In **Chambers**, wherein the defendant beat his victim to death, the jury recommended life. When a jury override is involved, it is inappropriate for the trial court to impose the death penalty unless the facts suggesting death are so clear and convincing that no reasonable person could differ. **Tedder v. State**, 322 So.2d 908 (Fla. 1975).
>
> The state relies upon **King v. State**, 436 So.2d 50 (Fla. 1983) and **Harvard v. State**, 414 So.2d 1032 (Fla. 1982), **cert. denied**, 459

> U.S. 1128, 103 S.Ct. 764, 74 L.Ed.2d 979 (1983), in arguing proportionality. These cases are more similar to the present case . . . .

Florida caselaw is, of course, replete with instances in which spousal murder (or former spouse murder) has resulted in a valid sentence of death. **Correll v. State**, 523 So.2d 562 (Fla. 1988) (defendant murders wife, daughter, mother-in-law and sister-in-law after night of drinking and marijuana use); **Peede v. State**, 474 So.2d 1032 (Fla. 1982); **Koon v. State**, 513 So.2d 1253 (Fla. 1987). Thus, there is no hard and fast rule that defendants who murder their wives can mechanically escape justice by labeling the crime a "domestic dispute".

If anything, this murder is proportionate to those committed in **Harvard v. State, supra**, and **Koon v. State, supra**, if not **Huff v. State, supra**, and **Squires v. State, supra**.

Downs did not "just visit" his wife and gradually accelerate a quarrel into a shooting. Downs planned to kill Nicole, he committed a burglary **solely** to get a gun, he arrived at Nicole's home armed and he shot her without provocation when all he ever had to do was walk away. No one ever fought with him so there was no antecedent argument. Downs was not threatened, not attacked, not under stress and not justified in bringing or using a weapon under the facts of this case.

Taking all facts and inferences therefrom in favor of the judgment, Downs is not entitled to relief.

ISSUE V

THE JURY OVERRIDE AT BAR WAS PROPER

The final point on appeal addresses the trial judge's decision to override the advisory jury's life recommendation. It is undisputed that in the right case an override is proper. **Spaziano v. Florida**, 468 U.S. 447 (1984). This is particularly true when the jury renders an unreasonable life recommendation. **Eutzy v. State**, 458 So.2d 755 (Fla. 1984); **Thompson v. State**, 14 F.L.W. 527 (Fla. 1989). The jury's suggestion in this case was clearly unreasonable.

On appeal, Downs suggests certain possible grounds for the life suggestion, but none enjoy record support as we shall see:

(A) "Intoxication"

It was defense counsel himself who stood before the jury and said that alcohol consumption, while a "factor", was not being relied upon as a defense (TR 1102). This was an adroit move, since Officers Blank and Johnston, Glenda Smith, Linda Chewning, Lt. Lee, Ms. Cowette, Terry Strickland and Michelle LeClerc all agreed Downs was not drunk before, during or after his crime.

Downs always had slurred speech, as noted by Mike Downs and Judith LeClerc, because Mike kicked in Bobby's teeth in a fight.

Finally, let us not forget that Downs had time to sleep off any beer he consumed, he ate breakfast, he pulled off a masterful burglary and he disassembled, loaded and reassembled Sprouse's gun. He was not drunk or "impaired" when he killed Nicole.

(B) Mental Problems

The defense was allowed to have Downs examined by a psychiatrist, Dr. Miller, in addition to the psychiatrist Dr. Innocent, who saw Downs in jail.

The person who testified for Downs at trial was not a medical doctor at all. It was the ubiquitous anti-death psychologist Harry Krop.

"Doctor" Krop was decimated on cross-examination. Even his qualifications, apparently, had been misrepresented (by Krop) to lessen (as the prosecutor put it) his "hired gun image" (TR 1399-1400). Krop, of course, never testifies for the State in capital cases (TR 1500) and, we note, served as a "contract member" of Downs' defense team and as such would not stand for deposition pretrial (TR 406-408).

Dr. Krop did not do thorough research. He did not consult Dr. Innocent and he refused to look at jail records containing "superficial observations" (i.e., observations made when Downs did not know he was being watched. During those periods, Downs was sociable, normal, played cards, played basketball and watched T.V. in the recreation room). Krop did not review all information available from the trial or the State's various files.

Cross-examination revealed that Krop gave unblinking credence to every symptom reported by his client. Even though Downs got caught faking the MMPI the first time he took it, Krop trusted Downs and did not feel he was malingering, he merely "failed" the MMPI (one cannot "fail" a mental exam).

Challenged directly from the DSM III R regarding his diagnosis of "schizoid personality disorder"[2] and the requirement that Downs satisfy four (4) of seven (7) criteria, Krop gave answers which were both absurd and contrary to Downs' other penalty phase witnesses; to-wit:

(1) Lack of familial relationships: Given the testimony of Downs' relatives to the effect that he got along well with everyone except his stepfathers, this factor did not apply.

(2) Preference for solitary activity: Belied by his friends, his activities in jail, his registration for classes with Mr. Touchton and his continued attempts to socialize with Nicole and the children.

(3) Rarely expresses emotion: This assertion would, if made, run contrary to his entire defense of being a "victim of love".

(4) No desire for sex: Though Downs took time out from his grief to kiss and "hit-on" his friend's wife the night before the murder.

(5) Indifference to praise: Dr. Krop found Downs "indifferent at times", nothing more.

(6) No close friends: Downs had close friends, some of whom he confided in and who, in turn, testified for him in the penalty phase.

(7) Aloof, cold, rarely reciprocates: Downs' other witnesses described him as a loving husband, father, nephew and son.

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[2] This is **not** schizophrenia nor is it a mental illness, a fact brought out **only** on cross (TR 1474).

In other words, Krop's hired diagnosis could not stand in the face of the record. As Judge Haddock noted, the official sounding "diagnosis" of what in truth was a nonmedical[3] personality disorder may have misled the jury. Even Downs' possible "borderline retardation" was suspect, given his attempt to fake the MMPI and Dr. Krop's grudging admission, on cross, that Downs' lousy and lazy conduct in school could be the cause of his current "ignorance" (TR 1502).

Dr. Krop's equivocations on cross-examination rendered his theory as unreliable as his theories in **James v. State**, 489 So.2d 737 (Fla. 1986), and **Kight v. State**, 512 So.2d 922 (Fla. 1987).

More to the point, however, is the fact that the court was free to reject Krop's oddball theory since it clashed with the record. **Thompson v. State**, 14 F.L.W. 527 (Fla. 1989) (override upheld where mental health expert's mitigating testimony contradicted by the record). See also **Bundy v. Dugger**, 850 F.2d 1402 (11th Cir. 1988); **Bertolotti v. Dugger**, 883 F.2d 1503 (11th Cir. 1989). Of course, the operative legal presumption is that a defendant will portray his symptoms to his doctor in a manner helpful to his defense. **Mims v. United States**, 375 F.2d 135 (5th Cir. 1967); **United States v. Makris**, 535 F.2d 899 (5th Cir. 1976); **United States v. Mota**, 598 F.2d 995 (5th Cir. 1979).

The advisory jury, faced with Krop's theory and a contrary record, could not reasonably have believed Krop. **Thompson v. State, supra.**

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[3] Note that Dr. Krop attests that this disorder is a "learned response to the environment", **not** a disease (TR 1441, 1474). Krop said Downs was **not** "out of touch with reality" (TR 1445).

(C) Childhood

As noted above, Downs seemed only to have trouble with his stepfathers. His mother and aunt bought him gifts. His family gave him love and support even in jail. He, in turn, wrote letters and valentines. His surrogate father was his grandfather, with whom he got along.

Still, Downs was a delinquent, a school-skipper and a punk. He carried brass knuckles and got into trouble every day. He did not want to bother with school and dropped out as soon as he could.

In contrast, Reginald Touchton testified that Downs signed up for his class (in jail) and did his assignments accurately and promptly, proving that "retarded Bobby" could do his work when he felt like it.

The "mixed evidence" regarding Downs' youth does not support mitigation.

(D) Jail Conduct

Marilyn Fowler, a social worker who was neither a psychiatrist or psychologist, testified to Downs' self-reported hallucinations and self-reported symptoms (see **Mims, Makris** and **Mota**, above), but she disagreed with Krop's evaluation. Oddly, she testified to medication Downs was prescribed and to the fact that Dr. Innocent never joined in Krop's diagnosis, but she stated that Downs requested the medicine and an isolation cell.

Again, however, the jail records showed two different "Bobby Downs". One Downs complained to doctors, sought isolation and sought medicine. The other, unsuspectingly observed, Downs played cards, played basketball and did just fine.

If we balance this evidence against the four valid aggravating factors at bar, or even against the two uncontested factors, we can see that the life recommendation was unreasonable, **Thompson, supra,** and the override was indeed proper.

CONCLUSION

The conviction of first degree murder and sentence of death should be affirmed.

Respectfully submitted,

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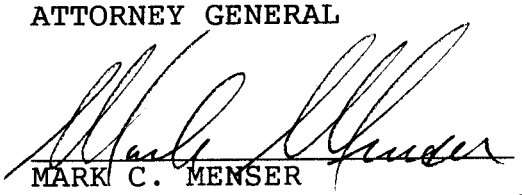
ATTORNEY GENERAL



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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. W.C. McLain, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 12 day of April, 1990.

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