

IN THE SUPREME COURT OF FLORIDA

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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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

A Duval County grand jury indicted Bobby Lee Downs on May 5, 1988, for first degree murder for the shooting death of his wife Nicole Downs. (R 255) The indictment also charged Downs with an aggravated assault on Terry Lamar Strickland. (R 255) April 20, 1988, was the alleged date of the homicide. (R 255) The indictment alleged April 26th as the date of the aggravated assault, but the State later filed a statement of particulars changing that date to April 20th. (R 255, 276) (Tr 193-196, 234-235) Bobby pleaded not guilty and proceeded to a jury trial. (Tr 13) The jury found Bobby guilty as charged and, after hearing additional evidence, recommended a life sentence for the murder. (R 491-492, 519)

Circuit Judge L. P. Haddock adjudged Bobby guilty and sentenced him to death for the murder and to five years imprisonment for the aggravated assault. (R 554-562) Judge Haddock found four aggravating circumstances: (1) a previous conviction for a violent felony; (2) the homicide was committed during a burglary; (3) the homicide was especially heinous, atrocious or cruel; and (4) the homicide was committed in a cold, calculated and premeditated manner. (R 559-562) The court rejected the mitigation evidence offered in support of the mitigating circumstances of extreme mental or emotional disturbance and substantially impaired capacity and found nothing in mitigation. (R 559-562)

Downs timely filed his notice of appeal to this Court on March 10, 1989. (R 565)

Facts -- Prosecution's Case Guilt Phase

Bobby and Nicole began their relationship when Nicole was 15-years-old. (Tr 479) They had two children during their two-year marriage which was marred by several brief separations. (Tr 461, 479) Nicole would typically leave and then return to the relationship a short time later. (Tr 479) The separation existing at the time of the homicide began shortly after the Christmas holidays and was the longest. (Tr 462-465, 479) Nicole's mother, Judith LeClerc, testified, over objection, that Nicole loved Bobby but was afraid of him because he had threatened her life. (Tr 464-465, 485-487) During the separation, Bobby saw Nicole and the children almost every day. (Tr 465) On one occasion, Bobby and Nicole took the children to the beach together with Nicole's sister. (Tr 480-481) Bobby still called Nicole's parents mom and dad. (Tr 480) He said loved Nicole and wanted a reconciliation. (Tr 471-472)

Several times during the separation, Bobby said he was going to kill Nicole. Bobby had an alcohol problem and frequently "runs his mouth" when he is drinking. (Tr 482, 515) Judith LeClerc heard Bobby threaten to kill Nicole at the time Nicole left him. (Tr 464-465) Later during the separation on April 9th, LeClerc had a conversation with Bobby about things he could do to help a reconciliation. (Tr 466-467) Bobby said he loved Nicole and the children. (Tr 471-472) At the

conclusion of the conversation, Bobby said he would "take care of things his way." (Tr 467) A long-time friend of the LeClerc family, Claire Cowette, also testified to hearing Bobby make threats. (Tr 492) Bobby called Cowette "Aunt Claire" just like Nicole did. (Tr 494) Two times in March, Cowette was outside the LeClerc home when Bobby was waiting outside. (Tr 495, 502) Bobby wanted Nicole to come outside to talk to him. (Tr 495, 502-503) When Cowette related Nicole's answer that she was not coming outside, Bobby said he was going to kill her. (Tr 495, 503) Although Bobby appeared sober on the first occasion, he was drinking a beer on the second. (Tr 495, 503) On April 20th, Bobby came to Cowette's house to see her son, Leeds Gallager, at 1:30 in the morning. (Tr 504-505, 512-513) Cowette was up late talking to a friend in the living room when Bobby walked inside and straight to Leed's bedroom. (Tr 504) She went to the bedroom and escorted Bobby from the house. (Tr 504-505) Bobby had been drinking. (Tr 507) He staggered and slurred his speech. (Tr 509) Although Cowette testified at trial that she did not think Bobby was drunk, she testified at a deposition that he was drunk at the time. (Tr 509-512) She had seen him drunk in the past and concluded he was drunk because of his stagger and slurred speech. (Tr 512-513) During this time, Bobby threatened to kill Nicole and Kenny Ray. (Tr 506, 513) Kenny Ray was a family friend, and Bobby apparently believed Nicole was having an affair with him. (Tr 471) No one who heard the statements believed he was seriously contemplating killing her. (Tr 515-516) In fact, his expressed concern

was reconciling the marriage or insuring he had access to his children. (Tr 466-467)

Around 11:00 on the morning of April 20th, Bobby telephoned the LeClerc house to speak with Nicole. (Tr 524-526) Present in the house were Nicole, her sister Michelle, Terry Strickland, who was waiting to meet a friend, and five children. (Tr 522-523) Terry Strickland said three telephone calls were made. (Tr 523-526) Nicole answered the first call and conversed in a normal tone of voice, mentioning Bobby's name. (Tr 524) Immediately after Nicole hung up the from the first call, the telephone rang a second time. (Tr 525) Nicole again answered and talked for three to five minutes. (Tr 525) She seemed upset at the conclusion of the call. (Tr 525) Michelle answered the third call and talked to Bobby. (Tr 525) She told him that Nicole did not want to talk, however, Nicole took the telephone from Michelle and did talk to Bobby. (Tr 525-526, 628) The conversation lasted five minutes and Nicole told Bobby he could come see his children. (Tr 526) Strickland testified that the conversations involved an argument between Bobby and Nicole about Kenny Ray. (Tr 622, 628) At the end of the third call, Nicole was screaming, yelling and cursing. (Tr 630) Over objection, Strickland testified that he heard Nicole say she was not going back to Bobby because he "stuck a gun to me and my kids once." (Tr 526-527) After the telephone conversation, Strickland asked Nicole if she would feel better if she called the police. (Tr 549) She said "No". (Tr 549) Strickland then asked if she had something for protection, and

in response, Nicole got a pipe wrench and concealed it in the couch. (Tr 550) Michelle left the house, and shortly thereafter, Bobby arrived. (Tr 550-551) A few minutes later, a friend of Nicole's, Michelle McAlister, also known as "Ziggy", telephoned and came to the house. (Tr 554-556, 649-650)

When Bobby entered the house, he spoke to Strickland and Nicole and began playing with his children. (Tr 553, 632-633) Bobby also talked to Nicole. (Tr 553) Strickland was watching television, but he heard part of their conversation. (Tr 553) Bobby repeatedly asked Nicole to come kiss him and talk to him. (Tr 553-554) Each time, Nicole said, "No". (Tr 553-558) Bobby wanted Nicole to talk to him in the kitchen or outside, but she refused to leave the living room. (Tr 553-558, 633-635) Bobby had not been rude or angry, just persistent. (Tr 634) At one point, Nicole said something about a bulge she saw in Bobby's pants. (Tr 558-559, 634) She asked if it was a gun, and Bobby told her not to worry about it. (Tr 559, 634) He told Nicole that he would not hurt her. (Tr 635) Nicole got up from the sofa and said she was going to call the police. (Tr 559) She picked up the telephone, dialed the number and sat down on the sofa. (Tr 559, 657) Bobby pulled a pistol from his pants and shot the telephone. (Tr 559, 565, 657-658) Nicole dropped the telephone and kicked back onto the sofa. (Tr 559, 566) She also kicked at Bobby. (Tr 674) Bobby was about two or three feet away when he fired the gun. (Tr 559) Nicole grabbed her two children and held them. (Tr 566-567)

Bobby told Nicole to put the children down, but she refused. (Tr 567, 659-660) Strickland started to get up, however, Bobby pointed the gun at him and told him not to try anything. (Tr 567) Bobby continued trying to talk Nicole into releasing the children, but she continued to refuse. (Tr 567-568) Bobby asked both Strickland and Ziggy to get the children. (Tr 568-569, 660-661) Nicole was screaming for them not to comply with Bobby's demand. (Tr 568-569) Ziggy left the house. (Tr 569, 664) Strickland remained but did not get the children. (Tr 568) Bobby put the gun back in his pocket and continued to ask that Nicole put the children down. (Tr 569, 636) He pulled the gun again, and after the fourth or fifth time he asked her to release the children, Bobby grabbed Nicole's hair, turned her head to the side and shot her three times. (Tr 570) The shots were fired rapidly, with a two or three second hesitation between the first and second shot. (Tr 637-638) Strickland said Nicole was begging Bobby not to shoot at the time. (Tr 571) Nicole was shot in the right cheek, the right shoulder and behind the right ear. (Tr 790-802) The shot behind the right ear entered the brain and was instantaneously fatal. (Tr 814-819) The other wounds were not fatal injuries. (Tr 809-813) Bobby backed away, fired another shot which hit the wall, and left through the back door. (Tr 577) Strickland tried to calm the children, then he left to go to a neighbor's for help. (Tr 577, 587) He saw Bobby get in his car in the front yard and drive away. (Tr 577-578) The incident from the first shot until Bobby drove away lasted about 15 to 20

minutes. (Tr 587) Bobby pulled his car beside Ziggy, who was walking home, and told her that he and Nicole were having problems and he had to leave before he killed her. (Tr 668)

Lieutenant George Lee with the Nassau County Sheriff's Office arrested Bobby as he was driving on I-95. (Tr 710-713) Lee turned on his blue lights and had to follow Bobby about a mile before he stopped. (Tr 722-723) They were about four miles from the Georgia border. (Tr 725) During the stop, Lee aimed his gun at Bobby and had him place his hands on the trunk of the car. (Tr 726-727) He advised Bobby that he was a murder suspect. (Tr 727) When Lee was about ten feet away as he approached, Bobby started toward the driver's side of his car. (Tr 728-729) Bobby said that he might as well kill himself, and then he began pulling his pistol from his pants. (Tr 729) Lee was able to grab Bobby's pistol and point his own gun up against Bobby's chin. (Tr 729-730) Lee secured the pistol, handcuffed Bobby and took him into custody. (Tr 730, 737-738) Lee said Bobby appeared calm and did not seem impaired from drugs or alcohol. (Tr 738, 744)

The .22 caliber pistol seized from Bobby belonged to Oscar Sprouse. (Tr 745-747) Sprouse had loaned the pistol to Bobby a couple of times in the past. (Tr 747-748) However, Sprouse made the decision not to loan Bobby the pistol again and told him that he could not use the gun. (Tr 749-750) Although he usually kept the pistol in his bedroom, Sprouse had the pistol in his living room on the television on the evening of April 19, 1988. (Tr 750) The gun was there when he left about 9:45

a.m. on April 20th. (Tr 751) When he returned around 11:45, Sprouse noticed that the pistol and a box of ammunition were missing. (Tr 752-753) There was approximately \$250 in cash sticking halfway inside a jewelry box less that a foot from the gun's location which was left untouched. (Tr 755) Sprouse also found pry marks to the lock on the door which had not been there earlier. (Tr 753) A ballistics expert concluded that one of the bullets removed from the body was fired from the pistol. (Tr 780-781) The other projectiles recovered were of the same caliber but too badly damaged for further comparison. (Tr 781-783)

Facts -- Defense Case

Several witnesses testified for the defense about their contact with Bobby the night before and the day of the homicide. However, the trial court excluded a significant portion of several witnesses' testimony concerning Bobby's state of mind during this time on the ground that testimony was hearsay and did not meet the requirements for the state of mind exception. The evidence presented to the jury was as follows:

On April 19th, the day before the homicide, Bobby spent part of the day taking Nicole and the children to the beach along with Nicole's sister, Michelle LeCleric. (Tr 994-996) Bobby talked to several people at various times that night and early the next morning. His mother, Jacquelyn Downs, said Bobby and a friend came to her house, where Bobby was then living, around 6:00 p.m. on April 19th. (Tr 934-935) They had

been drinking. (Tr 935) After a couple of hours, Bobby took his friend home and returned home around 9:00. (Tr 935) He made some telephone calls and left about 10:30. (Tr 936) At approximately 2:00, Bobby returned home and awoke his mother as he took money from a piggy bank to buy some gas for his car. (Tr 936-937) On the morning of April 20th at 6:00, Bobby's mother found him asleep in his car parked in the front yard. (Tr 937) The car radio was blasting and Bobby had a beer between his legs. (Tr 937) His mother tried unsuccessfully to awaken Bobby. (Tr 937) At 8:00, Bobby stumbled into the house and passed out drunk on the couch. (Tr 938) Jacquelyn Downs left for an appointment at 8:15 and returned at 10:30. (Tr 939) Bobby drank some coffee, ate some soup and left around 11:20. (Tr 939) His mother said he was still high when he left. (Tr 939)

William Downs, Bobby's brother, testified that Bobby telephoned him at 11:30 or 12:00 on the night of April 19th. (Tr 924) They talked for about 20 minutes. (Tr 924) William could tell that Bobby was drunk because he slurred his words and repeated himself continuously. (Tr 925-926) William Pulsifer spoke to Bobby at a convenience store where Pulsifer's wife worked around midnight on April 19th. (Tr 954-955) Bobby was drinking a beer, and Pulsifer could tell Bobby had been drinking because his speech was slurred and he was driving very slowly. (Tr 955) Bobby's aunt, Glenda Smith, testified that Bobby called her on the night of April 19th. (Tr 967) She

could tell that he was drunk because he slurred his speech and was crying. (Tr 968)

Bobby spoke to two police officers between 1:30 and 2:30 in the morning on April 20th. (Tr 904, 913, 916) Around 1:45 a.m., Bobby flagged down J. D. Johnston as he was driving to an unrelated call. (Tr 904-906) Johnston talked to Bobby briefly and told him to wait there until Johnston completed his call if he wanted to talk more. (Tr 906) Upon his return about 30 minutes later, Johnston found that Bobby had left the area. (Tr 906-907) Bobby called the sheriff's office at 2:30 a.m., and Officer Dennis Blank was dispatched to meet Bobby at a convenience store. (Tr 914-917) The dispatch was characterized as a family disturbance. (Tr 920) Johnston also heard the dispatch over his radio. (Tr 910-911) Blank spoke to Bobby for about 20 minutes, they shook hands and Bobby drove away. (Tr 918)

Linda Chewning, who had known Bobby since he was eleven-years-old, saw him on the side of the road at 11:20 a.m. on April 20th. (Tr 946) Bobby's car was out of gas. (Tr 946) Chewning took Bobby to get some gas and paid for it as well. (Tr 947-948) During this time, Chewning said Bobby appeared confused and repeatedly called her by her daughter's name, Lisa, which he had never done before. (Tr 948) She could also smell a strong odor of beer. (Tr 948-950) A short time later, Chewning heard that Nicole had been shot. (Tr 949-950) Bobby's aunt, Glenda Smith, said Bobby came to her house between 12:15 and 12:20 on April 20th. (Tr 968) He was "acting real wild and scary." (Tr 968) His eyes were bloodshot and he was crying.

(Tr 968) After five to ten minutes, Bobby ended up pushing his aunt against her house and driving away. (Tr 969) As soon as he left, Bobby's mother called to tell Smith that Bobby had shot Nicole. (Tr 969)

Excluded Defense Evidence

Since Bobby's state of mind was the critical issue at trial, the defense wanted to introduce evidence of Bobby's state of mind toward Nicole the night before and the day of the shooting. (Tr 834-840) The defense wanted to rebut the State's theory that Bobby planned a premeditated the murder by showing why Bobby went to Nicole the day of the homicide. (Tr 834-840) The trial court heard a proffer of the proposed evidence and excluded all or parts of the testimony of the defense witnesses. (Tr 831, 843, 859, 867, 873, 885, 891, 981, 998) As grounds for the exclusion, the court stated that Bobby's statements to these witnesses were hearsay and did not qualify for the state of mind exception. (Tr 834-840) Excluded testimony would have shown the following:

The night before the homicide, Bobby was confused and depressed. He loved Nicole and wanted to reconcile the relationship. He was also afraid of losing contact with his children. Bobby asked several people to accompany him to try to talk to Nicole. Each one told Bobby to wait until the next morning to contact Nicole. This evidence was probative of Bobby's state of mind when he saw Nicole the next day. William Downs would have testified that when Bobby called him that

night, Bobby wanted him to accompany him to Nicole's house to talk to her. (Tr 833) Since Bobby was drunk, his brother told him to wait until the the following day. (Tr 833) Susan Pulsifer, a friend of Bobby's who saw him at the convenience store where she worked around 12:30, would have testified that Bobby bought a six-pack of beer and talked about his relationship with Nicole. (Tr 984) He said he loved Nicole. (Tr 984) However, he felt the relationship was over, and he was upset and depressed. (Tr 984, 987) Leeds Gallagher, a long-time friend of Nicole's family and the son of Claire Cowette, would have testified that when Bobby came to their house at 1:00 a.m. on April 20th, Bobby wanted him to go somewhere with him. (Tr 1000) Cowette ran Bobby from the house and Gallagher had no further contact with Bobby. (Tr 1000) Bobby's aunt, Glenda Smith, would have testified that Bobby called her around 10:00 on the night of April 19th. (Tr 844) He was crying, upset and intoxicated. (Tr 844-845) He told her that he loved Nicole and was afraid that she was going away with Kenny Ray. (Tr 845) Bobby was concerned about seeing his children. (Tr 845) His aunt refused his request to go with him that night to see Nicole. (Tr 845) She advised him to wait until the next day. (Tr 845)

Portions of the testimony of the two police officers who spoke to Bobby the night before the homicide were also excluded. (Tr 859, 867) The court also prohibited playing the tape recording of Bobby's telephone conversation with the dispatcher. (Tr 873) Officer Johnston would have testified that Bobby

was concerned about his family problems when they talked the night before the homicide. (Tr 860-863) Bobby was upset and depressed. (Tr 863) Taking care of these problems seemed to be the most important thing on Bobby's mind. (Tr 863) He wanted the officer to accompany him to Nicole's house to talk to her. (Tr 865) Johnson's advice was for Bobby to go to bed and take care of the problem the following day. (Tr 862-863) Officer Blank would have testified that Bobby told him that he was having problems with his wife and wanted Blank to go with him to his wife's house to get his children. (Tr 869) Blank advised Bobby to wait until the morning to go to his wife to talk. (Tr 869) Blank said Bobby had been drinking and was upset. (Tr 870) Finally, the recording of Bobby's conversation with the dispatcher included his statements of concern about his relationship and his children. (Tr 873-877) The recording also showed Bobby's intoxication and state of confusion at the time. (Tr 873-878)

Michelle LeCleric, Nicole's sister, would have testified to a conversation she had with Bobby around midnight on April 19th. (Tr 886) Bobby told her that he suspected that Nicole and Kenny Ray, a family friend, were having an affair. (Tr 887) Michelle told him that as far as she knew, Kenny Ray and Nicole were just friends. (Tr 887-888)

Penalty Phase and Sentencing

During the penalty phase of the trial, the State presented two additional pieces of evidence: a judgment reflecting

Bobby's 1980 conviction, when he was 16-years-old, for aggravated assault and a notice and instruction to the jury that the contemporaneous conviction for aggravated assault on Terry Strickland could be used as an aggravating circumstance. (Tr 1252-1254) The defense presented several witnesses who testified about three areas: (1) additional events surrounding the shooting and the relationship between Nicole and Bobby; (2) Bobby's childhood and life history; and (3) Bobby's psychological condition. (TR 1255-1587) At the close of the defense evidence, the State called three witnesses in rebuttal. (Tr 1591, 1605, 1653)

Kenneth Ray Robson testified that he was living with his brother and his wife at the time of the homicide. (Tr 1256) The night before she was killed, Nicole spent the night at their residence. (Tr 1256) Robson took her there, and Nicole had spent the night there in the past. (Tr 1257) Robson denied his relationship with Nicole was anything more than friendship. (Tr 1259) Bobby's aunt testified that she had seen Nicole and Kenny Ray together on a couple of occasions. (Tr 1362-1363)

Terry Turknett was employed with Rite-way Paving Company and worked with Bobby. (Tr 1266) He had also known Bobby for over 15 years. (Tr 1266) Bobby was very young when he went to work with the paving company and was a good worker and employee. (Tr 1266) Turknett said he and Bobby had a four hour conversation about Bobby's trouble's with Nicole during a drive back from a job site. (Tr 1268-1270) Since Turknett had divorced a year earlier, he listened and gave Bobby some

advice. (Tr 1268) Turknett believed Bobby was falling apart emotionally. (Tr 1268) He was crying. (Tr 1268) During this time, Bobby had also missed a lot of work which was unusual for him. (Tr 1269-1270) Turknett talked to Bobby three or four more times about Bobby's problems. (Tr 1269)

Joseph White also worked with Bobby and had known Bobby most of his life. (Tr 1276) He said they worked out of town frequently. (Tr 1276) Since there was often little notice when the job would require an overnight stay, White said his practice was to keep a packed suitcase with him. (Tr 1276)

One of the two police officers and the dispatcher who spoke with Bobby the night before the homicide testified about the content of their conversations. (Tr 1278, 1293) The tape recording of Bobby's telephone call to the police dispatcher, which the judge excluded during guilt phase, was played for the jury. (Tr 1280-1281) During this call, Bobby expressed concern about his wife and children. (Tr 1281-1286) He seemed particularly concerned that his wife would take his children away. (Tr 1283) Officer J. D. Johnston testified that Bobby said he was having trouble with his wife and wanted Johnston to accompany him, at that moment, to go talk to Nicole. (Tr 1294-1295) Johnston advised Bobby to wait until the following day to talk to his wife. (Tr 1296) Officer Blank had given Bobby similar advice earlier in the evening. (Tr 1296-1297) According to Johnston, Bobby said it would be stupid to kill his wife or himself. (Tr 1298)

Jacquelyn Downs testified about Bobby's childhood and family background. (Tr 1303) Bobby was sickly when born and had spinal meningitis when less than two months old. (Tr 1304) Jacquelyn Downs left Bobby's father before Bobby was born, and Bobby was five years old before he ever met his father. (Tr 1305) Jacquelyn's second marriage to Ed Peters lasted a little over four years, but he spent a total of about a year actually living with the family. (Tr 1306) He frequently came home drunk. (Tr 1308-1309) They divorced because of his drinking problem. (Tr 1306) He never acted as a father to Bobby. (Tr 1308) Bobby's father did see the children occasionally, but he never spent any time with them. (Tr 1309-1310) Bobby's mother worked long hours while he was young, and Bobby and his brother stayed with a baby-sitter or his grandmother. (Tr 1311-1312) Bobby also stayed out of town with his aunt in Milton for over a year. (Tr 1312-1313) Bobby never did well in school and only completed the sixth grade. (Tr 1313) His mother never understood why he did poorly. (Tr 1313) He was convicted for aggravated assault when he was sixteen and spent time in prison. (Tr 1314-1315) He joined the Jaycees in prison and did quite well in the organization. (Tr 1317-1318) Bobby met Nicole when he was released from prison in 1983. (Tr 1320) They had a child in June of 1986, but Nicole's parents would not allow them to marry at that time. (Tr 1320-1321) They had a second child and married. (Tr 1321) Bobby loved his children and took an active role in their care. (Tr 1321) He continued

to spend time with the children and care for them after he and Nicole separated. (Tr 1321-1322)

Dick Morris was the probation officer who supervised Bobby while he was on community control from his youthful offender sentence. (Tr 1335-1337) Morris had no problems with Bobby and he complied with all instructions and requirements of his supervision. (Tr 1338)

William Downs, Bobby's brother, testified about the telephone conversation he had with Bobby between 10:30 and 11:00 the night before the homicide. (Tr 1351-1353) Bobby wanted him to go with him to get his children. (Tr 1352) William could tell that Bobby was drunk and refused to go with him. (Tr 1352) He told Bobby to wait until the next morning. (Tr 1352) William said Bobby angered easily when he was drunk and he had a drinking problem. (Tr 1354-1355)

Bobby's aunt, Glenda Dale Smith, testified about her conversations with Bobby the night before and the day of the homicide and Bobby's childhood experiences. (Tr 1360) She received a call from Bobby around 10:00 the night before the murder. (Tr 13612) He was crying and slurring his speech and she knew he was drunk. (Tr 1361) Bobby kept repeating how much he loved Nicole and how distressed he was over his belief that she was going with Kenny Ray. (Tr 1361) He was afraid Kenny Ray would replace him as the children's father. (Tr 1361) Smith said Bobby wanted to talk to Nicole that night. (Tr 1361) Bobby thought that Nicole and the children were with Kenny Ray at that time. (Tr 1362) Smith advised him to go to bed and

wait until the next morning. (Tr 1361) Shortly after noon on the following day, Bobby came to his aunt's house upset and crying. (Tr 1363) He said he could not have Nicole anymore, and he was going to find peace. (Tr 1363) She asked Bobby what he meant and he explained that he had a gun and would kill himself. (Tr 1363) After giving him cigarettes and gas money, Smith tried to talk Bobby into giving her the gun. (Tr 1364) However, he pushed her up against the house and drove away. (Tr 1364)

Smith testified that Bobby's childhood years were marred because his mother and stepfather were alcoholics. (Tr 1365) They left the children alone a great deal. (Tr 1365) When Bobby's mother was injured in an automobile accident, the children lived for awhile with grandparents. (Tr 1365-1366) Smith said Bobby never really knew his natural father, but he idolized him. (Tr 1368) Bobby's natural father never showed any affection toward Bobby, and Smith remembers seeing him strike Bobby several times over minor things. (Tr 1368) Smith said her husband never had a relationship with Bobby when Bobby lived with her in Milton. (Tr 1370) During this time, she had trouble with Bobby skipping school. (Tr 1370) She found out that he skipped because other children ridiculed him because he could not read or write. (Tr 1370) When placed in a special class, Bobby did much better. (Tr 1371) Before coming to live with her, Smith said Bobby had been teased in school in Jacksonville because of his poor clothes and for being on the welfare free lunch program. (Tr 1371-1372) Bobby moved back to

his mother in Jacksonville, however continued to live with Smith since she moved to Jacksonville as well. (Tr 1373-1374) He dropped out of school in the seventh grade after being sent to a special disciplinary school for fighting. (Tr 1373-1374) Bobby went to work when he was 13 or 14 years old. (Tr 1375) While in prison, Bobby sent letters to his aunt and mother every week. (Tr 1377) Smith said prior to the separation, Nicole called her once because she was afraid Bobby was going to kill himself. (Tr 1378)

Nancy Gill was the president of the PTA for Oceanway Elementary School while Bobby attended there. (Tr 1383) She became acquainted with Bobby because he was in the school office for being in trouble almost every day. (Tr 1384) The principal had a conference with Gill about Bobby. (Tr 1384-1385) They concluded that Bobby needed counseling, but the principal decided not to get involved and let the seventh grade take care of the problem. (Tr 1385) Bobby was placed in a special class, but he dropped out of school in the seventh grade. (Tr 1387) Gill said a major problem Bobby had was the manner in which other children treated him because of the clothes that he wore. (Tr 1388)

Dr. Harry Krop, a clinical psychologist, examined and tested Bobby. (Tr 1391, 1411-1412) He placed his diagnosis of Bobby's mental impairments into three categories: (1) borderline mental retardation; (2) schizoid personality disorder; and (3) alcohol and drug abuse. (Tr 1439-1440) Krop noted that in Bobby's history he had always been slow developmentally. (Tr

1429) He did poorly in school both academically and socially. (Tr 1430-1432) Bobby began smoking and using alcohol and drugs at an early age. (Tr 1432) When Bobby was 20, he drank heavily, sometimes a case of beer a day. (Tr 1433) In stressful times, Bobby used alcohol to deal with his depression. (Tr 1433) During the year before the homicide, Bobby also used marijuana and LSD on a regular basis. (Tr 1433) Testing showed that Bobby is mildly retarded with a full scale IQ of 71, the verbal score being 67 and the performance score at 76. (Tr 1433) He ranked in the lowest two percent of the population in his functioning. (Tr 1433-1437) On a test of Bobby's social adjustment, he scored two of a possible 19, which placed him in the severely retarded range. (Tr 1435-1436) Bobby is extremely immature and has a mental age of around 13. (Tr 1442) In addition to his retarded intellectual and social functioning, Bobby also suffers from a schizoid personality disorder. (Tr 1440) This is a lack of development of personality traits which promoted healthy functioning. (Tr 1439) Under stress, a person with these problems can develop a psychotic reaction characterized by delusions, hallucinations or paranoia. (Tr 1440) Finally, Bobby's alcohol and drug usage would exacerbate his other chronic problems. (Tr 1440) When drinking, he is more likely to become irritable, impatient and violent. (Tr 1440)

Krop stated that Bobby suffered an extreme mental or emotional disturbance and an impaired capacity to appreciate the criminal nature of his actions at the time of the offense.

(Tr 1443, 1446) Bobby's mental retardation, his personality disorder and his alcohol consumption combined with the problems in his relationship with Nicole rendered him extremely disturbed. (Tr 1443-1447) He believed that another man was taking his wife and children away from him. (Tr 1444) This struck his feelings of inferiority and lack of masculinity. (Tr 1444) All of these factors eroded his reasoning ability to the point of rendering him extremely disturbed. (Tr 1444-1445) His judgment was impaired. (Tr 1446) His impulse control was poor. (Tr 1446) He felt he was losing his wife and children. (Tr 1446) He was desperate. (Tr 1446) His impulse control and judgment were lowered to the point of not thinking of consequences of actions. (Tr 1446) Krop said the fact that Bobby killed Nicole in the presence of a witness is particularly telling of his lack of judgment and impulse control. (Tr 1446) Bobby was in the heat of passion at the time of the killing. (Tr 1446) Krop did not view the killing as a planned or calculated one, but rather an impulsive one. (Tr 1447-1448)

While in jail after the homicide, Krop said Bobby suffered from extreme depression and exhibited genuine guilt and remorse for his actions. (Tr 1448-1450) During this time, he was hallucinating -- seeing his wife coming into the cell with him. (Tr 1437-1438, 1567-1568) Marilyn Fowler, a mental health counselor in the jail, described his distraught, depressed behavior while in incarcerated. (Tr 1565-1567) She referred him to a psychiatrist for medication and also counseled him. (Tr 1567-1571) Later, Bobby was able to successfully

participate in a short substance abuse class conducted in the jail. (Tr 1583-1587)

The State called two witnesses in rebuttal: Larry Pulsifer and Susan Pulsifer. (Tr 1591, 1605) These friends of Bobby's saw him at the convenience store where Susan Pulsifer worked the night before the homicide. (Tr 1594, 1607) Larry said Bobby was drunk. (Tr 1596-1597) He said Bobby told him that something was going to happen the next day. (Tr 1595) Susan also said Bobby was drunk, although she had seen him drunker in the past. (Tr 1608-1609) They talked about Nicole and also about the relationship Susan has with her husband. (Tr 1607) She tried to console Bobby about his loss, telling him that he could find someone else. (Tr 1620) He began flirting with her which was unusual behavior from Bobby. (Tr 1621) Susan did recall one other time when he flirted with her in a milder fashion when he was drunk. (Tr 1621-1622)

Finally, the State called a witness who had observed a comment and gesture Bobby made in the courtroom after the guilty verdict. (Tr 1653) James Thies, an attorney who happened to be in the courtroom, testified that he saw Bobby give a thumbs-up sign and make the comment to the effect that he would be back. (Tr 1658) On cross-examination, Thies admitted that he had no idea what Bobby meant by the expression or what emotions Bobby may have been experiencing. (Tr 1664-1665)

SUMMARY OF ARGUMENT

1. Bobby Down's state of mind was the critical issue at trial and the defense wanted to introduce evidence of his state of mind toward Nicole the night before and the day of the shooting. The evidence would rebut the State's theory that Bobby planned a premeditated murder since it would have explained Bobby's motive for seeing Nicole the day of the homicide. The trial court heard a proffer of the evidence and excluded all or parts of the testimony on the grounds that Bobby's statements to these witnesses were hearsay and did not qualify for the state of mind exception. Sec. 90.803(3)(a) Fla. Stat. The court's ruling was incorrect and the evidence was admissible under the exception. Furthermore, even if the exception did not apply, Down's Sixth Amendment right to present a defense would have prevailed over the application of the hearsay rule.

2. The prosecutor elicited hearsay statements the victim made which indicated that Bobby had threatened her and that she was afraid of him. The State contended that these statements showed the victim's state of mind and were admissible as an exception to the hearsay rule under Section 90.803(3)(a), Florida Statutes. Defense counsel objected, arguing that the victim's state of mind was irrelevant to the prosecution and could not be used in an attempt to show Downs' state of mind which was the issue at trial. However, the court allowed the testimony. The testimony was inadmissible since the state of mind exception only applies to prove the declarant's state of

mind if relevant to an issue at trial; the declarant's state of mind cannot prove the state of mind of another. See, e.g., Correll v. State, 523 So.2d 562 (Fla. 1988).

3. The trial court should not have found as aggravating circumstances that the homicide was especially heinous, atrocious or cruel and committed in a cold, calculated and premeditated manner. This was a spontaneous shooting death, which occurred during a passionate marital argument, while the defendant suffered from a mental disturbance and the influence of alcohol. There was no evidence proving any inordinate pain or suffering which would set this homicide apart from a typical shooting death. Moreover, there was no evidence of a plan to kill. Although Downs did make some prior threats, the evidence of Down's state of mind the night before and the day of the shooting refuted any suggestion of a calculated plan to kill.

4. The death sentence in this case is disproportional and must be reversed. Bobby Downs suffers form mental retardation and has the emotional development of a 13-year-old. He also suffers alcoholism and was under the influence of alcohol at the time of the crime. He was unable to cope with the situational stress of the separation from his wife and children. The shooting death of his wife was the culmination of a passionate, ongoing dispute. Neither the crime nor the defendant warrants imposition of the ultimate penalty in this case.

5. The trial court should not have overridden the jury's recommendation of a sentence of life in prison. Several mitigating factors existed which easily formed a reasonable

basis for the jury's recommendation. The judge was not free to override the jury simply because he disagreed with the weight of the mitigating evidence and the jury's sentencing decision.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY OF DEFENSE WITNESSES RELEVANT TO DOWN'S STATE OF MIND AT THE TIME OF THE HOMICIDE, AND WHICH REBUTTED THE STATE'S PREMEDITATION THEORY, ON THE GROUND THAT THE TESTIMONY CONTAINED HEARSAY STATEMENTS WHICH DID NOT FALL WITHIN THE STATE OF MIND EXCEPTION TO THE HEARSAY RULE.

Since Bobby's state of mind was the critical issue at trial, the defense wanted to introduce evidence of his state of mind toward Nicole the night before and the day of the shooting. (Tr 834-840) The defense wanted to rebut the State's theory that Bobby planned a premeditated the murder by showing why Bobby went to Nicole the day of the homicide. (Tr 834-840) The trial court heard a proffer of the proposed evidence and excluded all or parts of the testimony of the defense witnesses. (Tr 831, 843, 859, 867, 873, 885, 891, 981, 998) As grounds for the exclusion, the court stated that Bobby's statements to these witnesses were hearsay and did not qualify for the state of mind exception. (Tr 834-840) Section 90.803(3)(a) Fla. Stat.

The night before the homicide, Bobby was confused and depressed. He loved Nicole and wanted to reconcile the relationship. He was also afraid of losing contact with his children. Bobby asked several people to accompany him to try to talk to Nicole. Each one told Bobby to wait until the next morning to contact her. This evidence was probative of Bobby's state of mind when he saw Nicole the next day and rebutted the

State's theory that Bobby went to Nicole that day with the intent to kill her.

William Downs, Bobby's brother, would have testified that when Bobby called him that night, Bobby wanted him to accompany him to Nicole's house to talk to her. (Tr 833) Since Bobby was drunk, his brother told him to wait until the the following day. (Tr 833) Susan Pulsifer, a friend of Bobby's who saw him at the convenience store where she worked around 12:30, would have testified that Bobby bought a six-pack of beer and talked about his relationship with Nicole. (Tr 984) He said he loved Nicole. (Tr 984) However, he felt the relationship was over, and he was upset and depressed. (Tr 984, 987) Leeds Gallagher, a long-time friend of Nicole's family and the son of Claire Cowette, would have testified that when Bobby came to their house at 1:00 a.m. on April 20th, Bobby wanted him to go somewhere with him. (Tr 1000) Cowette ran Bobby from the house and Gallagher had no further contact with Bobby. (Tr 1000) Bobby's aunt, Glenda Smith, would have testified that Bobby called her around 10:00 on the night of April 19th. (Tr 844) He was crying, upset and intoxicated. (Tr 844-845) He told her that he loved Nicole and was afraid that she was going away with Kenny Ray. (Tr 845) Bobby was also quite concerned about seeing his children. (Tr 845) His aunt refused his request to go with him that night to see Nicole. (Tr 845) She advised him to wait until the next day. (Tr 845) Michelle LeCleric, Nicole's sister, would have testified to a conversation she had with Bobby around midnight on April 19th. (Tr 886) Bobby told

her that he suspected that Nicole and Kenny Ray, a family friend, were having an affair. (Tr 887) Michelle told him that as far as she knew, Kenny Ray and Nicole were just friends. (Tr 887-888)

Portions of the testimony of the two police officers who spoke to Bobby the night before the homicide were also excluded. (Tr 859, 867) Furthermore, the court prohibited the playing of the tape recording of Bobby's telephone conversation with the dispatcher. (Tr 873) Officer Johnston would have testified that Bobby was concerned about his family problems when they talked the night before the homicide. (Tr 860-863) Bobby was upset and depressed. (Tr 863) Taking care of these problems seemed to be the most important thing on Bobby's mind. (Tr 863) He wanted the officer to accompany him to Nicole's house to talk to her. (Tr 865) Johnson's advice was for Bobby to go to bed and take care of the problem the following day. (Tr 862-863) Officer Blank would have testified that Bobby told him that he was having problems with his wife and wanted Blank to go with him to his wife's house to get his children. (Tr 869) Blank advised Bobby to wait until the morning to go to his wife to talk. (Tr 869) Blank said Bobby had been drinking and was upset. (Tr 870) Finally, the recording of Bobby's conversation with the dispatcher included his statements of concern about his relationship and his children. (Tr 873-877) The recording also showed Bobby's intoxication and state of confusion at the time. (Tr 873-878)

Section 90.803(3)(a) Florida Statutes provides for an exception to the hearsay rule of exclusion for extra-judicial statements offered to prove the declarant's state of mind. The statute reads:

(a) A statement of the declarant's then existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:

1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.

2. Prove or explain acts of subsequent conduct of the declarant.

A party seeking admission of such hearsay need only show that the declarant's state of mind is relevant or that the statement of the declarant's state of mind explains his later conduct. See, e.g., Correll v. State, 523 So.2d 562, 656 (Fla. 1988); Peede v. State, 474 So.2d 808 (Fla. 1985); Jenkins v. State, 422 So.2d 1007 (Fla. 1st DCA 1982). The proffered defense evidence, here, satisfied both alternative theories for admission. Bobby's state of mind at the time the statements were made were relevant to rebut the State's theory that Bobby was planning the carrying out his prior threats. His statements show that instead of planning a murder, Bobby was in a state of mental and emotional confusion and pain. Moreover, the statements, when coupled with the advice from several people to wait until the next day to talk to Nicole, explains Bobby's motive for seeing Nicole the following morning. They corroborate the

direct evidence that Bobby repeatedly asked Nicole to just talk to him when he saw her before the shooting.

The exclusion of this critical evidence allowed the prosecutor to argue, without fear of rebuttal, that Bobby's threats made much earlier than the excluded statements showed a premeditated design to kill. (Tr 1070-1071, 1077, 1086-1088) Defense counsel's motion for mistrial after these arguments demonstrates that prejudicial impact of the court's decision to exclude the evidence. (Tr 1086-1088) At the very least, the court should have, at that point in the trial, corrected the error by granting a mistrial.

Assuming for argument the proffered evidence did not fall within the exception to the hearsay rule, the evidentiary rule could not be constitutionally applied to exclude Downs' defense evidence at trial. Amends. VI, XIV U.S. Const. In Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), a state evidentiary rule prohibiting accomplices from testifying for one another was used to deprive the defendant of the favorable testimony of an accomplice who had already been convicted for the same murder. The Supreme Court reversed, holding that application of this rule of evidence violated defendant's Sixth Amendment right to compulsory process. In Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), Mississippi's evidence rule preventing the impeachment of one's own witness was used to prohibit a murder defendant from cross-examining a witness who had confessed to the crime and then repudiated the confession on the witness stand. The

defendant was also prevented from introducing the witness's oral confessions as hearsay. The Supreme Court reversed holding that Chamber's right to confront and cross-examine witness was paramount to the state's rules of evidence. The United States Supreme Court addressed the the rule of excluding hypnotically refreshed testimony when it conflicts with a defendant's right to testify in Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). Once again, the Court held the Sixth Amendment right outweighed the need to rigidly apply the evidence rule. The defendant was charged with manslaughter for the shooting death of her husband. A licensed neuropsychologist hypnotized her in an effort to refresh her memory of the details of the shooting. Under hypnosis, she did not remember any further details. But, after hypnosis she recalled that she had not placed her finger on the trigger of the gun and that the shot occurred during a struggle with her husband. The trial court applied the state rule excluding hypnotically refreshed testimony and limited Rock's testimony to matters she remembered before the hypnotic session. The Supreme Court reversed holding that the rule of exclusion as applied in these circumstances infringed on the defendant's right to testify. The rule of evidence the trial court applied to exclude Bobby Downs' defense evidence must likewise yield to the Sixth Amendment right to present a defense.

Bobby Downs' proffered defense evidence was admissible under the state of mind exception to the hearsay rule. Moreover, even if not admissible under that exception, the evidence

was, nevertheless, admissible under the Sixth Amendment right to present a defense. Bobby Downs has been denied his Sixth Amendment right to present his defense at trial. This Court must reverse this case for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN ADMITTING HEARSAY STATEMENTS FROM THE VICTIM THAT DOWNS HAD THREATENED HER IN THE PAST AND THAT SHE WAS AFRAID OF HIM ON THE THEORY THAT THE STATEMENTS QUALIFIED FOR THE STATE OF MIND EXCEPTION TO THE HEARSAY EXCLUSION RULE.

On two occasions, the prosecutor elicited hearsay statements the victim made which indicated that Bobby had threatened her and that she was afraid of him. (Tr 486-487, 526-548) The State contended that these statements showed the victim's state of mind and were admissible as an exception to the hearsay rule under Section 90.803(3)(a) Florida Statutes. (Tr 486-487, 528) Agreeing with the State, the court overruled defense counsel's objections and allowed the testimony. (Tr 485-487, 526-548) The testimony was inadmissible, and Downs now asks this Court to reverse his convictions for a new trial. See, Correll v. State, 523 So.2d 562 (Fla. 1988); Hunt v. State, 429 So.2d 811 (Fla. 2d DCA 1983); Bailey v. State, 419 So.2d 721 (Fla. 1st DCA 1982); Kennedy v. State, 385 So.2d 1020 (Fla. 5th DCA 1980).

The first statement was admitted during redirect examination of Nicole's mother, Judith LeClerc. (Tr 485-487) The prosecutor asked why Nicole left Bobby. (Tr 485) Defense counsel objected since the question called for a hearsay answer. (Tr 485) Adopting the State's theory for admissibility, the court allowed the testimony to show the victim's state of mind. (Tr 485-487) The following exchange between the witness and the prosecutor then occurred:

Q. Did you talk with your daughter about her feelings about Bobby Downs?

A. Yes, ma'am, I did.

Q. And in April and when she left him in January of 1988 what were her feelings about Bobby Downs?

A. She loved him, but she was afraid of him.

Q. Did she tell you why she was afraid of him.

A. Because he had threatened her life.

(Tr 487)

Terry Strickland testified about the second statement. (Tr 521, 526) While Nicole talked to Bobby on the telephone before he came to her house, Strickland said he heard Nicole say she would not go back with Bobby because he pulled a gun on her in the past. (Tr 526) Strickland testified as follows:

Q. Did you hear her indicate anything about why she was not going to go back with him?

A. Yes, ma'am, I did.

Q. What did you hear her say?

A. I heard her say that Bobby, I'm not going back with you, you stuck a gun to me and my kids once, you are not going to do it again.

(Tr 526-527) Defense counsel objected to this testimony on two grounds -- it constituted Williams Rule evidence for which he had no notice and it was irrelevant evidence of the victim's state of mind. (Tr 527-533) The court agreed that it was Williams Rule evidence for which the State gave no notice,

however the judge declined to grant a motion for mistrial because the evidence was otherwise admissible. (Tr 540)

The court's rulings were incorrect because the victim's state of mind was not in issue. Only Bobby Downs' state of mind was relevant. Since the state of mind exception to the hearsay rule applies only when the declarant's state of mind is in issue, it cannot be applied, here, to allow statements reflecting the Nicole Downs' state of mind regarding her relationship with Bobby. Correll; Hunt; Bailey; Kennedy. Her state of mind cannot be used to prove Bobby's. Ibid. While some cases may require proof of the victim's state of mind, see, Peede v. State, 474 So.2d 808, 817 (Fla. 1985)(statements of victim's state of mind relevant to prove element of abduction against her will in kidnapping charge), statements of a murder victim about a defendant's intent to kill or the victim's fear of the defendant are usually inadmissible. Kennedy, 385 So.2d at 1021. Some defenses to homicide, such as self-defense, suicide or accident, may place the victim's state of mind in issue, ibid., however, Bobby asserted no such defense. Although the defense centered on Bobby's distress and confusion over the separation from Nicole, her reasons for the separation and her fears were irrelevant. The hearsay should not have been admitted.

ISSUE III

THE TRIAL COURT ERRED IN FINDING AS AGGRAVATING CIRCUMSTANCES THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AND THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

A.

The Trial Court Should Not Have Found And Considered As An Aggravating Circumstance That The Homicides Were Especially Heinous, Atrocious Or Cruel.

The trial judge found that the homicide was committed in an especially heinous, atrocious or cruel manner. In the sentencing order, the judge wrote,

3. This murder was especially wicked, evil, atrocious, or cruel. The victim here was held captive, terrorized, and prevented from summoning help by having the telephone shot from her hand. From that moment on there is little doubt that Nicole Downs knew that her death was imminent, that escape was impossible, that her babies were in her arms and would be there when the fatal shots were fired. After some ten minutes of putting her through the agony and terror of the inevitability of her own impending trauma and death, and after hearing her final words, which were begging him not to kill her, Bobby Lee Downs grabbed his young wife's hair, twisted her head to the side, put his stolen pistol to her head, and blew her brains out, dousing his own children with their mother's lifeblood. This is heinous, atrocious, wicked, evil, and cruel.

(R 559-560)

The homicide was a nearly instantaneous shooting death. This Court has consistently held that such killings do not qualify for the heinous, atrocious or cruel aggravating circumstance. E.g., Brown v. State, 526 So.2d 903 (Fla. 1988);

Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Armstrong v. State, 399 So.2d 953 (Fla. 1981); Lewis v. State, 377 So.2d 640 (Fla. 1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976). Nothing about the manner of the killing suggested it was done to cause unnecessary suffering. Brown v. State, 526 So.2d at 907; Gorham v. State, 454 So.2d 556, 559 (Fla. 1984); Dixon v. State, 283 So.2d 1, 9 (Fla. 1973). Multiple gunshots administered within minutes do not satisfy the requirements of this factor. See, e.g., Amoros v. State, 531 So.2d 1256, 1260 (Fla. 1988) (victim shot three times at close range within a short period of time as he tried to escape); Lewis v. State, 377 So.2d at 646, (victim shot in the chest and then several more times as he tried to flee). This is not a case where the victim suffered physically and mentally for a significant period of time before the fatal shot. See, Jackson v. State, 522 So.2d 802, 809-810 (Fla. 1988). Although Bobby pulled a gun on Nicole for a time before the shooting, there was no fear of impending death during this confrontation. The actual shooting was a spontaneous act. Just before the shooting, the victim did beg Bobby not to shoot, but this does not evidence the prolonged mental suffering and terror necessary to make a shooting death heinous, atrocious or cruel. Brown, 526 So.2d at 906-907, n. 11 (although victim begged not to be shot just before fatal wound, this Court rejected HAC circumstance). This is unlike the situation in Jackson, for example, where the victim was bound and driven to a remote area, fully aware of his impending execution. Furthermore, the fact that the victim

may have suffered some pain is insufficient to separate this crime apart from the norm of first degree murders resulting from a shooting death. Finally, the fact that the murder occurred in front of the victim's children is an irrelevant consideration. See, Riley v. State, 366 So.2d 19 (Fla. 1978). The homicide was not especially heinous, atrocious or cruel, and the trial court erred in finding and considering this factor in sentencing.

B.
The Trial Court Erred In Finding And
Considering As An Aggravating Circumstance
That The Homicide Was Committed In A Cold,
Calculated And Premeditated Manner.

The premeditation aggravating factor provided for in Section 921.141(5)(i), Florida Statutes, requires more than the premeditation element for first degree murder. See, e.g., Hill v. State, 515 So.2d 176 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla. 1986); Preston v. State, 444 So.2d. 939 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1981). The evidence must prove beyond a reasonable doubt that a heightened form of premeditation existed -- one exhibiting a cold, calculated manner without any pretense of moral or legal justification. Ibid. "This aggravating factor is reserved primarily for execution or contract murders or witness-elimination killings." Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987). There must be "...a careful plan or pre-arranged design to kill...." Rogers v. State, 511 So.2d 526 (Fla. 1987).

In finding the premeditation aggravating factor, the trial judge stated:

4. The murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. The Defendant threatened to take his wife's life, he planned to take his wife's life, and he carried out a series of actions in preparation for taking his wife's life that demonstrate the type of heightened premeditation contemplated in F.S. 921.141 (5)(i). He burglarized a neighbor's home to steal a firearm to use in killing his wife; he pried open their door, searched the house, found the gun, and continued to search the house of extra bullets. He found the bullets in a separate location (a crowded, messy "whatnot" stand or shelf), drove to the victim's parents house, shot the telephone from her hand, threatened and terrorized her for ten minutes, and then executed her by shooting her once in the head at point blank range, then two more times. He clearly wanted to take no chances that she might survive a grievous head wound. At some time, he had packed a bag of clothes and put it in his car. There was ample time and opportunity for him to reflect on his actions and attendant consequences.

(R 560) Contrary to the judge's finding, the required heightened degree of premeditation was not proven beyond a reasonable doubt. This aggravating circumstance should not have been considered in sentencing.

Initially, there is no evidence of a plan to kill. As this Court held in Rogers, the crime must be calculated, which involves a plan or prearranged design to kill. 511 So.2d at 533. Although Bobby had made threats to kill Nicole, he had also made threats to commit suicide. Consequently, the fact that he stole a pistol is not necessarily a step in a plan to

commit murder. He had used the gun in the past to merely threaten Nicole and to threaten his own suicide. Bobby went to Nicole to talk to her. He wanted to talk to her the night before the shooting, and he was following the advice of several people to wait until the next day. His attempt to talk escalated into a confrontation and the shooting. This was an unplanned, hot-blooded killing -- not a cold, calculated one. A heat of passion killing during the course of a family argument is the more reasonable inference from the evidence and these typically do not qualify for this aggravating circumstance. See, Garron v. State, 528 So.2d 353, 360-361 (Fla. 1988); Wilson v. State, 493 So.2d 1019, 1023 (Fla. 1986); Herzog v. State, 439 So.2d 1372 (Fla. 1983). Moreover, the fact that he had a packed suitcase in his car does not show a plan to kill. Witnesses explained that Bobby always kept a packed suitcase because his job sometimes required unexpected stays overnight out of town. (Tr 934, 1276) The trial judge also referred to the fact of multiple shots. However, on several occasions, this Court has rejected the premeditation circumstance even though the victim suffered several gunshot wounds. E.g., Caruthers v. State, 465 So.2d 496 (Fla. 1985) (victim shot three times); Blanco v. State, 452 So.2d 520 (Fla. 1984) (victim shot seven times). Instead of showing a calculated murder, the evidence shows the spontaneous shooting of a mentally and emotionally disturbed man overcome by rage while trying desperately to save his marriage and preserve his family.

The trial judge should not have found and considered the premeditation aggravating circumstance.

ISSUE IV

THE TRIAL COURT ERRED IN SENTENCING DOWNS TO DEATH BECAUSE A DEATH SENTENCE IS DISPROPORTIONAL TO THE OFFENSE AND THE OFFENDER.

The death sentence imposed in this case is disproportional. First, the validly found aggravating circumstances will not support a death sentence. See, Amoros v. State, 531 So.2d 1256 (Fla. 1988); Kampff v. State, 371 So.2d 1007 (Fla. 1979). And, second, the evidence indicates that the homicides resulted from a domestic dispute -- the type of crime for which a death sentence is inappropriate. E.g., Fead v. State, 512 So.2d 176 (Fla. 1987); Garron v. State, 528 So.2d 353 (Fla. 1988); Wilson v. State, 493 So.2d 1019 (Fla. 1986); Blair v. State, 406 So.2d 1103 (Fla. 1981).

Since the heinous, atrocious or cruel and the premeditation aggravating circumstances were improperly found, see, Issue III, supra., insufficient aggravating circumstances exist to support the death sentence. The only valid aggravating circumstances were a previous conviction for a violent felony based on an aggravated assault Bobby committed when sixteen-years-old and a technical burglary since he remained in the house after the homicide victim told him to leave just before the shooting. These circumstances carry little weight in the sentencing equation.

The murder occurred during the course of a domestic argument. This Court has held death sentences improper in similar cases. In Fead, 512 So.2d 176, this court reversed the

defendant's death sentence imposed for the shooting death of his girlfriend. Fead, who was on parole for a prior murder, became embroiled in an argument with his girlfriend which concluded with Fead's shooting her twice in the head at point blank range. Evidence showed that Fead was jealous, believed his girlfriend was leaving him and became angry when she danced with other men in a bar. Both Fead and his girlfriend had been drinking all day prior to the shooting. A psychiatrist testified that Fead's mental abilities were alcohol impaired and that the killing was the result of anger and impulse which possibly qualified for the statutory mental mitigating factors. Other witnesses said Fead had been a good worker and had a good prison record. The jury recommended life. This Court reversed the death sentence. In Irizarry v. State, 496 So.2d 822 (Fla. 1986), the defendant was jealous about the fact that his former wife had taken a new lover. He killed her with a machete and tried to kill her lover. The trial judge overrode a life recommendation finding four aggravating circumstances and two in mitigation. This Court reversed the sentence.

In Garron v. State, 528 So.2d 353, the defendant shot and killed his wife and stepdaughter and tried to shoot a second stepdaughter during an argument. Reversing the death sentence as disproportional, this Court described the case as a "passionate, intra-family quarrel" and said,

In Wilson v. State, 493 So.2d 1019 (Fla. 1986), this Court stated that when the murder is a result of a heated domestic confrontation, the penalty of death is not proportionally warranted. See Ross v.

State, 474 So.2d 1170 (Fla. 1985); Blair v. State, 406 So.2d 1103 (Fla. 1981). The record shows that this is clearly a case of aroused emotions occurring during a domestic dispute. While this does not excuse appellant's actions, it significantly mitigates them.

Garron, 528 So.2d at 361.

In Wilson v. State, 493 So.2d 1019, a fight erupted when the defendant's stepmother told him to stay out of the refrigerator. The defendant beat her with a hammer and also beat his father when he came to intervene. During the fight, the defendant also stabbed his five-year-old cousin with a pair of scissors. His stepmother obtained a pistol, which the defendant took away from her. He shot his father in the head, pursued his stepmother, emptying the pistol and inflicting several wounds. His father and cousin died. This Court reduced the murder conviction for the cousin's death to second degree murder and held that the death sentence for the murder of the father was disproportional:

We find it significant that the record also reflects that the murder of Sam Wilson, Sr. was the result of a heated, domestic confrontation and that the killing, although premeditated, was most likely upon reflection of a short duration. See, Ross v. State, 474 So.2d at 1174. Therefore, although we sustain the conviction for the first-degree, premeditated murder of Sam Wilson, Sr. and recognize that the trial court properly found two aggravating circumstances while finding no mitigating circumstances, we conclude that the death sentence is not proportionately warranted in this case. [citations omitted]

493 So.2d at 1023.

The crime committed here, like the ones in Fead, Irizarry, Garron and Wilson, was "the result of a heated, domestic confrontation" and "most likely upon reflection of a short duration." Ibid. Just as defendants in those cases, Bobby Downs does not deserve a death sentence. He killed Nicole after a long period of distress and alcohol abuse. Such distress often causes the loss of control resulting in a killing. See, Smalley v. State, 546 So.2d 720 (Fla. 1989). The death sentence is disproportional in this case, and this Court should reduce the death sentence to life in prison.

Bobby Downs' death sentence is disproportional. His sentence violates the Eighth and Fourteenth Amendments to the United States Constitution. He urges this Court to reduce his sentences to life imprisonment.

ISSUE V

THE TRIAL COURT ERRED IN OVERRIDING THE JURY RECOMMENDATION OF A SENTENCE OF LIFE AND IN IMPOSING A DEATH SENTENCE UPON BOBBY DOWNS.

A jury's recommendation of life imprisonment must be given great weight, and

In order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). If mitigating evidence provides any reasonable basis upon which the jury might have relied, the trial judge must impose a life sentence in accordance with the recommendation. E.g., Morris v. State, Case No. 70,234 (Fla. Feb. 22, 1990); Fead v. State, 512 So.2d 176, 178 (Fla. 1987); Ferry v. State, 507 So.2d 1337 (Fla. 1987). The fact that the sentencing judge disagrees with the jury's sentencing decision does not authorize an override and the imposition of a death sentence. Rivers v. State, 458 So.2d 762, 765 (Fla. 1984). This Court's consistent application of this standard in life recommendation cases has preserved the constitutionality of Florida's death penalty sentencing procedures. Spaziano v. Florida, 468 U.S. 447 (1984). Several valid reasons justify the jury's life recommendation in this case. The trial judge's decision to override the recommendation was wrong. Downs' death sentence must now be reversed for imposition of a life sentence.

Numerous mitigating factors exist in this case and easily provide support for the jury's life recommendation. First is Bobby's extreme mental and emotional disturbance and his impaired capacity at the time of the crime. His mental age of 13 with an IQ of 71 is certainly a compelling reason. Amazon v. State, 487 So.2d 8 (Fla. 1986) (defendant's mental age of 13 a reasonable basis for a life recommendation); Morris, Case No. 70,234 (Fla. Feb. 22, 1990) (defendant's IQ of 75 found to be a reasonable basis for jury's life recommendation); see, also, Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. ___, 106 L.Ed.2d 256 (1989). His alcoholism and troubled personal life is also mitigation. See, Huddleston v. State, 475 So.2d 204 (Fla. 1985). Downs' alcohol consumption prior to the time of the crime is also a valid basis for the recommendation. See, e.g., Fead v. State, 512 So.2d at 178-179; Amazon v. State, 487 So.2d 8, 13 (Fla. 1986); Norris v. State, 429 So.2d 688, 690 (Fla. 1983). Even though the jury rejected the intoxication defense during the guilt phase, such impairment is a legitimate mitigator of the degree of punishment deemed appropriate. Finally, and perhaps the most compelling, is the love relationship Bobby had with the victim. See, Morris, slip opinion at 6. Bobby experienced extreme grief and expressed remorse for his offense. Ibid. The jury could have, quite correctly, viewed this as a crime of passion. Given Bobby's child-like maturity level, his borderline retardation, his deprived background and poor social skills, and his alcoholism and alcohol consumption at the time, he simply could not handle the stress and

confusion which accompanies the loss of a love through separation. Dr. Krop testified that Bobby could, under stress, experience psychotic episodes. He likely did precisely that at the time of the shooting.

The trial judge found no mitigating circumstances and specifically rejected Dr. Krop's unrefuted testimony. (R 560-562) However, the jury could properly rely on the significant mental mitigation about which Krop testified and which was corroborated by lay testimony from friends, family, police officers and other mental health professionals. Simply because the trial judge disagrees with the force of the mitigation presented does not preclude the jury's reasonable reliance upon such factors. E.g., Morris; Rivers.

In Fead v. State, this Court reversed a trial judge's override of a life recommendation in remarkably similar circumstances. Fead shot his girlfriend twice in the head at at point blank range after an argument. Fead had a previous violent felony -- a prior murder conviction. Fead used alcohol the day of the murder. Experts said the alcohol somewhat impaired his abilities. Fead was a good worker and expressed remorse for his crime. Reversing the sentence, this Court said,

The limited question we must decide is whether a jury of reasonable men and women could conclude, based on this evidence, that death is inappropriate. We are convinced that they could.

512 So.2d at 179.

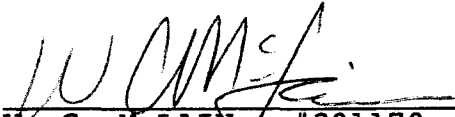
The trial judge, not the jury, made the wrong sentencing decision in this case. Bobby Downs should not be executed for his crime. This Court must reverse the death sentence with directions to impose a sentence of life imprisonment.

CONCLUSION

For the reasons presented in Issues I through II, Bobby Downs asks this Court to reverse his judgments with directions that he be afforded a new trial. Alternatively in Issues III through V, he asks that his death sentence be reversed for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand-delivery to Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to Mr. Bobby Lee Downs, #077853, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 6th day of March, 1990.



W. C. MCLAIN