SUPREME COURT OF FLORIDA

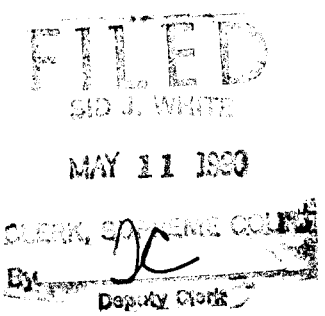
CARLOS SANTOS,

Appellant,

v. CASE NO. 74,467

STATE OF FLORIDA,

Appellee.



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SUMMARY OF THE ARGUMENT

As to Issue I: Appellant's motions for judgment of acquittal were properly denied. The motions asserted that the evidence of aggravated assault and of premeditation was insufficient under the standards applicable to circumstantial evidence. The evidence of the aggravated assault was almost entirely direct evidence, the victim's own testimony. There was also direct evidence of premeditation, Appellant's own before-the-fact statements that he was going to kill his girlfriend and his infant daughter. Therefore, the requirements for circumstantial evidence which appellant claims were not met had no application here. The convictions would be proper in any event because the evidence was inconsistent with any reasonable hypothesis of innocence. If Appellant is asserting that some formal finding of sufficiency was required in order to deny his motions, there is no merit in any such contention and Appellant has offered no authority for it.

As to Issue II: The death sentence imposed by the trial court was proper in all respects. The jury recommended the sentence by a margin of 10-2, and the trial judge properly found three aggravating factors and no significant mitigation. Appellant killed his girlfriend and their baby and would have killed his girlfriend's son had the gun fired. The offenses occurred in the course of the same incident, they were tried together, and Appellant was convicted of all three at the same time. Since the offenses involved three separate victims, the

trial court properly found that Appellant had previous convictions for a capital felony and a violent felony in sentencing each of the murders. The Court properly determined that this established statutory aggravation and that it offset the lack of a substantial criminal record at the time of the murders.

Appellant asserts two basic arguments in regard to all other sentencing issues. He attacks the trial court's factual findings and invites this Court to substitute its judgment for that of the fact finder on matters of credibility, the weight to be given evidence and so forth. The trial court's findings are amply supported by the evidence and should not be disturbed, particularly as the trial court and 10 jurors essentially agreed. Appellant further suggests that the findings of heinousness and cold calculation and the death sentence itself are inappropriate because of his "familial" relationship with the victims. That is incorrect. The propriety of the findings and the sentence depends upon the circumstances of the murder, not the relationships involved.

The findings of heinousness and cold calculation were quite proper on the facts at issue here. The findings with regard to mitigation were also proper. The court and the jury were not required to accept and give weight to the opinions and conclusions of the defense experts, and there were good reasons for not doing so in this case. The trial court properly found that the mitigating circumstances in question were not

established and that the value of all evidence as nonstatutory mitigation could not outweigh the aggravated factors. Since there were three aggravating factors and no significant mitigation, the death sentence challenged was not disproportional or improper in any respect. This Court has affirmed death penalties in cases very similar to this in which there were fewer aggravating factors.

ISSUE I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL.

Appellant's argument concerning his conviction is not altogether clear. He asserts that his motion for judgment of acquittal should have been granted because the evidence was insufficient under the standard applied when guilt is established circumstantially, but Appellant does not explain why he may think that standard applies. In addition, Appellant may be suggesting that the trial court failed to make some formal finding that was necessary in order to deny his motions, but there is no explanation for what that requirement might be and no authority for any such requirement at all.

Any contention that the trial court was required to make some formal finding of sufficiency in order to deny Appellant's motions is unfounded. If the trial court had not found the evidence sufficient to support conviction, Appellant's motion would obviously had been granted. The finding of sufficiency is inherent in the denial. Appellant offers no authority whatever in direct support of this portion of his apparent argument, and the authorities he cites in connection with his primary argument do not suggests the need for any specific, stated "finding" as to sufficiency. Appellee is aware of no authority requiring the trial court to do anything beyond what was done.

Appellant's primary argument, that the evidence was in fact insufficient to support his convictions, is also without merit.

Appellant cites the proper standard for determining the sufficiency of circumstantial evidence[1], but the standard has no application here. When guilt is established circumstantially, there must be evidence inconsistent with any hypothesis of innocence that would be reasonable in that case, but Appellant's guilt did not have to be inferred from circumstance in this case. It was shown by direct evidence.

The murders themselves and the murderer's identity were certainly not established circumstantially. Appellant chased down and shot his girlfriend Irma and their two-year-old child, Deirdre or DeeDee, in broad daylight, when people were about in the neighborhood. Jose, the older son and half brother of the victims, was with them at the time. He saw everything at close range, and he obviously knew Appellant. He had lived in the same household. Jose testified to the events and Appellant's role therein. (R. 382-383, 394-404, 536-538) Four other witnesses saw at least some part of the events. They all identified Appellant and testified to what they had seen him do. (R. 431-445, 458-470, 473-476, 480-487, 754-768)

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[1] Appellant argued below that the evidence was insufficient because he failed to exclude every reason of hypothesis innocence. (R. 12) Appellant has apparently recognized his error however. That standard is not urged on appeal, and the cases Appellant cites indicate that the evidence need only be inconsistence with any reasonable hypothesis of innocence, that the exclusion of such hypotheses is a matter for the jury. This is indeed the correct rule for determining the sufficiency of circumstantial evidence. See, e.g., Cochran v. State, 547 So.2d 928 (Fla. 1989).

Appellant is apparently not suggesting that these matters were shown circumstantially. The motions for judgment of acquittal that are appealed actually challenged the evidence on only two specific issues, Appellant's conviction for aggravated assault on Jose in Count 3, and the element of premeditation required to support his first degree murder convictions for the deaths of Irma and DeeDee[2] in Counts 1 and 2. (R. 810-815) Appellant's position would seem to be that there was sufficient evidence to convict him of second degree murder but nothing else. (R. 810-815, 948-950, 960-962, 970-971)

Appellant seemingly suggests that the premeditation required for his first degree murder convictions and the occurrence of the aggravated assault had to be inferred from the circumstances, and that the evidence was not sufficient to permit this because some reasonable hypothesis of innocence remained that was not inconsistent with any of the evidence. Appellant does not explain what "reasonable" hypothesis of innocence he might have in mind, but it would presumably be the version of events to which Appellant himself testified, either taking his complete denial of the shooting as true or, as defense counsel suggested in closing argument, assuming that he was telling the truth but

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[2] Appellant suggested below that the murder of two-year-old DeeDee was accidental, not intended at all. There is no evidence whatever to support this, but, even if it were true, Appellant acknowledges that it would not affect his conviction for first degree murder in that count so long as he intended to murder Irma, because that intent would be transferred to DeeDee. (R. 814)

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The situation is similar with regard to premeditation. That did not have to be inferred from the circumstances either. Appellant himself said that he was going to kill Irma and DeeDee long before he did so. He told Irma a number of times that he intended to kill them both. Her two older children heard him. He last told her this two days before the murder, and both older children saw him show her the gun at that time. She reported it all to the police. (R. 385-390, 684-689, 713, 716-725, 726-727, 731, 735) The evidence of Appellant's prior intent could hardly be more direct than his own before-the-fact statements that he was going to kill the victims.

Appellant's statements were not the only evidence of premeditation. There was circumstantial evidence of that as well. At the time of the murder, for example, Appellant's long relationship with Irma had essentially ended. Their relation had been steadily deteriorating and had reached a point of crisis. Arguments were frequent. For one thing, Irma had never legally recognized Appellant as the father of two-year-old DeeDee as he wanted. (R. 389, 668-669, 826-828, 846, 848, 849, 855-856, 861-862, 890) Irma and the children had moved out, and she had refused to tell Appellant where their apartment was. (R. 418-419, 425-426, 683, 713-714, 888-890, 896-897) Irma had been taking DeeDee to the park to see Appellant, but he could not count on that continuing because she was becoming increasingly afraid of him. (R. 650-651, 663-664, 667, 679, 684, 689, 691-699, 707-708, 713-714, 852-853, 896-898)

Appellant, who had not had a gun before, brought one shortly before the murders. (R. 688, 704, 865-866, 878-879, 900-904, 909) He testified that he brought it the very day of the murders, but Irma's two older children saw it two days earlier and Irma told the police about it at the time. (R. 387-389, 408-414, 687-688, 865, 873, 895, 900-901) Appellant somehow found out where Irma's apartment was, and he came there uninvited two days in a row. She let him in the first day, which is when he showed her the gun. Irma's parents arrived and Appellant left. (R. 687, 784, 856) Irma then called the police and told Officer Buckner about the gun and her concern that Appellant might use it on himself or on them. (R. 385-390, 408-414, 685-688, 704, 716-725)

When Appellant returned the next day, he did not get in, and he only saw Irma after Officer Albury arrived. Appellant saw Officer Albury before she saw him and did not have the gun when he showed himself and let her search him, but Officer Albury told him that he would be arrested if he came back there. (R. 726-735, 785-786, 859-861, 895-896) Nevertheless, Irma was afraid to stay there. She and the children left their apartment and went to stay with her parents even though it was crowded with all of them there. (R. 663-664, 688-689, 691-692, 705-708, 786-788)

On the day of the murder, Appellant got up late, took his gun, loaded, and spent about two hours that afternoon going from place to place, including the area of Irma's apartment and the area where her parents lived, sometimes on foot and sometimes in a taxi, waiting around here and there as though he were trying to

find her without anyone knowing that he was looking for her. He testified that he went where he did for entirely different reasons, but he told the cab driver one story that day and the jury another at trial. (R. 506-514, 517-519, 521-523, 596-599, 872-883, 905-927, 928-929)

When Appellant finally spotted Irma and DeeDee, it was late in the day, but still full daylight. Irma was walking along the street with DeeDee in her arms, and her son Jose was a little ahead. Appellant ran down the street toward them, drawing his gun as he went. When Irma saw him she ran, screaming, telling Jose to keep going and to call the police. She could not run very fast carrying DeeDee, and Appellant soon ran her down. He grabbed her and shot her twice in the face at point-blank range. DeeDee fell and Appellant shot her in the back of the head. He tried twice to shoot Jose, but the gun only clicked, and he then left the area. Not a word was exchanged. (R. 392, 401, 433-436, 456,470, 479-487, 550-553, 558-559, 752-768)

Appellant had been Jose's de facto stepfather for years, and Jose obviously knew who he was. Jose was just ahead of Irma and DeeDee when they were shot and saw everything that happened. (R. 382-383, 392-401, 433-436) Several of the neighbors and passersby saw some or all of the events as well, and they also identified Appellant as the murderer. (R. 433-436, 456-470, 479-487, 752-768) When Appellant was stopped, the murder weapon was at his feet and both hands tested positive for having recently fired a revolver. (R. 574, 580, 618-621, 623-626, 639, 642, 645,

791, 798-800, 834) Appellant testified that he had not shot anyone and had not been in the vicinity of the shooting at any time that day. (R. 870, 882-886, 898, 928-929)

The foregoing evidence was quite sufficient to support the convictions appealed, even if it was properly tested as circumstantial. It was inconsistent with either of the hypotheses Appellant could reasonably urge, on any number of points. Defense counsel's suggestion that Appellant had managed to forget the actual shootings solved the most glaring problem with his testimony, of course, but there were any number of other problems with his version of what "really" happened. His testimony was not very believable in general, and much of what he said about matters bearing on premeditation was inconsistent with extensive evidence to the contrary.

For example, Appellant denied ever saying that he was going to kill Irma or DeeDee. (R. 862-863, 870-883, 898-899) He said that he bought he gun two days after Irma and her children saw it and reported it to the police. (R. 387-389, 408-414, 687-688, 865, 873, 900-901) He said that the black gun butt everyone saw must have been his tan wallet. (R. 388, 413-414, 687, 693-694, 855-856, 890-891) The description he gave the jury of what he was supposedly doing when he appeared to be looking for Irma and DeeDee to kill them was not the same story he had given the cab driver at the time. (R. 506-514, 517-519, 521-523, 596-599, 872-883, 905-927, 928-929) Appellant denied being upset about Irma's leaving. He indicated that she was the one who did not want to

be apart, that she continued to be friendly and to want him back, that she never stopped inviting him over to her apartment, and that she was never afraid of him. (R. 830-837, 840-846, 850-852, 863, 882-884, 888-890, 895-899, 913, 934-935) These are only a few of the problems in Appellant's testimony.

Thus, if Appellant's version of events, with or without defense counsel's suggested change, could be viewed as a "reasonable" hypothesis of innocence at all, the evidence of premeditation was sufficient even if proof of premeditation could be seen as circumstantial, because it is clearly inconsistent with Appellant's hypothesis, with regard to premeditation and all other aspects of guilt. The convictions challenged would therefore have been proper even if they had been dependent upon circumstantial evidence as Appellant would apparently suggest. Since his guilt was in fact shown by direct as well as circumstantial evidence, his motions for judgment of acquittal were without merit for two reasons. Appellant's convictions should be affirmed accordingly.

ISSUE II

THE DEATH SENTENCES APPEALED AND THE FINDINGS UPON WHICH THEY WERE BASED WERE PROPER IN ALL RESPECTS.

In the penalty phase of this case, the jury was asked to consider three aggravating factors, previous convictions for violence, heinousess, and cold calculation, as described in Section 91.141(5)(b),(h)(i), Florida Statutes (1987). The jury was asked to consider all mitigating circumstances Appellant chose to present, including the lack of a significant history of prior crimes, extreme emotional disturbance or duress[4] and inability to understand and conform to the law, as described in Section 91.141(6)(a),(b)(f), Florida Statutes (1987), and any nonstatutory mitigation[5] which the evidence supported. (R. 1173-

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[4] The "duress" Appellant attempted to show was "emotional duress." (R. 1052, 1056, 1111-1112,1167-1168) The jury was instructed on duress in the usual sense of domination by another in the event that the "emotional duress" described by Appellant's experts could be said to constitute this statutory circumstance. (R. 1174-1175) The trial court's sentencing order grouped this testimony with that concerning emotional disturbance generally and noted that the statutory factor of duress, in the sense of domination, was inapplicable. (R. 1198,1206)

[5] The initial brief, at pages 26 and 27, lists a number of mitigating circumstances purportedly established . In addition to the statutory circumstances described, a number of nonstatutory circumstances are listed. Appellant claims to have established the absence of cold calculation by the testimony suggesting that Appellant had difficulty in controlling his emotions. He certainly argued that, and that the murders could have not been heinous for the same reasons. (R. 1170-1171) He suggested that his mental condition and history were mitigating generally. On the other hand, Appellee has not found any evidence of two of the two mitigating circumstances said to have been proven, the purported absence of future danger and the purported good conduct in jail. Appellee found no support for either and notes that Appellant provided no record references for

1175) The State raised no objections to any mitigation Appellant sought to offer and none was precluded otherwise. Appellant called a psychologist and a psychiatrist to testify of his mental and emotional condition generally and his likely state at the time of the murders. Appellant's arguments with regard to sentencing focus almost entirely on the testimony of these two witnesses. The jury heard and considered this testimony, the evidence presented at trial, the arguments of both parties, and the instructions of the trial court.[6] Based on that, the jury recommended the death sentence by a vote of 10 to 2. (R. 190)

The trial court agreed and imposed the death sentence accordingly, finding that each of the three aggravating circumstances had been established beyond reasonable doubt, that no statutory mitigation had been established, and that the nonstatutory mitigation that was offered would not outweigh the aggravating factors. (R. 1194-1200, 1204-1207) Appellant takes

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those items in the initial brief. Appellee found discussion of appellant's conduct in jail, but the conduct referenced would hardly be described as "good." (R. 1063,1120,1123, 1130)

[6] At page 15 of the initial brief, Appellant suggests that the State's closing argument in the penalty phase was objectionable, but Appellant made no objection whatever to that argument below. (R., 1145-1161) The jury instructions on sentencing were essentially standard except for agreed wording changes that were intended to benefit the defense. (R. 1136) Appellant objected to instructing the jury on the three aggravating factors offered by the state, essentially on the theory that the evidence did not support them. (R. 1137,1141) Otherwise, Appellant's only objection was to any reference to his conviction for aggravated assault on Irma's son Jose. (R. 1138) The mitigating instructions Appellant wanted were given, and, except as noted, he concurred with the instructions otherwise. (R. 1142-1143)

exception on virtually every point. He argues that the aggravating factors were improper in the circumstances, essentially as a matter of law; that the trial court and the jury misinterpreted the evidence in finding that heinousness and cold calculation were established and statutory mitigation was not; and that the death penalty was disproportional in any event because the murders were just a domestic dispute that got a bit out of hand.

Appellant is wrong on all points. Moreover, much of his argument concerns matters not properly cognizable on appeal. He repeatedly asserts that findings were incorrect or improper or not supported by the evidence simply because there was some evidence to the contrary, often his own testimony, and that favorable points were necessarily established whenever there was some arguably favorable evidence that was not directly rebutted. The argument presupposes that findings are properly made mathematically, by counting witnesses, offsetting contradictions and so forth. That is not the test. See, e.g., Hargrave v. State, 336 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 26 L.Ed.2d 176 (1979). It totally overlooks the role of the fact finder in judging the credibility of witnesses and weighing the evidence generally.

The trial judge is the finder of fact with regard to aggravating and mitigating circumstances which have and have not been established, and it is not within the province of appellate courts to reweigh and reevaluate the evidence and draw their own

conclusions on such matters as Appellant seeks to have this Court do here. See, e.g., Hudson v. State, 538 So.2d 829, 831 (Fla. 1989), citing Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). The trial judge's determination as to aggravating factors and mitigating circumstances that were and were not established and the weight to be given them will not be disturbed unless there was a palpable abuse of discretion or the finding was not supported by competent, substantial evidence. See, e.g., Hill v. State, 549 So.2d 179 (Fla. 1989); Stano v. State, 460 So.2d 890 (Fla. 1984), cert. denied, 471 U.S. 111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985); Toole v. State, 474 So.2d 731 (Fla. 1985); Daugherty v. State, 419 So.2d 1067 (Fla. 1982), cert. denied, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983).

The rule should be even clearer where, as here, the jurors all heard the same evidence the trial judge heard and the great majority of them obviously viewed the evidence much as he did. They reached the same conclusion, that any mitigation was outweighed by the aggravating factors, and recommended the death penalty by a vote of 10 to 2. Their decision is to be given great weight. See, e.g., Grossman v. State, 525 So.2d 833, 846 (Fla. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1345, 103 L.Ed.2d 822 (1989).

PREVIOUS CONVICTIONS FOR VIOLENCE

The trial court found that previous convictions for violence had been established by Appellant's convictions for the second murder and the aggravated assault that occurred at the same time

as each of the murders being sentenced, and that these convictions offset Appellant's lack of any substantial criminal history prior to the commission of these offenses. (R. 1195-1198, 1204-1206) Appellant contends that these findings were incorrect because convictions for violence committed and tried at the same time as the murder being sentenced are not properly considered. (Initial brief at 16) Appellant is incorrect. This Court has long recognized that the reference to "previous," which Appellant would apparently interpret to mean prior to the offenses, actually means prior to the sentencing.

The Court has held that violence committed at the same time cannot be used to establish the aggravating factor when only one victim is involved, even where there are separate offenses. Where separate acts of violence were committed on different victims, however, the fact that they occurred in the course of the same incident is irrelevant. See, e.g., Wasko v. State, 505 So.2d 1314 (Fla. 1987); Lucas v. State, 376 So.2d 1149 (Fla. 1979). In the instant case, Appellant murdered two people and seemingly tried to murder a third. He was tried for all three offenses together and the jury found him guilty of each. Therefore, the trial court properly found that each murder was aggravated by previous convictions for a capital offense and a violent felony.

HEINOUSNESS

Appellant asserts that the trial court erred in finding that heinousness had been established, either as a matter of law or

because the evidence was misinterpreted. (Initial brief at 16-18) Appellant suggests that the aggravating factor of heinousness is inapplicable here because his victims died quickly by gunshot. Heinousness can certainly be established by showing physical torture or a slow death, but it can be established by showing undue suffering of other types as well. This Court has long recognized that it is cruel to inflict mental and emotional pain just as it is to inflict physical pain, and that the aggravating factor can be shown by unnecessary suffering of either sort, particularly when it was deliberate. See, e.g., Parker v. State, 476 So.2d 134 (Fla. 1985) (victim told of impending death during journey to murder site); Lemon v. State, 456 So.2d 885 (Fla. 1984) cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985) (victim expecting boyfriend to kill her and begging him not to do it); 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) (threatening, harassing and stalking victim).

The circumstances here are comparable. The trial court found that the murders sentenced in the instant case were heinous because of the unneccesary mental and emotional pain and suffering which Appellant deliberately inflicted on his victims in the instant case, on Irma directly and indirectly on DeeDee, who would at least have felt her mother's disturbance and fear even if she did not understand its cause. The rationale is clear in the sentencing order, and it is well supported by the evidence. (R. 1205)

Appellant worked hard at frightening Irma. He had been telling her for some time that he was going to kill her and, even worse, that he was going to kill her baby. (R. 385-386, 684-685, 722, 735) This did frighten Irma. She tried to keep Appellant from finding out where she and the children were living, and she always made sure someone was nearby when she took DeeDee to the park to see him. (R. 418-419, 425-426, 650-651, 666, 713-714, 888-890, 896-898)

Two days before the murders Appellant stepped up his efforts to terrorize his victims. He came to their apartment, letting them know that he had found out where they lived, and told Irma again that he was going to kill her and their child. (R. 387, 390,684-689,716-725) He even showed Irma that he had a gun. Irma was definitely frightened at that point. She called the police as her parents advised and told them about the gun and what Appellant said he was going to do. (R. 388-389, 687-688, 716-755) She did not go to her parents' apartment that night because DeeDee was not well and it was crowded there when she and the children stayed, but she was extremely nervous in the apartment that night even though she had taken precautions. (R. 687-691, 705-708, 784-788, 852-857) Appellant came back to the apartment again the next day. The police were there when Irma spoke to him and they told him not to come there again. (R. 726-731, 785-786, 859-861, 896-898) Nevertheless, Irma was too afraid after that to continue to stay there. She said she could not take the pressure anymore, and she and the children did go to stay with her parents. (R. 687-691, 707-708, 785-788)

Irma and the children was still staying there the next day when Appellant tracked her and DeeDee down and killed them. Irma was walking to a friend's house in broad daylight, carrying DeeDee, with her teenage son Jose just ahead, when she saw Appellant running down the street after them, with his gun already drawn and in his hand. (R.390-407, 420-424, 433-442, 445, 459-469) Irma immediately began to run, screaming and telling Jose keep going and call the police. (R. 396-397, 403, 424, 437-439, 463, 468-469, 475, 754-761) When she did this, Appellant began to ran faster. (R. 445)

Irma certainly knew that she could not outrun Appellant, particularly while carrying DeeDee, and that he would catch her long before the police could arrive, but she did not put DeeDee down or try to talk to Appellant. (R. 403) She obviously knew from the gun in his hand that he had come to kill her and the baby both, just as he had been saying he would, and that there is nothing she could do save herself or even her two year old daughter. She was correct. When Appellant caught up with them, he grabbed her, turned her around, put the gun in her face so that she could not help seeing what was coming, and pulled the trigger. When he had shot her a second time for good measure, he turn and shot little DeeDee, who had to have been terrified by then. (R. 397-400, 468-469, 758-760) The victims were not in court to describe their emotions at the time, of course, but that is not necessary. It is a matter of common sense which is properly inferred. See, e.g., Swafford v. State, 533 So.2d 270 (Fla. 1988).

Had Appellant shot Irma and DeeDee in sudden response to a heated argument as Appellant continually suggests, the heinousness might well be questionable, but that is hardly the case. Appellant played a cat and mouse game with his victims, telling them his intensions, letting them think that they were safe, that he did not know where they lived, then coming there, showing them the gun, returning the very next day, until Irma was very frightened indeed. Then he came in for the kill, announcing his intentions all the way by displaying the gun in his hand as he ran, making sure that Irma knew what he was coming for this time. He showed no mercy or pity whatever for Irma or DeeDee. The murders were heinous and the trial court properly found them so.

Whatever Appellant may suggest to the contrary, this Court has approved findings of heinousness under comparable circumstances. The situation in the instant case is very similar to that in Harvard, 414 So.2d at 1032. The victim in that case was the defendant's ex-wife. He had been harassing her since their separation and had sent her a Christmas card telling her that she would not live to see Christmas. A few weeks later, he waited for her where she worked and followed her in his car for ten miles. He then pulled up beside her and blew her away with a shot gun blast through the car window. The Harvard defendant only once said he would kill the victim, and he did not give her cause to fear for the safety of loved ones as well. Furthermore, he did not advertise the fact he was following her that day to

kill her, or she would hardly have stopped in the subdivision entrance and let him pull up beside her. Nevertheless, this Court approved the finding that the murder in Harvard was heinous, and the murders at issue here are even more clearly so.

Appellant suggests that the trial court and the jury misconstrued the evidence, that neither the murders nor the events proceeding them occurred as they were found to have occurred, but, for the reasons heretofore stated, that is not for this Court to decide. There were two fact finders below, the jury and the trial judge, and neither accepted Appellant's view of what happened. The trial judge's contrary view of events is clear in the sentencing order, the jury would not have convicted Appellant and recommended the death penalty had they not essentially agreed, and this Court will not reweigh the evidence as Appellant requests. See, e.g., Stano, 460 So.2d at 890. The trial judge found that Appellant had engaged in actions which caused his victims to suffer unnecessarily and that the murders were especially heinous for that reason. The finding that this aggravating factor was established was supported by the evidence and was proper in all other respects. It must therefore stand undisturbed.

COLD CALCULATION

In an argument which closely resembles that on heinousness, Appellant asserts that the trial court erred in finding cold calculation, either because that aggravating factors was improper, essentially a matter of law, or because the evidence

was misconstrued. (Initial brief at 18-22) Appellant contends that the aggravating factor of cold calculation is inapplicable because the victims were like members of his immediate family and the murders were not contract killings or attempts to collect insurance proceeds or the like. Appellant is wrong on this point too.

It is true that this aggravating factor requires some heightened premeditation beyond what is necessary to convict for first degree murder, and the element is often present and quite obvious in contact killings, murders for money and the like, but neither financial gain nor an intricate scheme is essential. The heightened premeditation necessary to a finding of cold calculation can be shown in any number of ways as long as there is some indication that the murder was something decided upon ahead of time, not an unforeseen response to an immediate stimulus of some kind. The finding is usually proper whenever there is evidence that the defendant had thought about killing the victim and planned to do so.

It may be enough that the defendant had occasion to give thought to what he was doing in the course of the incident itself, as when the killing required some action that would not have been entirely automatic. For example, this Court has approved the finding of cold calculation where the defendant stopped to reload his weapon before killing the victim. See, e.g., Swafford, 533 So.2d at 277; Phillips v. State, 476 So.2d 194, 197 (Fla. 1985).

The heightened premeditation necessary to a finding of cold calculation is shown even more clearly where the defendant took some steps toward the murder at some earlier time, before the events which immediately proceeded it began, or otherwise give some indication of having reached the decision at some earlier time. The heightened premeditation can be shown by the advance purchase of a weapon, for example, or by stalking the victim. See, e.g., Mills v. State, 462 So.2d 1075, 1081 (Fla. 1985), cert. denied, 473 U.S. 911, 105 S.Ct. 3538, 87 L.Ed.2d 661 (1985); Eutzy v. State, 458 So.2d 755, 757 (Fla. 1984), cert. denied, 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985). See also Troedel v. State, 462 So.2d 392 (Fla. 1984) (obtaining "quiet" gun "to blow two dudes away").

The heightened premeditation is often shown by the fact that the defendant armed himself and went to where the victim was or otherwise initiated the fatal contact with the idea of killing the victim, and that he did kill the victim without any immediate provocation. See, e.g., Haliburton v. State, 15 FLW S193 (Fla. April 5, 1990) (defendant breaking in and attacking sleeping victim to see if he could kill him); Brown v., State, 15 FLW S165 (Fla. March 22, 1990) (defendant having grudge against victim and thinking he might kill her when he broke into her room); Lara v. State, 464 So.2d 1173 (Fla. 1980) (defendant having grudge against victim and going armed to where she lived for the purpose

of killing her.[7] An execution style killing with no struggle can be indicative also. See, e.g., Mills v. State, 462 So.2d at 1081; Eutzy, 458 So.2d at 757.

The finding of cold calculation here does not depend on any one circumstance this Court has considered indicative of heightened premeditation. Appellant did nearly everything discussed in all the foregoing cases combined. He announced his intention of killing Irma and DeeDee long beforehand. (R. 385-386, 684-685, 722-723, 735) He bought a gun for the first time shortly before the murders, whatever the exact date of purchase. (R. 688, 704, 865-866, 878-879, 900-904, 909). On the day of the murders he took the gun with him, loaded, and spent hours giving every appearance of looking for Irma and DeeDee. He first went to Irma's apartment as he had each of the past two days, but he found no one there because she had moved in with her parents the night before. For two hours or so thereafter he went from one area to another where they were likely to be. (R. 506-514, 527-519, 521-523, 596-599, 684-689, 865, 872-873, 895, 905-929)

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[7] In Harvard, 414 So.2d at 1036, this Court quoted the trial court's finding of heightened premeditation and cold calculation, but it is not discussed in this Court's opinion. The quotation was included to show why that murder was heinous. The Court found that the defendant's actions in threatening, continually harassing, and ultimately stalking and killing his ex-wife, which the trial judge discussed in connection with cold calculation, showed why the crime was heinous. Appellee would agree that the circumstances establish heinousness, but would note that they certainly show the heightened premeditation the trial court was discussing as well.

He finally spotted them near Irma's parent apartment about 7:00 P.M. When he did, he ran after them, pulling his gun at the outset and holding it ready in his hand. When he caught them, he immediately shot them, firing into the head at point blank range in each case. There was no argument and no struggle. No words at all were exchanged. (R. 392-400, 403-404, 431, 434-439,4 40-441, 461-465, 468-470, 488-489, 496-499, 520-526, 582-586, 631-633, 754-760)

The idea of killing Irma and DeeDee if he could not get what he wanted from them was obviously something that Appellant began thinking about long before the murder. He had been stating that intention to Irma for some time. He admitted to Dr. Kremper, the defense psychologist with whom he had weekly sessions prior to the trial, that he had bought the gun days or weeks before he used it. (R. 1050, 1075) He had plenty of time to reflect on the matter and, at some point, he obviously decided to kill them. He had plenty of time for second thoughts on the day of the murders, while he rode around looking for Irma and DeeDee and even while he chased them down the street, but he remained firm in his purpose.

He had told Irma what he was going to do if she did not comply with his wishes, she was obviously not going to comply, and he was not going to let her get away with that. When he saw them, he pulled out his gun. When he caught them, he executed them publicly, without a word, much less an argument. The eyewitnesses who saw Appellant before, after and even during the

murders, trained and untrained observers alike, said that he was calm throughout, that he did not appear to be upset in any way. (R. 435, 470, 488-489, 496-499, 520-526, 582-586, 631-633) He was a man who had made a decision and was carrying it out. If he had not found Irma and DeeDee that day, he would presumably have returned the next.

Appellant suggests that the trial court, and presumably the jury, "either misheard or ignored the testimony," that Appellant, in fact, "came upon the victim by happenstance," presumably when he just happened to have a gun with him, but this contention is out of place on appeal. Like the factual argument on other issues, it is fine for the jury and the trial court, but serves no purpose on appeal. As heretofore discussed, the weight and credibility of the evidence is not decided on appeal.

Appellant seemingly suggests that it was error to find cold calculation, even on the facts which the trial court actually found, because the matter was in the nature of a family dispute. This argument likewise has no merit. Appellant first suggests that the heightened premeditation required for a finding of cold calculation cannot be established without showing "an act of heightening," that the requisite "heightening" act is absent here, and that the amount of "forethought" and planning that actually went into the murder is therefore irrelevant. (Initial brief at 18-19) Appellant next cites a number of cases in which a finding of cold calculation was held to have been improper, many of which involved a victim who was a member of the defendant's household.

Appellant seemingly offers these cases to show that findings of cold calculation are rarely permissible in murders of family members, and that the finding is improper anyway unless the defendant also committed some "heightening act." It is unclear what "acts" will qualify in Appellant's view, but it does not matter. The argument confuses events with evidence. A finding of cold calculation does not require a pre-planned murder plus some mystical act. A murder which is planned in advance and deliberately carried out is cold and calculated. The requirement of "heightened" premeditation is met by showing a greater degree of premeditation than that required for first degree murder. If the murder is planned in advance and carried out later, after ample opportunity for reflection, the requirement is usually met. The acts which are significant are those which show that the pre-planning, the opportunity for reflection or the like occurred. As discussed, there is certainly no shortage of such acts in this case.

Appellant's cases likewise do not suggest that cold calculation must meet some stricter standard when the victim is a family member rather than a stranger. They show that the evidence of heightened premeditation must be clear in order to suport the finding in any murder. Murder can be a spur-of-the moment decision even when it is technically premeditated. The decision to kill is often triggered by some immediate stimulus, an argument, a physical fight, a sudden movement by a holdup victim or such. The defendant might have not have foreseen the

murder any more than the victim did and might never have done it had he had occasion to give it real thought. Many murders of family members undoubtedly are of this type. As Appellant notes, emotions are high in that setting, inhibitions are low, the potential for friction is constant, and the wrong things said or done at just the right moment can lead to violence. A finding of cold calculation assumes the opposite scenario, and it is hardly surprising that it is inappropriate in many family murders.

There are obviously cases in which the impetuous for the murder is unclear. The circumstances might be consistent with an impromptu killing during the course of the argument, but there might be other evidence suggesting that the defendant intended to kill the victim all along. Where cold calculation is found in cases of this type, this Court must obviously ensure that the evidence is inconsistent with spontaneous murder because the defendant must receive the benefit of any reasonable doubt on that question. However prevalent decisions of that type may be in the context of family murders generally, they have little bearing on the murders at issue here. There is no evidence at all in this case indicating that Appellant shot Irma and DeeDee in the course of a heated argument or in response to anything else that was happening in the moment.

Nothing was going on at all at the time of the murders, between Appellant and victims or anyone else. He had had no contact with them since the day before, and he did not stop to talk that day. There is certainly nothing indicating that he

would not have killed them if he had had more time to think about it. He had days and weeks beforehand, and, if that were not enough, he could have thought about it longer. There was no apparent reason for killing them that particular day. He had presumably thought about it all he wanted to and wanted to get on with it. The heightened premeditation is obvious in these circumstances, the trial court certainly did not err in finding that aggravating factor here, and, like those factors discussed previously, it must stand undisturbed.

MITIGATION

Appellant asserts that the trial court erred in finding that the testimony offered at sentencing did not establish statutory psychological mitigation, and that the evidence offered as mitigation did not establish any nonstatutory mitigation that could outweigh the aggravation. Appellant attempted to establish mitigation by the testimony of Dr. Kremper, a psychologist, and Dr. Ainsworth, a psychiatrist, who gave their opinions about Appellant's mental and emotional makeup generally and his likely state at the time of the murders. Appellant had hoped to establish that he was in a state of extreme of emotional disturbance amounting to "emotional duress," and that his ability to understand and conform to standards of lawful behavior was substantially impaired as a result. The trial judge and the jury both heard and considered the evidence the doctors presented. The trial court found that the testimony did not establish any of the statutory mitigation for which it was offered, and the jury apparently agreed. (R. 1190, 1198-1199, 1206-1207)

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the right of the fact finder to "believe or disbelieve all or any part of an expert's testimony," and was part of the witness instruction given in the guilt phase in the instant case. (R. 1009)

It is not surprising that the trial judge and the jury gave little weight to the defense experts' testimony and found that the statutory mitigation for which it had been offered was not established. In many instances, the experts' opinions were not as strong as Appellant seems to suggest. The "duress" to which they testified was "emotional duress," simply a recharacterization of the mental and emotional conditions that were said to constitute extreme mental or emotional disturbance. (R. 1052-1053, 1056, 1111-1112) When Doctor Kremper, the psychologist, was asked whether he thought Appellant was suffering extreme mental or emotional disturbance at the time of the murders, he testified only to "extreme emotional distress." (R. 1052) Doctor Ainsworth, the psychiatrist, would only say that he had been "under great deal of emotional stress at the time." (R. 1111)

When defense counsel sought testimony that Appellant's ability to understand and conform to lawful standards of conduct was substantially impaired, the response was similar. The doctors agreed that Appellant was not incapable of understanding the criminality of his conduct. Dr. Ainsworth thought his understanding was probably "impaired," but less so than his ability to conform his conduct to lawful standards, and he did

not say that even this was substantially impaired. (R. 1056-1058) Doctor Kremper, thought that the ability to conform to the law was substantially impaired but that the ability to understand was less impaired. (R. 1056-1058, 1111-1112)

The doctors' opinions were highly speculative anyway. The doctors themselves did not seem confidant about the correctness of their conclusions. As discussed in connection with the guilt phase, defense counsel had suggested to the jury in closing argument that Appellant's testimony that he did not commit the murders meant that he did not remember committing them. (R. 948-949) The defense experts discussed the phenomenon of "denial" and said that they had come to believe Appellant about not remembering the murders. Their belief in this "denial" was interwoven with their conclusions about Appellant's mental and emotional state at the time of the murders. They described him as emotional and unstable under pressure and concluded that Irma's continuing refusal to abide by his wishes probably disturbed him so seriously that he could neither control himself at the time nor remember his action later. (R. 1052-1058, 1108-1112) Thus, accepting the inability to remember the murders supported the conclusion that Appellant was in an abnormal state at the time and vice versa, but both conclusions were questionable.

Since Appellant had or admitted no memory of the murders, the doctors could not ask him what he was thinking and feeling then, and they ordinarily would have relied heavily on such

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his emotional distress and even psychopathological symptoms when he thought it might be to his benefit. (R. 1044,1062, 1067-1069, 1122) He would draw attention to himself in various ways when he wanted something. (1063, 1119-1120) He was a malingerer who exaggerated, if not invented physical and mental health problems to avoid unpleasant things. (R. 1068, 1122-1124, 1132) They acknowledged incidents in which Appellant had lied to them and did not think he would be entirely truthful with anyone, even his attorney. Appellant had claimed not to remember any number of things that the doctors knew or later learned that he remembered quite well. (R. 1066-1073, 1075, 1122, 1125-1128, 1133-1135) The doctors would hardly have found one more lie of that type surprising.

In addition to this problem with the defense experts' testimony, the scenario they envisioned is inconsistent with the evidence otherwise. The doctors thought that Appellant was likely to have been in a highly disturbed state and largely out of control at the time of the murders because that was consistent with their understanding of his psychological makeup, and because they had observed such disturbances and losses of control on other occasions when Appellant was confronted with adversity, particularly when he was originally scheduled for trial. They thought that Appellant probably reacted much the same way to the break-up of his household and Irma's continuing refusal to comply with his demands. They said that when Appellant was in that disturbed state, his judgment and control

would be impaired as heretofore explained. (R. 1049-1053, 1056-1058, 1073-1974, 1079-1080, 1089, 1112-1113) The pressures on Appellant at the time of the murders were analogized to those confronting him when he was declared incompetent to stand trial and the doctors concluded that his mental and emotional condition would probably have been similar as well. (R. 107-1081, 1116-1117, 1129)

However likely Appellant might have been to react to his family problem the same way, and however unaccountable he might be for his conduct when he is that disturbed, the evidence showed that Appellant was not in fact in that condition when the murders occurred. When Appellant was highly disturbed, his disturbance was visible. He became "highly agitated." (R. 138) he was given to outbursts and exaggerated emotional displays. (R. 1058) He became "unraveled." (R. 1051) When he and Dr. Ainsworth were not released from a locked interview room the moment they signaled, Appellant became visibly enraged and even threw furniture. (R. 1123) His conduct was sometime quite bizarre. (R. 1059-1060, 1083, 1116-1117) On at least one occasion he throw feces. (R. 1130) The disturbance and lost of control brought on by the pressures of trial, which the defense experts thought he was probably experiencing at the time of the murders, was certainly visible. It was so obvious that the judge sent for the mental health professionals testifying in a nearby courtroom to come and observe him. (R. 1038, 1079-1080, 1083-1084, 1097-1100, 1106, 1132) Appellant's behavior was so blatantly abnormal that Doctor Ainsworth thought he was psychotic. (R. 1106, 1130, 1132)

Appellant's behavior at the time of the murders was not at all the type of behavior he exhibited when he was in the disturbed state the doctors thought likely. No one who saw Appellant on the day of the murders described him as upset or agitated or otherwise disturbed in any way, or even angry. A child who knew the victims and saw the actual shooting, described Appellant as looking "nasty" or "mean" and grunting as he run. (R. 470-471) Everyone else who saw him before, after and during the murders thought he look perfectly ordinary.

The cab driver who spent two hours or so driving Appellant around before the murders and picked him up again afterwards said that he observed his passengers and their behavior rather closely for his own safety and would not accept passengers who were acting strangely. He described Appellant as cool, calm, controlled, unemotional and otherwise normal at all times. He was not muttering or grunting or muttering or cursing or doing anything else unusual. Appellant said he was mad at a guy for not bringing his car back to him, but he was "real calm." He was "just like anybody else." (R. 521-522) Appellant was calm and controlled when he picked him up after the murders too. He was sweating, but that was the only difference. He was not shaking. His voice was not trembling. He was just sitting calmly in the back seat. (R. 524-525)

A convenience store clerk also saw Appellant both before and after the murders. The first time Appellant came to the store, he brought a soft drink. About three hours later, he came

running across the parking lot from the other side of the street and asked to used the telephone. The clerk looked over her customers for reasons of safety also, and she saw nothing in Appellant's appearance or behavior to concern her either. He seemed to be in a hurry, but she saw nothing unusual about him. (R. 495-500)

The witnesses who saw Appellant running down the street only seconds before the murders saw nothing unusual about Appellant even then other than the gun in his hand. He did not seem excited or upset in any way. He had no particular expression on his face. (R. 488-489) A new neighbor and her girlfriend got a good look at Appellant because their eyes met his as he ran by and he hesitated there for a moment. (R. 484) When they realized that something had happened to a woman down the street, they did not connect Appellant with the incident for some time. They thought she might have been bitten by a dog they had seen. (R. 442) A neighbor of Irma's parents, who knew Irma but not Appellant, thought he was out jogging until he pulled the gun out of his pants. (R. 437)

The police officers who saw Appellant shortly after the murders saw no sign of excitement or disturbance either. The arresting officer saw nothing unusual about Appellant's behavior. He said he became a little nervous when handcuffed, but that this was a normal reaction. Some people reacted quite explosively. (R. 582) Appellant behaved properly, and the deputy saw no sign of undue emotion or marginal behavior of any kind. (R. 583-586)

The deputy who saw Appellant at the police station later and tested his hands for gunpowder residue saw no sign of disturbance either. He was responsive to her explanations and instructions. She did not notice his hands trembling, his palms being unduly sweaty or his face showing any emotion. She saw nothing unusual about his emotional state at all. He seemed calm and in possession of his faculties.

It is clear from the testimony of these witnesses that Appellant was not in the emotional condition the defense experts thought he was probably in when he committed the murders. There are undoubtedly people who act and seem perfectly normal even when they are extremely disturbed and out of control in other ways, but Appellant, as described by the defense experts at sentencing, certainly was not one of them. When Appellant was disturbed, it was evident from his behavior and his manner, and those who observed him at the time of the murders saw no indication of any disturbance at all. If Appellant was not in the disturbed state the experts envisioned, the impairments they thought would result are irrelevant, and the trial court and jury were entitled to disregard them for that reason alone. Under these circumstances, the trial court's finding that no statutory physiological mitigation was established and that there was no nonstatutory mitigation which would outweigh the aggravation was certainly not a palpable abuse of discretion, and the findings on mitigation, like the findings on aggravation, must stand undisturbed.

PROPORTIONALITY

Appellant asserts that the death penalty is disproportional and generally inappropriate in the instant case. Appellant's position on this point, and throughout his sentencing argument, is that the murders were really spontaneous responses to a heated argument, notwithstanding the trial court's finding to the contrary, or that they must be treated as though they occurred in the midst of a heated argument, whether they actually did or not, because the victims had once been members of Appellant's household and had had arguments involving personal feelings in the past.

Appellant's continued efforts to change the facts of the case on appeal are addressed in connection with previous points. The facts are what the trial judge and the jury found them to be. The murders were in fact planned in advance. Appellant in fact terrorized his victims for some time before killing them, he in fact caused them a great deal of unnecessary mental and emotional suffering, and he in fact went looking for them on the day of the murders for the purpose of killing them. The murders were not in fact precipitated by any argument or disagreement or provocation from the victims, and Appellant was not in fact in any state of disturbance which would serve to mitigate his actions.

Appellant again cites various decisions in which the victims were family members and the death penalty was overturned, much the same body of caselaw he cites elsewhere. These cases are no more controlling on the question of proportionality than on other

points. The murders in these cases largely resulted, or might have resulted from spur-of-the moment decisions made in response to something immediate and might have never have occurred had the murderers really thought about it. That it not the situation here. The evidence in this case is not even susceptible to that interpretation.

The only argument Appellant could hope to make on these facts is that the murders should be treated as though they occurred spontaneously in the heat of argument, even though they did not, because there were ongoing disagreements between the parties, which had resulted in arguments in the past. This was not the rationale for reversing the death penalty in the cases Appellant cites, and Appellee is unaware of authority for such a rule. It is another way of saying that the death penalty is improper as matter of law when a family member is murdered for personal rather than financial reasons, and even Appellant acknowledges that this is not the law. (Initial brief at 23) Nor should it became the law, through this case or any other. Had the legislature intended to make murder a non-capital offense when it is kept within "family" and has no financial overtones, or to make certain aggravating factors inapplicable to such murders, the legislature would have said so.

Appellant also cites several decisions involving murders within the family in which this Court approved death sentences. Appellant notes that the facts of those cases differ from the facts at issue here and suggests that the listing includes all

cases in which this Court affirmed death sentences for murders within the family. Appellant suggests that comparing the instant case with those in which the death sentence has been affirmed will show the impropriety of that sentence here. Actually, the murders of Irma and DeeDee are no more dissimilar to the murders in Appellant's cases affirming death sentences than they are to the murders in his cases vacating death sentences.

There are cases cited in earlier sections of the answer brief which are far more analogous to the instant case than any Appellant has listed, and this Court approved the death penalty in each. The facts in Harvard, 414 So.2d at 1032, are quite similar to those here. The defendant and his ex-wife were separated. He had been harassing her ever since and had essentially threatened to kill her. He waited for her where she worked one day, followed her, and murdered her with a shotgun blast to the neck.

Lemon, 456 So.2d at 885, was also similar. The defendant wanted to marry his girlfriend but she was uncertain. He agreed not to see her for a month to give her time to make up her mind, but he told his landlady that he would kill his girlfriend rather than let her go. She was still uncertain at the end of the month but he insisted on meeting her anyway and she finally agreed. He brought tape and a knife to his room. When she refused to have sex and said she was still undecided, Appellant used the tape to choke her and the knife to stab her. She knew he was going to kill her before he did and begged him not to.

The least similar of the cases is King, 436 So.2d at 50. It is more similar to the cases Appellant cites in which death sentences were vacated. The defendant and his girlfriend were having an argument in their apartment one morning. He hit her in the face with a heavy iron bar, but that blow neither killed her nor rendered her unconscious. He left the room, took his gun from its hiding place in another room, returned to the victim, and shot her in the face and in the back of the head.

In all three of these cases, the aggravating factor of previous convictions for violence was found because the defendant had violently attacked or killed another family member under similar circumstances. That factor was also found in this case. In those cases, the family members were attacked and/or killed at different times, while Appellant killed and attacked three different family members at the same time. The two are equivalent both in law and in common sense. All three murders were found heinous as well, and mental and emotional suffering, particularly the fear of impending death, played a part in all three. In King, there was physical suffering as well, but the victim in Lemon was apparently unconscious from the strangling before she was stabbed. In Harvard, the finding of heinousness was attributable entirely to the harassment, the death threat and the stalking of the victim on the day of the murder. One mitigating circumstance was found in Lemon. None were found in King and Harvard.

The defendants in those cases made much the same arguments that Appellant makes here. In Harvard, for example, the defendant argued that the crime was not heinous because the victim died instantaneously from gunshot wounds, and that there were no "additional acts as to set the crime apart from the norm of capital felonies." 414 So.2d 1036. In King, the defendant argued that the murder was not heinous because it "culminated a serious of incidents occurring the heat of passion," that his emotional condition should have been taken into account, and that the murder was "a crime of passion occurring between two individuals engaged in an on-going relationship." 436 So.2d at 55. In Lemon, the defendant argued that his impaired capacity should have been taken into account and that the death sentence was disproportional in any event because of his relationship with the victim. 456 So.2d at 887-88.

This Court was not persuaded by such arguments when they were made in Lemon, King, Harvard, and the arguments are even less persuasive here. The victims in those cases, like Irma, were not the defendants' wives. One was an ex-wife and two, like Irma, were girlfriends. Two of the victims, like Irma, were no longer engaged in close personal relationships with the defendants. Their relationships, like Irma's, had ended, apparently against the wishes of the defendants. Perhaps this is why Appellant did not find these cases when he searched for death sentence affirmances in "familial" contexts, but, if those victims were not family members, Irma certainly was not.

There really was an on-going "familial" relationship in King. The victim was living with the defendant and seeking a divorce from her husband. Furthermore, the murder was the type that Appellant's cases suggest is most common in family settings, a killing that occurred during an argument, with no indication that the defendant had even intended to kill the victim before then. This Court determined that the existence of two aggravating factors and no mitigating circumstances justified the death penalty nevertheless.

In responding to the defendant's proportionality argument in Lemon, this Court reviewed the decisions in King and Harvard as well as those the defendant had cited in which death sentences were reversed. In discussing the defendant's cases, some of which Appellant urges here, the Court demonstrated that the reversals occurred where there was significant mitigation and little, if any valid aggravation. In King and Harvard, where there was substantial aggravation and no mitigation, the death sentences were properly affirmed, and the Court went on to affirm that sentence in Lemon as well, although a mitigating circumstances had been found in that case. The proportionality of the death penalty in Lemon and in the cases discussed there had little, if anything to do with the relationship between the defendant and the victim. It was proper there and not in other cases because there were two aggravating factors and only one mitigating circumstance. There should certainly be no question here, where there are three aggravating factors and no

significant mitigation. The sentence of the trial court should therefore be affirmed in all respects.

CONCLUSION

For the reasons herein stated, the convictions and sentences challenged should be affirmed in all respects.

Respectfully submitted,

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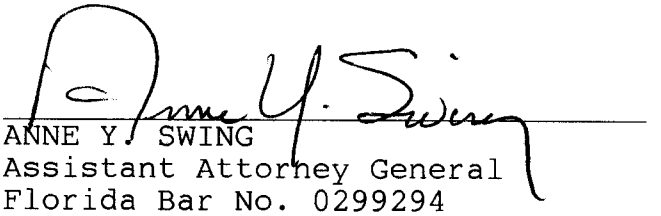
ATTORNEY GENERAL



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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 Jack T. Edmund, Esquire, 423 Pool Branch Road, Fort Mead, Florida 33841, on this 9th day of May, 1990.

OF COUNSEL FOR APPELLEE