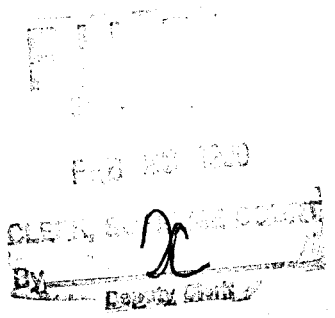
SUPREME COURT OF FLORIDA



CARLOS SANTOS, :

Appellant, :

vs. : Appeal Case No. ~~89-164~~ 74467

STATE OF FLORIDA, :

Appellee. :

INITIAL BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

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PRELIMINARY STATEMENT

REFERENCES TO THE RECORD ON APPEAL WILL BE MADE BY THE DESIGNATION (T-XX) WITH THE XX REPRESENTING THE PAGE OF THE RECORD CITED AS NUMBERED BY THE CLERK.

STATEMENT OF THE CASE

On September 10, 1987, in the Circuit Court of the Tenth Judicial Circuit, in and for Polk County, Florida, Appellant, Carlos Santos was indicted for:

1. The unlawfull killing of Irma Torres, in violation of Florida Statute 782.04 (1)(a); in case number CF87-3723A1-XX, Count I of the indictment, dated September 10, 1987, and

2. The unlawfull killing of Deidre Torres, in violation of Florida Statute 782.04 (1)(a); in case number CF87-3723A1-XX, Count II of the indictment, dated September 10, 1987.

3. Appellant was tried and convicted on both counts on July 18, 1989.

4. That a Penalty Phase of the trial was conducted.

5. That the Jury recommended Death by a ten to two vote on each Count of the Indictment.

6. That the Court sentenced the Defendant to Death on each Count and of the Indictment.

STATEMENT OF FACTS

At or about 7:00 p.m. on August 21, 1987, Carlos Santos shot and killed Irma Torres and her 22 mongh old daughter Deidre Torres. The latter being the daughter of Carlos.

The homicides were accomplished by the firing of 2 pistol rounds into the face and head area of Irma and one round into the top of the head of the child, Deidre. All rounds were fired at extremely close range.

Carlos Santos, Appellant, and Irma Torres lived together, without benefits of matrimony for 7 1/2 years prior to the homicide. Their relationship ran the gamuts of serene to stormy during its latter stages when Appellant moved from their home in Winter Haven, Florida to the home of relatives in New Jersey, T-838-839. No violence of any substance occured during the 7 1/2 year relationship, T-823, and Appellant blamed the meddling of Irma's family for the ultimate separation, T-838.

At the time of the homicide Irma, Deidre, and Irma's two teenage children by a prior marriage, Jose and Cynthia, lived in an apartment complex in Winter Haven, Florida, known as the Landings, T-848. Carlos, who had returned to Winter Haven from New Jersey at Irma's urging, T-839 and T-847 was living in a Winter Haven motel. He visited for the purpose of seeing Deidre, T-852.

Two days prior to the homicide Appellant visited Irma's apartment for the purpose of seeing Deidre T-852. Cynthia testified to having seen a pistol upon his person, T-687, but when Appellant was searched by police immediately after leaving the apartment no pistol was found, T-729. Appellant testified to

having purchased the pistol during the time between that visit and the time of the homicide, T-865.

On the day of the homicide, Irma and the children were at the home of her parents near Avenue T and 31st Street N.W., Winter Haven, approximately 3 miles N.W. of the Landings, T-689. Carlos was driven by taxi through the area of Avenue T and 31st Street N.W. then to the Landings where he alighted, went to the apartment, returned to the cab and was dropped off in the vicinity of 16th Street N.W., approximately 1 1/2 miles from the point of the homicide, to-wit: Avenue T and 31st Street N.W., T-504-527. It is assumed he walked from the drop-off point to the site of the homicide. He was identified by several witnesses moments before the homicide, proceeding at a fast pace toward Irma, Deidre and Jose, T-434-438, T-460-470.

A short time prior to the homicide Irma, carrying Deidre, and Jose left the residence of Irma's parents and proceeded W. toward 31st Street, approximately 1/2 block away, T-433. At the intersection she apparently saw Appellant coming N along 31st Street about 1/2 block away, screamed and began running N along 31st Street. Appellant pursued and caught her, she still with Deidre in her arms, grabbed her, spun her around and fired three rounds, T-399. Irma and Deidre died as a result.

A person matching Appellant's description was observed proceeding N along 31st Street, N of the point of the homicide, immediately after the shooting, T-480 and 484. A short time later Appellant entered the <u>same</u> cab that had earlier transported him to the Landings and instructed the driver to take him to the Landings

again, T-513. Their southernly route took them near, but not immediately by, the scene of the homicide, T-513.

The cab was stopped by a Deputy Sheriff, on the look-out for just such a vehicle carrying just such a described individual, at a point approximately 1/2 way between the point of the shootings and the Landings. The Deputy observed a pistol on the rear floorboard of the cab and took it, along with 5 live rounds, into custody. He similarly placed Appellant into custody, T-561-583. Ballistics comparisons between slugs removed from the victims and rounds fired from the pistol confirmed that it had fired the fatal rounds, T-799. Cynthia Torres testified that Appellant had made threats to kill Irma and Deidre, T-684, but this was catagorically denied by Appellant, T-862. There was no testimony to indicate any prior effort to carry out these alleged threats.

The Penalty Phase consisted of the testimony of William Kremper, Ph.D., T-1032, and Gary Ainsworth, M.D., T-1086.

Dr. Kremper testified to his many consultations, including having found the Appellant incapable of assisting Counsel at an earlier scheduled trial in September 1988,. T-1050, as did Dr. Ainsworth, T-1099.

Dr. Kremper also found Appellant to have been under extreme emotional distress, T-1052, involved in a denial phenonema, T-1053-1055, extreme duress, T-1056, impaired capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law, T-1057, all at the time of the homicide.

Dr. Ainsworth found the Appellant to be under a great deal of emotional stress, T-1111, acting under duress, T-1111, impaired

ability to appreciate the criminality of his conduct, T-1112 and a greater problems with conforming his conduct to the requirements of the law, T-1112.

The Trial Court's Sentencing Order is as follows, to-wit:

Defendant, Carlos Santos, has been found guilty by jury of murder in the First Degree of Irma Torres, Murder in the First Degree of Deidre Torres, and Aggravated Assault with a Firearm. Said jury verdicts were returned on June 9, 1989.

The penalty phase was conducted on June 12, 1989. Both the State and Defense presented evidence as to aggravating and mitigating circumstances. The jury returned a recommendation to the Court of Death for the first degree murder of Irma Torres and Death for the first degree murder of Deidre Torres.

A Jury recommendation under our death penalty statute should be given great weight. I have given great and due weight to our jury's recommendation.

The Court finds the aggravating circumstances are three (3) in number. F.S. 921.141 (5).

1. The defendant, Carlos Santos, has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person. This circumstance is established by clear and convincing evidence beyond a reasonable doubt in that the defendant was convicted of the first degree murder of Irma Torres, the first degree murder of Deidre Torres, and aggravated assault with a firearm on Jose Torres, all of which occurred within seconds of one another. First degree murder is a capital offense and aggravated assault with a firearm is a felony involving the use or threat of violence to another person.

2. The crime for which the defendant, Carlos Santos, is to be sentenced was especially heinous, wicked, evil, atrocious, or cruel. This circumstance is established by clear and convincing evidence beyond a reasonable doubt in that Carlos Santos hours and days before tracking down his victims, Irma Torres, Deidre Torres, and Jose Torres, made verbal and physical threats to their safety and well-being. The defendant, Carlos Santos, inflicted a high degree of pain and suffering to the victims by imposing the fear of violence or death to their persons. The defendant showed an utter indifference to the suffering of the victims. The defendant tracked down and hunted the victims showing his extremely wicked and evil intent. The defendant ran the victims down in an outrageously wicked manner and shot them at point blank range. The defendant, Carlos Santos, showed no mercy and no pity whatsoever for the helpless, innocent victims, Irma Torres, Deidre Torres, and Jose Torres.

3. The crimes for which the defendant, Carlos Santos, is to be sentenced were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. This circumstance is established by clear and convincing evidence beyond a reasonable doubt that the defendant purchased a firearm in preparation for the executions of the helpless victims, the

defendant displayed the firearm to the victims and verbally told the victim, Irma Torres, that he would kill her and the small child victim, Deidre Torres. The defendant set out on a planned, prepared, course of action to hunt down the victims and execute them. The defendant carried out the plan by finding the victims walking alongside the roadway. The defendant chased the victims down and shot them in the head at point blank range. No justification existed for the killing of the helpless victim, Irma Torres. No justification existed for the killing of the helpless, innocent, two year old child victim, Deidre Torres.

These three aggravating circumstances are all supported by the evidence and facts of the case.

In considering the mitigating circumstances, the Court reviews the statutory circumstances.

1. No significant history of prior criminal activity. The presentence investigation reveals that the defendant does not have a lengthy and significant history of criminal activity, however, the defendant has been previously convicted of another capital offense and a felony involving the use or threat of violence to another.

2. No evidence to determine or establish that defendant was under the influence of extreme mental or emotional disturbance.

3. Not applicable. Since no evidence that the victims were participants in the defendant's conduct.

4. Not applicable. Since no evidence that defendant was an accomplice or had an accomplice.

5. Not applicable. Defendant did not act under the extreme duress or under the substantial dominance of another person.

6. No evidence to establish that the capacity of the defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law was substantially impaired.

7. Age of defendant at time of crime is not applicable. Defendant is thirty-eight years of age; he was thirty-six years of age at time of the capital felony crimes.

The Court finds there are no statutory mitigating circumstances.

In considering the nonstatutory mitigating circumstances and all other circumstances of mitigation, the Court has reviewed and considered them all, however, these do not outweigh the aggravating circumstances in this case. Therefore, this Court having considered all of these circumstances imposes the following sentences on defendant, Carlos Santos.

CASE NO. CF87-3723A1-XX:

Count 1: Adjudicated guilty of First Degree Murder of Irma Torres - sentenced to Death by electrocution.

Count 2: Adjudicated guilty of First Degree Murder of Deidre Torres - sentenced to Death by electrocution.

Count 3: Adjudicated guilty of Aggravated Assault with a firearm - sentenced to 15 years in Florida State Prison consecutive to Count 2 with a 3 year minimum mandatory.

Defendant is ordered to pay fine and court costs in the amount of $1,500.00.

The Court finds good and sufficient reasons for exceeding the guidelines in Count 3 as follows:

1. The psychological trauma to the victim, Josse Torres, in observing the execution murder of his mother and baby sister, then having the firearm turned on him and misfiring at him at point blank range.

2. The premeditation and calculation of the defendant in carrying out the executions of the victim's mother, Irma Torres, and his baby sister, Deidre Torres, and then the planned execution of the victim, Jose Torres, which failed due to the misfire of the firearm.

The defendant, Carlos Santos, has thirty (30) days to file an appeal.

DONE AND ORDERED in Polk County, Florida this 18th day of July, 1989.

SUMMARY OF ARGUMENT

i. The Trial Court, in denying Appellant's Motions for Judgements of Acquittal, refused to make a finding that the evidence excluded any reasonable hypothesis of innocence.

ii. In Its Order imposing the death penalty the Trial Court refused to apply the law applicable to the aggravating factors of cold, calculated and premeditated; AND, especially heinous, atrocious and cruel; AND prior conviction of another capital offense or of a felony involving the use or threat of violence to some person.

The Trial Court ignored unrebutted testimony establishing the mitigating factors that at the time of the homicide Appellant acted under Extreme Duress; and was incapable of appreciating the criminality of his conduct or conforming his conduct to the requirements of the Law.

The Trial Court refused to apply Proportionality in Its Sentencing Order.

ISSUES

ISSUE #I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGEMENTS OF ACQUITTAL, EACH AND EVERY.

ISSUE #II

THE COURT ERRED IN IMPOSING DEATH AS TO COUNT I AND II OF THE INDICTMENT.

ARGUMENT

ISSUE #I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGEMENTS OF ACQUITTAL, EACH AND EVERY.

This Honorable Court in the landmark decision of McArthur v. State, 351 So.2d 972, (Sup. Ct. 1977) decreed:

> ...where the only proof of guilt is circumstantial, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence.

This has been consistently followed in Drake v. State, 476 So.2d. 210 (Sec. Dist. 1985); Valdez v. State, 504 So.2d. 9 (Sec. Dist. 1987); and Shaw v. State 510 So.2d. 349 (Sec. Dist. 1987).

Upon Appellant's Motion for Judgement of Acquittal, T-810, and it's renewal, T-936, the Trial Court, made no finding in accordance with the dictates of this Court. T-816 and T-936. The Court, instead, simply denied the Motions with a simple, one sentence denial, T-816 and T-936.

If is respectfully urged that absent a specific finding by the Trial Court that the circumstantial evidence excludes any reasonable hypothesis of innocence the dictates of this Court have not been followed and a reversal is required. In the instant case the Trial Court either failed to recognize the law with which it was faced or refused to apply that law, even to so simple a point as enunciating a finding.

ISSUE #II

THE COURT ERRED IN IMPOSING DEATH AS TO COUNTS I AND II OF THE INDICTMENT

The trial jury having recommended a sentence of death for Appellant, Carlos Santos, and the Trial Court having imposed the Death Penalty, this Honorable Court must now make a very difficult decision as to whether death is required for Appellant given the Court's own assessment, weighing aggravating and mitigating circumstances. Appellant appreciates the consternation which the Court may be experiencing where the jury has recommended death and the Trial Court has followed that recommendation. Given the factors of this murder case Appellant submits that a sentence of life imprisonment is the only appropriate sentence in this case, despite the recommended sentence. The Trial Court's legal responsibility under its defined role at sentencing stage is to recognize the hazards incumbent in jury penalty recommendations and to make its own independent balancing of the case circumstances and to make its own decision on the appropriate penalty. The Trial Court failed to act responsibly.

The landmark case in which the Florida Supreme Court initially addressed this state's post-Furman death penalty statute, Section 921.141, Florida Statutes, was State v. Dixon, 283 So.2d 1 (Fla. 1973). Dixon upheld the constitutionality of the statute. The language of the opinion in Dixon is authoritative and not dicta

because it is the Court's definition of standards, criteria and procedure for applying the statute in a constitutional manner that is used by that Court and by the United States Court to grant Florida's statutory death penalty scheme legitimacy.

In Dixon at 7-8, this Court outlined the Florida scheme as a five step process, each step an integral stage necessary to remove arbitrariness from the outcome as to who receives death and who does not. The first step is the evidentiary penalty phase hearing. Second is the jury's decision as to penalty recommendation. Third is the trial judge's decision as to penalty. Fourth is the requirement that the trial judge justify and sentence of death in writing. Fifth is the Florida Supreme Court's review.

The description in Dixon of steps three and four are the guideposts for the trial judge's role. Significant is that the perceived purpose of the Florida rule placing sentencing responsibility in the hands of the trial judge rather than the trial jury is to protect against those situations where a jury might inappropriately recommend death. This Court explained:

> The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed - guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience. Dixon at 8.

The pitfalls of the jury penalty vote expressed in Dixon are evidenced in Appellant's case. To a layman, no premeditated murder may be less than heinous. To a layman, death by pistol shot of a

mother and child may seem especially atrocious, even if the medical evidence indicates unconsciousness would occur within seconds of the First shot. To a layman, photographs of a deceased woman with wounds to head and face, and a deceased baby with wounds to the head might easily incite these emotions.

The function of the Florida scheme is to guarantee that "the inflamed emotions of jurors can no longer sentence a man to die." The concept is to infuse the penalty decision with the light of judicial experience. This Honorable Court has such experience. It is the responsibility now for this Court "with experience in the facts of criminality...to balance the facts of this case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants."

Appellant pleads with this Court to bring its judicial experience to bear. The unfortunate circumstance that the State of Florida has processed numerous murder cases is a fortunate circumstance only in that such history does provide a measure for comparison. Undersigned counsel's own experience with a number of those cases, and witnessing the progress of others, causes a confidence that should this Court duly compare Appellant's case with those of so many murderers with more aggravated and less mitigated circumstances - the light of judicial experience - this Court will recognize that on such review this case does not bear up as one in which the death penalty is imposed. Appellant submits that at least locally the death penalty has never been imposed in any case as little aggravated and as mitigated as this one.

The fourth step outlined in Dixon also aids in defining the

trial judge's role as that of guarding against the unwarranted imposition of the death sentence.

> The fourth step required by Fla. Stat. 921.141, F.S.A., is that the trial judge justifies his sentence in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute. Dixon at 8.

The function of the trial judge is once again recited as being designed "for the protection of the convicted defendant." Appellant requests that this Court assume this responsibility, since the Trial Court did not. Acceding to the recommendation of this jury, a surprise to those involved in the trial, would be to allow the death penalty to be exacted in a freakish manner. "Discrimination or capriciousness cannot stand where reason is required..."

The United States Supreme Court in Proffitt v. Florida, 428 U. S. 242, 252-3, 49 L. Ed.Ed 913, 923 (1976), lauded this aspect of Florida's capital sentencing scheme, saying:

> And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.
>
> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner.

Florida's capital sentencing scheme does include this protection stage, that of allowing the trial court rather than the jury to impose sentence, which not all states with death penalty laws have. However, states where juries actually impose sentences

require a unanimous vote or death cannot be imposed. While the vote in this case was a strong majority, it was not unanimous.

The Court is well aware that a jury's recommendation is to be afforded great weight. That standard developed from Tedder v. State, 322 So.2d 908.910 (Fla. 1975), where restrictions were placed on a trial court imposing death, despite a jury recommendation for life. While a death recommendation should also be given serious consideration, the consideration is not of an equal nature with that to be given the life recommendation. This Court addressed this distinction in Thompson v. State, 328 So.2d 1 (Fla. 1976):

> It stands to reason that the trial court must express more concise and particular reasons, based on evidence which cannot be reasonably interpreted to favor mitigation, to overrule a jury's advisory opinion of life imprisonment and enter a sentence of death than to overrule an advisory opinion recommending death and enter a sentence of life imprisonment.

This dichotomy is based, of course, in the principle that the primary function of the Court's authority to contravene the jury's recommendation is to protect defendants from lay overreaction in cases not appropriate for the death sentence, as decreed in Dixon, at 8.

Although the jury's recommendation in this case was of a high majority, ten to two, the numbers do not reduce the likelihood that the vote was based on emotions or other inappropriate considerations or layperson's inexperience, the pitfalls described in Dixon. Rather, such a high vote in such a little legally aggravated case may even suggest the vote likely was the product of emotional or other inappropriate consideration.

Inappropriate considerations that may have influenced the jury's vote include:

1. Inflamed emotions. Photographs of the deceased victims were sent to deliberations. Moreover, inflamed emotions by laypersons inexperienced in such matters can occur in any murder trial. Dixon at 8.

2. Lack of remorse. The law allows that lack of the expression by a murder defendant of remorse for his misdeed may not be considered in aggravation. Pope v. State, 441 So.2d 1073 (Fla. 1983). The danger exists, however, that a jury, ignorant in such principles, may hold an accused's failure to confess and show remorse as a strong and emotional strike against him.

3. Mitigation as mere sympathy. The prosecutor's argument at penalty phase intimated to the jury that the mitigation that the defense would argue was nothing more than hogwash. T1148. Such argument denigrating mitigation is improper and is believed to cause erroneous verdicts. California v. Brown, 479 U.S. 538, 546, 93 L. Ed. 2d 934, 942; Floyd v. State, 497 So. 2d 1211 (Fla. 1986).

4. Premeditation. Despite the lack of instruction, jurors have been known to consider the premeditation to kill as aggravation. The danger exists that jurors considered premeditation as a reason to vote for death.

Where the course of a trial holds open the possibility that a penalty recommendation may have been influenced by improper considerations, the recommendation is not necessarily to be disregarded entirely, although it may be. The weight to be given the recommendation, however, is to be assessed in light of such

possibility. This Court has held in several cases that a jury's recommendation may be seen as "tainted" and, therefore, not worthy of full credit. See, e.g., Trawick v. State, 473 So. 2d 1235 (Fla. 1985).

PRIOR CONVICTION OF
A CAPITAL OFFENSE

As the first Aggravating factor, the Trial Court found Appellant had been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person, T-1204. Trial Court's findings and reasoning boggles the imagination.

While Appellant was convicted of two capital offenses and an Aggravated Assault with a firearm, T-1019, the offenses occurred simultaneously and the verdicts were returned simultaneously. Each was the result of a single episode of violence by a man acting under Extreme Emotional Distress, T-1052, and T-1111; Intense Emotion, T1053-1055; Incapable of Appreciating the Criminality of his Conduct of Conforming his Conduct to the Requirements of the Law, T-1056-57 and T-1112-1113.

ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

As a second aggravating factor, the Trial Court found that the crime for which Appellant was to be sentenced was especially heinous, wicked, evil, atrocious or cruel, T-1205, and went into a long disertation of "tracking down his victims", T-1205, which is totally inmaterial and totally unsupported by the evidence. To the contrary, the evidence indicates the victim was concerned for Appellant's welfare and fearful that he might commit suicide, T-718-721.

While death by pistol shot can be especially heinous, atrocious or cruel, there is no evidence that it was in this case. The evidence of what happened at the time of death is entirely circumstantial. Any theories of prolonged suffering or torturous acts are unsupported by evidence.

The testimony of the medical examiner disputes rather than supports any theory of suffering as either wound would have been fatal, causing fracture of the skull, hemorage to the brain and brain injury, T-551-554; that Irma would have been incapacited immediately, death within seconds, T-554.

He concluded that Deidre Torres died a very rapid death from a gunshot wound to the head causing skull fracture, brain injury, injury of the internal organs of the body with subsequent bleeding, T-559.

1. The law provides that only acts occurring while the victim is still conscious are relevant to this circumstance. How long it may have taken for the victim's heart to stop has no relevance; only the point of lost consciousness does. Immediate unconsciousness is the only reasonable presumption. How quick is quickly?

2. Killing by causing injury to the victim is not especially heinous, atrocious or cruel even if the victim sees it coming, as long as unconsciousness is rendered quickly. See e.g., Kampff v. State, 371 So.2d 1007 (Fla. 1979); Halliwell v. State, 323 So.2d 557 (Fla. 1975).

3. There was no evidence that the murders were accomplished with the commission of "additional acts" of torture to the victim,

as required by Dixon at 9. The second shot certainly does not satisfy this definition. There are no acts additional to the three very quick shots to set apart these homicides as especially heinous, atrocious or cruel.

Appellant contends that this circumstance is not proved beyond every reasonable doubt. The evidence as to this factor is entirely circumstantial, and the evidence is not inconsistent with a reasonable hypothesis that this murder was carried out in a volital, spontaneous reaction of anger, frustration and jealousy.

Should this Court disagree and find this circumstance proven, Appellant contends that the weight to be given it must be light. That is, in comparison to other murders that would fit the definition of especially heinous, atrocious or cruel this killing- if it fits the criteria at all - would be minor league material, relative to the others. Defendant requests that this Court apply its judicial experience, giving knowledge of other murders to compare this killing with other, truly heinous and wicked murders.

Appellant contends that what aggravation the Court may find in this case is not sufficient to justify the death penalty, even without considering the mitigation. Compare: Wilson v. State, 493 So.2d 1019 (Fla. 1986).

COLD, CALCULATED AND PREMEDITATED

As a third Aggravating factor, the Trial Court found the capital offenses to have been committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification, T-1205. Again the Trial Court either misheard or ignored the testimony, as it is obvious that Appellant came upon

the victims by happenstance at the time of the homicide, and Appellant urges a total lack of proof, surely a total lack of proof beyond a reasonable doubt.

Rogers v. State, 511 So.2d 526 (1987) sets out the guidelines or perameters of this aggravating factor, which is reiterated in no uncertain terms by Garron v. State, 528 So.2d 353, (1988).

The latter capsules the obvious, to-wit:

> Heightened premeditation aggravating factor was intended to apply to execution or contract type killings - This case involves a passionate, intra-family quarrel, NOT AN ORGANIZED CRIME OR UNDERWORLD KILLING. (Emphasis added)

It has long been the position of this Honorable Court that this factor sustains existance only when the circumstances of the homicide are such as to "heighten" the already existing decision to kill by a demonstration of more than a plan to take a life in a certain fashion.

Premeditation presupposes calculation which, in turn, presupposes coldly. Each could exist in the mind of the premeditator for a thousand years prior to the execution of the plan yet never mature to conformity with this aggravating factor, absent an act of heightening. There was no such act accompanying this homicide.

The following cases demonstrate the Court's rulings, to-wit:

> Herzog v. State, 439 So.2d 1373 (1983). Florida Statutes (1981), "ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive." McCray v. State, 416 So.2d 804, 807 (Fla.1982) (citing Jent v. State, 408 So.2d 1024 (Fla.1981), cert. denied, 457 U.S. 1111, 102 S. Ct. 2916, 73 L.Ed.2d 1322 (1982): Combs v. State, 403 So.2d 418 (Fla.1981) cert. denied, 456 U.S.984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982). The trial court found the facts supporting this factor as follows: "[T]he killing was the consummation of prior

threats and arguments based on defendant's belief that the victim had previously taken some of his money or drugs." This finding speaks to the issue of premeditation, however, it is not sufficient to establish the requirement that the murder be "cold, calculated...and without any pretense of moral or legal justification." Combs v. State, 403 So.2d at 421; see also Mann v. State, 420 So.2d 578, 580-81 (Fla.1982)(10-year-old girl, abducted, skull fractured, cut and stabbed several times not sufficient to meet section (5)(i) requirement).

Ross v. State, 474 So.2d 1170 (1985), Although the record contains sufficient evidence to sustain the jury's verdict of guilty of first-degree premeditated murder, we conclude the death penalty is not proportionately warranted under the circumstances of this case. See Blair v. State, 406 So.2d 1103 (Fla.1981).

Wilson v. State, 493 So.2d 1019 (1986), 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. See Ross, 474 So.2d 1170; Blair v. State, 406 So.2d 1103 (Fla. 1981).

Floyd v. State, 497 So.2d 1211 (1986). We agree, however, with Floyd's contention that the aggravating factor of cold, calculated, and premeditated under section 921.141(5)(i) was not proved beyond a reasonable doubt. The aggravating circumstance that the murder committed was cold, calculated, and premeditated requires a "heightened" form of premeditation. Phillips v. State, 476 So.2d 194, 197 (Fla. 1985); Hardwick v. State, 461 So.2d 79, 81 (Fla.1984), cert. denied, 471 U.S. 1120, 105 S.Ct. 2369, 86 L.Ed.2d 267 (1985). This aggravating factor is not to be used in every premeditated murder prosecution, but is reserved primarily for those murders which are characterized as execution or contract murders or witness-elimination murders. Bates v. State, 465 So.2d 490 493 (Fla. 1985).
Subsequent cases: Rhodes v. State, 547 So.2d 1201 (1989), Freeman v. State, 547 So.2d 125 (1989), and Cochran v. State, 547 So.2d 928 (1989)

All follow this tenet.

Contrarily, in virtually every instance involving a familial type homicide, and the instant case is in that category and so argued by the State, the plan to kill must have been coupled with particularly heinous acts, committed for some pecuniary gain, or multiple killings. Such were the rulings in:

Zeigler v. State, 402 So.2d 385 (1981)
Peede v. State, 474 So.2d 808 (1905)
Byrd v. State, 481 So.2d 468 (1986)
Way v. State, 496 So.2d 126 (1986)
Buenoano v. State, 527 So.2d 194 (1988)

up through today.

Again, the instant case falls into none of these cited catagories. The State failed to prove the aggravating factor of Cold, Calculated and Premeditated.

Appellant contends that this circumstance is not proved beyond every reasonable doubt. The evidence as to this factor is entirely circumstantial, and the evidence is not inconsistent with a reasonable hypothesis that this murder was carried out in volital, spontaneous reaction of anger, frustration and jealousy.

Should the Court disagree and find this circumstance proven, Appellant contends that the weight to be given it must be light. That is, in comparison to other murders that would fit the definition of cold, calculated and premeditated, this killing - if it fits the criteria at all - would be minor league material, relative to the others. Appellant requests that this Court apply its judicial experience, giving knowledge of other murders to compare this killing with other, truly heinous and wicked murders.

Appellant contends that what aggravation the Court may find in

this case is not sufficient to justify the death penalty, even without considering the mitigation. Compare: Wilson v. State, 493 So.2d 1019 (Fla.1986).

PROPORTIONALITY

Appellant would remind this Honorable Court of its decisions in domestic homicide death penalty cases. All but one of those, Herzog v. State, were cases where the jury had recommended death. In each case, the Court reversed for a life sentence. The following is a summary of the factors in these cases, all where death was recommended by a jury but was held to be an unlawful penalty:

Wilson v. State, 493 So.2d 1019 (Fla.1986)

The appellant beat his mother and then his father with a hammer. He shot his father in the head with a pistol, killing him. In the fracas, he stabbed a five-year-old with scissors killing him. He also shot his mother several times, but she survived. Two aggravating factors, including prior conviction for violent felony; no mitigators. Reversed for a life sentence.

Blair v. State, 406 So.2d 1103 (Fla. 1981)

The appellant allegedly planned to kill his wife and prepared a gravesite in the backyard. He arranged for the children to be away from the home and then shot and killed his wife. Reversed for a life sentence.

Ross v. State, 474 So.2d 1170 (Fla.1985)

The appellant killed his wife with multiple blows of blunt trauma, suspected to be by fist, foot and blunt instrument. Reversed for a life sentence.

Garron v. State, 528 So.2d 353 (Fla.1988)

The appellant was angry with his wife and may have feared she would report him for child sexual abuse. He shot her to death. When a teenage daughter used the telephone to try to call for help, he shot and killed her, too.

Kampff v. State, 371 So.2d 1007 (Fla.1979)

The appellant killed his lover's husband by beating him with a breaker bar and then continued to beat, bruise and cut the man's body with the bar. He then dismembered the body with a saw, machete and knife in order to dispose of it. Reversed for a life sentence.

It is unfair to say that death should not be a possible penalty simply because the defendant and victim were married or had a romantic relationship. It is not the status of the relationship that mitigates. Emotions and passions are heightened in romantic relationships. It is the recognition of this fact that fuels the recognition of mitigation and creates the pattern that the case law demonstrates. Just this past May, the Florida Supreme Court advanced its message in Garron at 361:

> 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.

After an exhaustive search of the 500 plus Supreme Court capital case decisions, undersigned counsel believes the below five (5) to be the only defendants who have had death sentences affirmed for killing either their spouse, common law spouse or former spouse. As can be easily seen, all are far more aggravated than Defendant's case.

Byrd v. State, 481 So2d 468 (Fla.1986)

Because he had a new girlfriend and planned to profit from a $100,000.00 life insurance policy, Byrd hired two men for $5,000.00 to help him kill his wife. The three men exacted four lacerations to the wife's head and four gunshot wounds before proceeding to strangle her to death.

Peede v. State, 474 So.2d 808 (Fla.1985)

Peede planned to kill his former wife and her boyfriend. Peede lured his current wife into helping him in the plan but then kidnapped her and stabbed her repeatedly to death. Peede was arrested while lying in wait to kill his former wife and her boyfriend, as planned. Peede had previous convictions for violent felonies and the killing was during the course of a felony. Also, Peede asked for the death penalty in a letter.

Way v. State, 496 So.2d 126 (Fla.1986)

Two deaths: wife and daughter. Way apparently beat both with a blunt instrument and then poured gasoline on them and burned them, setting them and the house on fire. Great risk of death or many others, during course of the felony of arson, especially heinous, cold and calculated, etc., were aggravators.

Ziegler v. State, 402 So.2d 385 (Fla.1981)

Four deaths. Ziegler plotted and shot to death his wife as well as his father-in-law and mother-in-law. An innocent bystander was also shot and killed. The motive in killing the wife was to collect a $500,000.00 insurance policy. The motive in killing the others was to make the crime look like a robbery and to avoid detection and arrest.

Buenoano v. State, 527 So.2d 194 (Fla.1988)

Buenoano poisoned her husband for insurance benefits of $95,000.00. Evidence of other crimes included that she poisoned and killed her next boyfriend and attempted to kill her next fiance after that. She also had a prior conviction for the first degree murder of her son years earlier.

These cases, the only such affirmances of which undersigned counsel is aware, identify the type of spouse killings that are different and can justify death: killing for insurance benefits, multiple killings or attempted multiple killings. This is not to say these cases identify the only type of aggravation that can heighten domestic murder to death eligibility. However, they do demonstrate a distinction with the reversed cases where spouses were killed out of anger, anger arising from domestic dispute scenarios, as in the instant case.

Proportionality and appropriateness are in no way limited to domestic killings. These principles are applied throughout the decisions of the Court. Each case of particular circumstances is weighed against all other cases of similar circumstances and a thoughtful, thought-out, courageous, judicial decision is made, unstained by fear, emotion, prejudice or capitulation to social or public pressures.

The Court, in a vacuum of all but precedent, intelligence, knowledge, experience, temperament, courage and the highest altar of responsibility, enters Its Order of Life or Death. This Order, free of the pressures, prejudices, fears, personal experience and idiosyncrasies of the lay jury is what breathes the Life of

Constitutionality into the Florida Death Penalty Statute.

MITIGATION

The Trial Court found no statutory Mitigating factors (circumstances), T-1206. It would seem that one of two events occurred.

Either Drs. Kremper and Ainsworth did not testify or the Trial Judge was not present during their testimony. Neither event occurred and the Record so reflects. The Court simply chose to ignore unrebutted testimony of two doctors whom the Court accepted as experts, T-1036 and 1096.

Dr. Kremper found Appellant to have been, at the time of the homicide, under Extreme Emotional Distress, T-1052; Extreme Duress, T-1056; and Incapable of Appreciating the Criminality of his Conduct or Conforming his Conduct to the Requirements of the Law, T-1056-57, reiterating the latter, T-1058.

Dr. Ainsworth, while not so verbose as Dr. Kremper, confirmed Appellant's Emotional Stress, T-1111; Duress, T-1111; and Inability to Conform his Conduct to the Requirements of the Law, T-1112-13.

Appellant therefore contends that the following have been proven to a "reasonably convinced" standard. They are:

1. The homicide was committed while Appellant was under Extreme Emotional Distress, T-1052 and T1111.

2. That Appellant was unable to Conform his Conduct to the Requirements of the Law, T-1056-58 and T-1112-13.

3. The killing was done for Emotional or Passionate reasons rather than from mere Cold Calculation.

4. It is unlikely that Appellant will be a danger to others

while serving a sentence of life in prison.

5. Appellant has displayed good conduct while in custody.

6. The killing occurred while Appellant was under Extreme Mental Duress, T-1056 and T-1111.

7. That Appellant was Unable to Appreciate the Criminality of his Conduct, T-1056-58 and T-1112-13.

The Court can compare findings of mitigation in capital appeals reported from this Court. For example, the Court found in Kampff v. State, 371 So.2d 1007 (Fla.1979), that the following established the statutory mitigating circumstance (b) that the "capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" in a case where the appellant had shot his former wife three times:

> The appellant and the victim were married when he was twenty-one and she was seventeen years of age. They reared four children. They were divorced after seventeen years of marriage. For three years after the divorce, the appellant begged his former wife to remarry him. The children testified to his continual harassment of her and his obsessive desire to regain his former status as husband. The obsession was intensified when he began to suspect that she was becoming involved romantically with another man.
>
> There was testimony that the appellant had an extreme and chronic problem with alcoholism. During the last few days before the murder and on the day of the murder, the appellant visited at various times with his children and their friends. He continually brought up the subject of his former wife's involvement with another man, and the children vehemently defended their mother. They also demanded that he not bring up the matter, but he was incapable of complying.

While granting that every one of these domestic killings has its own particular facts, Kampff and other cases are not so dissimilar to Appellant's case to allow the mitigation to be ignored. Appellant contends that this same statutory mitigator exists in his case.

The fact that a defendant at trial denies committing the murder alledged does not absolve the trial court from looking to the other evidence to identify mitigating circumstances. Ross v. State, 474 So.2d 1170 (Fla.1985). This Court ruled in Ross at 1174 that the fact that "the killing was the result of an angry domestic dispute in which the victim realized the appellant was having trouble controlling his emotions" was a "significant mitigating factor." Similarly, in Garron v. State, 528 So.2d 353 (Fla.1988), this Court held that it being a case of aroused emotions occuring during a domestic dispute, while not excusing the two murders, did significantly mitigate them.

Even the prosecution's theory of the guilt in this case was that the reason that Appellant killed the victim was not for profit or gain but was because he was jealous and angry with Irma. Prior threats, if any, were just that and were not acted upon until a week or more of fear of losing all emasculated Appellant's reason. The evidence corroborates what the circumstantial evidence of the homicides suggest, or at the least does not rule out - that the killings were the product of Defendant's anger stemming from domestic dispute.

The mitigation in this case is both subjective and objective. It is both significant and multi-faceted in nature. It must be recognized and should be given significant weight. The mitigation balances well against the aggravation in this case, especially due to the low weight nature of the aggravation in relation to other cases of premeditated murder.

CONCLUSION

The evidence in this case does not show what exactly happened immediately before the killings. That is because the evidence is entirely circumstantial. Certainly there is no evidence showing that the homicide was anything but the result of a domestic dispute, whether long-standing or short in duration.

The parties had a domestic relationship. The parties were having difficulties. Irma was probably trying to please her family and appellant. They had heated arguments before. All evidence is consistent with an assault arising out of a domestic dispute.

While it is certainly no easy task to decline to follow a jury's recommendation and the Trial Court's sentence, this is one of those times when the difficult must be done. In Profile in Courage, President John F. Kennedy wrote:

> To be courageous requires no exceptional qualifications, no magic formula, no special combination of time or place or circumstance. It is an opportunity that sooner or later is presented to us all.

Appellant respectfully requests this Honorable Court set aside the sentences of Death, mandating instead, life imprisonment.

Respectfully submitted,

JACK T. EDMUND

REQUEST FOR ORAL ARGUMENT

Comes now Appellant, **CARLOS SANTOS**, and hereby requests oral argument.