IN THE SUPREME COURT OF FLORIDA

REGINALD S. WHITE,

Appellant,

v. Case No. 75,571

STATE OF FLORIDA,

Appellee.

# BRIEF OF THE APPELLEE

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## SUMMARY OF THE ARGUMENT

Appellant claims that the trial court erred in excluding both lay and expert opinions as to his intoxication and his ability to form a specific intent. It is the state's position that none of the excluded evidence was relevant or otherwise admissible. Further, any probative value the testimony may have had was substantially outweighed by the potential for confusion of issues before the jury.

Appellant claims that White's statement that "while he was in Raiford, after Spenkelink [sic] had got it, they allowed him to sit in the electric chair. Now, he guessed he'll have to sit in it for real," was unduly prejudicial because it suggested his guilt of a collateral crime, was not relevant to any issue in the case, and should not have been admitted. It is the state's position that the evidence was relevant and admissible as it showed consciousness of guilt on the appellant's part. Further, this issue is procedurally barred as this claim was not presented to the court below.

Appellant challenges the closing argument by the prosecutor no objection was made to the closing argument as presented, Accordingly, this issue was not preserved for appeal. Further, even if an objection had been raised to the comments, the challenged argument was not so outrageous as to taint the validity of the jury's recommendation, in the instant case.

Appellant contends that the trial judge erred in instructing the jury and in finding that the homicide in the instant case was

committed in a cold, calculated and premeditated manner without any pretense of legal or moral justification. Appellant places reliance in his argument upon the purported "domestic" nature of the case and upon appellant's mental problems to support his contention that this aggravating factor should not have been found.

The state submits that an examination of all the components of the cold, calculated and premeditated aggravating factor reveals that this aggravator was properly applied under the facts in the instant case.

Appellant contends that the trial court applied the improper standard in sentencing appellant to death and that had the proper standard been used, the trial court would not have imposed death because this murder was motivated by passion. The state contends that the trial court applied the appropriate standard of review and that the sentence of death was properly imposed in the instant case.

Appellant contends the sentence was also disproportionate to the circumstances of the offense because of the defendant's history of drug abuse and the existence of a long-standing domestic dispute. It is the state's position that, contrary to the defense position, this Court has not developed a "per se" reversal rule in domestic cases. Rather, each case must be reviewed on its own facts. A review of the facts of this case shows that the imposition of the death sentence was proportionate to other capital cases where the sentence was upheld.

## ARGUMENT

### ISSUE I

**WHETHER** THE TRIAL COURT VIOLATED APPELLANT'S **CONSTITUTIONAL** RIGHT TO PRESENT HIS DEFENSE THROUGH THE TESTIMONY OF FAVORABLE WITNESSES BY EXCLUDING TESTIMONY THAT APPELLANT WAS INTOXICATED AT THE TIME OF THE OFFENSE AND THAT THERE **WAS** A **REASONABLE DOUBT** OF **HIS ABILITY** TO **FORM** A **SPECIFIC INTENT.**

Disposition of appellant's claim hinges upon a discussion **of** whether the type of testimony proposed by the defendant herein was relevant and, if **so**, whether the testimony would have been inadmissible where its probative value was substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading of the jury. Although the state submits that none of the precluded testimony would have been relevant to the issues in the instant case, as will be discussed below, the state will also offer reasons why the testimony, even if relevant, would still be inadmissible because of prejudice and confusion.

Appellant, Reginald White, was charged with the first degree, premeditated murder of Melinda Scantling. At trial the defendant **presented** a **defense** of voluntary intoxication. In support of this defense appellant presented several witnesses who testified that the defendant had a severe drug problem and that on the day of the murder he was high. The defense also presented a stipulation that Reginald White's urine sample contained residue of cocaine, valium and marijuana, The stipulation

contained a proviso that no tests were performed and no tests are available that would indicate whether the cocaine, valium and marijuana were ingested before or after 5:00 p.m., July 10, 1989 (the time of the murder). (R 658 - 659) Appellant also sought to present the expert testimony of Dr. Sidney J. Merin. (R 589) Upon objection by the state, defense counsel represented to the court that his purpose in presenting Dr. Merin's testimony was to have Dr. Merin testify as to tests he rendered to Reginald White in 1984 and to contrast those tests with tests conducted in 1989. Defense counsel represented that the purpose of this testimony was to establish "what was the mental state or capacity of Reginald White on July the 20th of 1989 when those tests were conducted and his opinion [Dr. Merin's], and whether or not Reginald White -- Reginald White's normalcy was such that he should or should not have been hospitalized." (R 595 - 596) Defense counsel then represented that Dr. Merin was going to say, "He's nutty and he should be in the slam, he should be in the hospital." Defense counsel further stated:

> "Judge, I'm saying that he took a history and that based upon the history, he came to a conclusion, to a reasonable degree of medical certainty, that Reginald White, if, at 4:30 on -- between 3:30 and 4:30 on the afternoon of July 10th was observed in a condition that a friend described as being the condition associated of the high of crack cocaine use, that the friend indicated it could last for as long as five hours, does he have an opinion as to whether or not at 5:00, on or about -- at or about 5:00 in the afternoon on the 10th, a short time later, Mr. White would have been under the influence of this narcotic and intoxicated to the point that he

> could or could not formulate an intent. And his response will be that -- what's your response, Dr.? His response will be that he cannot."

To clarify this position, defense counsel then stated that Dr. Merin's testimony would be that he cannot testify beyond a reasonable doubt that Reginald White was not under the influence of intoxication to the point he could not formulate an intent. (R 597) He further stated that Dr. Merin's opinion was that he could not say beyond a reasonable doubt that Reginald White could have formulated the intent to kill the woman. (R 598)

Upon questioning by the court as to whether he could state with any reasonable psychological probability based on the information he had been furnished as to whether Mr. White, at or around 5:00 or 5:30 on July 10th, could form a specific intent to do anything, Dr. Merin testified:

> "No sir, I cannot do that. The only thing I can do is simply to supply the court and the jury with an understanding that there is, in my estimation, a reasonable doubt. But to say that he could or could not, I don't know. (emphasis added) (R 599)

Dr. Merin further agreed that what he was actually stating was White may or may not have been able to form specific intent and that the doctor could not state either position beyond a reasonable doubt. (R 602)

This Court in Gurganqus v. State, 451 So.2d 817 (Fla. 1984), thoroughly addressed the issue of expert testimony with regard to

both insanity and diminished capacity.[1] This Court held that where the expert's testimony was that there was equal probabilities of Gurgangus' sanity and insanity under the McNaghten rule that the testimony was of no evidentiary value because it did no more to prove Gurgangus' case than it did to prove the state's case. This Court held that the opinion evidence did not tend to prove or disprove the legal insanity and therefore the trial court's decision to exclude the testimony under the issue was correct. Id. at 821.

Despite appellant's attempt to characterize the evidence in the instant case as an expert opinion on the reasonable doubt of the ability to form specific intent, it is clear that Dr. Merin's testimony was that he simply did not have an opinion one way or another. Thus, in accordance with Gurgangus, the trial court below did not abuse its discretion in denying the admission of the testimony.

Subsequently, defense counsel attempted to elicit testimony from Dr. Merin with regard to Merin's professional opinion as to the differences between the **1984** test and the **1989** tests and what each of the points on the chart means to him as a clinical

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[1] Subsequently, in Chestnut v. State, 538 So.2d **820** (Fla. 1989), this Honorable Court held that the language in Gurgangis with regard to the admission of any evidence relating to the accused' ability to perform a specific intent as dicta. In Chestnut, this Court ruled that Gurgangis simply reaffirmed the long standing rule in Florida that evidence of voluntary intoxication is admissible in cases involving specific intent. Id. at 822.

psychologist to a reasonable degree of psychological certainty. (R 612) Based upon this information, defense counsel offered that he would ask Dr. Merin's opinion as to whether or not Reginald White was intoxicated as a result of his examination of the charts, the psychological tests, the other psychological tests that were given at or about 5:00 p.m. on the afternoon of July the 10th of 1989. He asserted that Dr. Merin's response would be yes he has an opinion, he is of the opinion that Reginald White was intoxicated. (R 613) He also asserted that Reginald White has been in an intoxicated state for a long period of time in order for the test to result in the distinct differences between those conducted in 1984 and 1989. (R 614)

Essentially, the defense wanted Dr. Merin to testify that because the defendant had been a drug addict for a number of years and because people said that he had ingested drugs on the day of the murder that he was intoxicated at the time of the murder. This was not the issue before the jury. The issue before the jury was whether the defendant was so intoxicated that he was incapable of forming specific intent necessary for premeditated murder. Whether the defendant was a drug addict the day before or the day after the crime was not relevant to the issue at hand. Rather, the only issue is whether the defendant was so intoxicated he could not form the necessary intent. Dr. Merin's opinion did not go to this issue and, accordingly, it was within the trial court's discretion to preclude the admission of this testimony. Further, even if the evidence was relevant, its

probative value was substantially outweighed by the danger of confusion of issues or misleading of the jury. This Court in Glendening v. State, 536 So.2d 212, 220 (Fla. 1988), held that in order to admit an expert opinion, inter alia, the probative value of the opinion must not be substantially outweighed by the danger of unfair prejudice. *Florida Statute 90.403* provides in pertinent part:

> **90.403 Exclusion on grounds of prejudice or confusion.** -- Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, [or] misleading the jury . . ..

The court below excluded the testimony because Dr. Merin could not testify as to the degree of intoxication, only that based upon what he was told that the defendant was intoxicated. The court noted that the law is clear that voluntary intoxication is not a defense for a specific intent crime unless the person was so intoxicated that he was incapable of forming a specific intent. Accordingly, the any evidentiary value the Doctor's testimony may have had was substantially outweighed by the potential of confusing or misleading the jury as to the issue before it. The trial court did not abuse it's discretion in excluding the testimony.

Appellant also contends that the trial court erred in excluding the testimony by Mrs. King and Albert Taylor that appellant was so intoxicated on drugs that he could not form a specific intent. It is the state's position that not only would

it have been improper to allow the witnesses to state such an opinion, but also that the record does not support White's claim that it was Ms. King or Mr. Taylor had such an opinion .

The state recognizes that there is no longer a hard and fast rule that precludes witnesses from testifying as to their opinion an the ultimate issue, the abolition of the court's ultimate issue exclusionary rule does not admit all opinion testimony. Section 90.701 prohibits opinions and inferences of a lay witness where the witness lacks the knowledge, skill, experience, or training to rationally form such opinions, and permits the exclusion of opinions of a lay witness when the lay witness can just as adequately and accurately relate what he has perceived without testifying in terms of inferences or opinions. See, *Sponsor's note, §90.703, Florida Evidence Code.* This is a matter that is within the trial court's discretion and appellant has failed to show an abuse of that discretion. Gurganqus at 821. Upon having the testimony proffered to the trial court, the trial court found that the witnesses could accurately describe their observations without resorting to giving an opinion on the ultimate issue. Neither witness was qualified as a legal expert and competent to give the legal definition of the term "specific intent". To permit either witness to testify that the defendant met this legal standard was properly excluded because of the probability of confusion of the issues before the jury. In Hansen v. State, 585 So.2d 1056 (Fla. 1st DCA 1991), the court reviewed a similar question and based on an analysis of this Court's opinion in

Garron v. State, 528 So.2d 353 (Fla. **1988**); Rivers v. State, 458 So.2d 762 (Fla. 1984), stated:

> "The trial court correctly ruled that while a proper lay witness may testify regarding mental condition, the question of whether a defendant knew the consequences of an act is not appropriate under Garron and Rivers. Hansen cites no case that would allow lay testimony on such a fine aspect of the insanity- defense. While Garron and Rivers allow, under certain specified circumstances, lay opinion as to 'sanity' it does not follow that a witness may testify to purely legal conclusions. The value of a lay opinion as to sanity lies to **the** ability of the witness to effectively convey her impressions of the defendant's behavior. See §90.701(1), Fla. Stat. **(1989)** (Lay opinion is proper where '[t]he witness cannot readily, and with equal accuracy and **adequacy,** communicate what ***he has perceived*** to the trier of fact without testifying in terms of inferences or opinions **and** his use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party.' (emphasis supplied)). We cannot agree that lay testimony on the ultimate fact of whether a defendant can distinguish right from wrong is an appropriate means for a witness to convey 'what he has perceived' to the jury." Id. at **1058 - 1059**

Similarly, in the instant **case**, the witnesses were able to explain their observation of the defendant's behavior on the day in question without resorting to giving an opinion on the ultimate legal issue. In fact, the record shows that defense counsel had to considerably prod Ms. King to get her to state that the defendant could not form the required specific intent in her description of the defendant's actions. (R 530)

> **BY** MR. EDMUND:
> *Q:* Do you have an opinion as to whether or not on the 10th of July of **1989**, Reginald

White was so intoxicated to the point that he could not formulate a specific intent? Do you have such an opinion? Just tell me, yes or no?

A: Yes.

Q: What is that opinion Ms. King?

A: He was absolutely out of his mind.

Q: Ma'am, I asked you, did you have an opinion as to whether or not he was intoxicated to the degree that he could not form an opinion that required specific intent?

A: He could not formulate an opinion regarding specific intent.

And, although defense counsel did ask Elbert Taylor if he had an opinion as to whether Reginald White had the ability to form an intent to commit a particular act during the period of time, the prosecutor objected to the question and the objection was sustained. Defense counsel did not proffer Elbert's response. (R 643) Accordingly with respect to Elbert's testimony appellant has failed to show that Elbert had such an opinion and that such an opinion was favorable to the defendant. Clearly, both witnesses were able to competently testify without resorting to giving an opinion on the ultimate issue. Therefore, appellant has failed to show that the trial court abused its discretion in excluding this testimony.

Appellant further complains because the trial court allowed Ms. King to testify that the defendant was "out of his mind" that therefore he is somehow prejudiced because she was not allowed to give her opinion on whether the defendant could form the specific

intent. Clearly the trial court was giving the defendant the type of leeway contemplated under the rule. Where such an opinion was necessary for the witness to explain what she had observed, the trial court admitted it. Where an opinion as to specific intent was not necessary for the defendant to explain her observations, it was properly excluded.

Further, even if the trial court erred in excluding the testimony of Dr. Merin, Ms. King or Mr. Taylor, the error was clearly harmless in the instant case. The defendant was allowed to present substantial evidence before this jury as to the fact that he was intoxicated and his level of intoxication. An expert's opinion that essentially says that I have no opinion and a witness' opinion where it was only to the ultimate issue and where the witness was able to explain her observations without resorting to that statement was not of such import as to prejudice the defendant in excluding this evidence. Where the evidence shows, as it does here, that the defendant clearly premeditated the murder in question by not only making threats to kill, procuring the weapon beforehand and stalking his victim, but also to elude arrest after the fact, any evidence that the defendant was intoxicated on the day in question does not undermine confidence in the verdict, Clearly, the preclusion of this evidence is harmless beyond a reasonable doubt.

## ISSUE 11

WHETHER THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF APPELLANT'S STATEMENT CONCERNING HIS FEAR OF PUNISHMENT./

Appellant claims that White's statement that "while he was in Raiford, after Spenkelink [sic] had got it, they allowed him to sit in the electric chair. Now, he guessed he'll have to sit in it for real," was unduly prejudicial because it suggested his guilt of a collateral crime, was not relevant to any issue in the case, and should not have been admitted. It is the state's position that the evidence was relevant and admissible as it showed consciousness of guilt on the appellant's part. Further, this issue is procedurally barred as this claim was not presented to the court below.

It is well-settled that all relevant evidence is admissible even if it tends to establish that the accused is guilty of a crime other than that for which he is currently standing trial. Williams v. State, 110 So.2d 654 (Fla. 2nd DCA 1966); *Florida Statutes* §90.402 (1983). In analyzing the meaning of Williams, supra, the Second District said:

> "We analyze *Williams* to mean that evidence of other offenses is admissible if -- it is relevant and has probative value in proof of the instant case or some material fact or facts in the issue in the instant case."

The evidence at issue here was relevant because it helped to establish guilty knowledge on the appellant's part, Case law of this state has long recognized the relevance of this type of evidence. See, Mankiewicz v. State, 114 So.2d 684 (Fla. 1959), *cert. denied,* 456 U.S. 965.

In Sireci v. State, 399 So.2d 964, 968 and Straight v. State, 397 So.2d 903 (Fla. 1981), this Court upheld the admission of evidence showing the accused to be guilty of uncharged crimes. In Sireci, this Court ruled admissible evidence from one of Sireci's former cellmates that Sireci had told him he had attempted to have a witness against him killed. In Straight, this Court found evidence that Straight fled from police and used a gun when they tried to apprehend him in California was relevant as it showed consciousness of guilt on Straight's part.

And, in Floyd v. State, 497 So.2d 1211 (Fla. 1986), this Court held that it was not error for an officer to testify to Floyd's statement at the police station that: "I know the police are mad at me for running, but I've been in jail before and I don't want to go back." This Court disagreed with Floyd's argument that it was error to let the jury hear that he had been incarcerated at a prior time. The testimony against Floyd was relevant to the issue of flight and was, therefore, admissible. Similarly, in Rhodes v. State, 547 So.2d 1201 (Fla. 1989), this Court held that it was not reversible error for the trial court to admit a statement referring to Rhodes prior incarceration.

In the instant case, White's statement was relevant as it showed guilty knowledge and planning. After murdering Ms. Scantling, White took the time to drive to the river to dispose of the gun and then hid from the police until he was captured the next day. White's statement is evidence of his intent to murder Ms. Scantling and his awareness of the magnitude of his actions,

Appellant's argument that the statement was subject to other interpretations does not undermine it's relevance in the instant case. There is no requirement that to be admissible evidence must only be subject to one interpretation. The only requirement for admission of evidence is that it must tend to prove or disprove a material fact. §90.401 *Florida* ***Evidence Code.*** Therefore, White's statement was properly admitted.

Further, appellant is procedurally barred from challenging the admission of this statement on these grounds as this claim was not presented to the court below. It is well settled that for an issue to presented for appellate review it must be the subject of a specific objection to **the** court below. Steinhorst v. State, **473** So.2d **1280** (Fla. **1985);** Lucas v. State, 376 So.2d **1149** (Fla. **1979);** Castor v. State, 365 So.2d **701** (Fla. **1978).** The only objection raised to the admission of this statement was based on an alleged violation of White's 'rights against self-incrimination' as argued in the defendant's Motion to Suppress Statement. (R **1066)** This **same** objection was raised when officer Stanton testified. (R. **488-89)**[2] The only reference to the relevancy of the statement was made by the prosecutor prior to opening statement. Mr. Benito asked the court for a ruling on the admissibility of two statements before he referred to them in opening statement. (R. 235, 245) At that time defense counsel

[2] Defense counsel stated, "Your Honor, **please** the Court (sic), may the record reflect my objection to this that you've ruled on?"

did not object to admission of the statement on relevancy grounds and presented no argument in opposition to the prosecutor's relevancy argument. (R. 245-50, 254-55). Further, there was no objection to the prosecutor's reference to the remark in opening statement. (R. 262) Accordingly, the state urges this Court to find that this claim has been waived.

Assuming, arguendo, that this claim is properly before this Court and that it was erroneous to admit the statement, the state urges this Court to find that the error was harmless error is harmless "if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error." Ciccarelli v. State, 531 So.2d 129, 132 (Fla. 1988). Accordingly, this Court found that, in light of the totality of the evidence against Castro, including Castro's own confession, the erroneous admission of the testimony could not have effected the outcome of the guilt phase. With or without the error, the jury could have reached no conclusion other than that Castro was guilty. Thus, this Court found that the presumption of harmfulness that accompanies a Williams Rule error of this type can be rebutted by the state.

In light of the substantial evidence before the jury in the instant case, the limited reference to any collateral crime,[3] and

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[3] The statement did not contain evidence that White was imprisoned for any crime. The statement was as easily subject to an interpreatation that White was a visitor at Raiford and was given a tour.

the knowledge that White had just gotten out of jail on other charges, harmless. (R 385 - 394)

## ISSUE III

WHETHER STATEMENTS MADE BY THE PROSECUTOR DURING CLOSING ARGUMENT ABSENT AN OBJECTION BY THE DEFENDANT CONSTITUTES REVERSIBLE ERROR.

Appellant challenges the closing argument by the prosecutor in which he stated:

> "Now, Mr. Edmund may get up here and tell you that life imprisonment would be sufficient punishment for Mr. White. He's going to go to jail for the rest of his life. That life imprisonment is a living hell. It's a torture. All sight, I'm not saying I would want to spend one day in jail.
>
> Don't get me wrong, but what is life imprisonment? What is life imprisonment? What can one do in jail?
>
> Well, you can laugh. You can cry. You can read a book. You can watch TV. In short, you live to learn of the wonders that the future holds. In short, it is living. People want to live.
>
> If Miss Scantling had had a choice of being in prison for life or being in that photograph with a shotgun hole in her back, what choice would Melinda Scantling have made? The answer is clear. She would have chosen to live, but, you see, she didn't have that choice. You know why? Because that man, right there, decided for himself that Melinda Scantling should die. And for making that decision, for making that decision, he too deserves to die.

(R 882-883)

First, it should be noted that no objection was made to the closing argument as presented. Accordingly, this issue was not preserved for appeal. Hodges v. State, 17 F.L.W. S74 (Fla. January 23, 1992); Jackson v. State, 522 So.2d 802 (Fla. 1988).

Further, as this Honorable Court held in Jackson, Hudson v. State, 538 So.2d 829, 832 n. 6 (Fla. 1989) and Hodges, even if an objection had been raised to the comments, the challenged argument was not so outrageous as to taint the validity of the jury's recommendation, in the instant case.

Accordingly, because White did not object to the prosecutor's argument and based on the circumstances of this case, the argument was harmless error. See, Hodges at S75

## ISSUE IV

**WHETHER THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BY INSTRUCTING THE JURY UPON AND FINDING THIS OFFENSE TO BE COLD, CALCULATED, AND PREMEDITATED.**

Appellant contends that the trial judge erred in instructing the jury and in finding that the homicide in the instant case was committed in a cold, calculated and premeditated manner without any pretense of legal or moral justification. Appellant places reliance in his argument upon the purported "domestic" nature of the case and upon appellant's mental problems to support his contention that this aggravating factor should not have been found. However, as will be delineated below, the actions of appellant belie the contention that he was incapable *of* committing a cold, calculated and premeditated homicide.

In support of his finding of cold, calculated and premeditated the trial court stated:

> The Defendant, after willfully violating a valid restraining order, was arrested and charged with burglary of his ex-girlfriend's home and aggravated battery of her male friend. While in jail he was heard by another prisoner to say that if he got out on bond he would kill the "ho". Shortly after bonding out of jail, he reclaimed a shotgun from a pawn shop, drove to his place of employment, shot her through the arm and chest as she was walking across a parking lot and, as she lay face down, shot her in the back.
>
> (R. 1136)

This Honorable Court in Swafford v. State, 533 So.2d 270 (Fla. 1988), held:

> . . . The cold, calculated, premeditated murder, committed without pretense of legal or moral justification, can also be indicated by circumstances showing such facts as advanced procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter course. *See, e.g., Burr v. State,* 466 So.2d 1051, 1054 (Fla. 1985), *cert. denied,* 474 U.S. 879, 106 S.Ct. 201, 88 L.Ed.2d 170 (1985); *Eutzy v. State,* 58 So.2d 755, 757 (Fla. 1984), *cert. denied,* 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985). . . . (text at 277)

All of the factors discussed in Swafford, i.e., advanced procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course, are all present in the instant case and noted by the trial judge in his order.

Appellant contends that his shooting of Ms. Scantling was the passionate climax to a long-standing lover's quarrel and, therefore it could not be cold, calculated, and premeditated. (appellant's brief at page 33). However, this Court has on several occasions found the applicability of the cold, calculated and premeditated aggravating factor in "domestic" situations. The significant factor appears to be not whether the homicides are "domestic" but rather whether the method employed by the defendant fit the definition of this factor. The method used by White and the trial court's finding compost with cases decided by this Honorable Court on this issue; e.g., Klokoc v. State, 16 F.L.W. S756 (Fla. Nov. 72, 1991) (revised opinion); Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990); Zeigler v. State, 580 So.2d 127 (1991); Brown v. State, 565 So.2d 304 (Fla. 1990). In

Klokoc, the defendant killed his nineteen-year-old daughter in order to spite his estranged wife, In Porter, the defendant murdered his former lover and her male companion. In Zeigler, the defendant killed his wife as well as her parents and another male. In Brown, the defendant killed the daughter of his female live-in companion. These "domestic" settings did not preclude this Honorable Court from finding the applicability of the cold, calculated and premeditated aggravating factor. Indeed, a review of the facts of those cases indicate that they are very similar to the instant case. In each of the cases, the defendant committed the murders in the manner described by *Florida Statute 921.141(5)(i)*. As in Klokoc, supra, Brown, supra, and Bruno v. State, 574 So.2d 76 (1991), the record shows that the murder in the instant case was committed in the style of an execution. Merely because the instant case was not a contract murder or a witness elimination murder does not obviate the fact that an execution took place. The mental health experts who testified on appellant's behalf attempted to corroborate the appellant's assessment of his state of mind. However, although the trial court found the statutory mental mitigators to be present, the court also found that it was questionable that White was under the influence of extreme mental or emotional disturbance or that he was unable to conform his conduct to the requirements of the law. (R 951). Accordingly, the trial court did not err in instructing the jury on the aggravating factor and finding that appellant's actions showed that he was capable of committing these murders in a cold, calculated and premeditated fashion.

Appellant correctly points out that a "calculated" murder is one which consists of a "careful plan or prearranged design" (appellant's brief at page 57, citing Reed v. State, 560 So.2d 203, 207 (Fla. 1990); Garron v. State, 528 So.2d 353 (Fla. 1988); Rivera v. State, 545 So.2d 864, 865 (Fla. 1989); Schafer v. State, 537 So.2d 988, 991 (Fla. 1989). Appellant contends that he did not act in a calculated fashion, but rather his actions were the result of a "passionate obsession" and rage. This contention is absolutely refuted by the facts of his case. First of all, a calculated plan can be formed in a manner of minutes; there is no hard and fast rule that many hours are necessary in which a defendant plans a murder. See, Valle v. State, 581 So.2d 40 (Fla. 1991) (cold, calculated aggravating factor held applicable even where only approximately eight minutes elapsed between the initial encounter between the victim and the defendant. A review of the facts of the instant case supports the court's finding that the defendant planned the murder prior to arriving at Ms. Scantling's place of employment. (R 1850). The facts show that after having told a cellmate that he was going to kill her, White procured a shotgun the next day and, at hi5 first opportunity, gunned her down. The defendant deliberately set about completing his mission. After determining that he was going to kill his Ms. Scantling, the defendant went to the pawn shop, got a shotqun, went to Ms. Scantling's place of employment and waited for her to come out. Then, without any provocation he gunned her down. Not satisfied with having shot

her to the ground, he stood over her and shot her in the back. It is likely that the fully formed intent to kill commenced prior to the point when he told Michael Clethen he was going to kill the "ho", although it is not necessary to so find in order to sustain the existence of a prearranged plan to kill. Thus, the defendant had at least twenty-four hours from the time he decided to kill Ms. Scantling to when he actually ambushed her to reflect upon his conduct (R 2071). The facts as outlined above do not suggest a sudden fit of rage brought upon by some type of provocation. Nor do they necessarily evidence a person who, because of an uncontrollable mental disease, reacts impulsively and commits a crime. Rather, the facts reveal a careful plan of one who wished to **execute** his victims. "While [White's] motivation may have been grounded in passion, it is clear that he contemplated this murder well in advance." Porter v. State, supra at 1064. The evidence in the instant **case** supports the conclusion that appellant carefully planned and executed this murder.

Appellant also contends that the facts of this case also do not show the "heightened" premeditation necessary to support the **cold**, calculated and premeditated aggravating factors. To the contrary and, as the trial court found, and the record shows that the execution-style murder was committed by a person with heightened premeditation. In Porter v. State, supra at 1064, n. 4, this Honorable Court cited Hernandez v. State, **273** So.2d 130 (Fla. 1st DCA), cert. denied, 277 So.2d 287 (1973), for the well

accepted proposition that "premeditation does not have to be contemplated for any particular period of time before the act, and may occur at a moment before ~~the act~~." As discussed above, the defendant in Valle was determined to have heightened premeditation in an event which occurred over a period of time no longer than eight minutes. In the instant case, appellant made the threat to kill Ms. Scantling and followed through on the threat the following day. Certainly appellant had "ample time to reflect and evaluate his actions" (R 2068). Heightened premeditation is evident in this record.

The state submits that an examination of all the components of the cold, calculated and premeditated aggravating factor reveals that this aggravator was properly applied under the facts in the instant case. Appellant's point must fail.

## ISSUE V

WHETHER THE TRIAL COURT IMPROPERLY IMPOSED DEATH IN THE INSTANT CASE.

Appellant contends that the trial court applied the improper standard in sentencing appellant to death and that had the proper standard been used, the trial court would not have imposed death because this murder was motivated by passion. The state contends that the trial court applied the appropriate standard of review and that the sentence of death was properly imposed in the instant case.

The trial court's written order imposing the death sentence states:

> "The Court is therefore bound to follow the jury's recommendation of death in the instant case since there is a reasonable basis for such recommendation and the court is unable to find that no jury, comprised of reasonable persons, could have ever returned such recommendation."
>
> **(R. 1137-1138)**

Based on this statement, appellant contends that the trial court failed to independently weigh the aggravating and mitigating circumstances before imposing the death penalty. To support this position appellant relies on Ross v. State, 386 So.2d 1191 (Fla. 1980). In Ross, this Court remanded for a resentencing where the record showed that the trial court gave undue weight to the jury's recommendation of death and did not make an independent judgment of whether or not the death penalty should be imposed. This Court based its decision on the trial

court's express statement that, "This Court finds no compelling reason to override the recommendation of the jury. Therefore, the advisory sentence of the jury should be followed." In reviewing the court's order, this Court stated:

> "Although this Court in Tedder v. State, supra, and Thompson, supra, stated that the jury recommendations under our trifurcated death penalty statute should be given great weight and serious consideration, this does not mean that if the jury recommends a death penalty, the trial court must impose the death penalty. The trial court must still exercise its reasoned judgment in deciding whether ~~the~~ death penalty should be imposed. (emphasis added).
>
> Id. at 1197.

The record in the instant case clearly shows that the trial court exercised its reasoned judgment in deciding whether the death penalty should be imposed. The order thoroughly sets out the aggravating and mitigating circumstances considered by the court. (R 1136 - 1138)

In addition to the jury's recommendation of death in the instant case, the trial court found two aggravating factors; (1) the defendant was previously convicted of a prior violent felony, and, (2) the crime was cold, calculated and premeditated.

In mitigation, the court found existence of the two mental mitigators to be questionable. He also found nonstatutory mitigation, to wit:

> "Personality change caused by a drug problem; upset and jealous caused by severed relationship with victim,"
>
> (R. 1137)

This Court has consistently held, even where a trial court has acknowledged that the jury recommendation must be given great weight, that where the record shows the trial court independently weighed the aggravating factors and mitigating factors that a sentence of death will be upheld. See, Grossman v. State, 525 So.2d 833 (Fla. 1988); Tompkins v. State, 502 So.2d 415, 421 (Fla. 1987). The sentence of death was properly imposed in the instant case as the aggravating factors established below sat White and this killing apart from the average capital defendant. The imposition of the death sentence was proportionate to other capital cases where the sentence has been upheld. Cf. Brown v. State, 473 So.2d 1260 (Fla. 1985).

When considered in the context of the facts of this case, the aggravating circumstances clearly outweighed the existing mitigating circumstances. Thus, there is absolutely no support for appellant's contention that had the trial court applied the incorrect standard and that if he had had the correct standard, he would have imposed the life sentence. The record clearly supports the imposition of a death sentence in the instant case. As the record in the instant case shows the trial court independently reviewed the aggravating and mitigating circumstances no error was committed.

## ISSUE VI

WHETHER THE DEATH SENTENCE IMPOSED BY THE TRIAL COURT WAS DISPROPORTIONATE TO THE CIRCUMSTANCES OF THE OFFENSE AND VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

Appellant contends the sentence was also disproportionate to the circumstances of the offense because of the defendant's history of drug abuse and the existence of a long-standing domestic dispute. It is the state's position that, contrary to the defense position, this Court has not developed a "per se" reversal rule in domestic cases. Cf. Brown v. State, 473 So.2d 1260 (Fla. **1985**); Porter v. State, 564 So.2d **1060** (Fla. **1990**). Rather, each case must be reviewed on its own facts. A review of the facts of this case shows that the imposition of the death sentence was proportionate to other capital cases where the sentence was upheld. Cf. Williamson **v.** State, **511** So.2d **289** **(Fla.** 1987); Woods v. State, 490 So.2d 24 (Fla. **1986**); Lusk v. State, **446** So.2d 1038 (Fla. **1984**).

In addition to the jury's recommendation of death in the instant case, the trial court found two aggravating factors; **(1)** the defendant was previously convicted of a prior violent felony, and, (2) the crime was cold, calculated and premeditated. In mitigation, the court found existence of the two mental mitigators to be questionable. He also found nonstatutory mitigation, to wit:

> "Personality change caused by a drug problem; upset **and** jealous caused by severed relationship with victim."

(R 1137)

Accordingly, when considered in the context of the facts of this case, the sentence was properly imposed. As the court below found:

> The Defendant, after willfully violating a valid restraining order, was arrested and charged with burglary of his ex-girlfriend's home and aggravated battery of her male friend. While in jail he was heard by another prisoner to say that if he got out on bond he would kill the "ho". Shortly after bonding out of jail, he reclaimed a shotgun from a pawn shop, drove to his place of employment, shot her through the arm and chest as she was walking across a parking lot and, as she lay face down, shot her in the back.

(R. 1136)

Given these facts, even if this murder did qualify as a domestic dispute, the sentence of death was proper in the instant case.

In general, however, "domestic disputes murder" are reversed by this Court where the killings were the result of heated domestic confrontations and, although premeditated, were most likely committed upon reflection of a short duration. *See,* Garron v. State, 528 So.2d 353 (Fla. 1988); Wilson v. State, 493 So.2d 1019 (Fla. 1986); Irizarry v. State, 496 So.2d 822 (Fla. 1986). The murder in the instant case was not the result of a sudden reflection, but rather the result of a cold, calculated and premeditated plan formulated over a period of time sufficient to accord reflection and contemplation to the defendant's

actions. See, Swafford v. State, 533 So.2d 270, 277 (Fla. 1988). The instant case was more akin to cases such as Porter v. State, 564 So.2d 1060, 1064 - 1065 (Fla. 1990), and Brown v. State, 565 So.2d 304, 309 (Fla. 1990), wherein this Court upheld "domestic" style cases on the grounds of proportionality.

This is the type of defendant for which the death sentence was instituted and the sentence was properly imposed in the instant case even though the victim in the instant case was the defendant's ex-girlfriend. State v. Dixon, 283 So.2d 1 (Fla. 1973). Appellant's reliance on McKinney v. State, 579 So.2d 80 (Fla. 1991); Downs v. State, 574 So.2d 1095 (Fla. 1991); Penn v. State, 574 So.2d 1079 (Fla. 1991); Nibert v. State, 574 So.2d 1059 (Fla. 1059 (Fla. 1990); Farinas v. State, 569 So.2d 425 (Fla. 1990); 569 So.2d 425 (Fla. 1990); Cheshire v. State, 568 So.2d 908 (Fla. 1990) is misplaced. In each of those cases, this Honorable Court found that the killings were the result of heated, domestic confrontations and, although premeditated, were most likely committed upon reflection of a short duration. The murder in the instant case was not the result of a sudden reflection, but rather the result of a cold, calculated and premeditated plan formulated over a period of time sufficient to accord reflection and contemplation of the defendant's actions.

## CONCLUSION

Based on the foregoing facts, arguments and citations of authority, appellee would pray that this Honorable Court affirm the judgment and sentence of the lower court.

Respectfully submitted,

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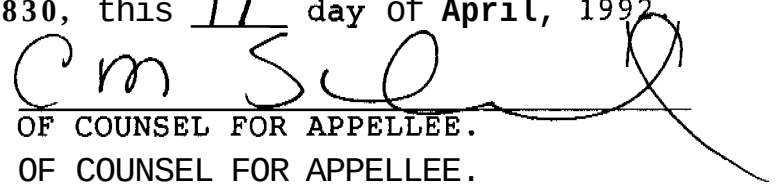
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Office of the Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 17th day of **April**, 1992.



OF COUNSEL FOR APPELLEE.
OF COUNSEL FOR APPELLEE.