IN THE SUPREME COURT OF FLORIDA

CHARLES SEBASTIAN MAULDEN,

Appellant,

v.

Case No. 75,595

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

OF COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

SUMMARY OF THE ARGUMENT

As to Issue I: The record of the voir dire proceedings conducted in the instant case reveals that peremptory challenges were not made in a discriminatory fashion. The trial court never expressly found a strong likelihood that the challenges were being exercised in a discriminatory manner. Alternatively, the prosecutor's voluntary explanation of his challenge for cause was immediately sanctioned by the trial judge, thereby indicating that the prosecutor's reason was supported by the demeanor of the prospective jurors' answers, Also, there was no reason for the trial judge to require the prosecutor to provide reasons for peremptorily excluding another black juror where the defense did not request such inquiry.

As to Issue 11: The test to be applied in Fourth Amendment cases is whether or not an arrest (i.e., a seizure) is reasonable. In the instant case, a neutral and detached magistrate had determined that probable cause existed to arrest appellant and, therefore, the dictates of Payton v. New York, 445 U.S. 573 (1980), were satisfied. Where none of appellant's Fourth Amendment rights were implicated by the procedures employed herein, the confessions flowing from a reasonable seizure were properly admitted at trial.

As to Issue 111: The physical evidence obtained from a stolen truck were properly admissible because there was no unreasonable seizure attending the search. Alternatively, the defendant has no standing to contest the search of a stolen

vehicle and, in any event, the inevitable discovery doctrine would have been applicable obviating the need for suppression.

As to Issue IV: The trial judge followed the law of the State of Florida as expressed in Chestnut v. State, 538 So.2d 820 (Fla. 1989), where he would not permit evidence of mental infirmity not rising to the level of an insanity defense. Where insanity was not pled as a defense in the instant case, the trial court's ruling was correct.

As to Issue V: The prior violent felony aggravating factor was properly instructed upon and found by the trial judge in the instant case. As long as the two crimes involved multiple victims, this aggravating factor is proper. Wasko v. State, 505 So.2d 1314 (Fla. 1987).

As to Issue VI: This Honorable Court has consistently and regularly denied the claim presented by appellant that instructions on the cold, calculated and premeditated aggravating factor are impermissibly vague. This claim should again be rejected by this Court.

As to Issue VII: The trial court properly found the facts of the instant case justified a finding that the homicides were committed in a cold, calculated and premeditated manner without a pretense of legal or moral justification. The execution-style murders committed by appellant were done so with "heightened" premeditation, and an examination of each of the components of the statutory elements of this aggravating factor reveals that it was properly found by the trial judge,

As to Issue VIII: The sentences of death were not disproportionate to other death cases upheld by this Court. The facts and circumstances reveal that the murders were committed in the manner of an execution which sets this case apart from those involving a heated domestic confrontation which, although premeditated, most likely resulted from reflection of a short duration. Here, appellant clearly formed the intent to kill. Additionally, an examination of the aggravating and mitigating factors as set forth in the trial court's findings of fact reveals that the trial court validly imposed the death sentences in this case.

ARGUMENT

ISSUE I

WHETHER THE JURY **SELECTION** PROCESS IN **THE** INSTANT CASE SUPPORTS APPELLANT'S CONTENTION **THAT** THE PROCESS **VIOLATED THE PRECEPTS** ESTABLISHED IN STATE V. **NEIL** AND **ITS** PROGENY.

As his first point on appeal, appellant contends that the trial court erred by failing to require **reasons** for peremptorily challenging a **black** prospective juror and by failing to dismiss the jury poll because the prosecutor's given reason for peremptorily challenging a second black prospective juror was not supported by the record. Appellant, a white defendant who murdered two white victims, raised an objection pursuant to State v. Neil, 457 So.2d 481 (Fla. 1984), clarified, State v. Castillo, **486** So.2d 565 (Fla. 1986), only after a second black venire person was peremptorily challenged by the state. Although appellant in his brief offers a two-page analysis of the standing of a white defendant to raise Neil claim the state did not contest standing below (R 958) and your appellee does not dispute appellant's standing to raise a Neil claim in this appeal. However, for the seasons expressed below, appellant's point must fail.

Appellant's claim is premised upon this Honorable Court's decision in State **v.** Neil, supra, wherein it was held that peremptory challenges cannot be exercised solely because of **a** prospective juror's race. In Neil this Court established the following test:

> The initial presumption is that peremptories will be exercised in a nondiscriminatory manner. A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If a party accomplishes this ***then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race.*** If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race. (Id. at 486 - **487**; emphasis supplied; footnotes omitted)

In the instant **case**, four prospective black jurors were challenged by the state. The first two blacks on the venire, jurors Hardy and Hayes, were challenged and excused for cause based upon their opposition to the death penalty (R 603). The state's next challenge of a prospective black juror was a peremptory challenge of Ms. Johnson. The state's use of a peremptory challenge as to Ms. Johnson was not contested in any way by the defense **(R 781)**. Indeed, this is not surprising in that Ms. Johnson throughout her questioning by both the prosecution and the state indicated that she "didn't like death" especially where she works to save lives. Even if she could vote for the death penalty, it was something that she would have to live with for the rest of her life (R 729, **747 - 748, 754)**. Lastly, the state exercised a peremptory challenge as to Mrs.

Watkins, another black prospective juror. It was at this point in the voir dire proceedings that defense counsel objected "as to what would be a pattern of excusing blacks" (R 956). For the benefit of this Honorable Court, your appellee will set forth immediately below the entire portion of the record pertaining to the colloquy among the trial judge, defense counsel, and the prosecutor pertaining to the Neil objection:

> MR. AGUERO: State strikes Mrs. Watkins.
>
> THE COURT: Okay.
>
> MR. SHEARER: Your Honor, at this time I have to make a couple of observations. One is the observation that Ms. Watkins is black. She is the fourth prospective black juror that we have had. All four have been challenged, two for cause, Mrs. Hayes and Ms. Hardy. The other two have been challenged by peremptories by the State, that would be Mrs. Johnson and now Mrs. Watkins. I'd make an objection as to what would be a pattern of excusing blacks, and I say this noting that there are no blacks left in the panel that we have here. I'd ask the Court to make inquiry whether or not there is any valid reason. I heard none from Mrs. Watkins while giving her answers, any obvious reasons why she would not be a fit juror.
>
> THE COURT: Okay. Mr. Aguero?
>
> MR. AGUERO: Does the Court wish me to go back and talk about all the black jurors, Judge, or just Ms. Watkins?
>
> THE COURT: Just Mrs. Watkins will be fine.
>
> MR. AGUERO: Judge, Mrs. Watkins is very, very weak on the death penalty questions that I asked her. I do not think that Mrs. Watkins is a juror who is going to impose the death penalty under any circumstances, and that is the only reason that I do not like her as a juror.

THE COURT: Okay.

MR. SHEARER: My response is that I didn't hear that. I heard that she could vote for the death penalty. She would listen and hear all the circumstances.

THE COURT: Okay. The objection to the challenge will be overruled and I'll allow the challenge to stand. So Mrs. Watkins will be the sixth challenge on behalf of the State.

MR. AGUERO: Judge, is the Court finding -- this is a sensitive issue, this is not something we can leave right now.

THE COURT: Right.

MR. AGUERO: I think the Court has to make a finding since it asked for my explanation whether the Court feels that I'm systematically -- there's only two. I mean, you can't count cause challenges. Cause challenges are cause challenges. There have been two blacks excluded, Mr. Watkins -- according to Mr. Shearer, the second one -- I remember Ms. Hardy.

MR. SHEARER: She was cause. She was a cause challenge.

MR. AGUERO: Ms. Hayes was a cause challenge.

I frankly don't remember the other one,

MR. SHEARER: Ms. Johnson.

MR. AGUERO: Where was she, Ms. Johnson?

MR. SHEARER: The nurse.

MR. AGUERO: Ms. Johnson. Well, let me ask the Court if the Court wishes me to make an explanation, because the Court feels that in striking Ms. Johnson and Mrs. Watkins the State has systematically engaged in exclusion of blacks from a jury that involves a white defendant and two white victims and nothing that has to do with black people?

THE COURT: Well, they do have standing to raise that.

MR. AGUERO: I understand they have standing, but I want to make sure the record is clear.

THE COURT: My initial response is that I was only asking for an explanation as to Ms. Watkins, that's simply because there may have been a pattern developing, but I'm satisfied with your explanation of Ms. Watkins. I don't think we need to go back to Mrs. Johnson.

MR. AGUERO: Thank you, Judge. (R 956 - **958)**

Based on the colloquy set forth above, it is questionable at best as to whether the trial judge found that there was a strong likelihood **the** prosecution was exercising peremptory challenges solely on the basis of race. It is significant to observe that all parties concerned (i.e., the court, the defense counsel, and the prosecutor) talked in terms of the state establishing a "pattern" of excusing black prospective jurors. Indeed, the prosecutor asked the court as to whether reasons should be given for all the black jurors; the trial court insisted on hearing the reasons for excusal of Ms. Watkins because, as he later explained, "I was only asking for an explanation **as** to Ms. Watkins, that's simply because there may be a pattern developing . . . " (R 958). There simply never was a question concerning the state's peremptory challenge as to Ms. Johnson, the first black prospective juror against whom the prosecutor employed a peremptory challenge. As noted above, the entire questioning of Ms. Johnson revealed a juror who did not like the death penalty

and that even if she could vote for it would have to live with that decision for the rest of her life. It is most significant that defense counsel never questioned the use of a peremptory challenge against Ms. Johnson. Therefore, when the issue of the peremptory challenge of Ms. Watkins arose, the trial court merely was attempting to determine whether the "complaining party's objection was proper and not frivolous." State v. Slappy, 522 So.2d 18, 22 (Fla.), cert. denied, 47 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988). It appears on the face of the record presented to this Court that Ms. Watkins was the first prospective black juror whose responses during voir dire didn't' automatically indicate the reason for a challenge. Thus, the trial court was attempting to determine if there was a racial basis for the exclusion of Ms. Watkins. It does not appear upon review of the trial court's ruling in this matter that he ever determined that a strong likelihood existed that challenges were being exercised in a discriminatory manner. See, Valle v. State, 581 so.2d 40, 43 - 44 (Fla. 1991).

Without explicit directions from the trial court to do so, the prosecutor voluntarily offered his reasons as to the use of a peremptory challenge as to Ms. Watkins. Your appellee submits the prosecutor offered these reasons prior to the shifting of the burden to do so. In Thompson v. State, 548 So.2d 198, 202 (Fla. 1989), this Court was confronted with a situation where "[t]he record reflects that the trial court below clearly entertained serious doubts as to whether the state was improperly exercising

its peremptory challenges," The instant case must be contrasted with Thompson because the record here reflects that there were no serious doubts entertained by the trial judge as to whether the state was improperly exercising its peremptory challenges in a discriminatory fashion. However, inasmuch as the prosecutor offered a reason as to the use of a peremptory challenge against Ms. Watkins, that reason should be discussed to determine whether the trial court was justified in not finding the likelihood of racial discrimination in the use of peremptory challenges.

The prosecutor, Mr. Aguero, stated:

> "Judge, Mrs. Watkins is very, **very** weak on the death penalty questions that I asked her. I do not think that Mrs. Watkins is a juror who is going to impose the death penalty under any circumstances, and that is the only reason that I do not like her as a juror. (R 956 - **957)**

Defense counsel countered by observing that he heard the juror state that she could vote for the death penalty and would listen and hear all the circumstances. The trial court immediately overruled the defense objection to the challenge **and** allowed the peremptory challenge to stand. The trial court stated that he was satisfied with the state's explanation as to **the** use of the peremptory challenge of Ms. Watkins (R 958). Candidly, a review of the answers supplied by Ms. **Watkins** to the prosecutor's questions concerning the death penalty does not reveal on its **face** that this juror would not be able to vote for the death penalty (R 895 - 896). But this is certainly not the **end** of the relevant inquiry. Ms. Watkins was a prospective juror who prior

to her service on the venire in the instant case never gave the death penalty any thought. She advised the prosecutor that since she had been sitting on the venire panel she had been thinking about the death penalty but she couldn't answer whether the State of Florida should have a death penalty (R 895). With respect to these responses of juror Watkins, this Honorable Court's decision in Reed v. State, 560 So.2d 203, 206 (Fla. 1990) is instructive:

> [2,3] Within the limitations imposed by *State v. Neil*, the trial judge necessarily is vested with broad discretion in determining whether peremptory challenges are racially intended. *State v. Slappy*. Only one who is present ~~at the~~ trial can discern ~~the~~ nuances of the spoken ~~word and the~~ demeanor of those involved, . . .
>
> . . . In trying to achieve the delicate balance between eliminating racial prejudice and the right to exercise peremptory challenges, we must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene ~~and who~~ themselves *get* a "feel" for what is going on ~~in the~~ jury selection process. (emphasis supplied)

The ambiguous nature of Ms. Watkins' responses concerning the death penalty are not susceptible, as appellant would have this Court believe, to a simple interpretation that she was a juror who could listen to all the circumstances and impose a sentence of death. The prosecutor, and the trial judge, are entitled to listen to the tenor of the juror's responses in making a determination as to whether what she is saying is really what she means. Indeed, this concept has been a part of American jurisprudence for many, many years. For example, in Creamer v. Bivert, 214 Mo. 473, 113 S.W. 1118, 1120, the appellate court observed:

> He sees and hears much we cannot see and hear. We well know there are things of pith that cannot be preserved in or shown by the written page of a bill of exceptions. Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heart, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien.
>
> The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching overeagerness of the swift witness, as well as the honest face of the truthful one, are alone seen by him. In short, one witness may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify."

The same observations are true, as recognized by this Court in Reed, supra, with respect to the carriage and deportment of a prospective juror. Indeed, the trial judge in the instant case, without hesitation, sanctioned the state's given reason for the exercise of a peremptory challenge as to Ms. Watkins. Implicit in this finding is the trial court's assessment of the person offering the reason, the prosecutor:

> Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in Batson, the finding will "largely turn on evaluation of credibility." 476 U.S. at 98, n. 21, *90* L.Ed.2d 69, 106 S.Ct. 1712.

> In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province." Wainwright **v.** Witt, **469** U.S. **412, 428, 83** LEd.2d **841, 105** S.Ct. **844** (1985), citing Patton **v.** Young, 467 U.S. 1025, **1038, 81** L.Ed.2d **847,** 104 **S.Ct. 2885 (1984).**

Hernandez v. New York, **500** U.S. ___, **111 S.Ct. 1859, 114 L.Ed.2d 395, 409 (1991).** Your appellee respectfully submits that the trial court did not abuse its discretion in making his findings with respect to sustaining the state's peremptory challenge and this Honorable Court should not overturn the observations of those who were present at the voir dire.

As a separate sub-issue, appellant contends that once the prosecutor gave a reason as to his exercise of a peremptory challenge against Ms. Watkins, the prosecutor should have also given his reasons for the exercise of a peremptory challenge against Ms. Johnson. As observed above, however, the responses of Ms. Johnson to the questions of both the state and the defense indicated that she was not in favor of the death penalty. However, because she could have voted for the death penalty even though, in her words, she would have had to live with that decision for the rest of her life, Ms. Johnson was not susceptible to a challenge for cause by the state. It is most significant that defense counsel never requested the trial judge

to have the prosecutor relate his reasons as to the peremptory challenge of Ms. Johnson. This failure to require inquiry persisted even after the state had asked the trial judge on two separate occasions as to whether reasons should be supplied for the peremptory strike of Ms. Johnson (R 956, 958). Your appellee submits that the failure to object to the use of a peremptory strike as to Ms. Johnson and the failure to request the trial judge to have the state offer reasons for that strike preclude appellate review. This is especially true where, as in the instant case, there has been no showing of a likelihood of racial discrimination in the use of peremptory challenges.

In conclusion, your appellee submits that the instant case is not unlike the situation presented in Holton v. State, 573 So.2d 284 (Fla. 1990), a case cited by appellant in his brief on this point. In Holton, the state exercised three peremptory challenges to exclude perspective black jurors from the panel. During the jury selection in Holton, defense counsel timely objected on two separate occasions to the exclusion of perspective black jurors. After objecting, defense counsel explained that each peremptory had been used to exclude the only two blacks on the panel. The trial judge in Holton overruled the objection and did not require reasons from the state because the two perspective jurors had expresses opposition to the .death penalty. This Court held with respect to those two perspective Jurors that the defense failed to show that there was a strong likelihood that the two perspective jurors were challenged solely

because of their race. This Court held that "Ambivalence toward recommending a sentence of death and opposition to the death penalty are race-neutral and acceptable grounds for excusing a perspective juror." Id. at 287. Your appellee submits that the circumstances of the instant case are akin to those presented in Holton. It was clear to the prosecutor and to the trial judge that both prospective black jurors were at best ambivalent with respect to their attitudes toward the death penalty, a proper race-neutral reason for use of a peremptory challenge. Indeed, in his brief, appellant acknowledges that "the most [the prosecutor] could have said was that Ms. Watkins was not so 'gung-ho' on the death penalty . . . "(Appellant's brief at p. 38). Your appellee submits that this is a good enough reason to exercise a peremptory challenge. As this Court is well aware, the reasons for the use of a peremptory challenge do not need rise to the level justifying a challenge for cause. The voir dire in the instant case presents a situation where a prosecutor was attempting to seat a jury more favorable to the state with respect to attitudes concerning the death penalty. This race-neutral reason is ample justification for the use of peremptory challenges.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENTS AND ADMISSIONS.

As his second point on appeal, appellant contends that the trial court erred by denying appellant's motion to suppress statements and admissions. At the outset, it must be observed that it is axiomatic that the Fourth Amendment to the United States Constitution only proscribes unreasonable searches and seizures. The United States Supreme Court in Payton v. New York, **445** U.S. **573, 600,** 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), observed that "the constitutional standard is as amorphous as the word 'reasonable'." This axiomatic principle was succinctly set forth in Harris v. United States, **331** U.S. **145, 150, 67** S.Ct. 1098, 91 L.Ed.2d 1399 **(1947):**

> This Court has also pointed out that it is only unreasonable searches and seizures which come within the constitutional interdict. The test of reasonableness cannot be stated in rigid and absolute terms. "Each case is to be decided on its own facts and circumstances." (citation omitted)

In Florida, this principle has long been recognized. For example, in Webster v. State, 201 So.2d 789 (Fla. 4th DCA 1967), the court observed:

> . . . [W]e must bear in mind the basic principle that it is only "unreasonable" searches that are prohibited, not all searches. Whether a particular search is or is not reasonable must be determined by the circumstances surrounding the search and the manner in which it was conducted. (citation omitted) The reasonableness or unreasonableness must be determined largely

> by the facts of the particular case. (text at 791)

The court in Webster then continued with language that is singularly appropriate to the facts and circumstances of the instant case:

> [4] The constitutional provision regulating searches and seizures is intended to protect persons against oppression and not to bring into being numerous minute technical obstructions against the enforcement of criminal law. (citation omitted; text at 791)

With these principles in mind, your appellee submits that appellant's point is without merit.

The underlying facts of appellant's claim were not in dispute and were related by defense counsel at the suppression hearing below. Arrest warrants were issued in Polk County for the two counts of murder and for grand theft of a truck (the validity of those warrants were not in dispute). The arrest was made in Las Vegas, Nevada, by Las Vegas Police Department Officer Michael Campbell. He was running random checks of license tags of vehicles in the parking lot of the Sombrero Motel and obtained a hit from his computer on the vehicle that the defendant had driven to the motel (the defendant's employer's truck). Officer Campbell then obtained further information and found there was a warrant outstanding for the grand theft of the automobile and that there were arrest warrants outstanding on two counts of murder in Florida. Telephone verification was made with the Polk

County Sheriff's Department (R 85 - 87).[1] Officer Campbell next contacted the motel manager to determine who brought the truck to the motel and if that individual was still there. The defendant had rented room number 22 and was still in lawful possession of that room pursuant to the registration and rental agreement. The motel manager advised that he believed the defendant was still present and a key to the room was obtained by Officer Campbell. After two backup officers arrived and were strategically placed, the officers entered the room. The officers used the key quietly to unlock the door and then forced the door open because there was a chain lock on the door. The defendant was handcuffed and read his Miranda rights and it was ascertained that the defendant understood those rights.[2] While still in the motel room, the officers asked the defendant questions about the vehicle and the defendant acknowledged that it was his employer's. The defendant advised the officers where the keys to the vehicle were. When asked if he had killed someone in Florida, the defendant confessed that he did, that he killed his ex-wife and his ex-wife's boyfriend (R 89). The defendant was subsequently taken to

---

[1] The defense below conceded that Officer Campbell acted upon reasonable information that Florida had issued a warrant. In other words, the defense did not dispute the fact that the Las Vegas Police Department officer acted upon probable cause (R 87, 97).

[2] The defense did not make any claims of violation of Miranda or claims of involuntariness of any statements (R 89).

the police department where he was booked, fingerprinted, hair and blood samples were obtained with consent, and the defendant was interrogated by detectives with the Fugitive's Department where a more detailed statement was obtained from the defendant concerning the theft as well as the murder allegations (R 89 - 90). Certain evidence was obtained in the motel room, to-wit: the vehicle keys, the defendant's clothing, some motel room receipts, personal papers, wallet, and cash. After the defendant was removed from the scene, the crime scene technician arrived. The officers then entered the vehicle by the use of the keys and conducted a search of the vehicle. That search obtained certain items including a gun suspected to be the murder weapon, ammunition cartridges and casing, a holster, hotel pass keys, motel receipts, road maps, and various vehicle documents (R 90 - 91).

As noted above, there is no doubt that sufficient probable cause existed in this case to support an arrest by the Las Vegas Police Department. The concession by the defense below as to the existence of probable cause is not surprising, especially in light of the "fellow officer" rule. This rule holds that a suspect may be properly arrested and searched by a law enforcement officer in another state based on information from an officer who had probable cause to make an arrest. Carroll v. State, 497 So.2d 253 (Fla. 3d DCA 1986), review denied, 511 So.2d 297 (Fla. 1987). See also, United States v. D'Angelo, 819 F.2d

1062 (11th Cir. 1987).[3] Appellant contends, as he did below, that the existence of probable cause was insufficient to permit the Las Vegas officers from arresting appellant inside his motel room. Appellant contends that such an arrest violated the precepts of Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 856 (1980). Payton holds that it is unconstitutional to permit a police officer to make a warrantless, nonconsensual entry into a suspect's home to make an arrest absent exigent circumstances. However, although the Nevada law enforcement officers did not obtain a Nevada warrant prior to making the arrest of appellant, this is not the end of the relevant inquiry. As will be discussed below, appellant's Fourth Amendment rights were not infringed.

Your appellee submits that the proper inquiry to be made by this Court revolves around the question of whether the procedures employed in Nevada were "reasonable." Your appellee further submits that the Fourth Amendment rights of appellant were not infringed by the procedures employed in the instant case. Payton is predicated on the fact that:

> . . . [A]n arrest warrant . . . will suffice to interpose the magistrate's determination of probable cause between a zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a

[3] An officer in Nevada is permitted to make an arrest where he has probable cause for believing the person to be arrested has committed a felony. Nevada Revised Statute 171.124 1.(c).

> felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable . . . . (445 U.S. at 602)

The Payton court in footnote 24 relied upon Justice Jackson's "cogent" observation in Johnson v. United States, 333 U.S. 10, 13 - 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not be a policeman or government enforcement agent. (445 U.S. at 586)

These principles, when applied to the facts of the instant case, supply ample justification for the trial court's ruling that the appellant's Fourth Amendment rights were not infringed. arrest warrants were obtained in the State of Florida, specifically, in Polk County. Thus, there was a determination by a neutral, detached magistrate that probable cause existed to arrest appellant on two counts of murder and for grand theft af the vehicle. Therefore, the precepts of Payton were satisfied. There were no further protections available to the appellant and no constitutional rights of the defendant were infringed. This precise reasoning was set forth by the trial judge in his order denying the appellant's motion to suppress evidence and motion to suppress statements and admissions:

> 8. The basic premise of Payton v. New York, 45 (sic) U.S. 573 (1980) in which the United States Supreme Court interpreted the warrant requirement of the United States Constitution, is that before the police may invade the privacy of an individual home and arrest that individual, a judicial officer must review the factual basis on which the arrest is premised, and determine whether there is probable cause to support the arrest. The existence of the Polk County warrant indicates that such a review has been made by a Polk County judge.[4]

The principle is well-settled that a trial court's order denying a defendant's motion to suppress comes to the appellate court clothed with the presumption of correctness, McNamara v. State, 357 So.2d 410 (Fla. 1978), and a reviewing court must interpret the evidence in the light most favorable to sustaining the trial court's ruling. State v. Riehl, 504 So.2d 798 (Fla. 2d DCA), review denied, 513 So.2d 1063 (1987). Your appellee submits that the trial court's ruling should be sustained where the precepts of Payton were satisfied in the instant case when an arrest warrant was obtained in the State of Florida. It does not appear that either precedent or logic dictates that a second arrest warrant need be obtained especially where, as the trial judge observed, "The prefatory note to the 1980 revision of the

---

[4] In his order denying appellant's motion to suppress, the trial judge set forth the provisions of the Uniform Extradition Act adopted by both Florida and Nevada and relied upon by appellant below and in this Court. Your appellee submits that resolution of the instant issue does not revolve around the Extradition Act. Indeed, the defendant appeared before a judge in Nevada and waived extradition (R 1293). Resolution of the instant issue turns on whether the arrest of appellant was "reasonable."

Uniform Extradition and Rendition Act provides that the Court of the asylum state would rely on the issuing of the warrant by the demanding state as the determination of probable cause for the arrest of the person" (R 120 - 121). The determination that probable cause existed to arrest appellant was made by a neutral and detached magistrate. That is all the Constitution requires.

Your appellee submits, therefore, that all statements made by the defendant were admissible where a neutral magistrate in Florida issued an arrest warrant. Alternatively, and as intimated by appellant, appellant's statements to the law enforcement officers at the Las Vegas Police Department would be admissible under the doctrine enunciated in New York v. Harris, 495 U.S. ___, 110 S.Ct. ___, 109 L.Ed.2d 13 (1990). In Harris, the defendant was arrested on probable cause without a warrant in his home in violation of Payton v. New York, supra. On certiorari review, the United States Supreme Court held that where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the state's use of a statement made by the defendant outside of his home, even though this statement is taken after an arrest in the home in violation of Payton. It is undisputed that appellant was removed from the motel and taken to the Las Vegas Police Department wherein he gave a thirteen page statement which was transcribed. Inasmuch as the thirteen page second statement was obtained properly under Harris, a statement which was merely amplification of the defendant's statement made in the motel room, the admission of

the statements made in the motel room, if error, was harmless beyond a reasonable doubt. It is the state's position, however, that all statements and testimony concerning appellant's demeanor were properly admissible where the procedures employed in the instant case were "reasonable" in that an arrest warrant had been issued based upon the decision of a neutral and detached magistrate that probable cause existed. Appellant's second point must fail.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY FAILING TO SUPPRESS EVIDENCE SEIZED FROM APPELLANT'S HOTEL ROOM AND TRUCK.

As a corollary issue to the issue discussed immediately above, appellant contends that because his arrest was illegal all evidence derived from that arrest should have been suppressed by the trial judge. For the reasons expressed below, appellant's point is without merit.

As asserted above, the arrest of appellant by Las Vegas law enforcement officers was constitutionally reasonable based upon the fact that a neutral and detached magistrate in Florida had determined that probable cause existed to support the arrest warrants issued. Thus, because appellant's arrest was not unreasonable, all evidence deriving therefrom was admissible and the motion to suppress was properly denied.

Alternatively, the items of evidence found in the stolen truck (the only items of evidence contested by appellant) are admissible independent of the question of appellant's arrest. First of all, appellant had no standing to contest the search of the stolen vehicle. A defendant does not possess a reasonable, legitimate expectation of privacy in a stolen vehicle and, therefore, has no standing to challenge its search. United States v. Salvucci, 448 U.S. 883, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980); Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). See also, United States v. Hargrove, 647 F.2d 411 (4th Cir. 1981). Secondly, the "inevitable discovery" doctrine

is applicable to the instant case. This exception to the exclusionary rule allows the admissian of unlawfully obtained evidence that ultimately or inevitably would have been discovered by lawful means. Nix v. Williams, 67 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). Inasmuch as appellant had no expectation of privacy in the stolen vehicle, the items contained therein would have inevitably been discovered, either by way of inventory search, by discovery by the rightful owner of the vehicle upon the vehicle's return, or by some other lawful means.

The instant case can, therefore, be materially distinguished from Graham v. State, 406 So.2d 503 (Fla. 3d DCA 1981), a case relied upon by appellant in his brief at pages 54 - 55. In Graham, police obtained keys in an invalid Payton search and seizure and ultimately used those keys to obtain a gun from the defendant's car. In the instant case, however, the arrest of appellant was not constitutionally unreasonable and, in any event, it was not the defendant's car which was searched. The defendant in Graham had standing to contest the search of his car, whereas appellant herein had no standing to contest the search of a stolen vehicle. Appellant's third point must fail.

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY EXCLUDING FROM THE GUILT PHASE OF TRIAL EXPERT TESTIMONY OF A PSYCHIATRIST PERTAINING TO MENTAL HEALTH ISSUES (SCHIZOPHRENIA) WHERE INSANITY WAS NOT A DEFENSE RELIED UPON BY APPELLANT.

As his next point on appeal, appellant attempts to have this Honorable Court not apply the principles enunciated in Chestnut v. State, 538 So.2d 820 (Fla. 1989), where Chestnut is clearly applicable. For the reasons expressed below, appellant's point is without merit.

Disposition of appellant's fourth 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 your appellee submits that Dr. Darby's testimony would not have been relevant to the issues in the instant case, as will be discussed below, your appellee will also offer reasons why the expert testimony, even if relevant, would still be inadmissible because of prejudice and confusion.

Appellant below tendered the testimony of Dr. Darby, a psychiatrist, with respect to issues concerning a previous schizophrenia diagnosis of appellant by Dr. Darby. The defense theory revolved around the notion that the jury would not be able to draw the proper inferences from the evidence with respect to

certain actions of appellant surrounding the circumstances of this case. The defense below conceded that Dr. Darby would not be testifying as to any type of insanity defense (e.g., R 1369). The defense did not contend that appellant did not have the ability to premeditate (e.g. R 1370). Rather, the defense sought the testimony as an aid to the jury in the determination of whether appellant did premeditate (as opposed to whether he had the ability to do so) (e.g., R 1371). The state immediately objected to admission of this testimony on the grounds of relevance (R 1371 - 1372). The state's objection was well-taken.

The prosecutor correctly pointed out to the court that "Dr. Darby doesn't have an opinion about anything surrounding this homicide", especially where Dr. Darby had no contact with appellant for at least six months prior to the murders (R 1 72). The prosecutor continued:

> . . . So, whatever he says can't possibly have anything to do with this particular crime. This is -- we want to explain Mr. Maulden's personality, this is penalty phase evidence and they can bring it up in penalty phase. But since it has nothing to do with any of the elements of any crime, nor is it relevant to any defense to this crime, because paranoid schizophrenia is not a defense, it is not relative to an element, it's not relevant to a defense, then it's not relevant. (R 1372)

Your appellee submits that the reasons submitted by the prosecutor as delineated above amply show why Dr. Darby's proffered testimony was not relevant to the issues presented in the instant case.

The trial judge was clearly concerned about the relevancy of the proffered psychiatric testimony. Several times during the defense argument concerning their request to permit Dr. Darby's testimony, the trial judge observed that the defense was really attempting to present an insanity defense without calling it such (R **1374, 1375, 1376, 1377, 1379, 1381).** The trial judge's observations were correct in that the defense was attempting to do what is proscribed by Chestnut, supra. Indeed, the trial court rejected the defense's disingenuous argument after the court had reviewed Chestnut (R **1446).** The defense attempted to skirt the fact that an insanity defense was not raised by stating they were not attempting to show that appellant could not premeditate, but rather that he did not premeditate. The trial court throughout this record expressed his disbelief that one could attempt to show that a person did not premeditate without also showing that he could not premeditate. The trial judge eventually questioned the defense as to **how** they could get around the language of the certified question answered by this Court in Chestnut. **The** question answered in the negative was as follows:

> Is evidence of an abnormal mental condition not constituting **legal** insanity admissible for the purpose of proving either that the accused or did not entertain the specific intent or state of mind essential to proof of the offense, in order to determine whether the crime charged, or a lesser degree thereof was in fact committed? **(538** So.2d at **820;** emphasis supplied)

The trial court's ruling based upon Chestnut was undoubtedly correct.

In his brief, appellant relies much upon the dissenting opinion written by Justice Overton in Chestnut. Yet, the instant case is not one involving objective evidence of organic brain damage which Justice Overton would hold admissible. Rather, the defendant wanted to introduce evidence of schizophrenia, a type of infirmity which Justice Overton apparently believes would be justifiably inadmissible: ". . . I could agree that it is justifiable to reject subjective evidence of an abnormal mental condition" (538 So.2d at 828).

Appellant's attempt to have this Honorable Court reconsider Chestnut is particularly unavailing. Reliance is placed upon several cases in appellant's brief which stand for the proposition that psychiatric testimony may be admissible if that testimony is relevant to prove a material issue in question. However, in the instant case, no material issue raised by the defense necessitated psychiatric testimony. To the contrary, appellant did not raise a defense of insanity, the only defense in this case upon which Dr. Darby's testimony would have been relevant.

Although the proffered testimony of Dr. Darby was clearly irrelevant to the issues presented at the guilt phase of trial, even if relevancy could have been established, the testimony would still have been inadmissible. In his brief, appellant recognizes that this Court's decision in Glendening, 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 unfair prejudice to the state in this case is obvious. The defense never filed a notice of intent to rely on an insanity defense and, therefore, the state was unable to have the defendant examined to rebut any defense mental health issues arising in the guilt phase (R 1393 - 1394). Also, there is no doubt that the type of testimony sought to be elicited here is the type which confuses and misleads a jury. This Honorable Court in Chestnut, cited with approval the following portion of the opinion rendered in Tremain v. State, 336 So.2d 705, 706 (Fla. 4th DCA 1976), cert. denied, 348 So.2d 954 (Fla. 1977):

> It is our opinion that to allow expert testimony as to mental state in the absence of an insanity plea would confuse and create immaterial issues. If permitted, such experts could explain and justify criminal conduct. As lay people we could guess that almost everyone who commits crimes against society must have some psychiatric of psychological problem. However, the test continues to be legal insanity as defined and not otherwise, and the court and jury should not be subjected to testimony as to mental flaws and justification where the defendant knew the difference between right and wrong at the time of the crime,

This Court also cited a portion of the opinion rendered in Bethea v. United States, 365 A.2nd 64, 88 (D.C. 1976), cert. denied, 433

U.S. 911, 97 S.Ct. 2979, 53 L.Ed.2d 1095 (1977), where the court recognized that there are significant differences between psychiatric abnormality and other recognized incapacitating circumstances, such as intoxication, medication, epilepsy, infancy, or senility. These matters are susceptible to quantification or objective demonstration and are susceptible to lay understanding, unlike the concept of partial or relative insanity. Chestnut, supra at 823. Thus, the type of testimony sought to be elicited by the defense with respect to partial insanity or a diminished capacity would surely have confused or misled the jury.

It is clear that the introduction of expert psychiatric testimony pertaining to a mental aberration short of insanity is not relevant and admissible in a Florida trial. Even if it were admissible, the probative value of such testimony would be clearly outweighed by unfair prejudice, confusion, and misleading of the jury. Appellant's fourth point must fail.

ISSUE V

WHETHER THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON AND FINDING THE PRIOR VIOLENT FELONY AGGRAVATING FACTOR.

The defense below argued that the prior violent felony aggravating factor should not be applied if based upon contemporaneous convictions. In doing so, defense counsel conceded that Florida law did not support his position (R 1682 - 1683). Defense counsel's concession was correct and the trial court properly instructed the jury and found the prior violent felony aggravating factor where appellant killed two persons.

In Pardo v. State, 563 So.2d 77 (Fla. 1990), the trial court had ruled that, in his opinion, the Florida legislature intended the aggravating factor of a prior conviction for a capital felony to apply to offenses other than the ones for which the defendant was being presently tried. Id. at 80. In rejecting this position, the same position as now advanced by appellant, this Honorable Court held:

> This is not a correct statement of the law. We have consistently held that the contemporaneous conviction of a violent felony may qualify as an aggravating circumstance, so long as the two crimes involved multiple victims or separate episodes. Wasko v. State, 505 So.2d 1314 (Fla. 1987).

Pardo, Id. at 8. In the instant case, the appellant's murder of multiple victims rendered him susceptible to a finding of this aggravating circumstance.

Appellant's contention in his brief that "generally" the defendant kills one victim before killing another (appellant's brief at page 73), is not a legal prerequisite to the finding of this aggravating circumstance. For example, in Santos v. State, 16 F.L.W. S633 (Fla. September 26, 1991), the defendant therein murdered his 22-month-old daughter and her mother at the same time in the same place. This Court agreed with the state that the aggravating factor of a prior violent felony properly exists, citing Wasko v. State, 505 So.2d 1314, 1317 (Fla. 1987). The same result must obtain in the instant case and appellant's point must fail.

ISSUE VI

WHETHER THE TRIAL COURT'S INSTRUCTION ON THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIONALLY VAGUE.

Under this point, appellant makes a now-familiar argument which appears in many direct and collateral pleadings which appear before this Court. He contends that the trial court's instruction on the cold, calculated and premeditated aggravating circumstance was unconstitutionally vague in that the jury is not informed of the limiting construction this Court has placed on this aggravating factor. Appellant's point is without merit.

This Honorable Court has regularly and consistently rejected the claim raised herein by appellant. For example, in Brown v. State, 565 So.2d 304, 308 (Fla.), cert. denied, U.S. ___, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990), this Court held:

> [8] Based on *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), Brown also argues that the standard instruction on the cold, calculated and premeditated aggravating circumstance is unconstitutional. In *Maynard [v. Cartwright*, 486 U.S. *356* (1988)], the Court held the Oklahoma instruction on heinous, atrocious and cruel unconstitutionally vague because it did not adequately define that aggravating factor for the sentencer (in Oklahoma, the jury). We have previously found *Maynard* inapposite to Florida's death penalty sentencing regarding this state's heinous, atrocious, and cruel aggravating factor. *Smalley v. State*, 546 So.2d 720 (Fla. 1989). We find Brown's attempt to transfer *Maynard* to this state and to a different aggravating factor misplaced. (citations omitted)

See also, Robinson v. State, 574 So.2d 108, 113 n. 6 (Fla. 1991); Occhicone v. State, 570 So.2d 902, 906 (Fla. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 2067, 114 L.Ed.2d 471 (1991).[5]

This Honorable Court should decline appellant's invitation to reconsider the issue raised herein. This Court's previous rulings pertaining to this issue are constitutionally correct. Appellant's sixth paint should be rejected as meritless.

[5] Undersigned counsel filed a brief in opposition to petition for writ of certiorari in the Occhicone case and can assert that the same claim being raised herein, the purported vagueness of the instruction on the cold, calculated and premeditated aggravating factor, was raised by Occhicone in his certiorari petition which was denied.

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON AND FINDING THE HOMICIDES WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF LEGAL OR MORAL JUSTIFICATION.

As his seventh claim on appeal, appellant contends that the trial judge erred by instructing the jury on and finding that the two homicides in the instant case were 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. Indeed, the actions of the defendant belie his self-serving testimony as to the manner in which the homicides were committed. The findings of the trial judge pertaining to the cold, calculated and premeditated homicides are set forth in the brief of appellant at pages 81 - 82 and will not be repeated verbatim herein (see also R 2068, 2071). However, certain findings of the trial judge will be discussed within this argument as they pertain to the specific components of the cold, calculated and premeditated aggravating factor.

Before discussing each component part of the aggravating factor at issue, your appellee, as a starting point, refers this Honorable Court to the decision rendered in Swafford v. State, 533 So.2d 270 (Fla. 1988). There, this Honorable Court 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 a homicide cannot be considered "cold" in "domestic" situations. He contends that this aggravating circumstance is reserved primarily for execution of a contract murder or witness elimination killings (appellant's brief at page 85). 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 trial court correctly referred to the two homicides in the instant case as "execution" .style murders. The trial court's analysis comports with cases decided by this Honorable Court, 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 trial judge in the instant case observed in his written findings that the murders were committed in the style of an execution. The facts of the instant case amply support this finding. The defendant deliberately set about completing his mission. After determining that he was going to kill his ex-wife, the defendant went to her residence and observed that both she and her fiance were there. The defendant then travelled back to Lakeland where he obtained the gun that he had previously buried and test fired the weapon to make sure it would work. The defendant then returned to the ex-wife's residence, parked his truck several blocks from the residence, stealthily entered the home and into the bedroom of his ex-wife,

and executed his victims with a .357 Magnum gun. The victims were, among other places, shot in the head so as to make sure death occurred. 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. Appellant attempts to explain the commission of the murders by self-serving statements concerning his being in a dazed condition. 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 found and that appellant suffered from some impairment, that impairment was either limited or selective at best (R 2070 - 2071). To the contrary, the trial court correctly found 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 89, citing Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988)). Appellant contends that he did not act in a calculated fashion, but rather reacted to a sudden and inexplicable impulse to kill his ex-wife. 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 and the murder). Secondly, even one af appellant's expert witnesses at trial acknowledged that there was some planning involved in committing the murder. Dr. McClane acknowledged this on cross examination (R 1850). Indeed, the basic facts of this case demonstrate on their face the calculated plan to execute the two murder victims. On the afternoon of the murders, the defendant called the father of one of the murder victims. The defendant advised, "If you love him, you'll get him out of there" (R 1506, 1538). It is conceivable that the fully formed intent to kill commenced at this point, although it is not necessary to so find in order to sustain the existence of a prearranged plan to kill. Indeed, when appellant awake during the night, he immediately determined that he was going to kill hi3 ex-wife. Thus, from that time until the commission of the murders, the defendant had at least one full hour from the time he decided to kill his wife to where he actually entered her home to reflect upon his conduct (R 2071). Nevertheless, appellant drove to his ex-wife's residence and determined that both she and her fiance were located therein. At this time it is certain that appellant also formed the conscious intent to kill his ex-wife's fiance. Once determining that his victims were at home, the defendant drove at least twelve - fifteen miles back to Lakeland in order to

retrieve the gun he had buried that day. Inasmuch as appellant had never fired the gun, it was test-fired. The defendant then returned to his ex-wife's residence and parked his truck two blocks away so that it would not be detected. The defendant then snuck into the house through a bathroom window and stealthily entered his ex-wife's bedroom. Appellant then executed his victims while they were asleep. Thereafter, appellant took his daughter, who was asleep in his ex-wife's death bed, and carried her to his truck, stopping to see if his stepson was all right. The appellant then drove to his mother's home, left his daughter there, and proceeded to flee the state in his employer's truck. Somewhere during his escape, appellant scratched off his employer's logo from the truck. 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 [Maulden'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 executed his carefully planned murders.

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. Your appellee asserts to the contrary and, as the trial court found,

the execution-style murders were 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 call to Earl Duval's father warning him to get Earl out if he loved him. Subsequently, the defendant set his plan into motion by travelling to the scene of the murders, back to Lakeland to obtain the weapon, and then back to the ex-wife's residence in order to execute the victims. Certainly appellant had "ample time to reflect and evaluate his actions" (R 2068). Heightened premeditation is evident in this record.

Finally, appellant intends that he had a pretense of legal or moral justification in committing murder. No "pretense" is even suggested by these facts. Even if appellant had reason to believe that Earl Duval was physically punishing the children or that Tammy and Earl were getting married and leaving the state, these matters supply no pretense of justification, either moral or legal, for lashing out and committed murder. This is not a case such as those cited by appellant where the defendant is afraid of his victim, where the victim attacked the defendant

previously and threatened the defendant's life or where a victim jumped at the defendant. In Cruse v. State, 16 F.L.W. S701 (Fla. October 24, 1991), this Honorable Court found that the mentally ill defendant did not have a colorable claim of any kind of moral or legal justification for lashing out and murdering various members of the community simply because Cruse believed that people were talking about him or attempting to turn him into a homosexual. Similarly, in the instant case, the defendant does not have a colorable claim of any kind of moral or legal justification where he was upset that his ex-wife divorced him. Society does not recognize a license to kill because one is upset.

Your appellee 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 seventh point must fail.

ISSUE VIII

WHETHER THE DEATH SENTENCE **AS IMPOSED** IN THE INSTANT CASE **ARE** PROPORTIONALLY **WARRANTED.**

Appellant argues that the sentences of death imposed in the instant case were not proportionate to other death **cases** because his moral culpability is simply not great enough to deserve a sentence of death. He contends that the shootings show a distorted thought process rather than criminal intent and that this is not one of the unmitigated first-degree murders for which death is the proper penalty. Maulden essentially contends that he was under a lot of stress at the time, having recently been divorced from his wife (who was living with another man). Appellant then points to several cases where this Honorable Court has reduced sentences of death to a life sentence where the murders were the result of **a** "passionate obsession." E.g., 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).

Your appellee contends that the sentences of death were properly imposed in the instant case as the aggravating factors established below set Maulden and these killings apart from the average capital defendant. The imposition of the death sentences were proportionate to other capital cases where the sentence has been upheld. Cf. Brown v. State, **473** So.2d 1260 (Fla. 1985).

The jury recommended in the instant case that appellant receive death sentences for the two murders by a vote of eight to four. The trial court found the existence of three valid

aggravating circumstances: (1) previous conviction of another capital felony, (2) the capital felonies were committed while the defendant was engaged in the commission of a burglary, and (3) that the murders were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R 2067). In mitigation, the court found that appellant was under the influence of mental or emotional disturbance at the time the homicides were committed, that appellant's judgment was impaired by his mental or emotional condition, that Maulden's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, that appellant freely confessed to the police and fully cooperated with authorities, that appellant showed remorse for his actions, and that appellant received no disciplinary report while in jail prior to trial, although the last three items were to be accorded little weight (R 2068 - 2069). When considered in the context of the facts of this case, the aggravating circumstances clearly outweigh the existing the mitigating circumstances. The sentence of death was proportionate to other death cases and the lower court did not err in entering both sentences of death.

What is most significant and ignored by appellant in his brief is the fact that, although the trial court did find the existence of the statutory mental mitigating factors, the judge found only that appellant was "impaired". He specifically omitted a finding that appellant was "substantially" impaired.

Although appellant's mental health experts testified that he was substantially impaired, the trial court rejected these findings. The trial court, as finder of fact in determining the existence of mitigating factors, is entitled to draw this conclusion. "Expert testimony . . . is not binding on the trier of fact even when that testimony is uncontradicted." Cronin v. State, 470 So.2d 802, 804 (Fla. 4th DCA 1985). The trial court thoroughly analyzed the circumstances surrounding appellant's offenses and determined that appellant's conduct indicated that the defendant's impairment was limited or selective in nature (R 2070 - 2071). The trial court's analysis is well-supported by the record and should not be disturbed by this Honorable Court on appeal. The trial court correctly determined that the aggravating circumstances existing in this case clearly outweighed the mitigating factors. Thus, the instant case is not one such as Klokoc, 16 F.L.W. S603 (Fla. Nov. 27, 1991) (revised opinion), OF Songer v. State, 544 So.2d 1010 (Fla. 1989), wherein one statutory aggravating factor did not outweigh unrefuted mitigating factors. Rather, the trial court's well-reasoned order amply shows why the aggravating Circumstances outweighed the mitigating factors in the instant case.

Appellant's reliance on cases such as Garron, Wilson, Irizarry is misplaced. In each of those cases, this Honorable Court found that the killings were the result of heated, domestic confrontation and, although premeditated, were most likely committed upon reflection of a short duration. The murders in

the instant case were 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. The instant case is 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. The same result should obtain in the instant case.

CONCLUSION

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

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General
Florida Bar ID#: 0238538
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 10th day of January, 1992.

OF COUNSEL FOR APPELLEE.