IN THE SUPREME COURT OF FLORIDA

CHARLES SEBASTIAN MAULDEN,

Appellant,

vs.

Case No. 75,595

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On July 21, 1988, Charles Maulden was indicted for two counts of first degree murder, armed burglary, grand theft, and possession of a firearm by a convicted felan. The indictment charged him with the June 27, 1988, homicides of Tammy Maulden and Earl Duvall. (R. 3-6) The "firearm" count was later severed. (R. 117-18, 124)

A Motion to Suppress Statements and Admissions was denied after a hearing on April 28, 1989. (R. 68-69, 78-113, 119-21) Maulden was tried October 19-26, 1989, Circuit Judge Charles Davis, presiding, and found guilty as charged. (R. 136-1673, 2019-22) After a penalty proceeding October 27, 1989, the jury recommended death by a vote of eight to four. (R. 1773-2003, 2023-24)

On November 3, 1989, the judge sentenced Charles Maulden to death for each homicide; life in prison for the armed burglary; five years for the grand theft; and fifteen years for possession of a firearm by a convicted felon. (R. 2040-56) All sentences were to run consecutively. (R. 2060-65) The judge exceeded the guidelines recommendation of nine to twelve years for the noncapital offenses because of Maulden's conviction of two capital offenses. (R. 2055, 2066) On November 3, 1989, the judge filed written findings of fact supporting imposition of the death penalty. (R. 2067-72)

Maulden filed a Notice of Appeal to this Court, pursuant to Article V, Section 3(b)(1) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030 (a)(1)(A)(i), on November 22, 1989. (R. 2073) The Public Defender for the Tenth Judicial Circuit was appointed to represent Maulden on the same date. (R. 2079)

STATEMENT OF THE FACTS

Guilt Phase

Charles ("Chuck") Maulden's mother, Dean Austin, testified that her son was married to Tammy Maulden for five or six years. They separated about October of 1987. Chuck and Tammy had two children. Stacy, a bay, was nine at the time of the trial and Jenny was three. Maulden was Jenny's natural father but not Stacy's. (R. 1150-53)

Chuck Maulden lived with his mother in Lakeland, Florida, at the time of the homicides. (R. 1154) He had lived there for eight or nine months. (R. 1396) Tammy lived with Earl Duvall and the two children in Wahneta, Florida. (R. 1155)

Mrs. Austin testified that Chuck was depressed. His depression would came and go. When he was taking Mellaril, he acted much better.[1] He took the medicine for the first two months he lived with her but had not renewed the prescription after that. (R. 1399, 1403) She was not aware of Chuck's diagnosis but when he was taking the medicine he talked to her and carried on conversations. (R. 1400) When he was not on medication, he stayed in his room and heard voices.[2] (R. 1401) Things she said went "over his head" and

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[1] Defense counsel attempted to call Dr. Darby to testify that Maulden was schizophrenic and that he prescribed the Mellaril but the trial court sustained the state's objection and would not admit the testimony. See Issue IV, infra.

[2] During penalty phase, Maulden's mother elaborated. Prior to the homicides, Chuck heard people talking to him when no one was there. (R. 1783) He talked to himself, especially in her bedroom where he often heard the voices. (R. 1784) She never heard the voices. (R. 1785)

he seemed confused. (R. 1405) He seemed suspicious and distrustful of everyone except his mother. (R. 1406) He always smelled his food before he ate it. (R. 1407)

Although he did not talk much, Chuck acted especially depressed, upset and nervous during the two weeks preceding the crimes. (R. 1397-98) He vomited almost every morning as soon as he got out of bed. (R. 1407) He did not seem to have a virus and his mother did not know what was wrong with him. He stayed in his room far at least a whole weekend and would cry which was unusual for Chuck. (R. 1408) He would lay on the couch and stare into space for hours. (R. 1409) He had little appetite. (R. 1409)

Chuck's sister, Deanetta Quednau, testified that she saw her brother a couple times while he was living with his mother. She noticed that when he was on the medication he was "very, very very easy going, very relaxed, talkative, receptive to listening and sitting and discussing . . . . " (R. 1422-23) When she saw him at her mother's house after he quit taking the medication, he was quite different. When she asked him about his children, he told her he did not want to talk about his family with her. She said that his mood "put terror in me, scared me . . . ." (R. 1425-27)

Dewey A. Chancey was Chuck Maulden's employer at Southern States Utilities, a waste water and water treatment company. (R. 1138-39) He testified that he hired Maulden who worked for him for about six months. (R. 1420) Chancey had hired and worked with Chuck Maulden at another utility company in the early 1980s. (R. 1144-45) He hired Chuck because he was a good worker and was

licensed by the state to deal with water and sewer treatment. He had taken courses to become certified as an operator. (R. 1146-47)

Maulden was given the use of a company truck. (R. 1140) Chancey said that he did not see Maulden every day because the employees went directly to their job sites, but that he usually ran into him at least a couple times a week. (R. 1141-42) The first couple months Chuck worked there, starting in January of 1988, his work was very good. After several months, however, Chuck's work started to drop off and he stopped checking in regularly. (R. 1421)

Chancey said that he had been intending to talk to Chuck Maulden about his work. Things were not getting done and Maulden was not checking in on a regular basis. The last couple weeks prior to the homicides, Chuck had been sitting outside the shop when the men met rather than coming in to talk with the others. (R. 1416-17) He seemed withdrawn, did not want to communicate, and acted as though he did not care about the job. (R. 1418-20)

On the Sunday prior to the Monday morning homicides, Mrs. Austin, Chuck's mother, was supposed to go to church with Chuck and the two children. When she awoke, however, Chuck was gone. He and the children returned from church about 1:00 p.m. After lunch, Mrs. Austin watched Jenny for about an hour and a half while Chuck and Stacy were gone in the truck. (R. 1157)

Although Tammy was to pick up the children at 6:00 p.m., she called and said it would be closer to 10:00 p.m. Mrs. Austin was watching television and did not see Tammy when she picked up the two children. She fell asleep on the couch. (R. 1159-60)

Larry Duvall, father of Earl Duvall, testified that on that Sunday afternoon he noticed a white pickup truck in front of his house. A little boy was in the truck in addition to the driver. He did not recognize them and had not seen the truck before. By photograph, Duvall identified Maulden's company truck as the truck he had seen at his house that day. (R. 1123-24) Later that day, about nine or ten o'clock, Larry Duvall received a telephone call. The caller said, "If you love him, you'll get him out of there." When Duval asked the man what he said, he repeated the same statement, then hung up. (R. 1124)

Chuck Maulden, age 34, testified in his own defense.[3] (R. 1487) He said that he had tried to figure out why he killed Tammy Maulden and Earl Duvall but had not come to any conclusions; he just did not know why. He was remorseful for the victims, his children, and for the families involved. (R. 1487)

Maulden first met Tammy in 1980 in a dance bar called the "Peekaboo," where she was an employee and sex was prevalent. He was looking far a sexual relationship. (R. 1490, 1517) They did not start dating until the fall of 1981 and were married December 1, 1981. Maulden had never been married before. (R. 1489-90) He loved Tammy from the first time they met and the intensity of his love had grown very much since then. He did not believe he could have a deeper love for anyone on earth. (R. 1491)

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[3] At the time of the trial, Maulden was taking Thorazine three times a day, totalling 200 milligrams a day. He said the medicine calmed him down and enabled him to handle situations in a more appropriate manner. (R. 1535, 1883)

Tammy's son, Stacy, was in foster care at the time of their marriage. Maulden went to court with Tammy to get him returned. (R. 1492) Stacy then lived with them and Maulden had a goad relationship with him. Their much-wanted daughter, Jenny, was born in 1986. He and Tammy made plans to spend their lives together. They regularly attended the Assembly of God church. (R. 1494-96) They were married for about five years. (R. 1498)

During the final year of their marriage, Chuck and Tammy had a lot of financial problems. Chuck had started his own business maintaining water and waste water treatment plants. When he lost a major contract, his remaining business was insufficient to make the house payments. The financial problems created stress in the marriage. (R. 1497) Prior to the break-up of the marriage, he hit Tammy. She left him shortly thereafter. (R. 1537)

Chuck and Tammy separated in October of 1987 and were divorced in January of 1988. Chuck was very disturbed about the divorce. He laved Tammy and the children and cauld not understand how Tammy could give up on their relationship. He tried unsuccessfully to reconcile with her. Although he was not able to see the children much at first, after he got transportation and a better job, he saw them about twice a month. (R. 1499)

At first Maulden had hope that he would get Tammy back. As time passed, however, his depression over the separation and divorce grew worse and worse. His character was changing; he just wanted to be alone and to lay around and think of what he had done in his life "to come this far down the road and fail." He cried a

lot then and still did at the time of the trial. (R. 1499-1500)

Maulden was taking Mellaril during the separation and divorce. He obtained the medication from Dr. Darby at Peace River Center. It helped a lot. He slept and ate better. When the medicine ran out in January or February of 1988, however, he was unable to get to Peace River Center to get the medicine because of his work. He intended to but never did. (R. 1501-02) Meanwhile, his depression worsened until he imagined himself being hospitalized and totally separated from his family. (R. 1503)

Maulden heard "through the grapevine" that Tammy and Earl were going to Georgia and were possibly getting married. It was "the hardest thing to accept'' that another man would raise his children. Although he felt anger toward Tammy from time to time, he had no bad feelings towards Earl. (R. 1503-04) He had met him anly one time and had told Earl not to whip his daughter.[4] (R. 1489)

On the Sunday prior to the homicides, Maulden arranged to take Jenny and Stacy to church. He had been spending more time at church than anywhere else. They went out to eat after church and he took the children swimming at Saddle Creek Park. (R. 1504) Although he was happy to have the children, being with them made him miss Tammy mare. (R. 1504-05)

Because he wanted to see what type of people Earl Duvall's parents were, he went by their house. (R. 1505) After he saw where

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[4] Stacy told Maulden that Duvall whipped both Stacy and Jenny. (R. 1489) Maulden said that, although he really knew nothing about Duvall, he was concerned about him raising the children. (R. 1490)

the Duvalls lived, he was somewhat jealous of Earl and wanted him away from Tammy. Thus, he called Earl's father and said something like, "If you love him, you'll get him out of there." (R. 1506, 1538) Maulden testified that he did not then contemplate the homicides but, instead, was trying to cause a separation between Tammy and Earl so that Tammy would have time to think abaut what she was doing to their family and so he might see Tammy alone.[5] He thought Earl was too young to talk to about the situation so called Earl's father. (R. 1537-38) Earl was 24 years old at the time of his death. (R. 1120)

Tammy was supposed to pick up the children around 7:00 p.m but called and said she would be late. (R. 1505) She did not arrive until about 11:30. (R. 1506) Although Maulden was angry and upset because Tammy was being irresponsible, he was more concerned with getting back together with her. Thus, he told her that she better come home. Although he was not threatening her, Tammy said, "Don't threaten me, I've already been threatened once today." She smelled as though she was intoxicated. (R. 1508)

After Tammy left, Chuck Maulden went to sleep in his clothes. (R. 1508) He awoke at about 1:30 and had no feelings at all. He felt very much in a daze. He looked at himself in the mirror by the bed and said he was going to kill Tammy. He had never thought of killing her before. (R. 1509-10)

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[5] Dr. McClane testified, during penalty phase, that Maulden's call to Larry Duvall appeared to be associated with Maulden's "burgeoning stress and concern about Tammy and Earl hurting the kids," and that his intent to kill was a later development. (R. 1852)

He drove to Tammy and Earl's apartment. When he arrived, he noticed that Earl's car was there. At that time, he assumed that Earl would be with Tammy and he would probably kill Earl too.[6] He went to Saddle Creek Road where he had buried his gun earlier in the day and dug it up.[7] (R. 1511-12, 1536, 1543) He returned to the apartment, crawled through the bedroom window, switched on the light and immediately fired five shots.[8] He could not recall any thoughts when he shot Tammy and Earl or while he was driving to their apartment. He was confused and dazed. (R. 1511-12, 1541)

Maulden did not know Jenny was in bed with Tammy and Earl until after he shot them. He picked her up and took her with him, leaving Stacy asleep in the other bedroom because Stacy was not his natural child. (R. 1511-12) He took Jenny back to his mother's house and put her on the couch where she went back to sleep. He looked at his mother sleeping in the bedroom and left. (R. 1513)

He did not know where he was going but was "just driving." He felt pretty much alone. He had an intense flood of emotion and was remorseful for what he had done. He was also scared and did not know what he was going to do. (R. 1513) He heard "voices of Tammy"

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[6] Maulden said he might have talked to Tammy about a reconciliation if Earl had not been there. (R. 1511)

[7] Maulden said he had owned the gun for about six or seven months. (R. 1536) He had never fired it so after he dug it up and loaded it, he fired it to make sure it worked. He said that he buried it Sunday afternoon after he called Larry Duvall because he was afraid someone would come to question him about the telephone call and he did not want to get his mother in trouble. (R. 1540-46)

[8] Maulden said he shot Tammy; then fired three shots at Earl and fired the fifth shot in the back of Tammy's head. (R. 1551)

and was trying to communicate with her "in a remorseful state of mind." He knew the voices were in his head but did not know exactly where they were coming from or why. He knew he was sick but did not know how sick he was. (R. 1514) At some point, he scraped the company signs from the side of the truck to avoid being captured.[9] (R. 1552-54) He ended up in Los Vegas.[10] (R. 1514)

Chuck's mother testified that, on the morning of the homicides, Jenny woke her up about 3:00 a.m. because she needed to *go* to the bathroom. Neither Chuck nor his truck were there. (R. 1160) When Mrs. Austin awoke at 5:00 to get ready for work, Jenny was still there and Chuck had not returned. (R. 1161) She called her sister, Fran Hall Cherry, who suggested that if Chuck had not returned by the time she had to leave for work, she take Jenny to Tammy Maulden's apartment.[11] (R. 1161-62)

When Mrs. Austin arrived at Tammy's apartment, she found the bathroom window broken out. When she received no response to her calls at the bathroom window and at Stacy's bedroom window, she went to the window of Earl and Tammy's bedroom and saw their bodies on the bed. (R. 1166) She then found that the kitchen door was partially open and entered the house. She felt Earl and Tammy's

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[9] Maulden said he intended to eventually turn himself in and return to testify. (R. 1554) The prosecutor implied that Maulden told someone that he "figured he'd go to Los Vegas, see the Rocky Mountains before the police found him."' (R. 1905)

[10] Maulden called his mother several times prior to his arrest but did not tell her where he was. (R. 1172)

[11] Fran Hall Cherry's testimony was essentially the same as that of her sister, Dean Austin. (R. 1173-1178)

legs and found they were cold. She awoke Stacy and took the children to Publix where her sister worked. (R. 1167) They took the children to Fran's house and called the police.[12] (R. 1170)

Dawn Lanae Fountain, a Polk County deputy sheriff at the time of the homicide, responded to the Village Apartments in Wahneta on June 27, 1988, at about 9:15 a.m. (R. 1179-81) Fountain pulled aside a drape at a window with the screen missing and observed two bodies on the bed. (R. 1186-87) She climbed through the window to ascertain that both persons were dead. (R. 1187) The bathroom window was broken and propped open with a branch. Fountain observed dirt and a little grass in the bathtub. (R. 1188-90)

Lori Egan, a Polk County Sheriff's Office crime scene technician at the time, took notes, photographed the crime scene, and made crime scene sketches, all of which she identified in court. (R. 1223-33) She processed items for latent fingerprints and searched for evidence at the scene. (R. 1233) She identified evidence including bullet fragments, miscellaneous bathroom products found outside the bathroom window, and the pair of panties received from Fran Cherry's daughter.[13] (R. 1234-42)

Larry Duvall testified that, on the morning of the homicide, his son Wayne flagged him down while he was on the way to open his

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[12] Fran noticed that Jenny's panties appeared to have a blood stain on them. They saved the panties for the police. (R. 1171) Fran's testimony was essentially the same. (R. 1177)

[13] A forensic serologist from FDLE later testified that the stain on the panties was type B human blood. (R. 1350) Earl Duvall's blood type was B. Bath Tammy and Charles Maulden had type O blood. (R. 1351)

store in Lakeland. Wayne told him that Earl had not picked him up for work that morning. (R. 1121) After taking Wayne and his wife to work, Mr. Duvall went to the apartment that Earl shared with Tammy Maulden. (R. 1121-22) When he arrived, a policemant told him he could not go in and that "they was in there." (R. 1125-26)

That Monday morning, Maulden's employer received a phone call from his mother who asked if he had seen or heard from Chuck that day. He had not. (R. 1143) Maulden never returned to work. (R. 1144) When Chancey was unable to locate Maulden by the following day, he reported Maulden's truck stolen. (R. 1144)

Dr. Alexander Melmud, the medical examiner, testified that he performed autopsies on Earl Duvall and Tammy Maulden. (R. 1204) Tammy Maulden had a gunshot wound behind the left ear, exiting the right temple. (R. 1207) He found a second gunshot wound to the left cheek; the bullet was removed from the back of her neck. A third gunshot wound was to the upper chest; the bullet was retrieved from the upper-left back. (R. 1208) A fourth bullet entered her arm and came out the elbow.[14] (R. 1209) The head, cheek and chest wounds would have been fatal. (R. 1210-11, 1213) Dr. Melmud found stippling around several of the wounds, indicating that the shots were fired from within twa feet. (R. 1209)

Earl Duvall had a gunshot wound to the right shoulder or chest area, exiting in the left back area; another passing through the right-upper arm; and a third to the right cheek area, recovered in

[14] Some of the gunshots apparently went through Tammy in more than one place or from Earl's body into Tammy because Maulden fired only two shots at Tammy and three shots at Earl. (R. 1511-12)

the left side of the neck. Dr. Melmud also found stippling on Duvall. (R. 1215-20) The wound to the chest passed through the lungs and would have been fatal in a very short time. (R. **1219)**

Dr. Melmud testified that bath victims would have died very rapidly and no amount of medical intervention would **have** saved their lives. (R. **1221)** Although the wounds indicated that the gun was fired from within two feet, none were contact wounds. (R. 1222)

On July **12,** 1988, Mike Campbell, a Las Vegas, Nevada, police officer, was running license plate checks on his mobile computer. **(R. 1244-45)** He ran such a check on a white Ford pickup truck with a Florida license plate in the parking lot of the Sombrero Motel in Las Vegas. His computer indicated that the vehicle was stolen and that the persan responsible, Charles Maulden, was wanted for two murders in Florida. (R. 1245) He positioned his car so that it could not be seen from Maulden's roam and called for backup. Meanwhile, he contacted the motel manager and found that Charles Maulden was registered in room **22** and drove the white pickup truck. In about five minutes, two other officers arrived. (R. **1247-49)**

Their dispatcher confirmed that Maulden was wanted in Florida by a telephone call to a Florida sheriff.[15] Campbell obtained a key to Maulden's roam from the motel manager. (R. 1250) The three officers positioned themselves on both sides of Maulden's room door with guns drawn. Campbell opened the door with the key but had to

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[15] Ted Veach, **a** fugitive detective with the police department, testified that he canfirmed through the NCIC computer system that Maulden was wanted in Florida. He telephoned the Polk County Sheriff to confirm that the warrants were outstanding. (R. 1290-91)

kick the door open because it had a chain an it. The officers entered the room, pointed their guns at Maulden, and told him to put his hands where they could see them. It appeared that Maulden had been sleeping. (R. 1252) He was not dressed. (R. 1256) Campbell approached Maulden and handcuffed him. (R. 1252)

Maulden did not resist. An officer read him his Miranda rights, after which Maulden confessed to the homicides.[16] He told the officers that the truck outside was stolen and that the keys were in his pants or on the chair. Campbell retrieved the keys and went outside to verify that they were the keys to the white pickup truck. (R. 1254-55) When he returned to the room, Maulden told them that he was wanted for murder. He said he murdered his ex-wife and her boyfriend. (R. 1256)

Maulden told the officers that he killed the two victims with a gun. He said the gun was in the front seat of his truck. (R. 1257) Campbell transported Maulden to the county jail. (R. 1258) Maulden was cooperative and readily agreed to submit to a blood test, a urine test, a saliva test and a pubic hair test. (R. 1259)

Campbell testified that Maulden's demeanor during his contact with him was "scary." He was "very calm, very cooperative" at all times. Looking at him was like "looking into a shark's eyes, he was very cold." Campbell said that Maulden made him "apprehensive" because he did not know what Maulden was thinking. Maulden had

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[16] Defense counsel objected prior to Maulden's statement, renewing his pretrial motions to suppress Maulden's statement and the evidence found. The judge granted his request for a continuing objection and adopted the prior arguments and his denial of the motion. (R. 1253-54)

that effect on the other officers too. He was "matter of fact," and gave them whatever they asked for. (R. 1260) He showed no emotion and had a blank empty look in his eyes. (R. 1261-62) Officer Dennis Burgess also described chuck Maulden's demeanor as calm and matter of fact.[17] (R. 1272)

Kathy Adkins, an identification specialist with the Las Vegas Metropolitan Police Department, also responded to the Sombrero Motel. (R. 1273, 1275) She took photographs of Maulden's vehicle and dusted it for latent fingerprints.[18] Inside the truck, she found a brown holster, a revolver, and a box containing cartridges for the gun. (R. 1276-78, 1981) The gun was under the seat directly in front of the gear shift. (R. 1282) There were five shells inside the cylinder of the gun. (R. 1283) A shell casing was found in one of the gun's cylinders. (R. 1283)

Ted Veach, a fugitive detective with the Los Vegas Metropolitan Police Department, and two other officers visited Maulden at the jail in Los Vegas where Maulden signed a waiver of extradition. (R. 1292-93) At the jail, Maulden told the detective he wanted to talk to clear his conscience and do the right thing. (R. 1319)

They then transported Maulden to the police department. Veach

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[17] During penalty phase, Dr. McClane, a psychiatrist, testified that the blank look in Maulden's eyes described by the Los Vegas arresting officers is typical of chronic schizophrenics or schizotypal personality disorders (his diagnosis of Maulden's condition) and common in someone in a dissociated state. (R. 1826)

[18] She turned the fingerprints over to Detective Paul Schaill of the Polk County Sheriff's Office, in Bartow. (R. 1286) Pursuant to a stipulation between counsel, the prosecutor read the report to the jury. Various fingerprints found on the truck were Maulden's fingerprints. (R. 1332)

advised him of his Miranda rights. (R. 1296) Maulden then made a thirteen page statement which was taken in shorthand and transcribed the same day by an employee of the Los Vegas police department. (R. 1297, 1301) It was read to the jury.[19] (R. 1303-1317) Detective Veach described Maulden's demeanor during his statement as "very calm and sad." (R. 1317) Veach paused at one point because Maulden appeared ready to cry. (R. 1318)

Paul Schaill, a detective with the Polk County Sheriff's Department, investigated the homicides.[20] (R. 1354-55) The day after the homicides he obtained an arrest warrant for theft of the company truck. During the two-week interval between the homicides and Maulden's arrest, Schaill obtained warrants for Maulden's arrest for the two homicides. (R. 1359)

Schaill left for Los Vegas on July 12, 1988, after he was notified of Maulden's arrest there, accompanied by Sergeant Roy McGuirt. He interviewed witnesses and reviewed Maulden's statement but had no contact with Maulden until July 15th when they transported him back to Florida. (R. 1360-61) After McGuirt advised Maulden of his rights, while en route to the airport, Maulden admitted having shot and killed Tammy and Earl. (R. 1363)

Joseph Michael Hall, FDLE, examined the gun found in the truck. (R. 1333) He said that the gun, a .357 magnum caliber

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[19] Maulden's statement was essentially the same as his in-court testimony. (R. 1301-17)

[20] Before Schaill began to testify, defense counsel objected to his testimony concerning statements made by Maulden, thus renewing his pretrial motion to suppress. (R. 1353)

double-action revolver, held six cartridges and could fire either single or double action shots. (R. 1337) Hall determined that bullets remaved from Tammy Maulden's hair, left upper face and spine were fired from Maulden's .357 magnum revolver. (R. 1342-43) A bullet fragment found in Duvall's neck and other fragments found in his body were fired from the revolver. (R. 1344-45) Hall identified .357 magnum cartridges as the type of cartridge used to shoot the victims. (R. 1346)

Maulden was found guilty as charged on all counts. (R. 1673)

Penalty Phase

Dr. Thomas McClane, a psychiatrist, was appointed by the court as an expert advisor in Charles Maulden's case. (R. 1786, 1790) He examined Maulden to determine competency and sanity at the time of the offense. He reviewed arrest reports, depositions, and psychological evaluations done by Dr. Mercer and Dr. Dee, and talked with Maulden's mother. (R. 1791-93) Dr. McClane found Maulden competent to stand trial and, although seriously mentally ill, legally sane at the time of the homicides. (R. 1793-96)

Dr. McClane diagnosed Chuck Maulden's mental illness as (1) major depression and (2) either a psychosis (schizophrenia) or a severe personality disorder (schizotypal or borderline). He concluded that Maulden was "at the borderline between these two entities." (R. 1796-98) Common symptoms af a psychosis are: loss of the ability to distinguish real from unreal; irrational beliefs such as feelings of persecution; delusions; and hallucinations such as hearing voices or seeing things that others are not hearing or

seeing. (R. 1798) McClane ruled out all psychoses except schizophrenia, a major thinking disorder, which does not always but usually involves delusions and hallucinations. (R. 1799) Symptoms of schizophrenia most always fluctuate in intensity. (R. 1800)

McClane ruled out antisocial personality disorder because Maulden did not have enough symptoms in the early part of his life. Additionally, if he were diagnosed as schizophrenic, the pet-sanality disorders, except for borderline personality disorders, would necessarily be excluded or superseded. (R. 1803-04) Even if all symptoms of personality disorders are present, if the person is schizophrenic, then the diagnosis of schizophrenia must supersede other illnesses as the most dominant thing going on. (R. 1802-03)

Dr. McClane said that, at the time of the homicides, Maulden was most likely in a depersonalized or dissociative state, which means a splitting, dissociating between two parts. His mental functianing was dissociated from his behavior. The most severe form of dissociation is amnesia. Maulden's state was a milder form called "depersonalization," which causes an unreal daze feeling but does not substantially affect the memory. (R. 1805) By the time Dr. McClane examined Maulden he was no longer dissaciative and his mental state was improved because of medication although he still showed symptoms of personality disorders and/or residual schizophrenia. (R. 1805-08)

Maulden's condition was worsened by stress. The stress of his separation worsened as time went by and he began to lose his naive hope of getting Tammy back. Additionally, Tamrny told him she was

probably going to move to Georgia with Earl, taking the children. The day prior to the homicides, he learned from one of the children that Earl was physically punishing them, which was a tremendous blow to him. When Tammy picked up the children, she insinuated that Earl threatened her earlier in the day. (R. 1814)

Maulden went to bed with these stresses whirling around in his mind, feeling rejected by Tammy whom he deeply cared about. His manhood and self-esteem were threatened by Tammy becoming involved with another man who was replacing him by disciplining the children and possibly threatening Tammy. This occurred while Maulden was deeply depressed and losing control of his thinking and actions. He woke up in a dazed, dissociated state and said that he would kill Tammy. (R. 1814-15) Once the obsession was clear in his mind, the momentum from the state of mind carried him through the homicide in a depersonalized state. Although he knew what was going on, he felt as though he were in a dream or a daze while it was happening. Rather than being unemotional, he was overwhelmed by his emotions and unconsciously split off from them. (R. 1816)

Dr. McClane believed Maulden remained in this state well after the homicides and during much of the time he was traveling west in the truck. During that time, Maulden heard the voices of Tammy and Earl talking to him and to each other. (R. 1817) Theblanklaokin Maulden's *eyes*, described by the Los Vegas arresting officers, is sometimes seen in persons suffering major depression alone, but is much more typical of chronic schizaphrenics or schizotypal personality disorders. (R. 1826)

In McClane's opinion, Maulden was under the influence of extreme mental or emotional disturbance at the time he committed the homicides. His ability to sort out information and make intelligent logical judgments about Tammy, Earl, and the children was grossly impaired. (R. 1817-19) He also believed Maulden's ability to appreciate the criminality of his conduct was substantially impaired, and that Maulden did not even think about criminality at the time. (R. 1820) He believed Maulden's capacity to conform his conduct to the requirements of law was substantially impaired at the time of the homicides because of his depersonalized or dissociative state. (R. 1821) McClane said Maulden did not have much insight into his mental illness and did not appear to fully understand why he committed the homicides. (R. 1854)

Dr. William E. Darby, also a psychiatrist, testified that he was employed by Peace River Center for Personal Development, a comprehensive mental health center. (R. 1863-66) As part of his job, he regularly diagnosed and treated inmates at the county jail one day a week. (R. 1874, 1877) He first interviewed Charles Maulden on September 10, 1987, at the jail. (R. 1968, 1877) His diagnosis was paranoid schizophrenia. (R. 1870) He saw Maulden five times from September 10, 1987, through December 16, 1987. His diagnosis did not change. Psychological testing done by a psychologist at Peace River Center confirmed his diagnosis. Dr. Darby prescribed Mellaril, an antipsychotic drug with a sedative affect. (R. 1970-73) He increased the dosage gradually. (R. 1880)

Dr. Darby was to have seen Chuck Maulden again on January 20,

1988, but Maulden did not keep the appointment. He did not see Maulden again until August 25, 1988, subsequent to his arrest for the homicides. (R. 1874) He saw Maulden two more times during 1988. At the time of the trial, he had seen Maulden four times during 1989. (R. 1875) The mental status evaluations consisted of a series of questions and took no longer than thirty minutes. (R. 1880-81) His diagnosis never changed. (R. 1876)

Dr. Darby said that Maulden's paranoid schizophrenia was in remission except for some residual effects. (R. 1876) Maulden was currently taking 200 milligrams of Thorazine per day.[21] Thorazine is an antipsychotic drug which helped alleviate Maulden's delusions, helped him to relax and to think more clearly, thus enhancing his coping skills in dealing with delusions of persecution and hallucinations. (R. 1883)

Dr. Henry L. Dee, a clinical psychologist, was appointed as a panel member by the court to determine Maulden's competency and mental state, or sanity, at the time of the offense. (R. 1885-87, 1890) He interviewed Maulden on June 6, 1989, and performed a series of tests which took about eight hours. (R. 1888-89) He read arrest reports, previous records, medical records from the jail, Dr. Darby's notes, autopsy reports, and statements by Maulden's family. (R. 1889-90) He found Maulden competent to stand trial and legally sane at the time of the offense. (R. 1890-91)

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[21] Although Dr. Darby said this was not a high dosage, Dr. Dee said it was "a lot" and that no normal person could withstand that amount. A normal person would sleep for days and be disoriented for sometime after he awoke. He might develop symptoms causing him to jerk and switch all over. (R. 1907-08)

Dr. Dee determined that, at the time of affense, Maulden suffered from a combination of cognitive or thinking problems (psychosis) and emotional problems (depression). His psychosis was manifested by symptoms of schizophrenia (including avoidance of close personal relationships) and by unusual behavior, delusions and hallucinations. The emotional or affective symptoms, resulting from very intense depression, included feelings of sadness, sleep disturbance, and appetite disturbance. (R. 1892)

Dr. Dee determined that Maulden's primary problem was his schizoid adjustment and personality. His emotional problems were secondary. At the time Dr. Dee saw him, Maulden was suffering from guilt and remorse for the homicides as well as depression from the loss of his wife to another man. He felt a "terminal despair about the possibility of ever having anything meaningfully good happen in his life because of the things that had happened and the things that he had done." (R. 1983-84)

Dr. Dee noted that the primary diagnosis of schizophrenia was supported by Dr. Darby's prescription of antipsychotic drugs for Maulden, the remission of his psychosis while he was on medication, and the fact that he became delusional again when he ran out of medicine. He became fearful of leaving his job to get his prescription refilled, began to hallucinate in his work stations, and heard voices. (R. 1894-95) Dr. Dee diagnosed chranic schizophrenia, an incurable mental disease with symptoms that fluctuate for unknown reasons. (R. 1895) Schizophrenia, or a split from reality, is thought to be an inherited brain deficit. (R. 1910)

Dr. Dee opined that, because of auditory hallucinations and deep-seated feelings of inferiority caused by long-term psychosis, Maulden's judgment was substantially impaired at the time of the offenses. (R. 1899-1902) He believed that Maulden's persecutory delusions substantially impaired his ability to appreciate the criminality of his conduct. He noted that psychosis causes failure to appreciate reality. A psychotic person interprets events in a private way. (R. 1902)

Maulden reported to Dr. Dee that he knew what was happening while he committed the homicides but "it was like he was outside watching it happen in slow motion," Thus, although he was not legally insane, his capacity to conform his conduct to the requirements of law was substantially impaired. (R. 1903-04) Although he knew what he was doing, his thinking was very disturbed. (R. 1905) Dr. Dee said that it was "more probable than not" that Maulden was in a dissociate state when he committed the homicides. R. 1906)

The trial court instructed the jury on the following aggravating factors: (1) the defendant had been previously convicted of another capital offense or prior violent felony; (2) the crime was committed while the defendant was engaged in the commission of a burglary; and (3) the crime for which the defendant was to be sentenced was committed in a cold, calculated and premeditated manner without pretense of legal or moral justification. (R. 1993)

In mitigation, he instructed the jury to consider that (1) Maulden was under the influence of mental or emotional disturbance at the time the homicides were committed; (2) his judgment was

impaired by his mental or emotional condition; (3) his capacity to appreciate the criminality of his conduct or his capacity to conform his conduct to the requirements of law was impaired; (4) Maulden freely confessed to the police his responsibility for the homicides and cooperated fully with authorities; (5) Maulden had shown remorse for his actions; and (6) any other aspect of his character, background or circumstances of the case. (R. 1995)

By an eight to four vote, the jury recommended imposition of the death penalty in each case. (R. 2001-02) On November 3, 1989, the trial court sentenced Charles Maulden to death for each homicide. (R. 2040, 2046-56) In his written findings of fact supporting imposition of the death penalty, the judge found all three aggravating factors and all mitigating factors on which he instructed the jury plus an additional nonstatutory mitigator -- that the defendant received no disciplinary reports while in jail.[22] He concluded that, although the first two aggravating factors did not warrant the death penalty, the fact that the crime was "cold, calculated and premeditated" by itself outweighed the mental and other mitigation. (R. 2067-72)

[22] Defense counsel read to the jury a letter from Maulden's classifications officer at the Polk County Jail, stating that Chuck Maulden had no disciplinary reports since his incarceration an July 12, 1988. (R. 1782)

SUMMARY OF THE ARGUMENT

I: A prosecutor may not peremptorily exclude black prospective jurors simply because they are black. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); State V. Neil, 457 So.2d 481 (Fla. 1984). In this case, the first two prospective black jurors were excluded for cause because they were opposed to the death penalty. When the prosecutor used a second peremptory challenge to excuse a prospective black juror, leaving no blacks on the panel, defense counsel objected. The prosecutor's explanation was not supported by the record. The trial court erred by (1) failing to require the prosecutor to provide reasons for peremptorily excluding both black potential jurors; and (2) failing to dismiss the jury pool because the prosecutor's reason for peremptorily excluding a second prospective black juror was clearly pretextual.

11: The Fourth Amendment to the United States Constitution prohibits police officers from making a warrantless, nonconsensual entry into a suspect's home to make an arrest, absent exigent circumstances. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 856 (1980). This prohibition is equally applicable to a guest in a motel room. Stoner V. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964). Without a warrant, officers from the Los Vegas Metropolitan Police Department entered Maulden's motel room by breaking down the door, to arrest him for Florida charges. Maulden was asleep and the officers had no reason to anticipate that he would flee or hide evidence before they obtained a warrant. Although the extradition laws permit arrest without a

warrant in certain cases, Payton precludes arrest in one's residence without a warrant. Additionally, the officers failed to follow the extradition law requiring that a fugitive arrested without a warrant be brought in front of a judge or magistrate as soon as possible. Thus, Maulden's confession must be suppressed. A new trial is required.

111: The evidence obtained as a result of Maulden's illegal arrest must also be suppressed as "fruit of the poisonous tree." While in Maulden's motel room, the officers obtained the key to his truck where they found the gun used to kill the victims. They also found ammunition in the truck. All items found as a result of the illegal arrest are inadmissible in a new trial.

IV: During the guilt phase of the trial, defense counsel proffered the testimony of Dr. Darby, a psychiatrist who treated Maulden for paranoid schizophrenia during the year prior to the homicides. Darby was again treating Maulden since he had been incarcerated for the instant offenses. The trial court excluded this evidence of Maulden's mental state based on Chestnut v. State, 538 So.2d 820 (Fla. 1989). The court erred by following Chestnut; because Maulden was not attempting to establish a "diminished capacity" defense. The evidence should have been admitted under section 90.702, Fla. Stat. (1989), because it was relevant and necessary to enable the jury to understand Maulden's behavior and, thus, his defense of lack of premeditation. The exclusion of this evidence precluded Maulden from presenting a viable defense, and violated his fifth, sixth, and fourteenth amendment rights.

V: Over defense objection, the trial court instructed the jury that Maulden had been convicted of another capital felony based on the simultaneous murders of Tammy Maulden and Earl Duvall. In his written findings, the judge found that each homicide aggravated the other. See § 921.141(5)(b), Fla. Stat. (1989). Although Florida law presently allaws the use of contemporaneous convictions to establish this aggravator, a literal reading of the statute defining the prior violent felony aggravating factor precludes consideration of a contemporaneous conviction. In this Case, Maulden shot two persons simultaneously without pause for reflection. Where two simultaneous deaths occur, and the defendant is canvicted of both at the same trial, neither is "prior."

VI: In the Florida schema of attaching great importance to the penalty phase jury recommendation, it is critical that the jury be given adequate guidance. When, as here, the jury is given incorrect or inadequate instruction as to the definition of the cold, calculated, and premeditated aggravating factor, its decision may be based on caprice or emotion or an incomplete understanding of the law. Although a Florida jury recommendation is advisory rather than mandatory, it is a "critical factor" in determining whether a death sentence is imposed. Because the jury was instructed on the cold, calculated and premeditated aggravating factor only in the statutory language, Maulden's death sentence was unreliable, thus violating his canstitutional rights under the eighth and fourteenth amendments.

VII: Although the trial court found the "cold, calculated, and premeditated" aggravating factor to be the critical factor in imposing the death penalty, the factor is inapplicable. This Court has traditionally found CCP inapplicable to crimes arising from domestic disputes and crimes of passion because such killings are neither "cold" *or* "calculated." In this case, Maulden killed his ex-wife and her boyfriend because he loved and was obsessed with Tammy. Additionally, he suffered from chronic paranoid schizophrenia, a major mental disorder that causes confused thinking. At the time of the murders, he was not an medication and his thinking was seriously disturbed. Because of his disturbed thinking, he had some pretense of legal and moral justification.

VIII: If this Court finds CCP inapplicable, the death penalty must be vacated because the trial judge found that this was the only aggravating factor justifying a sentence of death. Whether or not this Court finds CCP applicable, the death penalty is not proportionately warranted because Maulden killed Tammy and Earl because of a "passionate obsession." This Court has traditionally found the death penalty unwarranted in cases involving domestic disputes and crimes of passion. Additionally, the judge found six mitigating factors, including the two statutory mental mitigators, and should have found a seventh -- that the crime was of a domestic nature. The extensive mitigation in this case clearly outweighs the aggravating factors, even more so if CCP is eliminated from consideration. A life sentence is required.

ARGUMENT

ISSUE I

THE COURT ERRED BY (1) FAILING TO REQUIRE THE PROSECUTOR TO PROVIDE REASONS FOR PEREMPTORILY CHALLENGING A BLACK PROSPECTIVE JUROR; AND (2) FAILING TO DISMISS THE JURY POOL BECAUSE THE PROSECUTOR'S REASON FOR PEREMPTORILY CHALLENGING A SECOND BLACK PROSPECTIVE JUROR WAS NOT SUPPORTED BY THE RECORD.

The Equal Protection Clause in the Fourteenth Amendment to the United States Constitution prohibits the exclusion of jurors on the basis of race. Batson v. Kentucky, 476 U.S.79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Article I, section 16, of the Florida Constitution guarantees a defendant's right to be judged by a fair cross-section of the community and a citizen's right not to be precluded improperly from jury service. State v. Neil, 457 So.2d 481 (Fla. 1984), clarified, State v. Slappy, 522 So.2d 18 (Fla.), cert. denied, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988). Batson, Neil, and Slappy hold that a party may not peremptorily exclude black prospective jurors simply because they are black. The issue is not whether several jurors have been excused because of their race but whether any juror has been so excused. Slappy, 522 So.2d at 21. When a party has challenged a prospective juror solely on the basis of race, Neil requires that the court dismiss the jury pool and start over with a new pool. 457 So.2d at 487.

In the case at hand, five black persons were among the venire. The trial judge excused the first two for cause because they were opposed to the death penalty. The prosecutor exercised peremptory challenges to exclude the third and fourth potential black jurors.

The final black on the venire became and remained the second alternate. (R. 1063) Thus, no blacks actually served on the jury.[23]

The second time that the prosecutor used a peremptory challenge to excuse a prospective black juror, defense counsel objected and the judge required the prosecutor to provide a reason. The prosecutor's reason -- that the prospective juror was weak on the death penalty -- was not supported by the record. The trial court erred by (1) failing to require the prosecutor to provide reasons for peremptorily excluding both black potential jurors; and (2) failing to dismiss the jury pool because the prosecutor's reason for peremptorily excluding a second prospective black juror was clearly pretextual.

The Neil Test as Clarified by Slappy

In Neil, this Court first set out the test to determine whether the use of peremptory challenges to exclude potential black jurors constituted exclusion based solely on race. When a party is concerned that the other side is using its peremptory challenges in a discriminatory manner, that party must make a timely objection and must demonstrate that the challenged jurors are members of a

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[23] It is of no consequence that a black is seated on the jury or as an alternate. Slappy, 522 So.2d at 21. "[T]he striking of a single black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even where there are valid reasons for the striking of some black jurors." Slappy, 522 So.2d at 21; see also Bryant v. State, 565 So.2d 1298 (Fla. 1990) (reversed even though defendant was white and six blacks eventually served on the jury); Tillman v. State, 522 So.2d 14 (Fla. 1988) (of no consequence that state accepted one black to sit on jury).

distinct racial group and that there is a strong likelihood they have been challenged solely on the basis of race. If the trial court so finds, it should request reasons for the exercise of the challenges. The burden then shifts to the other party to show that the challenges were nat exercised solely on the basis of race. Neil, 457 So.2d at 486-87.

Subsequently, this Court clarified its Neil holding. Noting that the peremptory challenge is "uniquely suited" to mask discriminatory motives, and the difficulty in deciding what constitutes a "likelihood" of racial discrimination under Neil, the Slappy court determined that parties must be given "broad leeway" in making a prima facie showing that a likelihaad of discrimination exists. The trial court must resolve any doubts as to whether the complaining party has met its initial burden in that party's favor. If the objection is "proper and not frivolous," the burden of proof shifts to the other party to rebut the inference created. The rebuttal must be a "clear and reasonably specific" racially-neutral explanation of "legitimate reasons." Slappy, 522 So.2d at 20-22; accord Thompson v. State, 548 So.2d 198, 200 (Fla. 1989); Tillman v. State, 522 So.2d 14, 16 (Fla. 1988).

The Prima Facie Case

Defense counsel objected to the prosecutor's peremptory challenge of Ms. Watkins because the first two prospective black jurors were excused for cause and the prosecutor exercised peremptory challenges to excuse the other two. He noted that no blacks were

left on the panel, thus creating a pattern of excusing blacks.[24] Counsel asked the judge to inquire as to the prosecutor's reasons because he heard nothing in Ms. Watkins's answers an voir dire which provided a valid reason for the challenge.[25] (R. 956)

Defense counsel met his initial burden to show a prima facie case of racial discrimination. The prosecutor had just peremptorily challenged the only black person left on the panel. See Williams v. State, 574 So.2d 136 (Fla. 1991) (prosecutor peremptorily excused two black prospective jurors); Kibler v. State, 546 So.2d 710 (Fla. 1989) (prosecutor peremptorily excused all three blacks on venire); Eichelberger V. State, 562 So.2d 853 (Fla. 2d DCA 1990) (state used peremptories to exclude the only two blacks on venire); Timmons v. State, 548 So.2d 255 (Fla. 2d DCA 1989) (prosecutor peremptorily challenged sole remaining black juror). Defense counsel gave an additional reason -- that he did not hear Ms. Watkins say anything that would provide a valid reason for the prosecutor's challenge. Thus, the burden of proof shifted to the state to show that Ms. Watkins was challenged for a legitimate and racially-neutral reason. Slappy; Neil.

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[24] Prospective black jurors Hardy and Hayes were excused for cause because of their opposition to the death penalty. (R. 603) The black juror who eventually became the second alternate was not yet an the panel. Once the jury was selected, the judge called up additional venire persons far alternates.

[25] Ms. Watkins was a cashier at a department stare, married with five children. She was formerly a college student studying electronic engineering. She said that, as a juror, she could sit and listen and draw her own conclusions without being prejudiced. She could vote for the death penalty and would have an open mind. (R. 863-64, 869, 896, 905, 927-28)

The trial court required the prosecutor to respond. (R. 956) The prosecutor asked whether he should explain his reasons for excusing all prospective black jurors or just Ms. Watkins. The court responded that an explanation as to Ms. Watkins would be "fine." The judge later said that he asked for an explanation as to Ms. Watkins to see if a pattern was developing. (R. 957)

Although the judge correctly requested that the prosecutor provide a racially-neutral explanation, his decision to restrict the inquiry to Ms. Watkins was clearly erroneous. Once the issue has been properly raised, the judge must conduct a Neil inquiry as to the state's reasons for all of the challenged excusals. Slappy, 522 So.2d at 21-22. This Court reversed in Thompson for precisely this reason:

> Here, the trial court conducted an improper inquiry because it failed to question the state as to each and every peremptory challenge exercised against blacks once it became clear that the state might be improperly exercising its peremptory challenges. For this reason alone, we must reverse.

Thompson, 548 So.2d at 202; accord Williams v. State, 574 So.2d 136, 137 (Fla. 1991) ("Whenever a sufficient doubt has been raised as to the exclusion of any person on the venire because of race, the trial court must require the state to explain each one of the allegedly discriminatory challenges.").

The Prosecutor's Reason and Defense Objection

This case gets worse. When the prosecutor gave his reason for excluding Ms. Watkins, the trial court failed to question it even though the record did not support it. The prosecutor's explanation

was as follows:

> Mrs. Watkins is very, very weak on the death penalty questions I asked her. I do not think that Mrs. Watkins is a juror who is gaing to impose the death penalty under any circumstances, and that is the only reason that I do not like her as a juror.

(R. 956-57) Defense counsel objected:

> 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.

(R. 957) The judge immediately overruled the defense objection.

The prosecutor suggested that the court make a finding as to whether he was systematically excusing blacks. He told the judge that he could not remember the first prospective black juror he excused peremptarily, but asked whether the judge wanted him to "make an explanation because the court believed he was systematically excluding blacks." The judge said he was only asking as to Ms. Watkins to see whether a "pattern" was developing, that he was satisfied with the prosecutor's explanation, and that the prosecutor did not need to go back to Ms. Johnson.[26] (R. 957-58)

Apparently, the judge mistakenly believed that a "pattern" of discrimination was required under Neil and its progeny. Florida law clearly holds that even one improper excusal is sufficient to trigger the requirements of the Florida Constitution. See Bowdcn v. State, 16 F.L.W. S614, S615 (Fla. Sept. 12, 1991); Reynolds v. State, 576 So.2d 1300, 1301 (Fla. 1991); Slappy, 522 So.2d at 21. Although the judge was required to inquire into the reasons for

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[26] The first black juror peremptorily excused by the prosecutor was Ms. Johnson. (R. 781, 956)

both of the prosecutor's peremptory challenges, the possibility that the prosecutor had a racially-neutral reason for challenging Ms. Johnson was not relevant to his improper challenge of Ms. Watkins. See id.

The prosecutor's reason for excluding Ms. Watkins -- that she was "very, very weak on the death penalty" and would not impose it under any circumstances -- was not supported by the record. Her responses to the prosecutor's questions were as follows:

MR. AGUERO (prosecutor): Agree or disagree that we as a society, Ms. Watkins, should have a death penalty?

PROSPECTIVE JUROR WATKINS: Do I agree with it?

MR. AGUERO: Uh-huh.

PROSPECTIVE JUROR WATKINS: I've never given it a thought, really.

MR. AGUERO: Okay. Haw about since you came in here on Thursday and you heard us asking all these questions, have you thought about it since Thursday?

PROSPECTIVE JUROR WATKINS: Yes.

MR. AGUERO: If it was up to you would the State of Florida have a death penalty?

PROSPECTIVE JUROR WATKINS: I couldn't answer that.

MR. AGUERO: Okay. Do you think you could vote to put somebody to death?

PROSPECTIVE JUROR WATKINS: If I heard all the circumstances.

MR. AGUERO: Okay. How about your husband, do you know how he feels about that?

PROSPECTIVE JUROR WATKINS: Not really.

MR. AGUERO: Do you understand that if the State proves the aggravating circumstances outweigh the mitigating circumstances, the law says death is the appropriate punishment?

PROSPECTIVE JUROR WATKINS: Yes, I understand that.

MR. AGUERO: If that were the case, do you think you could make that vote, come in here, tell the Court we the jury voted for death with Mr. Maulden sitting over there?

PROSPECTIVE JUROR WATKINS: Yes.

(R. 895-96)

Although the prosecutor allegedly challenged Ms. Watkins based on her answers to his questions, her answers to defense counsel's questions also showed no signs of weakness as to the death penalty:

MR. MASLANIK (defense counsel): Okay, all right. Let me start with Ms. Watkins with my last area of questioning, which does deal with the death penalty. Ms. Watkins, you've never really thought much about the death penalty before you came in today?

PROSPECTIVE JUROR WATKINS: Right.

MR. MASLANIK: Or came in last week.

PROSPECTIVE JUROR WATKINS: Right.

MR. MASLANIK: How do you feel about having the responsibility of sitting on a case where that might be something you might have to consider?

PROSPECTIVE JUROR WATKINS: Well, after I hear all the -- hear the case and if it comes to the point where that has to be done, I can agree to it.

MR. MASLANIK: In sitting here over the last three days and hearing people talk about the death penalty, are there certain situations where you think the death penalty should always be imposed?

PROSPECTIVE JUROR WATKINS: I've never really given it any thought.

MR. MASLANIK: Okay. would it be fair to say that if we gat to that part of the trial that you would have an open mind as to life or death?

PROSPECTIVE JUROR WATKINS: Yes, I would.

(R. 927-28)

Judges cannot merely accept the reasons proffered by the prosecutor at face value, but must evaluate the reasons as they

would evaluate any disputed fact. The reasons must be (1) neutral and reasonable, and (2) not merely a pretext. Slappy, 522 So.2d at 22; see e.g., Wright v. State, 16 F.L.W. S596 (Fla. Aug. 29, 1991) (reason pretextual). The judge must evaluate both the credibility of the person offering the explanation and the credibility of the asserted reasons. Id.; Tillman, 522 So.2d at 16.

Defense counsel objected immediately to the prosecutor's explanation as required by Floyd v. State, 569 So.2d 1225 (Fla. 1990), cert. denied, 111 S.Ct. 2912 (1991) (defendant must place court an notice that he contests factual existence of reason); accord Bowden, 16 F.L.W. at S615 (court refused to find error, even though record did not support state's reason, because defense failed to controvert reason). Because defense counsel disputed the state's statement, the trial court was "compelled to ascertain from the record if the state's assertion was true." Floyd, 569 So.2d at 1229. He failed to do so. He should have asked the prosecutor to cite something specific in Ms. Watkins' answers on voir dire which would suggest that she was weak on the death penalty. He should then have reviewed Ms. Watkins' answers on voir dire to determine whether the prosecutor had any basis far his conclusions.

Defense counsel was right. Ms. Watkins never said anything that could be construed as "very, very weak on the death penalty" or which suggested that she could never impose the death penalty under any circumstances. To the contrary, she said she had never thought about it before and would have an open mind. She said she understood when the law required that the death penalty be imposed

and could vote to impose it. Had the judge asked the prosecutor for a specific example of what Ms. Watkins said that suggested to him that she would not impose the death penalty, he would have been hard-pressed to find something. The most he could have said was that Ms. Watkins was not so "gung-ho" on the death penalty that was predisposed to impose it before hearing the circumstances.

In Williams v. State, 574 So.2d 136 (Fla. 1991), this Court reversed because the trial judge did not require the prosecutor to explain all of his peremptory excusals of blacks and because the prosecutor's reason for excusing a prospective black juror was not supported by the record. Although the state alleged that the prospective juror could not understand the felony murder doctrine, the record showed no questions about felony murder. The juror indicated no inability ta recommend the death penalty.[27] Id. at 137.

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[27] Although this Court has found that "qualms about the death penalty" is a valid reason for excusing a juror peremptorily, such reason would seem to violate the principles of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). When challenges for cause and peremptory challenges exclude all persons opposed to the death penalty, the combination unconstitutionally produces a jury unrepresentative of the community and organized to return a verdict of death:

> A jury composed exclusively of [people who believe in the death penalty] cannot speak for the community. culled of all who harbor doubts about the wisdom of capital punishment -- of all who would be reluctant to pronounce the extreme penalty -- such a jury can speak only for a distinct and dwindling minority . . . . [A] State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. . . . No defendant can constitutionally be put to death at the hands of a tribunal so selected.

Witherspoon, 391 U.S. at 519-23.

(continued...)

In Roundtree v. State, 546 So.2d 1042, 1045 (Fla. 1989), the prosecutor explained that he challenged two prospective black jurors because of their views on the death penalty. This Court found his explanation pretextual because both jurors indicated that they could follow the law. The Roundtree court noted that "[t]he state's explanations must be critically evaluated by the trial court to assure they are not pretexts for racial discrimination." Id. at 1045.

Willisms and Roundtree show that the record must specifically support the prosecutor's reason. His "seat of the pants instincts'' or gut feelings are not sufficient.

> A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen" or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. . . . [P]rosecutors' peremptories are based on their "seat-of-the-pants instincts." . . . Yet "Seat-of-the-pants instincts" may often be just another term for racial prejudice. . . .

Slappy, 522 So.2d at 23 (quoting Batson, 476 U.S. at 106) (Marshall, J., concurring) (citations omitted); see e.g., Wright, 16 F.L.W. at S596-97 (rejecting prosecutor's alleged reason that prospective black juror had no eye contact with him, making him uncomfortable). Because the instant record contains no evidence

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[27](...continued)

The issue was left unresolved in Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987). The plurality implied in dictum that a prosecutor could not constitutionally use peremptory challenges to exclude potential jurors with reservations about capital punishment. 481 U.S. at 667-68, 107 S.Ct. at 2056, 95 L.Ed.2d at 639.

suggesting that prospective juror Watkins would have been unable to impose the death penalty under any circumstances, the prosecutor's alleged reason must have been a "seat-of-the-pants" instinct.28

Standing of a White Defendant:

The prosecutor noted for the record that the case involved a white defendant and two white victims. (R. *958)* A criminal defendant, whatever his race, has standing to challenge the arbitrary exclusion of members of any race from jury service. Powers v. Ohio, 499 U.S. ___ , 111 S.Ct. ___ , 113 L.Ed.2d 411 (1991); Kibler v. State, 546 So.2d 710 (Fla. 1989).

Justice Kennedy, writing for the seven to two majority in Powers, noted that "racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity af the courts." Relying on the equal protection clause of the fourteenth amendment and well-established principles of standing, the Court held that "a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race." Powers, 113 L.Ed.2d at 419. The Court held that the ''equal protection rights at stake are those of the excluded jurors, who have a right not to be excluded from jury service on the basis of

28 Perhaps the prosecutor consciously or unconsciously felt that, because two blacks were excused for cause based on their opposition to the death penalty, such opposition was a common trait in black people. If this was the prosecutor's real reason for challenging Ms. Watkins, it is a racially impermissible reason under Slappy. Ms. Watkins did not indicate that she shared this feeling with the prospective black jurors who were excused earlier.

race."[29] The majority found that the Court's earlier decision in Batson was not inconsistent with Powers because, although Batson dealt with a black defendant, the **Batson** Court recognized that a prosecutor's discriminatory use of a peremptory challenge harms the excluded jurors and the community at large. **Powers,** 113 L.Ed.2d at **422** (citing Batson, **476** U.S. at **87,** 106 S.Ct. 1712, 90 L.Ed.2d **69)**

Even prior to powers, this Court held that the prosecutor may not purposefully use peremptory challenges to exclude members of a cognizable racial group, regardless of the race of the defendant. Kibler, **546 So.2d** at **712.** Unlike the Powers Court, however, this Court based its decision on article I, section 16, of the Florida Constitution which guarantees the defendant's right to a fair trial by an impartial jury. Since Kibler, this Court and the district courts have uniformly reversed cases involving white defendants when the state exercised its peremptory challenges in a racially discriminatory manner. See e.g., **Bryant, 565** So.2d 1298; **Torres v.** State, 548 So.2d **660** (Fla. 1989); Barwick v. State, **547** So.2d 612 (Fla. 1989); Eichelberger, 562 So.2d 853; Timmons, **548** So.2d **255.**

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[29] In Holland v. Illinois, 493 U.S. **474, 110** S.Ct. **803,** 107 L.Ed.2d 905 (1990), the United States Supreme Court held that a white defendant had no sixth amendment right to challenge the exclusion of prospective black jurors but did not rule out standing to raise a fourteenth amendment equal protection claim. The **Powers** Court found that a criminal defendant does have standing to raise the equal protection rights of an improperly excluded prospective black juror because the defendant suffers an "injury in fact," the defendant has a close relationship to the excluded juror, and the excluded juror's ability to assert his own rights is hindered. The defendant is injured because "racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process'. . . and places the fairness af a criminal proceeding in doubt." Powers, 113 L.Ed.2d at **425-26** (citation omitted).

Conclusion

In the case at hand, the prosecutor did not meet his burden of proving that he excused two black potential jurors for reasons other than race. Even if the prosecutor had provided an acceptable explanation for his second peremptory challenge, the case would require reversal because the judge did not require the state to explain both challenges. Conversely, even if the prosecutor had given a nonracial explanation for peremptorily excusing the first prospective black juror, the case would require reversal because the record does not support the prosecutor's explanatian for his second peremptory challenge. Thus, the prosecutor and the judge unconstitutionally deprived Mauldcn of a jury composed of a cross-section of the community and prospective juror Watkins of her right to sit on that jury. This Court must remand for a new trial.

In the event that this Court agrees and grants a new trial, it should consider two penalty issues in the interest of judicial economy. *See* e.g., Williams v. State, 574 So.2d 136 (Fla. 1991); Hamilton v. State, 547 So.2d 630 (Fla. 1989); cf. Wright V. State, 16 F.L.W. S598 (Fla. Aug. 29, 1991) (defendant entitled to benefit of prior jury recommendation of life). Because the judge's order stated that death would not be warranted without the finding of CCP, if this Court were to find CCP inapplicable, the judge would sentence Maulden to life. (See Issue VII, infra.) Moreover, death is not proportionately warranted because of the domestic nature of the crime. (See Issue VIII, infra). Thus, this Court should reverse and remand for a new trial without the possibility of death.

ISSUE II

THE COURT ERRED BY DENYING MAULDEN'S MOTION TO SUPPRESS HIS STATEMENTS AND ADMISSIONS.

The Fourth Amendment to the United States Constitution prohibits police officers from making a warrantless, nonconsensual entry into a suspect's home to make an arrest, absent exigent circumstances. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 856 (1980). This prohibition is equally applicable to a guest in a motel room. Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964); Sheff v. State, 329 So.2d 270 (Fla. 1976); Graham v. State, 406 So.2d 503 (Fla. 3d DCA 1981). Neither the motel manager or desk clerk can consent to entry of a guest's motel room by the police. Stoner, 376 U.S. at 487-88, 11 L.Ed.2d at 860; Sheff, 329 So.2d at 272.

Without a warrant, officers from the Los Vegas Metropolitan Police Department arrested Maulden after breaking into his motel room where he was sleeping. Although extradition laws permit arrest without a warrant in certain cases, Payton precludes arrest in one's residence without a warrant absent consent or exigent circumstances, neither of which were present in this case. Thus, Maulden's arrest violated the fourth and fourteenth amendments to the United States Constitution and article 1, section 12, of the Florida Constitution.[30]

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[30] Defense counsel's Motion to Suppress Statements and Admissions was denied after a hearing on April 28, 1989. (R. 119-21) Counsel renewed the motion to suppress just prior to trial (R. 1072) and again just before the prosecutor elicited evidence from police officers and detectives concerning Maulden's statements and (continued...)

Mike Campbell, a Las Vegas police officer, testified that, while running license plate checks on his mobile computer, he ran a check on a white Ford pickup truck with a Florida license plate in the parking lot of the Sombrero Motel in Las Vegas. His computer indicated that the vehicle was stolen and that the person responsible, Charles Maulden, was wanted for two murders in Florida. (R. 1244-45) Their dispatcher confirmed that Maulden was wanted by a telephone call to a Florida sheriff. (R. 1250)[31]

Campbell parked his car out of sight and called for backup. Two more officers arrived. (R. 1247-49) He contacted the motel manager and learned that Charles Maulden was registered in room 22 and drove the white pickup truck. Campbell obtained a key to Maulden's room from the motel manager. (R. 1250)

The officers positioned themselves on both sides of Maulden's room door with guns drawn. Although Campbell unlocked the door with the key, he had to kick the door open because it had a chain on it. The officers entered the room, painted their guns at

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[30](...continued)
admissions at the time of his illegal arrest. (R. 1253, 1353) The judge granted a continuing objection and adoption of all pretrial motion arguments but overruled the objections. (R. 1254, 1353)

[31] Ted Veach, a fugitive detective, testified that he confirmed through the NCIC computer system that Maulden was wanted in Florida. He also telephoned the Polk County Sheriff *to* confirm that the warrants were outstanding. (R. 1290-91) Paul Schaill, a detective with the Polk County Sheriff's Department, testified that, the day after the homicides, he obtained an arrest warrant for theft of the company truck. During the two-week interval between the homicides and Maulden's arrest, Schaill obtained warrants for Maulden's arrest for the two homicides. (R. 1359) Schaill had no contact with Maulden until July 15th when he and another deputy transported him back to Florida. (R. 1360-61)

Maulden, and told him to put his hands where they could see them. Campbell handcuffed him. Maulden was not dressed and appeared to have been sleeping. He did not resist. (R. 1252, 1256)

An officer read Maulden his Miranda rights, after which he readily confessed to the homicides. He also told the officers that the truck outside was stolen and that the keys were in his pants or on the chair. Campbell retrieved the keys and went outside to verify that they were the keys to the white pickup truck. (R. 1254-56) Maulden told the officers that the gun with which he killed the two victims was in the front seat of the truck. (R. 1257)

Campbell transported Maulden to the county jail. (R. 1258) Maulden was cooperative and readily agreed to submit to a blood test, a urine test, a saliva test and a pubic hair test. (R. 1259) At the jail, Maulden told the detectives he wanted to talk to clear his conscience and do the right thing. (R. 1319) The officers then transported Maulden to the police department where he made a thirteen page statement which was read to the jury. (R. 1296, 1303-1317) He also signed a waiver of extradition. (R. 1292-93)

The Uniform Criminal Extradition Act has been adopted by both Florida and Nevada. West's F.S.A., ch. 941, part I, commentary at 67-68 (1991). The Uniform Act permits the arrest of a person wanted in another state without a governor's requisition warrant, with or without a warrant. The Nevada statutes read as follows:

179.203. Arrest before requisition.

> 1. Whenever any person within this state is charged on the oath of any CREDIBLE person before any judge or magistrate of this state with the commission of any crime in any other state and ... with having FLED from JUSTICE

... or,

2. Whenever complaint has been made before any judge or magistrate in this state setting forth on the affidavit of any CREDIBLE person in another state that a crime has been committed in such other state and that the accused has been charged in such state with the commission of the crime, and ... has FLED from JUSTICE . . . and is believed to be in this state,

the judge or magistrate shall issue a warrant directed to any peace officer COMMANDING HIM to APPREHEND the person named therein, wherever he may be found in this state, and to bring him before the same or any other judge, magistrate or caurt who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit. A certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

§ 179.203, Nev. Rev. Stat. (1967).

179.205. Arrest without warrant.

The arrest of a person may be lawfully made also by any peace officer or a private person, withaut a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding 1 year; but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in NRS 179.203. Thereafter his answer shall be heard as if he had been arrested an a warrant.

§ 179.205, Nev. Rev. Stat. (1967).[32] The comparable Florida laws arc substantially the same. See §§ 941.13-14, Fla. Stat. (1989). Section 179.203, Nev. Rev. Stat., and section 941.13, Fla. Stat., require a warrant by "any judge or magistrate of this state." See

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[32] Undersigned counsel obtained the text of the Nevada statutes through Westlaw. Although the statutes were dated "1967," Westlaw indicated that they were from NEVADA REVISED STATUTES, copyright (c) 1986-1989 by The Michie Company. Apparently, the statutes remain unchanged since 1967.

also § 171.108, Nev. Rev. Stat. (1967) ("The WARRANT of ARREST is an order in writing in the name of the State of Nevada . . ."). Obviously, then, a warrant in the name of the State of Florida would not authorize an arrest in Nevada by Nevada officers. Moreover, the Nevada officers did not have a Florida warrant. They only knew that a warrant was outstanding in Florida.[33]

The exceptions to the Payton prohibition against warrantless arrests in one's residence are consent and exigent circumstances. Because the officers unlocked the door and broke the chain while Maulden was in bed, we know he did not consent to their entry. They never knocked on the door or asked to come in.

Exigent circumstances justifying quick action arc destruction of incriminating evidence within the reach of the defendant and harm to the arresting officer. Coolidse v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). An emergency must exist requiring immediate action for the police activity to be effective. Hornblower v. State, 351 So.2d 716, 718 (Fla. 1977).

In this case, the officers had no reason to suspect that

[33] The prosecutor argued that this was not a warrantless arrest because of the Florida warrant. (R. 108-110) In denying the defense motion, the judge cited Michisan v. Doran, 439 U.S. 282, 99 S.Ct. 530, 58 L.Ed.2d 521 (1978) (courts of asylum state without power to review demanding state's probable cause determination). The judge concluded that because Florida determined that the officers could enter Maulden's home, a warrant by a Nevada judge would be superfluous. (R. 119-21) In Michisan v. Dorm, the Supreme Court held that once the governor of the asylum state has acted on a requisition for extradition from the governor of the demanding state, based on the demanding state's judicial determination that probable cause existed, the asylum state can make no further inquiry as to probable cause. This is far different from our case where Nevada had no governor's requisition warrant determining probable cause, nor any other warrant from Florida.

Maulden would leave his motel room or destroy evidence. Maulden did not know that anyone was suspicious of his presence at the motel. It would have been a simple matter for the Los Vegas officers to obtain a valid arrest warrant in Nevada. Having verified that a warrant was outstanding in Florida, the officers could have signed an affidavit to that effect and asked a Nevada judge or magistrate to issue a warrant. An officer could have watched Maulden's room while another officer obtained the warrant. If Maulden left his room, he could then have been arrested outside his residence without a warrant. Payton only precludes arrest without a warrant in one's residence.

Miranda warnings do not cure the taint of an unconstitutional arrest. "If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest . . . the effect of the exclusionary rule would be substantially diluted . . . . Arrests made without warrant or without probable cause, for questioning or 'investigation,' would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving Miranda warnings." Brown v. Illinois, 422 U.S. 590, 602, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

Brown required an analysis of whether intervening events were sufficient to break any "causal connection" between the illegal detention and the confession. When indirect fruits of an illegal search or arrest were closely related to the underlying illegality, they were required to be suppressed. 422 U.S. at 603-04; accord Reilly v. State, 557 So.2d 1365, 1367 (Fla. 1990).

Last year, however, the United States Supreme Court distinguished Brown v. Illinois and its progeny in New York v. Harris, 495 U.S. __, 110 S.Ct. 1640, 109 L.Ed.2d 13 (1990). The Court ruled that statements made by the illegally arrested defendant after he had been taken from his residence to the police statian were admissible. The Harris Court distinguished cases in which the officers lacked probable cause for the arrest from warrantless arrests under Payton. In the first instance, the defendant was still illegally detained after he was taken to the police station because the officers lacked probable cause for the arrest. On the other hand, once a defendant arrested in his home without a warrant is taken outside the home, the arrest is no longer illegal. Because the officers have probable cause, they could then legally arrest the defendant. The Court determined that the statement given at the police station was not the fruit of the defendant's having been arrested at home rather than someplace else.[34] 109 L.Ed.2d at 21.

Although at first glance, this situation seems nearly identical to the situation in Harris v. New York, Maulden's arrest was

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[34] In State v. Geisler, 49 CrL 2024 (Conn. Ct. App. July 23, 1991) (en banc), the Connecticut Court of Appeals rejected application of the per se rule of Harris v. New York, finding that the Connecticut constitution requires more protection of citizens' privacy rights. Although Florida's constitution protects the right to privacy, see art. 1, § 23, Fla. Const., this Court held in State v. Hume, 512 So.2d 185 (Fla. 1987), that section 23 does not modify applicability of article 1, section 12, which protects against illegal search and seizure, and is required to be interpreted in conformity with United States Supreme Court decisions interpreting the fourth amendment to the United States Constitution. Because there is no federal counterpart to Florida's right to privacy, however, it would seem that federal law would be inapplicable in this case. See Hume, 512 So.2d at 190 (Barkett, J., dissenting).

different because he was arrested pursuant to the Uniform Criminal Extradition Act. Section 179.205, Nev. Rev. Stat. (§ 941.14, Fla. Stat.), states that, when a fugitive is arrested without a warrant,

> the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in NRS 179.203. Thereafter his answer shall be heard as if he had been arrested on a warrant.

Maulden not taken before a judge or magistrate. He was taken to the county jail where he agreed to submit to a blood test, a urine test, a saliva test and a pubic hair test. (R. 1258-59) Immediately thereafter, he was taken to the police station where he made a lengthy statement concerning his involvement in the homicides. (R. 1259) He also signed a waiver of extradition. (R. 1292-93)

The record does not reflect that Maulden was **ever** taken before a judge or magistrate in Nevada, or that he was ever taken to any judicial proceeding which would be equivalent to a First Appearance hearing in Florida. Maulden was arrested on July 12, 1988. His statement was taken the same day. The detectives notified the Polk County Sheriff's Office of Maulden's arrest and Detective Paul Schaill left Polk County the same day to fly to Los Vegas. Schaill testified, however, that he did not come in contact with Maulden until July 15th when he took him back to Florida. (R. 1360-61)

No intervening circumstance occurred to break the chain of illegality to remove the taint of Maulden's illegal arrest. Maulden was not taken in front of a judge or a magistrate. He was under arrest without a warrant for three days while awaiting transportation to Polk County. Thus, this case is unlike the situation in

Harris, in which the defendant was legally under arrest after he was no longer in his home. Harris was then legally under arrest because the officers had probable cause, which is all that was required, to arrest him. In this case, something more was required. Because Maulden was never taken before a judge for a complaint to be made under oath, he was never legally arrested in Nevada. Thus, all statements Maulden made prior to his arrest by Florida officers should be suppressed. Everything that he told the officers while in his room and all evidence procured as a result of the illegal arrest must be suppressed. Payton; Graham v. State, 406 So.2d 503, 505 (Fla. 3d DCA 1981).

Even if this Court finds this case indistinguishable from New York v. Harris, 109 L.Ed.2d 13, the statements Maulden made while in his motel room must be suppressed. Additionally, the officers' incriminating testimony concerning his demeanor upon his arrest must be suppressed. This testimony, which the state introduced to show premeditation, was particularly harmful. See Issue IV, supra.

Los Vegas Officer Campbell, who arrested Maulden in his room, testified that Maulden's demeanor during his contact with him was "scary." Although Maulden was "very calm, very cooperative" at all times, Campbell said that looking at him was like "looking into a shark's eyes, he was very cold." Maulden made him "apprehensive." He was "matter of fact," gave them whatever they asked for, showed no emotion and had a blank empty look in his eyes. (R. 1260-62) Los Vegas Officer Dennis Burgess also described Maulden's demeanor as calm and matter of fact. (R. 1272)

These descriptions resulted from the officers' contact with Maulden at the time of his arrest. Detective Veach, who transported Maulden to the police station and took his statement, described Maulden's demeanor during his statement as "very calm and sad." He said that, at one point, Maulden appeared ready to cry. (R. 1317-18) Had the arresting officers' testimony concerning Maulden's bland effect at the time of the arrest been suppressed, the jury would have heard only Detective Veach's description which suggested remorse rather than cold calculation.[35] See Issue VII, infra.

For the above reasons, Maulden's statements, and testimony by Los Vegas afficers concerning his demeanor at the time of his arrest, must be suppressed. A new trial must be granted.

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[35] A psychiatrist testified during the penalty phase of Maulden's trial that the bland effect described by the Los Vegas arresting officers is typical of schizophrenics. (R. 1826)

ISSUE III

THE TRIAL COURT ERRED BY FAILING TO SUPPRESS EVIDENCE SEIZED FROM MAULDEN'S HOTEL ROOM AND TRUCK PURSUANT TO HIS ILLEGAL ARREST.

"It is well settled that searches conducted without a warrant are per se unreasonable under the fourth and fourteenth amendments unless conducted within one of the recognized exceptions to the warrant requirement. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The only exceptions to the warrant requirement that might be considered in this case are (1) search incident to a lawful arrest; (2) consent; and (3) probable cause to search with exigent circumstances. See Coolidse v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); Hornblower v. State, 351. So.2d 716, 718 (Fla. 1977) (exigent circumstances); Engle v. State, 391 So.2d 245 (Fla. 5th DCA 1980) (exceptions).

Maulden's arrest was unlawful as discussed in Issue II, supra, because Maulden was arrested without a warrant while in his place of residence. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 856 (1980). Payton is equally applicable to a guest in a motel room. Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964); Sheff v. State, 329 So.2d 270 (Fla. 1976). Thus, the search was not incident to a legal arrest.

The officers opened the door to Maulden's room with the manager's key, kicked in the door which was chained, and arrested Maulden at gunpoint. They read him his rights,[36] and started

[36] Miranda warnings do not cure the taint of an unconstitutional arrest. Brown v. Illinois, 422 U.S. 590, 602, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

asking questions. He immediately told them where to find the keys to the truck and the gun in the truck. (R. 1254-56) He was never asked to consent to a search of his room, truck or belongings.

"Consent given after an illegal detention . . . is presumed to be involuntary." Norman v. State, 379 So.2d 643 (Fla. 1980); Mitchell v. State, 558 So.2d 72 (Fla. 2d DCA 1990). Unless there has been a break in the chain of illegality sufficient to erase the taint, when the defendant voluntarily hands over evidence to law enforcement officers after an illegal arrest, his actions amount to "nothing more than mere acquiescence to authority." Mitchell, 558 So.2d at 74. In fact, when the consent follows an illegal arrest, the state has a greater burden to prove an unequivocal break in the chain of illegality sufficient to dissipate the taint of the prior illegal police action. Gonzalez v. State, 578 So.2d 729, 736 (Fla. 3d DCA 1991). In the case at hand, there was no break. The officers broke in, arrested Maulden, read him his rights, and started asking questions. He admitted to the homicides, gave them the keys to the truck, and told them where to find the gun,

There were no exigent circumstances. Maulden did not know the officers were aware of his presence in Los Vegas. He was in bed in his room. The officers had no reason to think that he would try to run or hide evidence or that they were in any danger. They had plenty of time to get a search warrant. See Hornblower v. State, 351 So.2d 716, 718 (Fla. 1977).

In Graham v. State, 406 So.2d 503 (Fla. 3d DCA 1981), the court held that the items seized from Graham's motel room pursuant

to an illegal arrest were unlawfully obtained. Thus, the keys found as a result of the illegal search could not be used to get the gun from the defendant's car. Id. at 505. The same is true in this case. The trial court erred by failing to suppress the keys, the gun, and all other evidence found in Maulden's truck.

Kathy Adkins, an identification specialist with the Las Vegas Metropolitan Police Department, searched Maulden's truck after Maulden was taken from the scene. (R. 90-91) Inside the truck, she found a brown holster, a revolver, and a box containing cartridges for the gun. (R. 1276-78, 1981) She found five shells inside the gun's cylinder and a shell casing in one cylinder. (R. 1283)

Joseph Hall of FDLE examined the gun found in the truck. (R. 1333) He determined that the gun, a .357 magnum caliber double-action revolver, fired the bullets removed from Tammy Maulden's hair, left upper face and spine. (R. 1342-43) A bullet fragment found in Duvall's neck and other fragments found in his body were fired from the revolver. (R. 1344-45) Hall identified .357 magnum cartridges as the type of cartridge used in the shooting. (R. 1346)

Because Maulden's arrest was unlawful and there were no exceptions to the search warrant requirement, all evidence found as a result of the illegal arrest must be suppressed as fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Norman v. State, 379 So.2d 643 (Fla. 1980). A new trial is required.

IV

THE TRIAL COURT ERRED BY EXCLUDING, **FROM** THE **GUILT PHASE OF THE TRIAL,** THE TESTIMONY **OF** DR. DARBY **WHO DIAGNOSED AND** TREATED **MAULDEN FOR PARANOID** SCHIZOPHRENIA DURING **THE** YEAR PRIOR TO THE HOMICIDES, TO ENABLE THE JURY TO PROPERLY EVALUATE **MAULDEN'S** BEHAVIOR.

In Chestnut v. State, 538 So.2d 820 (Fla. **1989),** this Court **found** that evidence of diminished mental **capacity** was inadmissible **to** negate the specific intent required to convict of first-degree premeditated murder. Justice Grimes, writing for the majority, reasoned that many, if not most, crimes are committed by **persons** with mental aberrations, and concluded **as** follows:

> If such mental deficiencies are sufficient to meet the definition of insanity, these persons should be acquitted on that ground and treated for their disease. Persons with less serious mental deficiencies should be held accountable for their crimes just as everyone else. If mitigation is appropriate, it may be accomplished through sentencing, but to adopt a rule which **creates an** opportunity for such persons **to** obtain immediate freedom to prey on the public once again is unwise.

538 So.2d at 820; accord Christian **v.** State, ***550*** So.2d **450** (Fla. **1989)** (following Chestnut); **Ziegler v.** State, **402** So.2d 365 (Fla. 1981); Tremain v. State, 336 So.2d 705 (Fla. 4th **DCA** 1976).

The Chestnut majority based its decision on a concern that, if evidence of diminished mental capacity were found admissible, dangerous criminals would be acquitted. Courts would have no authority to require these acquitted "criminals" to undergo psychiatric treatment like they do when the defendant is found not guilty by reason of insanity. Because this fear **was directed** at the diminished capacity defense against **specific** intent, the holding in Chestnut was that Florida would not adopt or recognize

a diminished capacity defense.[38] 538 So.2d at 824-25.

As Justice Overtan suggested, the Chestnut court could have decided the case without reaching the question of whether Florida should adopt a diminished capacity defense. The issue should have been limited to the evidentiary question of whether the evidence of brain damage was admissible to establish that the defendant lacked the requisite mental state of first-degree premeditated murder. 538 So.2d at 826 (Overton, J., dissenting). "Whether evidence of mental condition should be admitted if it is relevant to the existence of a state of mind required for conviction is an evidentiary question, not an issue of substantive criminal law doctrine." Id. (quoting from Standards for Criminal Justice, Standard 7-6.2 commentary at 316-17 (1986)).

In a number of Florida cases, courts have decided whether expert psychiatric testimony should be admitted during a trial based on section 90.702 of the Florida Rules of Evidence.[39] e.g., Glendening v. State, 536 So.2d 212, 220 (Fla. 1988); Tullis v. State, 556 So.2d 1165, 1167 (Fla. 3d DCA 1990); Ward v. State,

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[38] Justice Overtan, in his dissenting opinion with which Justices Barkett and Kogan concurred, found "a clear injustice'' in permitting an intoxication defense while excluding evidence of involuntary organic brain damage. 538 So.2d at 826 (Overton, J., dissenting). Justice Shaw concurred with the plurality opinion but thought the intoxication defense should be re-examined. 538 So.2d at 825 (Shaw, J., specially concurring).

[39] Testimony by experts -- If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial. § 90.702, Fla. Stat. (1989).

519 So.2d 1082, 1084 (Fla. 1st DCA 1988); Fridovich v. Statg, 489 So.2d 143, 145 (Fla. 4th DCA 1986); Kruse v. State, 483 So.2d 1383, 1384 (Fla. 4th DCA 1986); Terry v. State, 467 So.2d 761, 764 (Fla. 4th DCA 1985); Hawthorne v. State, 408 So.2d 801, 805 (Fla. 1st DCA), rev. denied, 415 So.2d 1361 (1982). In the instant case, Dr. Darby's testimony should have been admitted under sectian 90.702.

Based on this Court's Chestnut decision, the trial judge in the instant case excluded the testimony of Dr. Darby, a psychiatrist from Peace River Mental Health Center, during the guilt phase of the trial. (R. 1446). The trial court permitted Dr. Darby to proffer his testimony. Dr. Darby testified in proffer that he saw Maulden four times in 1987, priar to the homicides, treating him for mental illness through December, 1987. He saw Maulden seven times in 1988, following the homicides. His diagnosis was paranoid schizophrenia which was in remission at the time of the trial due to treatment. The medication Dr. Darby prescribed helped Maulden keep his thoughts together, think clearly, and cope with delusions and hallucinations. Schizophrenia causes loss of contact with the environment and a disintegration of the personality. Its symptoms include inappropriate grooming, poor hygiene, diminished motor activity, and incongruity of affect. Speech becomes circumstantial, tangential, and paranoid. The patient withdraws from others, is noncommunicative, stares into space, and has a bland, flat affect. The patient cannot control schizophrenia.[40] (R. 1447-82)

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[40] When Dr. Darby first saw Maulden about nine months prior to the homicides, his diagnosis was schizophrenia, a major mental (continued...)

Defense counsel did not offer Dr. Darby's testimony to prove, or even to argue, that Maulden had a diminished capacity or was incapable of forming a specific intent or premeditating the crime. This is not a case in which the defense hired psychiatric experts after the crime to examine the defendant and, hopefully, support the mental illness defense. Maulden was diagnosed and treated for schizophrenia by a disinterested psychiatrist nine months before the homicides. The testimony was relevant ta understand Maulden's behavior prior to the homicides, as described by his mother, aunt, sister and employer, and his bland effect and unemotional demeanor at the time of his arrest.[41]

The most important reason that Dr. Darby's testimony should have been admitted was to explain, or put in the proper context, evidence inttoduced by the state. Officer Campbell, from the Los Vegas Metropolitan Police Department, testified that when they arrested Maulden his demeanor was "scary." Although Maulden was "very calm, very cooperative," looking at him was like "looking into a shark's eyes, he was very cold." Campbell said Maulden was

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[40](...continued)
disorder. After Maulden was released from jail when all charges were dropped, he voluntarily continued outpatient treatment through December of 1987. Maulden and other witnesses testified that he stapped taking the Mellaril in January or February of 1988. (R. 1367-68, 1501-02) Dr. Darby again treated Maulden for schizophrenia while he was in jail awaiting trial in this case. (R. 1875-76)

[41] Maulden's mother testified that he was depressed, did nat talk, stared into space, and heard voices. She said he formerly took Mellaril and was better then. She did not know what the medication was for. (R. 1398-1401) Because Dr. Darby was not permitted to testify, the jury may have inferred that Maulden stared into space and didn't talk because he was thinking a lot about what he was going to do, an improper inference.

"matter of fact,'' and gave them whatever they asked for. (R. 1260) He showed no emotion and had a blank empty loak in his eyes. (R. 1261-62) Officer Dennis Burgess, also of the Los Vegas Metropolitan Police Department, described Chuck Maulden's demeanor as calm and matter of fact.[41] (R. 1272)

The state introduced these comments to show Maulden's indifferent state of mind and lack of emotion or remorse, to support the alleged premeditation. Dr. Darby would have told the jurors that a bland effect or demeanor is a common symptom of schizophrenia. (R. 1442-46) Because his testimony was excluded, however, the jurors may have interpreted Maulden's bland effect as a sign that he had no feelings and coldbloodedly premeditated the homicides.

Florida's evidence code sets out four requirements to be met to admit an expert opinion: (1) the opinion evidence must help the trier of fact; (2) the witness must be qualified as an expert; (3) the opinion must be capable of being applied to evidence at trial; and (4) the probative value of the opinion must not be substantially outweighed by the danger of unfair prejudice. § 90.702, Fla. Stat. (1989); Glendening, 536 So.2d at 220 (citing Kruse, 483 So.2d 1383). Dr. Darby's testimony met all four criteria.

Courts have found expert testimony admissible to explain symptoms exhibited by the defendant or the victim under section 90.702 of the Florida Evidence Code. In Kruse, 483 So.2d at 1384-85, the

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[41] During penalty phase, Dr. McClane, a psychiatrist, also testified that the blank look in Maulden's *eyes* described by the Los Vegas arresting officers is typical of chronic schizophrenics or schizotypal personality disorders. (R. 1826)

Fourth District Court of Appeal determined that the testimony of an expert in child and adolescent psychiatry was relevant to explain the changed behavior of the alleged victim of child abuse. The expert testified that the child suffered from post-traumatic stress disorder, caused by the trauma of sexual abuse, and that her behavior was similar to that of other victims suffering from the syndrome. The court found that the evidence met the requirement of section 90.702 that it be helpful to the trier of fact. 483 So.2d at 1385-86. Dr. Darby's testimony would have been helpful to the trier of fact in interpreting Maulden's behavior before the homicides and at the time of his arrest to understand his state of mind at the time of the offense.[43]

In Ward v. State, 519 So.2d at 1084, the First District Court of Appeal found the psychiatric expert qualified to render an opinion that the child she examined displayed symptoms consistent with those displayed by children who were sexually abused. The court found that the subject matter of the opinion, child abuse, was beyond the understanding of the average layman, as required by section 90.702. Id. Paranoid schizophrenia is even more beyond the comprehension of the average layman than child sexual abuse.

The Third District, in Tullis v. State, 556 So.2d at 1167, applied the same reasoning in a murder case. Although the court found the evidence inadmissible for lack of predicate, the majority assumed, but did not decide, that the evidence of the defendant's

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[43] Maulden admitted that he shot Tammy and Earl. The only question was whether the crime was premeditated. Thus, Maulden's state of mind at the time of the offense was the sole issue.

post-traumatic stress disorder would have been admissible, upon proper predicate, to assist in explaining the defendant's conduct when he exercised his right to remain silent. Citing the Fourth District's opinion in Kruse, 438 So.2d at 1386, the court noted that, "by definition, such testimony must be intended to explain the evidence offered at trial. Id. This case is similar to the case at hand because, in each case, the psychiatric evidence was proffered to explain evidence introduced concerning the defendant's behaviar at the time of his arrest.

Similarly, the First District found expert testimony describing the "battered woman syndrome" admissible to explain the defendant's claim of self-defense. Hawthorne v. State, 408 So.2d at 805-07. The Hawthorne court nated that the purpose of the evidence of mental state was to give the jury a basis for considering whether the defendant suffered from the battered woman syndrome, not to establish a novel defense but as it related to her claim of self-defense. The defendant was required to show that she reasonably believed it was necessary to use deadly force to prevent death or great bodily harm to herself or her children. Without the psychiatric testimony, a jury would not understand why the defendant would remain in the abusive environment. Thus, the expert testimony would have aided the jury in evaluating the case. 408 So.2d at 806-07.

Rejecting the state's contention that the testimony was merely an insanity defense "in different clothing, "the Hawthorne court distinguished the case from cases such as Tremain, 336 So.2d 705,

and Ziegler, 402 So.2d 365 (testimony regarding defendant's mental state inadmissible in absence of insanity defense), and the rule that the doctrine af diminished capacity is not available in Florida. In those cases, the defense wanted to introduce testimony relating to the defendant's mental state to "directly explain and justify criminal conduct." In Hawthorne, the defective mental state of the accused was not offered as a "defense as such." Instead, it was offered to support the defendant's defense of self-defense. 408 So.2d at 806.

Likewise, in Terry v. State, 467 So.2d at 764, the Fourth District held that expert testimony as to the defendant's mental state, allegedly caused by the "battered woman's syndrome,'' was admissible to support a claim of self-defense. The court distinguished Zeigler and Tremain, "[f]or the same reasons articulated by the First District in Hawthorne." Id.

The instant case is distinguishable from Zeialer, Tremain, and Chestnut for exactly the same reason. Defense counsel did not seek to introduce the testimony concerning Maulden's mental condition to show diminished capacity or to justify Maulden's criminal conduct. Mental illness was not a defense. Maulden's defense was lack of premeditation. That defense required a showing that Mauldcn's mental condition had deteriorated to such a state that, although he knew what he was doing, his thought processes were seriously impaired and his judgment distorted. Dr. Darby's testimony would have been one piece of circumstantial evidence bearing on this defense. Without this testimony, the jury may have assessed

Maulden's behavior by assuming that his thinking was normal.

Dr. Darby's testimony clearly met all four criteria of section 90.702: (1) it would have helped the trier of fact evaluate the evidence; (2) Dr. Darby was qualified as an expert because the trial judge found him qualified during the penalty phase of the trial; (3) his testimony could have been applied to evidence of Maulden's behavior introduced at trial by both the defense and the state; and (4) its probative value was not substantially outweighed by the danger of unfair prejudice.

The probative value of Dr. Darby's testimony was great because Maulden's schizophrenia would have made his bizarre behavior more comprehensible to the jury and would have enabled the jurors to distinguish between criminal behavior indicating premeditation and behavior cause by Maulden's mental illness. The testimony was crucial to rebut the state's evidence that Maulden appeared to have no emotion at the time of the arrest. Even if the evidence had not otherwise been admissible, the judge should have allowed it to rebut or explain the state's evidence. By introducing the Los Vegas police officers' descriptions of Chuck Maulden's demeanor, the state opened the door to Dr. Darby's testimony.[44] Although the state was permitted to show evidence of Maulden's mental state, the defense was denied this same opportunity. "Fair play and common sense dictates that what is sauce for the goose is sauce for the

[44] Defense counsel renewed his request to allow Dr. Darby's testimony after Maulden testified concerning his state of mind and the prosecutor cross-examined him concerning what medication he was taking. The judge again denied it. (R. 1555)

gander." Sharpe v. State, 221 So.2d 217, 219 (Fla. 1st DCA 1969).

The only danger mentioned by the prosecutor was the danger that the jury would be confused and perceive this testimony as an insanity defense which totally excuses conduct. He argued that the jury was not voir dired on insanity and would not be instructed on it. (R. 1383) Although the jurors were not voir dired an insanity, both the prosecutor and defense counsel questioned them in great length about whether they had known anyone with mental problems; their views of mental health professionals, whether they would consider and evaluate psychiatric testimony; whether they believed that a person's emotional and mental state, even if it did not rise to the level of insanity, might affect his thaughts; and whether they would fairly consider Maulden's mental state to determine whether he could form premeditation. (e.g., R. 254-58, 897-98, 913-21)

Defense counsel assured the judge that Dr. Darby would not testify that Maulden was incapable of premeditating and that he would not argue to the jury that Maulden was incapable of forming intent or premeditating. He also suggested a jury instruction to clarify the use of the testimony for the jury and thus prevent any confusion. The proposed instruction would tell the jury that a mental disorder does nat excuse conduct and is not legal justification. (R. 1374-76) Any possible prejudice to the state would have been remedied by such an instruction.[45]

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[45] The judge had no problem with Dr. Darby testifying as to diagnosis and medication but was concerned about the symptoms of schizophrenia because other witnesses would testify that Maulden had the symptoms, thus confirming the diagnosis. He agreed to let (continued...)

The prosecutor argued that the testimony was irrelevant and that "no law allows defense to present evidence to support their argument." (R. **1371)** This is not true, of course. The right to develop and present a theory of defense is a fundamental constitutional right. Chambers v. Mississippi, 410 U.S. **284,** 93 S.Ct. **1038,** 35 L.Ed.2d 279 (1973). Whether "rooted directly" in the **due** process clause of the fifth and fourteenth amendments or in the confrontation or compulsory process clauses of the sixth amendment, the constitution guarantees the defendant in a criminal case a meaningful opportunity to be heard and to **present a** complete defense. Crane v. **Kentucky, 476 U.S. 683, 690, 106** S.Ct. 2142, **90** L.Ed.2d **636, 645** (1986); accord Gurganus v. State, **451** So.2d 817, **823** (Fla. 1984) (right to present **expert** testimony an effect of defendant's alleged consumption of drugs and alcohol); Fridovich **v.** State, 489 So.2d **143, 146** (Fla. **4th DCA** 1986) (right to **present** medical examiner's testimony as to manner of death, in support of his theory of defense).

Maulden's defense was lack of premeditation. The issue **was** not whether Maulden was capable of premeditating, but whether he **did** premeditate. Premeditation is a thought process which was affected by Maulden's mental condition. His mental conditian was **relevant and** necessary **for** the jury to understand the defense.

The prosecutor compounded the court's error during closing

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[45](...continued)
Dr. **Darby** testify that he treated **Maulden** and that what he had seen was consistent with the diagnosis (R. **1392-93)** but changed his mind when the prosecutor showed him the Chestnut case. **(R. 1446)**

argument. He argued as follows:

> Now throughout voir dire and opening the defense tried to tell you that there was an issue in this case and that the issue was the state of mind of Mr. Maulden. Now, Mr. Maulden doesn't think that's an issue. Mr. Maulden got on the witness stand and told you he intended to kill these people and he killed them on purpose, that's First Degree Premeditated Murder. His lawyers, however, think that there's an issue and, that is, whether he really premeditated it even thaugh he said he did. So, we have an interesting decision to make. Are you going to believe all of the overwhelming evidence --

(R. 1598-99) Defense counsel objected and asked for a mistrial, arguing that the prosecutor misstated the evidence by claiming that the defense lawyers did not understand the case. He said that Maulden testified that he intended to kill the victims, not that he premeditated the murders. (R. 1599) The court asked the prosecutor not to characterize the defense. The prosecutor told the judge he disagreed with his ruling and continued:

> This is not a case where there are any issues. This is a case of Overwhelming evidence of guilt.

(R. 1599-1601) Thus, the prosecutor tried to equate intent with premeditation in the jurors' minds, and probably succeeded. Without knowing that Maulden was schizophrenic, the jurors must have been confused about the defense and the prosecutor's argument. Had they heard Dr. Darby's testimony, they would have understood the defense argument and have been able to evaluate it.

Error in a capital case must be carefully scrutinized before written off as harmless. Pait v. State, 112 So.2d 380 (Fla. 1959). The trial court's erroneous exclusion of Dr. Darby's testimony, compounded by the prosecutor's misleading, inflammatory and prejudicial closing argument, prevented defense counsel from

presenting a viable defense to the jury. In Ball v. State, 568 So.2d 882 (Fla. 1990), this Court reversed the conviction because the trial court excluded evidence which "effectively prevented Hall from presenting his insanity defense to the jury." Id. at 886. Thus, the error was not harmless beyond a reasonable doubt. Id. (citing DiGuilio v. State, 491 So.2d 1129 (Fla, 1986)).

In Gurganus v. State, 451 So.2d 817 (Fla. 1984), this Court found that the trial court erred by excluding psychiatric testimony concerning the effect of alcohol and drugs on the defendant's mind to support his defense of intoxication.[46] The improper exclusion of the psychologists' testimony deprived Gurganus of his sixth and fourteenth amendment right to provide witnesses an his behalf. Id. at 823. The improper exclusion of Dr. Darby's testimony deprived Maulden of his sixth and fourteenth amendment rights. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The exclusion of Dr. Darby's testimony also deprived Maulden of his right to equal protection and due process. Defendants who use insanity or voluntary intoxication defenses are routinely permitted to introduce psychiatric testimony to support their defenses. As Justice Overton concluded in his dissenting opinion in Chestnut, "the majority's decision appears to violate the equal protection and due process clauses of both the United States and Florida Constitutions because no reasonable classification or

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[46] The Guraanus court stated, "[w]hen specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the accused's ability to form a specific intent, is relevant. 451 So.2d at 823 (citations omitted).

distinction to justify different treatment [of intoxicatian and brain damage] exists. 538 So.2d at 828 (Overton, J., dissenting).

Therefore, as this Court stated in Gurganus, we must evaluate the exclusion of Dr. Darby's testimony according to the harmless constitutional error rule articulated by the United States Supreme Court. The test is "whether there is a reasonable possibility that the lack of the evidence complained of might have contributed to the conviction or, in other words, was the error harmless beyond a reasonable doubt." 451 So.2d at 823 (citing Chapman v. California, *386* U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). The burden of proof is on the state. DiGuilio, 491 So.2d at 1139.

In Chapman, *386* U.S. at 23, 17 L.Ed.2d at 710, the Supreme Court cautioned against giving too much emphasis to "overwhelming evidence" of guilt where constitutional error affects substantial rights. Accord DiGuilio, 491 So.2d at 1136-39. The state cannot show beyond a reasonable doubt that the improper exclusion of Dr. Darby's testimony and defense counsel's resulting inability to present a viable theory of defense did not affect the verdict.

ISSUE V

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON AND FINDING THE PRIOR VIOLENT FELONY AGGRAVATING FACTOR BECAUSE MAULDEN'S ONLY OTHER CONVICTION OF A CAPITAL FELONY WAS HIS CONTEMPORANEOUS CONVICTION FOR A HOMICIDE THAT WAS COMMITTED SIMULTANEOUSLY.

Over defense objection, the trial court instructed the jury that Maulden had been convicted of another capital felony based on the simultaneous murders of Tammy Maulden and Earl Duvall. (R. 1682-83, 1993) See § 921.141(5)(b), Fla. Stat. (1989). In his written findings, the judge found that each homicide aggravated the other one. (R. 2067) Defense counsel admitted that Florida law did not support his position but argued that a literal reading of the statute defining the prior violent felony aggravating factor would preclude consideration of a contemporaneous conviction. Where two simultaneous deaths occur, and the defendant is convicted of both at the same trial, neither is "prior." (R. 1682-83)

This Court has held repeatedly that contemporaneous convictions can be used to establish the prior violent felony aggravating factor where there was more than one victim. See e.g., Dolinsky v. State, 576 So.2d 271, 274 (Fla. 1991); Pardo v. State, 563 So.2d 77, 80 (Fla. 1990); Wasko v. State, 505 So.2d 1314, 1317-18 (Fla. 1987); Johnson v. State, 438 So.2d 774, 778 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984).

On the other hand, contemparaneous convictions may not be used to support the prior violent felony aggravator when the convictions were for crimes such as robbery or sexual battery committed against the murder victim in the course of the action leading up to the

murder. Wasko, 505 So.2d at 1318 (in effect overruling Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984)); see also Holton v. State, 573 So.2d 284, 291 (Fla. 1990); Reed v. State, 560 So. 2d 203, 207 (Fla. 1990). Although the Waska court factually distinguished these cases from cases holding that contemporaneous convictions of crimes against different victims could be used as prior violent felonies, it gave no reason far making the distinction.

This Court held in Elledge v. State, 346 So.2d 998 (Fla. 1977) that prior convictions for crimes that occurred after the homicide could be considered prior violent felonies. To explain its holding, the Elledse court cited the "plain reading of the statute,"

> The defendant was previously canvicted of another capital felony or of a felony involving the use or threat of violence to the person.

§ 921.141(5)(b), Fla. Stat. (1989). The Elledge court noted that "[i]t is clear that the Legislature referred to "previous convictions" and not "previous crimes."

It is equally clear that the legislature did not intend "previously convicted" to mean previous to the sentencing. If that were the case, the homicide for which the defendant was being sentenced would always be a prior violent felony and, thus, this factor would automatically apply in every case. Aggravating factors were intended to set the crime apart from other homicides. Dixon v. State, 283 So.2d 1 (Fla. 1973), cert denied, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974). Thus, the legislature must have intended to include only prior violent felonies or capital felonies that occurred prior to the conviction far the homicide for

which the defendant was being sentenced. When convictions are contemporaneous, neither conviction occurred prior to the other.

In Elledge, this Court stated that the purpose for considering aggravating and mitigating factors was to engage in character analysis to ascertain whether death was appropriate. Whether the defendant exhibited a propensity to commit violent crime was relevant. 346 So.2d at 1001. The defendant who has killed before would seem to have a propensity to commit such crimes. When both homicides are committed as part of one act, however, it does not suggest that the defendant has a propensity to kill people.

The most likely purpose for section 921.141(5)(b)'s enactment would be to aggravate a homicide when the defendant has committed other capital or violent crimes and did not learn from his mistakes or profit from the penalties imposed. This is supported by analogy to the habitual offender statute which has been interpreted for years to require that the defendant committed two prior offenses, the second of which he committed subsequent to his sentencing on the first. Joyner v. State, 158 Fla. 806, 809-10, 30 So.2d 304, 306 (1947); Fuller v. State, 578 So.2d 887, 888 (Fla. 1st DCA 1991); Shead v. State, 367 So.2d 264, 266 (Fla. 3d DCA 1979).

> The purpose of the statute is to protect society from habitual criminals who persist in the commission of crime after having been theretofore convicted and punished for crimes previously committed. It is contemplated that an opportunity for reformation is to be given after each conviction.

Joyner v. State, 158 Fla. 806, 809-10, 30 So.2d 304 (1947). "'[T]he reason for the infliction of the severer punishment for a repetition of offenses is not so much that [the] defendant has sinned

mare than once as that he is deemed incorrigible when he persists in violation of the law after conviction of previous infractions.'" Shead, 367 So.2d at 267 (citation omitted).

That a defendant killed two people simultaneously adds nothing to the defendant's character analysis. The defendant had no opportunity ta learn from his first mistake because he had no time to reflect between the killings. He had no time to contemplate what he had done and feel remorseful. He received no punishment so had no opportunity to benefit from it.

Using the contemporaneous convictions to aggravate each other in Mauldcn's case is even worse than the usual case where the defendant killed more than one person. Generally, the defendant kills one victim before killing another. See e.g., Pardo, 563 So.2d 77 (nine murders during five separate episodes over four month period); Johnson, 438 So.2d 774 (hours separated three homicides); King v. State, 390 So.2d 315 (Fla. 1980), cert. denied, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981) (attempted murder during escape several hours after robbery/murder). In those cases, the defendants had at least a short time to reflect on their lethal behavior. Maulden had no time to reflect on what he had done.

In Santos v. State, 16 F.L.W. S633 (Fla. Sept. 26, 1991), Justice Kogan expressed similar sentiments in his dissenting opinion. In that case, the defendant shot and killed his ex-wife and two year old child. Justice Kogan stated as fallows:

> Had the two murders been separated by any appreciable amount of time, I might agree that this would be sufficiently aggravating to make death a permissible penalty, provided the mitigating evidence was not weightier.

> However, I cannot reach the same conclusion under the facts at hand. Both the killings occurred virtually in the same moment, and the evidence is consistent with the conclusion that Santos's daughter died only because her mother happened to be holding the child in her arms. In light of the weighty mitigating evidence, I thus cannot say that these murders were worse than the one in Blair, where the defendant actually dug his victim's grave in advance and did not suffer from the psychotic tendencies exhibited by Santas.

16 F.L.W. at S635-36 (Kogan, J., concurring in part, dissenting in part). For this reason and others in the majority opinion, Justice Kogan would have reduced Santos' two death sentences to life. Id.

In this case, Maulden committed the two murders simultaneously, The unrebutted evidence showed that Maulden only killed Earl Duvall because Earl was in bed with Tammy. Both homicides resulted from Maulden's demented obsession with hit ex-wife.

Maulden testified as follows:

> [W]hen 1 went into the house I flipped on the light and I saw everybody there, but before any reaction time, I had already pulled the pistol and shot Tammy and never stopped shooting until the five shots that I shot were finished.

(R. 1512) He first shot Tammy in the head. Without changing position, he fired three shots at Earl. He fired the fifth shot in the back of Tammy's head. (R. 1551) Dr. Melmud, the medical examiner, testified that both victims would have died very rapidly. (R. 1221) Thus, because it was impossible to tell which of the victims died first, the only conclusion is that the victims died simultaneously; neither before the other. Certainly, the legislature did not intend that each of these dual homicides be used to aggravate the other.

ISSUE VI

THE TRIAL COURT'S INSTRUCTION ON THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIONALLY VAGUE BECAUSE IT DID NOT INFORM THE JURY OF THE LIMITING CONSTRUCTION THIS COURT HAS PLACED ON THIS AGGRAVATING FACTOR.

In Maynard v. Cartwrisht, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), the United States Supreme Court found the Oklahoma aggravating circumstance, "especially heinous, atrocious or cruel," unconstitutionally vague and overbroad under the eighth amendment because the language gave the sentencing jury no guidance as to which first-degree murders met the criteria. The Court noted that the Oklahoma Court af Criminal Appeals had not adopted a limiting construction to cure its overbreadth. Consequently, the sentencer's discretion was not channeled to avoid the risk of the arbitrary imposition of the death penalty. 486 U.S. at 363-64, 108 S.Ct. at 1859, 100 L.Ed.2d at 382.

In the instant case, the judge gave no limiting instruction as to the "cold, calculated and premeditated" aggravating instruction which is even more critical because of this Court's interpretation that there must be "'heightened premeditation." Citing Maynard v. Cartwrisht, defense counsel requested the following instruction:

> The crime for which the defendant is to be sentence was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. "Cold" means totally without emotion or passion. "Calculated" means with studied planning and forethought. This aggravating circumstance requires proof of premeditation in a heightened degree, greater than that required to convict for premeditated murder.

(R. 2018) The prosecutor agreed that the judge could instruct the

jurors that premeditation must be heightened premeditation, but would not agree to a definition of cold or calculated. He said that to tell the jurors "cold" means "totally without emotion or passion,"[47] as suggested by the defense, was "just tailored to this case." The prosecutor argued that "cold, calculated and premeditated" was a "term of art." He said that the "cases don't break it down" and objected to breaking it down into elements. (R. 1746-55) Defense counsel said that five factors must be considered: (1) cold; (2) calculated; (3) premeditated; (4) without moral justificatian; and (5) without legal justification.

Although the trial court agreed to give the definition of heightened premeditation only, which the prosecutor agreed to, defense counsel objected because such an instruction would emphasize the premeditation aspect. Thus, the judge denied the whole instruction. (R. 1754-56) He instructed on the cold, calculated and premeditated aggravating circumstance, § 921.141(5)(i), Fla. Stat. (1989), using the standard instruction.

The prosecutor was wrong when he said that cases do not break down this aggravating factor into separate elements. When CCP was first added to the list of statutory aggravating factors, this Court specifically noted that the state must prove beyond a reasonable doubt the elements of the premeditation aggravating factor -- "cold, calculated . . . and without pretense of legal or

[47] Although defense counsel agreed to omit "totally'' from the proposed definition of "cold," the prosecutor would not agree to the instruction. He was apparently afraid that if the jury were instructed on the meaning of "cold," they would not find the CCP aggravating factor applicable.

moral justification." Jent v. State, 408 So.2d 1024, 1032 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982). In Douglas v. State, 575 So.2d 165, (Fla. 1991), this Court stated that section 921.141(5)(i) "limits the use of premeditation to those cases where the state proves beyond a reasonable doubt that the premeditation was "cold, calculated . . . and without any pretense of moral or legal justification." Id. at 166 (citing Jent and Combs v. State, 403 So.2d 418 (Fla. 1981). cert denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982).

In various cases, this Court has found CCP inapplicable, even when premeditation would otherwise appear to be "heightened," because of a pretense of legal or moral justification. See e.g., Banda v. State, 536 So.2d 221 (Fla. 1988), cert. denied, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989); Christian v. State, 550 So.2d 450 (Fla. 1989) (inmate victim tried to and repeatedly threatened to kill Christian); Cannady v. State, 427 So.2d 723 (Fla. 1983) (defendant said victim jumped at him). In other cases, this Court has found CCP inapplicable because the domestic nature of the crime negated the "cold calculation." See e.g., Santos v. State, 16 F.L.W. S633 (Fla. Sept. 26, 1991); Douglas v. State, 575 So.2d 165 (Fla. 1991); Garron v. State, 528 So.2d 353, 361 (Fla. 1988) (intrafamily quarrel not underworld killing).

Florida's statutory language gives no more guidance than the Oklahoma statute in Cartwright. One meaning of "calculated" is "intended," Webster's New World Dictionary 104 (2d concise ed. 1975). Under that definition, calculated would apply to any

premeditated murder. "Cold" has a number of meanings. One is "without warmth or feeling" which is similar to the instruction proposed by defense counsel. Other definitions given are "not cordial," and "depressing or saddening." Webster's New World Dictionary 146 (2d concise ed. 1975). All murders are sad and depressing and few are committed with warmth. Thus, the vague statutory language given to Maulden's jury might be perceived as applicable to any premeditated murder.

In Oklahoma, the jury is the sentencer and must make written findings as to which aggravating factors were found. In Florida, the jury's recommendation is advisory and no such findings are made by the jury. Thus, we do not know whether the jurors found Maulden's crime to be cold, calculated, and/or premeditated and without legal or moral justification. There is a reasonable possibility, however, that some of the jurors found this aggravating factor applicable and at least one of those jurors joined in the death recommendation. If the jurors had been given the limiting definition, their recommendation might have been life.

In Shell v. Mississippi, 498 U.S. ___, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990), the Court found the "heinous, atrocious or cruel" aggravating factor constitutionally insufficient, even with the following limiting instruction:

> The word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others.

112 L.Ed.2d at 4. In his concurring opinion, Justice Marshall

explained that, although the trial court defined "cruel" in an "arguably more concrete fashion" than "heinous" or "atrocious," that definition did not cure the vagueness of the other two definitions. "Even assuming that the trial court permissibly defined "cruel," the instruction in this case left the jury with two constitutionally inform, alternative bases on which to find that petitioner committed the charged murder in an "especially heinous, atrocious or cruel" fashion." 112 L.Ed.2d at 5 (Marshall, J., concurring) (citation omitted).

Thus, even if the judge here had instructed the jury that "heightened premeditation" was required for the finding of CCP, his instruction would not have cured the problem created by his failure to define the other terms in the CCP aggravating factor. As defense counsel pointed out, the instruction would have merely emphasized the premeditation aspect over the other factors.

Although this Court has adopted a limiting construction of the CCP aggravating factor, the standard jury instructions do not include the definitions which supposedly narrow its applicability. Thus, the jurors were not informed of the limiting construction in cases such as Rosers v. State, 511 So.2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988) (careful plan or prearranged design); Hansbroush v. State, 509 So.2d at 1086 (Fla. 1987) ("heightened" premeditation): Nibert v. State, 508 So.2d 1 (Fla. 1987) (coldblooded intent to kill that is more contemplative, more methodical, more controlled than necessary to sustain first-degree murder conviction); and Preston v. State,

444 So.2d 939, 946-47 (Fla. 1984) ("particularly lengthy, methodical, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator").

In the Florida scheme of attaching great importance to the jury recommendation, it is critical that the jury be given adequate guidance. When, as here, the jury is given incarrect or inadequate instruction, its decisian may be based on caprice or emotion or an incomplete understanding of the law. Although a Florida jury recommendation is advisory rather than mandatory, it is a "critical factor" in determining whether a death sentence is imposed. See LaMadline v. State, 303 So.2d 17, 20 (Fla. 1974). With this Court's holding in Wrisht v. State, 16 F.L.W. S598 (Fla. Aug. 29, 1991), that a defendant is acquitted of the death penalty (for purposes of double jeopardy) when this Court determines that the trial court should have accepted the recommendation of life, a jury recommendation of life is even more critical. Because Maulden's jury was given no definition of CCP, his death sentence was unreliable in violation of the eighth and fourteenth amendments.

We are aware that this Court rejected similar arguments as to the "heinous, atrocious or cruel" aggravating factor in Smalley v. State, 546 So.2d 720 (Fla. 1989), and subsequent cases, and refused to transfer Maynard v. Cartwrisht to the "cold, calculated and premeditated" aggravating factor in Brown v. State, 565 So.2d 304, 308 (Fla.), cert denied, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990), and other recent cases. Nevertheless, we request that this Court reconsider this important constitutional question.

ISSUE VII

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

Over defense objection, the trial judge instructed the jury on the "cold, calculated, and premeditated" aggravating circumstance ("CCP"). (R. 1702-05, 1993) In his written findings supporting imposition of the death sentence, the judge also found that the murders were cold, calculated, and premeditated.[48] He justified his finding as follows:

> The homicides were the result of a "heightened premeditation" and were most similar to the traditional execution type slayings. This defendant set out to kill these individuals, took deliberate steps to carry out his task, and completed his purpose after ample time to reflect and evaluate his actions. These victims were asleep and defenseless. They literally did not know what was happening to them. Although the victims were known to the defendant and his motive was not pecuniary gain, the defendant's method of killing was "execution style.
>
> The defense would suggest that since one victim was the defendant's former wife and the other victim was her fiance, these homicides were more domestic in nature and involved the "heat" of passion and emotion. This view is rejected. The killings were deliberate and planned--not spontaneous. There had not been any heated argument leading to the act, nor was the defendant taken by any surprise or subjected to any provocation by his finding his former wife in bed with the fiance. The defendant previously knew that the two were living together. By his own testimony, the defendant did not originally plan to kill the fiance. Only when he arrived at the former wife's apartment and found the fiance's vehicle did he decide to kill the fiance too. These killings were cold,

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[48] In his sentencing order, the judge said that first two aggravators (conviction of another capital felony and commission of homicides during a burglary) did not warrant the death penalty, but that the third factor (CCP) did. (R. 2068)

> calculated and committed after consideration and premeditation. There was no moral or legal justification for these killings that can even be remotely suggested by these facts. Accordingly, this court finds that this aggravating factor justifies the imposition of the death penalty.

(R. 2068) Later in his order, when justifying his weighing of the aggravating and mitigating factors, he wrote further:

> This defendant had at least a full hour from the time he decided to kill his ex-wife before he actually entered her home. This provided ample time for consideration of his acts. He spent that time in deliberate conduct aimed at fulfilling his goal. He had to travel to her home to locate her, travel to the site of the gun to obtain his weapon, load the gun and fire a test shot, and then travel back to her home. These facts, taken with the description of the slayings cited above, lead to the conclusion that this defendant--with significantly "heightened premeditation"--very directly and purposely set out to complete his deed.

(R. 2071)

This Court has uniformly held that a finding of the "cold, calculated and premeditated" aggravating factor requires that the state prove, beyond a reasonable doubt, a "heightened" premeditation substantially greater than that necessary to sustain a conviction for premeditated murder. In Holton v. State, 573 So.2d 284 (Fla. 1990), this Court reaffirmed that simple premeditation of the type necessary to support a conviction for first-degree murder is not sufficient premeditation to establish the aggravating factor. Accord Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988).

The key question is what constitutes "heightened premeditation"? Obviously, it means "above" or "more than" the premeditation needed for a first-degree murder conviction. Does heightened mean for a longer period of time or of greater intensity, or does

it mean, as suggested by Jent v. State, 408 So.2d 1024, 1032 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982); Combs v. State, 403 So.2d 418 (Fla. 1981), cert denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982); and Douslas v, State, 575 So.2d 165, 166 (Fla. 1991), premeditation that is cold, calculated, and without pretense of legal or moral justificatian?

"Cold" and "calculated" are connected to "premeditated" by the connector "and" rather than "or" as is used in "heinous, atrocious, or cruel." § 921.141(5)(h),(i) Fla. Stat. (1989). This suggests that, to establish this aggravating factor, the homicides must meet each element of the definition. See e.g., Farinas v. State, 569 So.2d 425 (Fla. 1990) (crime was not "calculated"); Christian v. State, 550 So.2d 450 (Fla. 1989) (although murder was cold and calculated, there was pretense of legal justification).

When CCP was first added to the list of statutory aggravating factors, this Court stated specifically that to establish this aggravating factor, the state must prove beyond a reasonable doubt "the elements of the premeditation aggravating factor -- 'cold, calculated . . . and without pretense of legal or moral justification.'" Jent v. State, 408 So.2d 1024, 1032 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982). Mare recently, in Douglas v. State, 575 So.2d 165 (Fla. 1991), this Court stated that section 921.141(5)(i) "limits the use of premeditation to those cases where the state proves beyond a reasonable doubt that the Premeditation was "cold, calculated ... and without any pretense of moral or legal justification." Id. at

166 (citing Jent and Combs v. State, 403 So.2d 418 (Fla. 1981), cert denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982)). This same language was used in Combs. Accordingly, a finding of "heightened premeditation" is not based on the amount of time the defendant may have reflected on what he was about *to* do, as emphasized by the prosecutor and the judge in this case. (R. 1696, 2071) Instead, "heightened premeditation" is premeditation that was cold, calculated, and without pretense of legal or moral justification.

Cold

The CCP aggravating factor was intended to separate the ordinary defendant convicted of premeditated murder from the cold, vicious person who has not the least bit of excuse, not the least bit of moral explanation, not the least bit of emotional reason for killing. Maulden was not an unemotional person or a coldblooded killer; instead, he was a human being who in the frailest of times in his mind did a terrible thing. Dr. McClane testified that, rather than being cold and unemotional, Maulden was overwhelmed by his emotions and unconsciously split off from them into a dissociated, or depersonalized, state.[48] (R. 1816) A detective described Maulden's demeanor while making his taped statement as "very calm and sad." At one point Maulden appeared ready to cry. (R. 1317-18)

The "cold, calculated and premeditated" aggravating factor is

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[48] His mental functioning was dissociated from his behavior. Dr. McClane believed that Maulden was in a state called *'depersonalization," which causes an unreal daze feeling but does not substantially affect the memory, from the time he awoke and looked in the mirror and said he was going to kill Tammy until sometime after the shootings. (R. 1805)

factor is reserved primarily for execution or contract murders or witness elimination killings. Hansbroush v. State, 509 So.2d 1081, 1086 (Fla. 1987). The judge mentioned twice in his written order that the homicides in this case were "execution-style" murders. What might appear to be "execution-style" murders committed in domestic situations are not generally considered to fall within the category of executions, contract murders or witness elimination killings. See e.g., Santos v. State, 16 F.L.W. S633 (Fla. Sept. 26, 1991); Douglas v. State, 575 So.2d 165 (Fla. 1991); Garron v. State, 528 So.2d 353, 361 (Fla. 1988) (case involved family quarrel, not organized crime or underworld killing).

In Santos, the defendant had lived with a woman for many years. Santos and the woman had a two-year-old daughter. After the woman left Santos, he became obsessed and threatened to kill hex. He finally caught up with her an the street one day, spun hex around and fired three shots, killing bath the woman and their daughter who was in her arms. 16 F.L.W. at S633.

Despite the fact that Santos bought a gun in advance and made death threats, and despite the "executian-style" manner af the homicides, this Court found that the state failed to prove that the homicides were cold, calculated and premeditated. The Santos court stated that, "the fact that the present killing arose from a domestic dispute tends to negate cold, calculated premeditation." 16 F.L.W. at S634 (citing Douslas, 575 So.2d 165). The domestic dispute, which involved Santos' "misguided, excessive sense of masculinity," severely deranged Santos. The psychological experts

found that the defendant met both mental mitigators and that stress caused him to deteriorate into a psychotic state. Id.

Similarly, in the case at hand, the psychologists and the trial judge found both mental mitigators. The psychiatric testimony indicated that Maulden's chronic schizophrenia was worsened by the stress of his separation. Tammy told him she was probably going to move to Georgia with Earl, taking the children. The day prior to the homicides, he learned that Earl was physically punishing the children, which was a tremendous blow to him. (R. 1814) Maulden went to bed with these stresses whirling around in his mind, feeling rejected by Tammy whom he deeply cared about. Like Santos, his manhood and self-esteem were threatened, in this case by Tammy becoming involved with another man who was replacing him by disciplining the children. Maulden was deeply depressed and losing control of his thinking and actions. He awoke in a dazed, dissociated state and committed the crimes. He was overwhelmed by his emotions and unconsciously split aff from them. (R. 1804-05)

In Douglas, 575 So.2d 165, this Court also rejected the trial court's finding that the murder was cold, calculated and premeditated despite four hours of torturous events leading up to the killing. The defendant obtained a rifle, accosted his former girlfriend and her new husband, directed them to a wooded area where he forced her to commit various sexual acts with her husband at gunpoint. He then bludgeoned the husband with his rifle and shot him in the head, killing him in from of the wife. The Douslas court found that because the killing arose from passion, it was not

cold and calculated. Id. at 166-67. In Qantos, this Court characterized its finding in Douglas as follows:

> The sheer duration of this torturous conduct, in another context, might have supported beyond a reasonable doubt a conclusion that the killing met the standard for cold, calculated premeditation established in Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), i.e., that it was the product of a careful plan or prearranged design. The opinion in Douglas, however, rested on our conclusion that the killing arose from violent emotions brought on by the defendant's hatred and jealousy associated with the love triangle. In other words, the murder in Doualas was a classic crime of heated passion. It was not "cold" even though it may have appeared to be calculated. There was no deliberate plan formed through calm and cool reflection, see Rogers, only mad acts prompted by wild emotion.

Santos, 16 F.L.W. at S634.

In addition to Santos and Douslas, the defendant in Kampff v. State, 371 So.2d 1007 (Fla. 1979), planned and carried out the shooting of his ex-wife. Kampff had brooded over his divorce for three years and had begged his ex-wife to return to him. He went out and bought a gun and, the following day, went to the restaurant where his ex-wife worked and shot her five times; he "directed a pistol shot straight to the head." Although the "cold, calculated and premeditated" aggravating factor had not yet been added, this Court rejected the trial court's statement (to support his finding that the murder was "heinous, atrocious or cruel") that Kampff planned the murder for three years, thus inferring that CCP did not apply. Noting that the death penalty was not proportionately warranted, this Court directed the trial judge to vacate the death sentence which had been recommended by the jury and imposed by the judge, and to sentence Kampff to life. Id. at 1010.

In each of the above cases, the defendant purposefully located his ex-wife or girlfriend and shot her (or her husband) at close range after procuring a weapon. In Garron, 528 So.2d 353, the defendant shot his wife and her daughter, who was on the telephone, during a domestic confrontation. Garron was sentenced to death only for the killing of the daughter. The majority found that, although he shot the daughter at "point blank" range, the killing was not cold, calculated and premeditated because it resulted from an intra-family quarrel.

Similarly, in Amoros v. State, 531 So.2d 1256, (Fla. 1988), this Court found that the defendant's killing of his former girlfriend's new boyfriend, was not cold, calculated and premeditated. Although the defendant had threatened his girlfriend, there was no evidence he knew the boyfriend would be in the apartment until he encountered him there and shot him three times. 531 So.2d at 1261.

In Farinas v. State, 569 So.2d 425 (Fla. 1990), the defendant was obsessed with his former girlfriend who moved out with their child two months before he killed her. After harassing the former girlfriend during the two month period, he followed her and forced her into his car. When she jumped out and ran, he shot her in the back paralyzing her. While she was lying face down, he unjammed his gun three times and shot her in the head, killing her. This Court found that the crime was not "calculated," because there was no "careful plan or prearranged design.'' Id. at 431.

Maulden's shooting of Tammy and Earl was no more "execution-style" than any of these other cases. Executions, contract murders

and witness elimination killings are more aptly applied to mafia hits and organized crime. See Garron v. State, 528 So.2d 353, 361 (Fla. 1988) (heightened premeditation aggravating factor intended to apply to organized crime or underworld killings, not intra-family quarrel).[49] Maulden's homicides were not contract murders but crimes of passion committed by a depressed man whose mental health had gradually deteriorated until he lost control of reality.

Calculated

The evidence does not show a careful plan to murder Tammy and Earl as required by 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) ("calculation" consists of "careful plan or prearranged design"). Instead, Maulden awoke obsessed with a sudden and inexplicable impulse to kill Tammy. Reacting to this obsession, he killed Tammy and Earl while in a psychotic, and probably depersonalized, state of mind.

The trial judge rejected the defense argument that the homicides were domestic in nature because they were "deliberate and planned -- nat spontaneous," and did not occur during a heated argument or because Maulden was surprised by finding his wife in bed with another man. Although she was in bed with another man, Maulden knew Tammy was living with Earl. The judge admitted that

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[49] It seems that few cases fall into this category, perhaps because the perpetrators of such crimes are generally experienced criminals who are rarely caught and brought to trial. "Unorganized" defendants who kill during domestic disputes or because of passionate obsession are likely to be caught and convicted.

Maulden did not originally plan to kill Earl.[50] (R. 2068)

Although Maulden testified that he intended to kill Tammy and Earl, he did not say they were "calculated," "carefully planned," or "deliberately planned through calm and cool reflection." See Santos, 16 F.L.W. at S634 (citing Rogers); Farinas, 569 So.2d at 431. That the homicides were not spontaneous (e.g., during a heated argument) does not mean they were "carefully planned" rather than mad acts by a man deranged by emotion and passionate obsession. See Santos. 16 F.L.W. S633 (hunted down and killed farmer girlfriend and daughter); Douglas, 575 So.2d 165 (followed former girlfriend and husband and, after forcing them to have sex, killed husband); Kampff, 371 So.2d 1007 (went to wife's place of employment and shot her in head); Blair v. State, 406 So.2d 1103 (Fla. 1981) (arranged to have wife's grave dug prior to killing wife).

In Penn v. State, 574 So.2d 1079 (Fla. 1991), the defendant beat his mother to death with a hammer while she was sleeping. Prior to killing his mother that night, he went to her house twice and stole items to buy drugs. This Court rejected the trial court's finding of CCP stating that, "[w]hile Penn obviously decided, for some unknown reason, that he should kill hi5 mother, there is no evidence of the cold calculation prior to the murder necessary to establish this aggravating factor . . . ." The Penn court then found that death was not proportionately warranted and remanded for a life sentence. 574 So.2d at 1083-84. In the instant

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[50] See Amoros, 531 So.2d at 1261 (not CCP where defendant did not plan to kill girlfriend's new boyfriend until he broke into her apartment and encountered him there).

case, Maulden awoke suddenly and, "for some unknown reason," decided to kill Tammy. Even afterwards, he did not know why he did it. There was no more cold calculation shown in this case than there was in Penn.

Farinas, 569 So.2d 425 is similar to this case because the defendant was obsessed with the idea of his farmer girlfriend returning with their child to live with him. He constantly called or visited her family's home and became upset when he could not talk to her. He was jealous and suspected she was becoming involved with someone else. He finally forced her into his car and, when she jumped out and ran, shot and killed her. This Court found that the crime was not "calculated," because there was no "careful plan or prearranged design." Id. at 431.

The same is true in this case. Maulden loved and was obsessed with Tammy, yet he could not convince her to return to him with the children. He was jealous of Earl's relationship with Tammy and the two children. (R. 1490) He was afraid that Tammy and Earl would get married and move out of state. He was afraid that Earl would mistreat the children. Although the killing may have appeared calculated, as did the crime in Douslas, Maulden was actually obsessed, "in a daze," and afterwards was remorseful and did not know why he had committed the crimes. (R. 1487) Any appearance of calculation or lack of emotion was merely a symptom of his mental disorder. Like in Douslas, Santos, and Farinas, Maulden farmed no deliberate plan through calm cool reflection, but committed mad acts prompted by uncontrollable emotion. Rather than feeling no

emotion, he was overwhelmed by his emotions and unconsciously split off from them. (R. 1804-05)

The sentencing judge's finding of both statutory mitigating factars indicates that the homicides were not cold and calculated. The killer's state of mind is the essence of the cold, calculated and premeditated aggravating circumstance. Mason v. State, 438 So.2d 374 (Fla.), **cert. denied**, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1983); Hill v. State, 422 So.2d 816 (Fla. 1982), **cert. denied**, 460 U.S. 1017, 103 S.Ct. 1262, 75 L.Ed.2d 488 (1983). Maulden's schizophrenia or schizoid-type personality disorder, compounded by stress, make it highly improbable that he engaged in cold calculation.

Premeditated

Even if the amount of time that the defendant premeditates the murder is significant in establishing this aggravator, Maulden did not premeditate for a long period of time, if at all. The evidence indicates that Maulden awakened at about 1:30 in the morning obsessed with killing Tammy. There was no evidence suggesting that he thought about it or that the thought had ever entered his mind before that moment. Even then, he did not immediately retrieve the gun that he buried near Saddle Creek Road earlier in the day. Instead, he drove ta Tammy's apartment. Maulden testified that he might have talked to Tammy about a reconciliation if Earl had not been there. (R. 1511) When he saw Earl's car there, however, he assumed that Earl would be with Tammy and he would probably kill Earl too. Only then did he retrieve his gun.

The judge speculated that Maulden thought about killing Earl earlier in the day when he called Earl's father. Speculation cannot support the CCP aggravating factor. Hamilton v. State, 547 So.2d 630 (Fla. 1989) (degree of speculation in judge's findings precluded finding of CCP beyond reasonable doubt). The burden is upon the state to prove, beyond a reasonable doubt, affirmative facts establishing the heightened degree of premeditation necessary to sustain this factor. Thompson v. State, 456 So.2d 444 (Fla. 1984); Peavy v. State, 442 So.2d 200, 202 (Fla. 1983).

That Maulden thought about killing Earl when he called Earl's father is refuted by Maulden's testimony that he merely wanted Earl to leave so that he could see Tammy alone, and by the fact that Maulden buried his gun after he called Larry Duvall. Although Maulden said he buried the gun so that his mother (with whom he lived) would not get in trouble because of his phone call, even if he buried it so that he would not use it, this indicates an absence of premeditation or intent to kill at that time.[52]

The trial judge found that Maulden "had at least a full hour from the time he decided to kill his ex-wife before he actually entered her home." He concluded that this "provided ample time for consideration of his acts" and that Maulden"' spent that time in deliberate conduct aimed at fulfilling his goal." Even if the

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[52] Dr. McClane attributed the phone call to Maulden's concern about Earl hurting the children. See note 5, supra. It seems inconsistent that Maulden would lie about his motivation for the phone call but testify that he intended to kill Tammy and Earl. If he wanted to lie about Premeditation, he could have said that he never thought about killing them until he saw them in bed together.

amount of time the defendant had available to contemplate the crime were probative of heightened premeditation, an hour is not a long period of time in which to conceive of and carry out a shooting, especially when compared to contract killings or even "passionate obsession" killings that have not proportionately warranted the death penalty. See e.g., Santos, 16 F.L.W. at S633 (Santos threatened to kill woman with whom he formerly lived two days before murder and had threatened to kill both her and their daughter prior thereto); Kampff, 371 So.2d 1007 (Kampff purchased gun the day before he shot his ex-wife); Chambers v. State, 339 So.2d 204, 205-06 (Fla. 1976) (defendant beat victim and told a witness he was going to kill victim several hours before he beat her to death).

In addition, Maulden testified that he did not remember having any thoughts when he shot Tammy and Earl or while he was driving to their apartment. He was confused and dazed. (R. 1511-12, 1541) Thus, althaugh he may have spent an hour in "deliberate conduct aimed at fulfilling his goal," there is no evidence that he premeditated the murder during that time.

Dr. McClane's testimony indicates a lack of Premeditation during the hour or so that Maulden prepared to commit the crimes. McClane testified that Maulden was in a dazed, dissociated state from the time he awoke and said he was going to kill Tammy until sometime after the shootings while he was en route to Los Vegas. (R. 1805) Once the obsession was clear in his mind, the momentum carried him through the homicide. Although he knew what was going an, his thinking was dissociated from his behaviar. (R. 1814-16)

The evidence in this case shows no lengthy period of reflection or planning. Instead, it shows that Maulden carried out a sudden obsession while in a depersonalized state, without reflection or deliberation.

Pretense of Legal or Moral Justification

The judge stated that there was "no legal or moral justification even remotely suggested." (R. 2068) The judge applied the wrong standard. Only a pretense of justification is required. A pretense is "something alleged or believed on slight grounds: an unwarranted assumption." Banda, 536 So.2d at 224 n.2 (quoting Webster's Third New International Dictionary 1977).

This Court has found that a "colorable" claim of legal or moral justification makes the CCP aggravating factor inapplicable, even when there is calculation and heightened premeditation. Banda v. State, 536 So.2d 221 (afraid of victim); Christian v. State, 550 So.2d 450 (Fla. 1989) (although Christian calculated the murder, he had pretense of justification because victim attacked him earlier and threatened his life); Cannady v. State, 427 So.2d 723 (Fla. 1983) (victim jumped at him). "[U]nder the capital sentencing law of Florida, a 'pretense af justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." Banda, 536 So.2d at 224.

Maulden had at least a pretense of legal or moral justification. Tammy left him and obtained a divorce over his objections. She was living with her fiance. Maulden loved Tammy and believed

that she should leave Earl and return to him with the children. She refused to do so. Instead, Tammy and Earl were contemplating getting married and taking the children out of state where Maulden could no longer see them. He had learned that Earl was physically punishing the children. Maulden was actively involved in the church and wanted Tammy to consider what her actions were doing to their "family.'" The evidence indicated that Maulden believed that what Tammy and Earl were doing was wrong.

Had Maulden not been psychotic and depressed, he probably would have better understood what was happening and reacted in a more appropriate manner. Chronic schizophrenia, a major thinking disorder, causes confused thinking, inability to distinguish real from unreal, irrational beliefs, delusions and hallucinations, loss of contact with the enviranment, and disintegration of the personality. The patient cannot control it. (R. 1447-82, 1798)

The defendant's state of mind is the essence of the cold, calculated and premeditated aggravating factor. Mason, 438 So.2d 374; Rill, 422 So.2d 816. Because of Maulden's chronic thinking disorder, worsened by depression and stress, he may have believed (if he was thinking at all) that his actions were justified because of what Tammy and Earl and done to his family relationship, or because he thought Earl would injure the children. Thus, Maulden had at least a pretense of legal or moral justification

Conclusion

The trial court improperly applied section 921.141, Florida Statutes, by instructing the jury on and finding CCP. This

misapplication renders Maulden's death sentence unconstitutional under the eighth and fourteenth amendments. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Because the judge expressly stated that he would not have sentenced Maulden to death had he not found CCP, the death penalty must be vacated and, if a new trial is not granted, the case remanded for impositian of a life sentence.

If a new trial is granted, this Court should still consider the penalty phase issues and reverse the finding of CCP. See e.g., Williams v. State, 574 So.2d 136 (Fla. 1991); Hamilton v. State, 547 So.2d 630 (Fla. 1989); cf. Wright v. State, 16 F.L.W. S598 (Fla. Aug. 29, 1991) (defendant entitled to benefit of prior jury recommendation of life). Because the trial judge explained in his written order that death would not be an appropriate penalty in this case without the finding of CCP, we knaw that if this Court were to find that aggravating factor inapplicable and remand the case, he would sentence Maulden to life. Additionally, death is not proportionately warranted in this case because of the domestic nature of the crime. See Issue VIII, infra. For the purpose of judicial economy, therefore, this Court should reverse and remand for a new trial without the possibility of death.

ISSUE VIII

THE DEATH SENTENCE SHOULD BE REDUCED TO LIFE BECAUSE **DEATH** IS **NOT PROPORTIONATELY WARRANTED IN THIS** CASE.

In Dixon, 283 So.2d at 7, this Court stated that, because death is a unique punishment in its finality and total rejection of the possibility of rehabilitation, it is proper that the legislature has "chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." This Court has traditionally found the death penalty proportionately inapplicable to murders which are domestic in nature or committed as a result of "passionate obsession." See e.g., Santos v. State, 16 F.L.W. 5633 (Fla. Sept. 26, **1991**); Klokoc v. State, 16 F.L.W. S603 (Fla. Sept. 5, **1991**); Douglas v. State, **575** So.2d **165** (Fla. **1991**); Farinas v. State, **569** So.2d 425 (Fla. 1990); Blakely v. State, **561** So.2d **560** (Fla. **1990**); Amoros v. State, 531 So.2d **1256** (Fla. **1988**); Garron v. State, **528** So.2d 353 (Fla. **1988**); Irizarry v. State, **496** So.2d **822** (Fla. 1986); Wilson v. State, **493** So.2d 1019 (Fla. 1986); Ross v. State, **474** So.2d 1170 (Fla. **1985**); Blair v. State, 406 So.2d **1103** (Fla. 1981); Kampff v. State, **371** So.2d 1007 (Fla. **1979**); Chambers v. State, **339** So.2d 204 (Fla. 1976).

There are other reasons that death is not proportionately warranted in this **case.** In his written sentencing order, the trial court found three aggravating factors and six mitigating factors. **The** aggravating **factors** were that: (1) the defendant had been previously convicted of another capital offense or felony involving the use or threat of violence; (2) the crime **was** committed while

the defendant was engaged in the commission of a burglary; and (3) the crime for which the defendant was to be sentenced was committed in a cold, calculated and premeditated manner without pretense af moral or legal justification. (R. 2067) Ha stated, however, that,

> although all three of these factors exist, numbers 1 and 2 above do not, under the facts of this case, warrant the imposition of the death penalty. However, the facts of this case do show that the third aggravation [CCP] does justify the imposition of the death penalty.

(R. 2068)

In mitigation, the court found that (1) Maulden was under the influence of mental or emotional disturbance at the time the homicides were committed; (2) his judgment was impaired by his mental or emotional condition; (3) his capacity to appreciate the criminality of his conduct or his capacity to conform his conduct to the requirements of law was impaired; (4) Maulden freely confessed to the police his responsibility for the homicides and cooperated fully with authorities; (5) Maulden had shown remorse for his actions; and (6) while in the Polk County Jail for sixteen months prior to trial, Maulden received no disciplinary reports. The judge found that, although all six mitigators applied, only the first three (statutory mental mitigators) were worthy of "significant consideration.'' (R. 2069) He concluded that the "cold, calculated, and premeditated" nature of the crime outweighed the mental mitigation and imposed the death penalty. (R. 2071)

The judge should have found a seventh nonstatutory mitigating factor. In Douglas, 575 So.2d at 167, this Court found that "a prior domestic relationship may be considered a nonstatutory

mitigating circumstance."' Accord Herzog v. State, 439 So.2d 1372 (1983) (defendant tried to smother girlfriend with pillow, then drug her into living room and choked her to death with telephone cord). Cases cited above in which this Court reduced death sentences to life based upon the domestic or passionate nature of the crime also support this conclusion.

This seventh mitigator also precludes the court's finding of CCP. As argued in Issue VII, supra, the "cold, calculated and premeditated" aggravating circumstance is not applicable. This was not a contract killing or underworld crime but, instead, was a crime committed out of "passionate obsession." See cases cited in Issue VII, supra. With the elimination of CCP, anly two aggravating factors remain. Because the judge specifically stated that the first two aggravating factors did not warrant the death penalty, this Court must vacate the death penalty and remand for the imposition of a life sentence. (R. 2067-72)

Even if this Court should find the CCP aggravating factor applicable, the death penalty is not proportionately warranted under the circumstances of this case. See Klokoc v. State, 16 F.L.W. 5603 (Fla. Sept. 5, 1991). In Klokoc, the defendant, who also suffered from mental problems, was obsessed with the return of his estranged wife although he had abused her for many years. He continually tried to find her through their three grown children, recording his efforts and his telephone calls on a tape recorder. He threatened to kill the children if he could not find her.

One evening he recorded that, if his wife did not call him

that evening, he would make her sorry for the rest of her life by killing their nineteen-year-old daughter. That night, he fatally shot their daughter by placing a pistol directly next to her head while she was asleep. Id.

The trial judge found only one statutory aggravating factor. He found that the crime was cold, calculated and premeditated because the killing was "a dispassionate and calm execution of the victim to achieve emotianal gain for Defendant in knowing he had and would hurt his estranged wife . . . . " Id. Although this Court found that the facts of this case justified this finding, it still found the death penalty proportionately unwarranted. The killing in Klokoc seems more calculated than in the usual domestic situation. Rather than killing his wife, with whom he was displeased, Klokoc killed his daughter to retaliate against his wife, thus achieving "emotional satisfaction" from his wife's suffering. Unlike Maulden, he showed no signs of remorse afterwards. 16 F.L.W. at S603-04.

Even though this Court upheld the finding of the CCP aggravating factor, it found that the five mitigating circumstances, which included the statutory mental mitigators, outweighed the CCP aggravating factor. In the case at hand, as in Klokoc, the substantial mitigation clearly outweighed the aggravating factors, making the death penalty disproportionate.

Both Maulden and Klokoc were obsessed with the return of their estranged wives and both were mentally ill. Unlike Klokoc, however, Maulden did not make prior threats against his family and

did not kill his child to spite his wife. He killed the object of his love and obsession and her fiance who was in bed with her. In addition, Maulden was extremely remorseful afterwards and did not understand why he had committed the crimes.

The trial judge found both statutory mental mitigators; in fact, he found three mental mitigators because they were divided into three instead of two. The unrebutted testimony of all three psychiatric experts showed that Maulden suffered from a major mental disorder which affected his thinking and judgment. This Court has affirmed a death sentence in only three cases in which the trial court found both mental mitigators. In Fersuson v. State, 474 So.2d 208 (Fla. 1985), the trial court found only "some evidence" to indicate that the mental mitigators applied. In the case at hand, the mental mitigation was substantial and the judge clearly found both mental mitigators. Similarly, in Hudson v. State, 538 So.2d (Fla. 1989), this Court declined to disturb the trial court's finding that the mental mitigators were entitled to "little weight." In this case, the judge found that the mental mitigators were entitled to "significant consideration." (R. 2069) The third case, Brown v. State, 565 So.2d 304 (Fla. 1990), did not involve long term mental illness but rather short term problems resulting fram family pressure. At some point in Florida's legal process, defendants to which both statutory mental mitigators apply normally get a life sentence.

Numerous other cases, cited on the first page of this issue, show that death is disproportionate in a crime involving passion.

Because many of these cases were discussed in Issue VII, supra, we will not repeat the details here. There are several cases, however, that were not discussed previously and are relevant to show that death is not proportionately warranted in this case.

In Blair v. State, 406 So.2d 1103 (Fla. 1981), Blair decided to murder his wife, apparently because she accused him of making advances toward her daughter. He purchased a weapon, had his son dig a grave in the yard, and arranged for the children to be gone at the time of the murder. He killed his wife and buried her in the backyard grave during the night. The jury recommended death. Id. at 1105. Nevertheless, this Court found death a disproportionate penalty and remanded for a life sentence.[53] Id. at 1109.

Although Maulden killed two people, the trial judge deemed this factor insufficient to warrant the death penalty, even before weighing it against the mitigation. In his dissent in Santos, Justice Kogan opined that, although Santos killed two people, he killed them simultaneous and probably would not have killed his daughter had she not been in her mother's arms. He did not think that this factor distinguished the case from Blair, in which this Court imposed a life sentence. 16 F.L.W. at S635-36. In this case, the two victims were also killed contemporaneously. As in Santos, Earl would not have been killed had he not been in bed with Tammy. Moreover, like Santos, the court found extensive mitigation related

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[53] The trial court found that the crime was committed from a premeditated design. This Court decided that because the judge did not use the language from the CCP statutory aggravating factor, which was new at the time, it was a nonstatutory aggravating factor and was, thus, inapplicable. 406 So.2d at 1108.

to Maulden's mental condition that was not present in Blair. A sentence of death is not more justified by the facts at bar than it was in Blair or Santos.[54]

Another domestic murder where two persons were killed in which the sentence was reduced to life was Wilson v. State, 493 So.2d 1019 (Fla. 1986). In Wilson, this Court found that the killing of the defendant's five-year-old nephew should have been only second-degree murder, and that imposition of death for the killing of the step-father was not proportionally warranted. In Wilson, the jury recommendation was death. The court found two aggravating factors -- a prior conviction of a violent felony and that the homicide was heinous, atrocious or cruel. These factors were not balanced by any mitigating factors. Nevertheless, this Court reduced the sentence to life because of the domestic nature of the crime. Compare the complete lack of mitigation in Wilson and the substantial amount of mitigation in the case at hand.[55]

In Blakely v. State, 561 So.2d 560 (Fla. 1990), the defendant killed his wife with a hammer as a result of ongoing domestic discord concerning their three daughters, followed by a heated domestic confrontation. It seemed that he "just couldn't take it anymore." The jury unanimously recommended death. Without saying

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[54] Another domestic-type situation in which the jury recommended death and this Court reduced the penalty to life is Kampff v. State, 371 So.2d 1007 (defendant obsessed with return of ex-wife procured a gun, went to her place of employment the next day and fired five shots, killing her), discussed in Issue VII, supra.

[55] Garron v. State, 528 So.2d 353, is another case in which the defendant killed two people and his penalty was reduced to life because the crime resulted from an intra-family dispute.

whether the aggravating and mitigating factors applied, this Court reversed and remanded for a life sentence because death was not proportionately warranted in a domestic case. 561 So.2d at 561. In a concurring opinion, Justice Ehrlich expressed the view that the judge erred by finding the crime "heinous, atrocious or cruel" and "cold, calculated and premeditated." 561 So.2d at 561-62.

In Irizarry v. State, 496 So.2d 822 (Fla. 1986), the defendant murdered his ex-wife with a machete and attempted to murder her lover. The trial court found four aggravating factors and only two mitigating factors. On appeal, this Court found that the jury could have reasonably believed that the defendant's crimes resulted from a passionate obsession, adding that "the jury recommendation of life imprisonment is consistent with cases involving similar circumstances." 496 So.2d at 825. The court ordered a reduction of the death penalty to life. Id.

In his sentencing order, the trial judge said that first two aggravators (conviction of another capital felony and commission during a burglary) did not warrant the death penalty, but that the third factor (CCP) did. The fact that Maulden killed two people should not be given too much weight because the murders were committed contemporaneously while Maulden was in an extreme state of mental illness. The fact that the murders were committed during a burglary should not be given much weight because the burglary was part of the homicides. With the elimination of the incorrectly found CCP factor, and addition of the former domestic relationship as a nonstatutory mitigating circumstance, the mitigation even

further outweighs the remaining aggravating factors.56

Maulden's moral culpability is simply not great enough to deserve a sentence of death. The uncontrolled shooting shows a distorted thought process rather than criminal intent. This is not one of the "unmitigated" first degree murder cases for which death is the **proper** penalty. Cf. Dixon, 283 So.2d at 7.

If a new trial is granted on other grounds, this Court should still consider these final two penalty phase issues. See e.g., Williams v. State, 574 So.2d 136 (Fla. 1991); Hamilton v. State, **547** So.2d 630 (Fla. 1989) (penalty issues decided even though new trial granted). Because the trial judge explained in his written order that death would not be an appropriate penalty in this **case** without the finding of CCP, we know that if this Court were to find that aggravating factor inapplicable and remand the case, he would sentence Maulden to life. See Issue VII, supra. Cf. Wright v. State, 16 F.L.W. **S598** (Fla. **Aug.** 29, 1991) (defendant entitled to benefit of prior jury recommendation of life). Because **death** is not proportionately warranted in this case, Maulden should be retried without the possibility of a death sentence. **For** the purpose of judicial economy, therefore, this Court should reverse and remand for a new trial without the possibility of death.

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56 **If** this Court does not find that the CCP aggravating factor was improper, it should not be given much weight because of Maulden's serious mental condition **and** passionate obsession with his ex-wife, and would not outweigh the extensive mitigation.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand this case for a new trial without the possibility of a death sentence. If the case is not remanded for a new trial, Maulden's death sentence should be vacated and the case remanded for a life sentence. Alternatively, this Court should reverse and remand for a new penalty phase proceeding with a new jury.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Office of the Attorney General, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 15th day of October, 1991.

Respectfully submitted,

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