IN THE SUPREME COURT OF FLORIDA

CHARLES SEBASTIAN MAULDEN,

Appellant,

vs.

Case No. 75,595

STATE OF FLORIDA,

Appellee.

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

# REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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### 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.**

Appellee first questions whether the trial judge found a "strong likelihood that the prosecution was exercising peremptory challenges solely on the basis of race." Florida law requires that the trial court 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 complaining party has met its initial burden. State v. Slappy, 522 So. 2d 18, 20-22 (Fla.), cert. denied, 487 U.S. 1219 (1988); accord Thompson v. State, 548 So. 2d 198, 200 (Fla. 1989).

The trial judge found that the defense met its burden by asking the prosecutor to respond. (R. 956-58) Although Appellee alleges that the prosecutor was not directly asked to but "voluntarily" gave his reasons, this was not the case. (See Brief of Appellee at 9) After defense counsel's objection, the judge turned to the prosecutor and said, "Okay. Mr. Aguero?" The prosecutor asked the judge if he should give reasons for excusing both black jurors or just Ms. Watkins. The judge responded that reasons for the excusal of Ms. Watkins would be "fine." The prosecutor then gave reasons. He later noted that the court had asked for his

"explanation" as to Ms. Watkins. The judge did not dispute this statement and later noted that he asked for an explanation to determine whether a pattern was developing. (R. **956-58)**

Appellee also argues that the judge only asked the prosecutor to respond to determine whether a pattern was developing and, thus, whether the objection was "propel: and not **frivolous." (Brief** of Appellee at 9) Contrary to Appellee's argument, the sufficiency of the complaining party's objection is established prior to the prosecutor's explanation -- not afterward. Moreover, Appellee's argument assumes the requirement of a pattern of discrimination.1

A pattern of discrimination is not required. **Even** one improper excusal is sufficient to trigger the requirements of the Florida Constitution. See Bowden v. State, 588 **Sa. 2d** 225 (Fla. 1991); Reynolds v. State, 576 So. 2d 1300, **1301** (Fla. **1991);** Slappy, **522 So.** 2d at 21. In Bowden, this Court stated:

> It is clear that a pattern of striking black venire members need not be demonstrated **before a** trial court's duty to conduct an inquiry into the State's reasons for the excusal of **a** minority member is triggered. Reynolds v. State, 576 ***so.*** **2d** 1300 (Fla. **1991).**

588 So. 2d at 228.

The fact that the trial judge required the prosecutor to give racially-neutral reasons for his excusal of Ms. Watkins conclusively shows that he found that the defense met its initial burden. Defense counsel did not have to ask **the** judge to make a ruling as

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1 The trial judge also assumed such a requirement in Thompson v. State, 548 **So. 2d 198, 200** (Fla. **1989),** in which this Court reversed for a new trial based on Neil error.

Appellee suggests; if the judge had not determined that the defense met its burden, he would not have required the prosecutor to provide reasons.[2] Furthermore, if the judge had not found the initial burden met, he would have erred because a "strong likelihood" was clearly shown by the fact that the prosecutor had just excused the only remaining prospective black juror. This exact scenario has been found to meet the initial burden time and time again. See e.g., 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 an venire); Timmons v. **State**, **548 So.** 2d 255 (Fla. 2d DCA **1989)** (prosecutor peremptorily challenged sols remaining black juror). In Bowden, this Court stated that:

> **Bowden** is correct that by pointing out that the only black venire member had been excused and requesting a Neil inquiry the defense met its initial burden of establishing a strong likelihood that the black venire member was excused because of race, thus shifting the burden to the state to justify the excusal.

***588*** **So**. 2d at 228.

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[2] Valle v. State, 581 **So.** 2d **40** (Fla. **1991),** cited by Appellee, is clearly distinguishable. In Valle, when defense counsel objected, the judge told the prosecutor that the state could respond "in any manner it wished." In response to the prosecutor's inquiry, the **judge** stated that **he** had not been **asked** to make a finding "that the state had somehow improperly excused jurors." 581 **So. 2d at 43.** (He did not say that he had not been asked to make a finding that the initial defense burden had been met.) In fact, he gave the state an "opportunity to respond." The state then gave its reasons which, on their face, appeared racially-neutral. 581 **So.** 2d at **43-44** nn.3 & **4.** Most importantly, after the prosecutor gave his reasons, defense counsel objected only on the ground that the challenges were **used** to create a jury in favor of the death penalty. 581 So. 2d at 44. This Court also noted that two blacks served as jurors and a third as an alternate. 581 **So. 2d** at **44** n.4.

Maulden's counsel also said that he did not hear Ms. Watkins say anything that would provide a valid reason for the prosecutor's challenge. As Appellee suggests, perhaps defense counsel did not object to the prosecutor's first peremptory challenge of Ms. Johnson because he realized that the prosecutor had a racially-neutral reason for excusing her. This is not relevant, however, to the prosecutor's improper challenge of Ms. Watkins. The issue is not whether several jurors have been excused because of race but whether any juror has been so excused. Slappy, 522 So. 2d at 21.

The fact that the judge did not understand the law, did not find a "pattern" developing, or require the prosecutor to give reasons for excusing the first prospective black juror has no bearing an his failure to sustain the defense objection to the prosecutor's reasons for excusing the second black juror. The trial judge cannot merely accept the reasons proffered by the prosecutor at face value, but must evaluate the reasons as he 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. The judge must evaluate the credibility of the person offering the explanation and the credibility of the asserted reasons. Id.

When defense counsel disputed the prosecutor's statement, the judge was "compelled to ascertain from the record if the state's assertion was true." Floyd v. State, 569 So. 2d 1225, 1229 (Fla. 1990), cert. denied, 111 S.Ct. 2912 (1991). He could have asked the prosecutar to cite something specific in Ms. Watkins' answers on voir dire which would suggest that she was weak an the death

penalty or he could have reviewed Ms. Watkins' answers on voir dire to determine whether the prosecutor had any basis for his conclusions. Certainly he did not remember her answers well enough to determine conclusively that the prosecutor's reason was valid. If he had remembered her answers, he would have known that Ms. Watkins was not weak on the death penalty.

Appellee suggests that the judge may have discerned some sort of "nuance of the spoken word" or "demeanor" of the witness. (Brief of Appellee at 11) Neither the prosecutor's nor the judge's gut feelings are sufficient because "seat-of-the-pants instincts" may be just another term for racial prejudice.

> 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. . . .

Slappy, 522 So. 2d at 23 (quoting Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., cancurring)); see also Wright, 586 So. 2d 1024, 1028 (rejecting prosecutor's alleged reason that prospective black juror had no eye contact with him, making him uncomfortable).

Moreover, neither the prosecutor nor the judge suggested that this was the case here.[3] If the trial court's ruling could be sustained on this basis, with no evidence that this was true, all trial court rulings could be sustained and racial bias could become

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[3] In Reed v. State, 560 So. 2d 203 (Fla. 1990), this Court relied in part on the fact that two blacks were seated on the jury when defense counsel objected. In this case, the prosecutor had excused all prospective black jurors.

rampant. This Court noted in Slappy that the peremptory challenge is "uniquely suited" to mask discriminatory motives; thus the Slappy Court required that the prosecutor's reasons be (1) neutral and reasonable, and (2) not merely a pretext. Slappy, 522 So. 2d at 22; see e.g., Wright v. State, 586 So. 2d 1024, 1028 (Fla. 1991); Tillman V. State, 522 So. 2d 14, 16 (Fla. 1988).[4]

It is worth noting that the prosecutor did not just argue that Ms. Watkins was not as strong on the death penalty as other jurors (which was not true anyway), or that she had not thought about it in advance. The fact that he told the judge she was "very, very weak on the death penalty" and that he did not believe that she could impose it "under any circumstances," indicates that his reason was merely a pretext. Just as defense counsel is required to object to the prosecutor's reasons (and did so here), the judge should certainly give reasons far accepting the prosecutor's reasons if they are "gut feelings" not apparent on the face of the record. This Court cannot be expected to read the mind of the trial court judge or the prosecutor.

Similarly, the trial court cannot be supposed ta have read the prosecutor's mind. The prosecutor gave a reason that was clearly not supported by the record and was not tied to anything specific that Ms. Watkins said. He did not suggest that he was reading something more than what she said into Ms. Watkins' responses.

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[4] Although Appellee characterizes Ms. Watkins' responses as "ambiguous," there was nothing ambiguous about them, nor has the state cited any ambiguous response.

Ms. Watkins' answers indicated that she would be the ideal juror. When asked whether she agreed with the death penalty, she said she had never thought about it. When asked whether she thought Florida should have a death penalty, she said she "couldn't answer: that.'' Thus, Ms. Watkins appeared to be a **person** who did not question the law. Rather than injecting personal opinions into her decision making, she would accept the law at face value and follow it. She said she could vote to put someone to death if she heard all the circumstances. She understood **that** if the state proved the aggravating factors outweighed the mitigating factors, death would be the appropriate punishment. If that were the case, she could vote to put Maulden to death. (R. 895-96) She never indicated any opposition ta the death penalty nor any hesitancy to impose it. She said she would have **an** open mind. (R. 928)

Roundtree v. State, 546 So. 2d **1042,** 1045 (Fla. 1989), is almost exactly like this case. The prosecutor said 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 Court reiterated 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.

Appellee cited part of a sentence by undersigned counsel, out of context, arguing that it suggested a valid a reason for excusing Ms. Watkins. The part of the sentence quoted by Appellee **was** that "the most [the prosecutor] could have said was that Ms. Watkins **was**

not so "gung-ho" on the death penalty . . . ." (Brief of Appellee at 15) Had Appellee finished the sentence, its meaning would have been clearer. Undersigned counsel's correct statement was that, "the mast he could have said was that Ms. Watkins was not so "gung-ho" on the death penalty that [she] was predisposed to impose it before hearing the circumstances." (Brief of Appellant at 38) Ms. Watkins said that she could impose the death penalty if she heard all the circumstances. (R. 895-96) If Ms. Watkins were so gung-ho on the death penalty that she would impose it without having heard all the circumstances, she would have been excusable for cause. The death penalty is applicable to only "the most aggravated and unmitigated of most serious crimes." State v. Dixon, 238 So. 2d 1, 7 (1973), cert. denied, 416 U.S. 943 (1974). The prosecutor is not entitled to a jury made up of peaple who would impose the death penalty without having heard the evidence.

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 (1988). Maulden was denied a trial by a fair cross-section of the community and prospective juror Watkins was denied her right as a citizen not to be improperly precluded from jury service. A new trial is required.

## ISSUE II

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

Appellee has attempted to circumvent the legal requirement for an arrest warrant in this case by asserting that police procedures are only required to be "reasonable." (Brief of Appellee at 20-24) Payton v. New York, 445 U.S. 573, 586 (1980), which requires a valid warrant for an arrest in the defendant's place of residence, makes no exceptions for "reasonable" searches. If searches needed only to be reasonable, there would be no need far laws or court cases interpreting laws. Police officers would just do what they believed ta be "reasonable" based on the individual case.

Laws requiring arrest warrants were made expressly to avoid such a result. As noted by Appellee (brief of Appellee at 21), "[w]hen the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." Payton v. New York, 445 U.S. 573, 586 (1980) (quoting from Johnson v. United States, 333 U.S. 10, 13-14 (1948)).

Arrests warrants issued in Florida are not valid in Nevada. This is why Nevada extradition law requires that a warrant be obtained from a Nevada magistrate or, alternatively, that the arrested party be taken before a Nevada magistrate as soon as possible. §§ 179.203, 179.205, Nev. Rev. Stat. (1967). In this case, the officers did not even have a Florida warrant when they broke into Maulden's motel room to arrest him. They only knew that

one had been issued in Polk County, Florida.

Appellee notes that a prefatory note to the 1980 revision of the Uniform Extradition and Rendition Act provides that the court of an asylum state would rely on the issuing of the warrant by the demanding state as the determination of probable cause for the arrest. (Brief of Appellee at 22-23) Appellee was referring to the trial judge's order denying the motion to suppress. The judge noted that the prefatory note cited Michigan v. Doran, 439 U.S. 282 (1978). In Doran, the reference to the "warrant by the demanding state" refers to the governor's requisition warrant -- not to a local warrant. If local law enforcement officers could rely on an arrest warrant issued in any county of any other state, there would be no need for procedures requiring the governor of the demanding state to issue a requisition warrant to the asylum state.

That Maulden later waived extradition does not make extradition law inapplicable, as argued by Appellee. (Brief of Appellee at 22, n.4) Maulden did not waive extradition until after his illegal arrest -- and before he saw a lawyer or a magistrate. When the officers arrested him without a warrant, they did not know whether he would waive extradition; thus, they were bound by the extradition laws.

Appellee states that Maulden appeared before a Nevada judge and signed a waiver of extradition. The record does not indicate that Maulden ever appeared before a judge. Although a Nevada detective testified that a waiver of extradition is "when a person voluntarily signs a waiver in front of a judge," he never testified

that Maulden signed a waiver in front of a judge. Instead, he testified that Maulden was transported from the jail to the Las Vegas Metropolitan Police Department Detective's Bureau when he agreed to waive extradition. (R. 1292-93) The implication is that he signed the waiver at the police station. There is no mention of a judge being present and no testimony that Maulden ever appeared before a judge to waive extradition or for any other reason. Had Maulden been taken before a Nevada magistrate after his arrest, as required by Nevada law, certainly the Nevada detectives would have so testified at Maulden's trial.

Maulden's statements, made pursuant to an illegal arrest and with no appearance before a Nevada magistrate immediately after his arrest, must be suppressed pursuant to the Florida and United States Constitutions.

## ISSUE III

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

United States v. Salvucci, 448 U.S. 883 (1980), and Rakas v. Illinois, 439 U.S. 128 (1978), do not hold, as Appellee asserts, that a defendant has no reasonable, legitimate expectation of privacy in a stolen vehicle. Salvucci dealt with an arrest in the defendant's mother's apartment and Rakas with passengers in a car. Instead, the cases hold that a defendant must have a "legitimate expectation of privacy in the area searched.''

In Nelson v. State, 578 So. 2d 694 (Fla. 1991), this Court held that the defendant had a reasonable expectation of privacy in a stolen vehicle for the purpose of a police stop of the vehicle. The Court did not address the search of Nelson's stolen car. It appears, however, that the issue turns on whether Maulden had a reasonable expectation of privacy in his employer's truck.

This case is different from the case in which a defendant steals a car parked an the street. Maulden was legally in possession of the company truck although it belonged to his employer. He kept it at his home for his daily use. An arrest warrant was issued for theft of the truck only after law enforcement officers told Maulden's employer that Maulden had disappeared in the truck after the crime. The warrant far theft was probably obtained because it was easier and faster to obtain a warrant for theft than for first-degree murder, and thus assured the police that they could arrest Maulden if they located him.

Although Maulden knew the truck did not belong to him, he routinely drove it and kept his belongings in it. Prior to leaving the state, he certainly had an expectation of privacy in the truck. Whether he lost that expectation upon driving across the county or state line is questionable. The state never argued this theory in the trial caurt; thus, no evidence was presented or argument made as to whether Maulden had a possessory interest in, or legitimate expectation of privacy in, the company truck.

Similarly, the state did not argue "inevitable discovery'' in the lower court. Thus, no evidence was presented that the officers would have inevitably discovered the evidence in Maulden's truck. Appellee attempts to bootstrap this argument by asserting that, because Maulden had no expectation of privacy in the stolen vehicle, the evidence would have been discovered in an inventory search or by the truck's owner. Although these are possible scenarios, other events might have changed the course of events. Had the officers not illegally entered Maulden's room, **perhaps** Maulden would have escaped and disposed of the gun and ammunition.

Although we recognize that this Court must affirm by any possible theory, even if not that of the trial judge, the record must be developed sufficiently to support the theory. Here, because the prosecutor never argued Maulden's lack of standing or "inevitable discovery," the record contains no facts to support the Appellee's new theories.

For **these** reasons and those in our Initial Brief, the evidence must be suppressed under the state and federal constitutions.

## ISSUE 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.

Appellee submits that the prosecutor's reasons for objecting to the admission of Dr. Darby's testimony "amply show" why the testimony was not relevant. (Brief of Appellee at 28) The prosecutor's "reasons" were patently wrong. The prosecutor argued that (1) Dr. Darby had not seen Maulden for at least six months prior to the homicides; (2) the testimony had nothing to do with any of the elements of the crime; and (3) the testimony was not relevant to any defense "because paranoid schizophrenia is not a defense." (R. 1372)

That Dr. Darby had not seen Maulden far six months prior to the homicide was relevant because Maulden had not returned to see the psychiatrist to refill his medication for schizophrenia. As with most chronic illnesses, when the patient stops taking the medication, his condition worsens. Such was the case here. Thus, Dr. Darby's testimony was relevant to explain the circumstances of the homicide.

Second, the testimony was expressly relevant to premeditatian which was an element of the crime. Third, the testimony was very relevant to Maulden's sole defense. Maulden's defense was that he did not premeditate the homicide but, instead, acted in a delusional or depersonalized state caused by schizophrenia. Dr. Darby's

testimony was the primary evidence supporting Maulden's defense.

Contrary to the prosecutor's insinuation, Maulden's defense was not "paranoid schizophrenia." In Hawthorne v. State, 408 So. 2d 801, 806 (Fla. 1st DCA), rev. denied, 415 So. 2d 1361 (1982), wherein the expert testimony was found admissible, the court distinguished cases in which the defense wanted to introduce testimony relating to the defendant's mental state to "directly explain and justify criminal conduct." As in Hawthorne, Maulden's defective mental state was not offered as a "defense as such" but was offered to support the defendant's defense of lack of premeditation. Accord Terry v. State, 467 So. 2d 761 (Fla. 4th DCA 1985).

Appellee argued that the trial judge "throughout this record expressed his disbelief that one could attempt to show that a person did not premeditate without also showing that he could not premeditate." (Brief of Appellee at 29) Although the judge was concerned that the testimony might sound like an "insanity defense," he certainly did not question the possibility that a person capable of premeditation might not have premeditated the crime in question. Many murder defendants who are capable of premeditation are convicted only of second degree murder.

Appellee next argues that "no material issue raised by the defense necessitated psychiatric testimony" because Maulden did not raise an insanity defense, which Appellee characterizes as "the only defense in this case upon which Dr. Darby's testimony would have been relevant." (Brief of Appellee at 30) Dr. Darby did not testify that Maulden was insane. He merely suggested that Maulden's

actions were affected by his schizophrenic state. Thus, Dr. Darby's testimony would not have been relevant ta an insanity defense. Instead, the testimony was relevant to Maulden's lack of premeditation defense.

Appellee argues that the state would have been prejudiced if the testimony had been admitted because the defense never filed a notice of intent to rely on an insanity defense and, therefore, "the state was unable to have the defendant examined to rebut any defense mental health issues arising in the guilt phase." (Brief af Appellee at 31) This is not true. When the prasecutor made this argument, defense counsel pointed out that he listed Dr. Darby as a witness, without specifying penalty phase as he often did, some five months before trial. (R. 1394)

Moreover, Dr. Darby was nat an expert hired by the defense to examine the defendant after the offense. He was employed by Peace River Mental Health Center which, apparently, is under contract with the county to examine and treat county jail inmates. He saw Maulden only because Maulden was incarcerated in the county jail, both before and after the instant offense. Dr. Darby had information relating to the crime and was equally available ta the state as a witness. Furthermore, the prosecutor knew the defense would present expert witnesses at penalty phase and did not request to have Maulden examined by an independent expert.

Appellee argues finally that "the type of testimony sought to be introduced by the defense with respect to partial insanity or a diminished capacity would surely have confused or misled the jury."

(Brief of Appellee at 32) Appellee's characterization of the testimony as showing "partial insanity or a diminished capacity" is apparently intended to place this case within the confines of Chestnut.[5] Dr. Darby's proffered testimony was not that Maulden was "partially insane" or that he had a "diminished capacity."

Defense counsel suggested a jury instruction to clarify the use of the testimony and prevent any confusion. The proposed instruction would have told the jury that a mental disorder does not excuse conduct and is not legal justification far murder. (R. 1374-76) This would have prevented any jury confusion and eliminated any possible prejudice to the state.

The excluded testimony was not harmless. Dr. Darby's proffered testimony was crucial to distinguish between criminal behavior indicating premeditation and behavior caused by Maulden's mental illness. Furthermore, it was necessary and essential 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 misleading evidence.

The omission of Dr. Darby's testimony violates the equal protection and due process clauses of the United States and Florida Constitutions because no reasonable classification or distinction exists to justify different treatment of defendants with insanity defenses, mental illness-related defenses, physical incapacity defenses and intoxication defenses.

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[5] Chestnut v. State, 538 So. 2d 820 (Fla. 1989).

## 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.**

**Appellant relies on the Initial Brief for this issue.**

## 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.**

Appellant is aware, of course, that this Court has rejected similar arguments concerning the "heinous, atrocious or cruel" aggravating factor and refused to transfer Maynard v. Cartwright, **486 U.S. 356** (1988), to the "cold, calculated and premeditated" aggravating factor. This Court has not, however, reconsidered this important issue in light of Shell v. Mississippi, **498** U.S. ___, **111** S.Ct. 313, **112** L.Ed.2d **1** (1990), in which 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 enjayment of the suffering of others,

**112** L.Ed.2d at **4.**

This Court approved a revision of the Florida Standard Jury Instructions, based on the Maynard v. Cartwright decision, defining "heinous, atrocious and cruel" using language from Dixon, **283** *So.* **2d** 1. Standard Jury Instructions Criminal Cases, 15 F.L.W. 5368 (Fla. June 29, **1990)** (not printed in So. 2d). The instruction is similar to the instruction found unconstitutional in Shell v. Mississippi, however. In the case at hand, the jury was given no definition whatsoever of the CCP aggravating factar.

## 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.

We first wish to point out that we are not arguing, as contended by Appellee, that Maulden was "incapable" of committing a cold, calculated and premeditated homicide. (Brief of Appellee at 37) We are instead arguing that because of his mental illness, Maulden committed the homicides without heightened premeditation.

Appellee argues that Maulden's actions belie his "self-serving testimony as to the manner in which he committed the homicides," referring to Maulden's testimony that he was in a dazed condition. Appellee argues further that the mental health experts "attempted to corroborate" Maulden's assessment of his mental condition but the judge did not fully accept it. (Brief of Appellee at 37, 40) Although the trial judge may not have agreed totally with the experts, he found both statutory mental mitigators worthy of "significant consideration." (R. 2069)

The mental health experts actually went much further than Maulden, who did not profess to understand why he committed the murders and regretted having dane so. (R. 1487) All three experts diagnosed chronic schizophrenia and/or schizotypal personality disorder. (R. 1796-98, 1870, 1895) The two defense experts who were appointed by the court to evaluate Maulden's competency and sanity -- not hired by defense counsel -- found that Maulden was in a dissociative or depersonalized state at the time. (R. 1790,

1805, 1890) The state offered no rebuttal testimony.

Dr. Darby, the third mental health expert, was not appointed by the court or retained by defense counsel. He was employed by Peace River Mental Health Center and routinely examined and treated inmates at the Polk County Jail. (R. 1874) Prior to the homicides, while Maulden was incarcerated for an unrelated offense, Dr. Darby diagnosed paranoid schizophrenia and treated Maulden for it. His diagnosis was confirmed by psychological testing. (R. 1870-77)

Dr. Darby was equally available to both parties and would generally be expected to be a state witness, having been under contract with a law enforcement agency. Instead, however, his diagnosis coincided with that of the two court-appointed experts. Because Dr. Darby diagnosed the problem before the homicides occurred, he cannot be accused of "attempting to corroborate" Maulden's testimony. If his diagnosis had been helpful to the state, the prosecutor would have called him in rebuttal. Instead, the prosecutor tried to keep out his testimony by insinuating that he was old and his memory was unreliable. (R. 1454, 1456)

Appellee noted that, "on several occasions," this Court has upheld the CCP aggravating factor in domestic situations. Although this is true, the cases are few and, generally, distinguishable. Conversely, cases in which the Court has found that CCP does not apply in domestic situations are legend. (See cases cited by Appellant in Initial Brief at pp. 84-95,)

Zeigler v. State, 580 So. 2d 127 (Fla. 1991), cited by Appellee, is clearly distinguishable. Zeigler killed his wife to obtain

insurance proceeds. He killed her parents and another man, Charles Mays, as part of an elaborate plan to cover up the homicide and make it look like Mays committed the other three murders during a burglary. ***588*** So. 2d at 129-31. Zeigler procured the guns and the insurance policies several months before the murders. ***588 So.*** 2d at 130 n.7. Zeigler's primary motive of pecuniary gain **takes** this case out of the "passionate obsession" or domestic category.

Although the homicide in **Klokoc v. State**, 589 So.2d 219 (Fla. 1991), resulted from Klokac's obsession with his wife, the **case** is to same extent distinguishable. Klokoc threatened his wife and family for some time prior to the homicides and finally killed his daughter to achieve emotional satisfaction from the suffering of his estranged wife. He showed no signs of remorse afterward. Despite its approval of the CCP aggravating factor in Klokoc, this Court found the death penalty disproportionate, in part because of the domestic nature of the crime.

In Porter v. State, 564 **So.** 2d 1060, 1064 (Fla. 1990), the defendant had also previously threatened to kill his former lover who was, by then, living with another man. He watched her house for two days prior to the homicides and stole a gun just to kill her. He told a friend she would read about him in the paper. The Court noted that, while the homicide may have **been** grounded in passion, it was planned well in advance. Two justices disagreed with the majority's finding that the murders were cold, calculated and premeditated. 564 ***So.*** 2d at 1065 (Barkett J., concurring in part and dissenting in part in opinion in which Kogan., J., concurred).

Brown v. State, 565 So. 2d 304 (Fla. 1990), is distinguishable because Brown did not kill his lover but, instead, killed her daughter, apparently because she had been telling lies. The homicide did not result from passionate obsession. In fact, the opinion suggests no deep-seated feelings but, rather, a preplanned and/or impulsive murder with very little motive.

Although Appellee argues that the instant shootings were "executions" despite their domestic nature, this case is no different than Santos v. State, 16 F.L.W. S633 (Fla. Sept. 26, 1991); Douglas v. State, 575 So. 2d 165 (Fla. 1991); and Farinas v. State, 569 So. 2d 425 (Fla. 1990), in which this Court found CCP inapplicable. In each of those cases, the defendant stalked the victims for some time prior to the homicides (unlike the instant case) and eventually caught up with them and committed one or more murders. Santos shot and killed his former live-in girlfriend and their two-year-old child; Douglas shot his farmer girlfriend's husband in the head; and Farinas chased his former girlfriend and shot her in the head while she lie paralyzed from his first shot. All three procured guns ahead of time and none of the victims were given a chance to defend themselves.

We agree that no specific length of time is necessary to establish heightened premeditation. Generally, however, unless other factors are present, the premeditation must be substantially greater than that necessary for simple premeditation. See Holton v. State, 573 So. 2d 284 (Fla. 1990). In Valle v. State, 581 So. 2d 40 (Fla. 1991), cited by Appellee because only eight minutes

elapsed between the initial encounter and the homicide, other factors were present. The defendant shot and killed a police officer to prevent arrest. He wounded another police officer. This is an "execution" as contemplated by the statute -- one in which the defendant shoots the victim in the head to eliminate a witness and/or avoid arrest.

Appellee asserted that this Court, in Porter, 564 So. 2d at 1064, cited Hernandez v. State, 273 So. 2d 130 (Fla. 1st DCA), cert. denied, 277 So. 2d 287 (1973), "for the well accepted proposition that 'premeditation does not have to be contemplated for any particular period of time before the act, and may occur at a moment before the act.'" (Brief of Appellee at 43) This "well-known proposition" does not define "heightened" premeditation, however. This Caurt's reference to Hernandez was contained in a quote from Sireci v. State, 399 So. 2d 964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982), defining premeditation as an element of first-desree murder. The Porter Court quoted from Sireci to distinguish premeditation as an element of first-degree murder from the heightened premeditation necessary to support the CCP aggravating factor. 273 So. 2d at 1064 n.4.

Appellee argues that at least "some" planning occurred. Mast first-degree murders involve "some" planning. The statute requires, however, that all elements be met to establish CCP. The murder must be (1) cold; (2) calculated; and (3) committed with heishtened premeditation; (4) without pretense of legal or (5) moral justification. This factor was not proven beyond a reasonable doubt.

## ISSUE VIII

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

Appellee acknowledges that Appellant cited "several" cases in which this Court reduced death sentences to life because the murders resulted from "passionate obsession." (Brief of Appellee at 45) Actually, Appellant's Initial Brief cited, as examples, about a dozen such cases. (See Initial Brief of Appellant at 98) In her partial dissent in Porter, 564 So. 2d at 1065, Justice Barkett cited fifteen such cases. In other cases such as Penn v. State, 574 So. 2d 1079 (Fla. 1991), the Court found the death penalty disproportionate although the defendant killed his mother rather than a wife, ex-wife or girlfriend and, thus, although the killing was domestic, it did not result from passionate obsession.

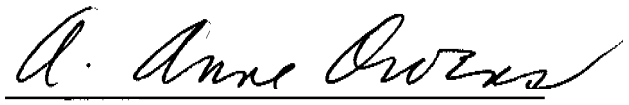
Appellee argues that "[w]hat is mast significant and ignored by appellant" is that, although the trial judge found that Maulden was impaired, he omitted a finding that appellant was "substantially" impaired. (Brief of Appellee at 46) Appellee failed to note, however, that the trial judge found the two statutory mental mitigators (which he divided into three mitigators) worthy of "significant consideration." (R. 2069)

As discussed in Issue VII, supra, Porter, 565 So. 2d 304, and Brown, 565 So. 2d 304, cited by Appellee as comparable cases, are distinguishable. This case is plainly closer to Douglas, Farinas, and other cases cited in our initial brief. This Court should vacate the death sentence as disproportionate.

## CERTIFICATE OF SERVICE

I certify that a copy of this brief was mailed to Robert J. Krauss, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 19th day of February, 1992.

Respectfully submitted,



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