IN THE SUPREME COURT OF FLORIDA

DOUGLAS CANNADY,

Appellant

v. CASE NO. 76,262

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR JACKSON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE

On October 1, 1989, Douglas Cannady murdered his wife, Georgia, and an individual named Gerald Boisvert. Cannady also tried to kill a third person, Steve Russ.

Cannady was indicted on two counts of first degree murder and one count of attempted murder. (R 1, 2).

A pretrial motion to determine competence to stand trial was submitted on Cannady's behalf (R 15, 16). Experts examined Cannady and, at their request, tests were performed on him (R 17, 156). Cannady was determined to be competent (R 164, 214).

Cannady filed a notice of intent to rely upon an insanity defense and requested the services of a third doctor, an addiction specialist (R 277). The request was granted (R 294). Meanwhile, new evaluations were performed (R 311, 339).

Cannady was tried the week of May 30, 1990, and convicted on all counts (R 1468-1469).

At the penalty phase, the court called Dr. Walker as its witness and Cannady spoke on his own behalf, requesting the death penalty (R 1501-1502). The jury recommended death on Count I (9-3), and Count II (10-2) (R 1530).

A presentence investigation was performed and Cannady was sentenced to death in keeping with the jury recommendation (R 1540-1548). The court found both murders to have been "heinous, atrocious and cruel" and "cold, calculated and premeditated." These factors outweighed the mitigating factors of "some" (but not extreme) mental or emotional disturbance, stress and the effects of alcoholism and depression.

STATEMENT OF THE FACTS

The Appellant's brief correctly recites the theory of the defense but is not accepted as a neutral presentation of the facts. The State will rely upon these facts:

(a) Evidence at Trial

The State's case was as follows:

Chris Cannady, the defendant's son, testified that on Sunday, October 1, 1989, he was at home watching a football game on television (R 852). Chris heard a "commotion" including the sound of a wall being kicked in another part of the mobile home (R 853). His parents were "fussing" loudly (R 854). Chris passed by his parents en route to the bathroom (R 854). His mother was sitting on the couch and his father was seated at the dining table (R 854). His father, the defendant, was doing something with his gun (R 855). While he was in the bathroom, Chris heard a gunshot (R 857). Chris came out to find his mother shot (R 857).

Doug Cannady told Chris "I had to do it." (R 859).

Doug ordered Chris to get into their truck while he fetched the box of shells (R 860). Doug told Chris they were going to Gerald Boisvert's home to kill Boisvert (R 861).

On their arrival, Cannady called to Boisvert and asked for a beer, thus luring him to the truck (R 864). Cannady, who had loaded the pistol en route, put the gun to Boisvert's forehead (R 865). As Boisvert asked what was going on, Cannady shot him (R 865). Doug fired five shots, exited the truck, reloaded the gun and shot six more (R 866).

Cannady told Chris to reload the gun, but Chris refused (R 867). As they drove away, Chris held the wheel while Doug reloaded (R 868). After a stop at Blackburn's Store, Doug told Chris that he was going to kill Russ (R 869).

At Russ' house, the "beer" ploy failed, so Doug shot at Mr. Russ as Russ stood in his doorway (R 871). Although Cannady tried to pursue Russ on foot, Russ escaped (R 871).

Doug and Chris then went home but, since neither had a key, they went to the store where Angela Cannady (Chris' sister) worked and got her key (R 873). Upon their arrival at home, Doug was arrested. Cannady said he knew he was going to prison and he hid the gun and box of shells under the truck seat (R 874).

Russell Dunaway was present at the Boisvert killing and heard the victim plead for his life before Cannady opened fire (R 925). Boisvert identified Cannady to Dunaway before he was killed (R 924).

Steve Russ corroborated the account of the third shooting (R 932-940). Russ testified, as a drinking friend of Cannady's, that on a sobriety scale of "0" (sober), to "10" (staggering drunk), Cannady was about a "5" or "6" (R 950).

Officer Earl Cloud arrested Cannady and stated that Cannady was able to drive, walk and climb stairs without seeming drunk (R 958). Officer Widner, who had seen Cannady drunk, did not find him incapacitated (R 960-982).

Officer Webster testified to the condition of the recovered pistol (R 993).

Officer Lowery, anticipating the defense, testified that a month earlier he had gone to the Boisvert residence to remove Mr. Cannady (R 1008). Cannady was upset that his wife was at Boisvert's (R 1008). Mrs. Cannady was scared to go home (R 1011). Angela Cannady took the defendant home. Georgia Cannady was not injured and did not report any "rape". (R 1012).

Wilton Cloud, another officer, testified that Cannady brought his wife to the Jackson County Sheriff's Office and wanted to report a "rape". Georgia, however, refused to report a rape or to press charges (R 1028-1036).

Dave Willens, a firearms expert, testified to the safety features of Cannady's .38 caliber Smith & Wesson (R 1042, et seq.). After testing Cannady's gun, Willens concluded it could not possibly have fired by accident (R 1089-1092).

Dr. Steiner gave Georgia's cause of death as a single bullet to the heart, causing internal bleeding (R 1106). Boisvert died more slowly, from seven shots which caused internal bleeding over a period of minutes (R 1125).

The defense called these witnesses:

(1) Deputy Baggett: To testify that Cannady drank.

(2) Billy Blizzard: A cell mate of Cannady's after his arrest, who said Cannady looked drunk when arrested.

(3) Tom Baxter: To testify that Cannady thought Boisvert raped Georgia (R 1143-1145).

(4) Deputy Davis: To testify that Cannady drank.

(5) George Cannady: To testify to Doug's drinking and Doug's suspicion that Boisvert raped Georgia (R 1161-1167).

(6) Deputy Mann: To testify that Cannady was drunk when booked (R 1172-1174) (Mann, however, did not do so).

(7) Deputy Smith: To testify to a suicide attempt by Cannady and that Cannady had been drinking prior to his arrest (R 1179-1183).

(8) Morris Pope: To testify that Cannady had been drinking.

(9) Kenneth King: To testify that Cannady drinks.

(10) Angela Cannady: To testify about events during the month prior to the murder (R 1287, et seq.)

(11) Dr. Macaluso: To refute "intent" based upon alcohol consumption (R 1313, et seq.)

(12) Doug Cannady: Who testified on his own behalf (R 1188, et seq.)

To rebut Dr. Macaluso, the State called Dr. MacLaren, the psychologist who tested Cannady (R 1352, et seq.)

During the penalty phase, the State relied upon guilt phase evidence (R 1479), and Doug Cannady spoke for himself, requesting a death sentence (R 1501-1502). The court called Dr. Walker as its witness to testify to Cannady's mental state (R 1480, et seq.)

On appeal, Cannady raises six issues. The facts relevant to each are as follows:

Facts: Issue I
(**Witherspoon**)

Defense counsel offered a general objection "for the record" to the State's challenges, for cause, made against anti-death-biased veniremen (R 599). Counsel never alleged that any

veniremen could render an honest verdict and counsel agreed that "one or two" were excludable anyway (R 599). A subsequent objection was made.[1] The excluded veniremen were:

> (1) Mrs. Bradford: She did not believe in and would not vote for the death penalty (R 491-492).
>
> (2) Mr. Brown: Did not believe in and would never vote for the death penalty (R 493). Brown knew about the case through the media and was a corrections officer (R 485, 510).
>
> (3) Mrs. Smith: Did not believe in and would not vote for the death penalty (R 558). She knew the Cannady family, especially George, who fixed her car (R 546). She also had heard about the case and was equivocal about whether she could "be fair" (R 546). Mrs. Smith also had health problems and was not sure she could sit through the trial (R 560-561).
>
> (4) Mrs. Sessions: An anti-death juror whose exclusion is not appealed (R 667).[2]
>
> (5) Mr. Jones: Anti-death juror who also knew witness Earl Cloud (R 692-696).
>
> (6) Mr. Cobb: Anti-death juror. Neither Jones' nor Cobb's exclusions are appealed.
>
> (7) Mrs. Goodson: Anti-death juror (R 754).
>
> (8) Mr. Garrett: Anti-death juror (R 754).
>
> (9) Mrs. Hayes: Anti-death juror (R 784).

Goodson, Garrett and Hayes were dismissed without objection.

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[1] At (R 667), defense counsel briefly objected but, again, the objection was more geared to the general proposition that anti-death jurors were excludable, not to the exclusion of any particular person.

[2] The court reporter has submitted a corrected transcript on Mrs. Sessions, who, in fact, opposed capital punishment. Her exclusion is therefore no longer "inexplicable". (Brief of Appellant, page 16). This correction was made after Appellant filed his brief so he is not to be faulted for raising the point.

Facts: Issue II
(Hearsay)

Cannady's defense was "accident" as to the killing of his wife, and "insanity" as to the killing of Boisvert. During trial, Cannady was allowed to produce evidence that he, Cannady, felt Boisvert had raped his wife (R 897, 904, 1035-1036, 1144, 1161-1167, 1220-1229). No actual rape was proven but the existence of an actual rape was not controlling on the issue of what Cannady "thought", a point Cannady makes again on appeal. (Brief of Appellant, page 20).

Cannady offered the hearsay testimony of his daughter, Angela, to the effect that Angela was told, by her mother, about the alleged rape (R 1293). No evidence was offered to show that Cannady knew about this conversation or acted in response to it. Since the subject of what Angela knew was irrelevant, this hearsay was properly excluded (R 1294). The State noted that if Doug had known about this revelation and had responded to it then the State would not object, but no such evidence was proffered (R 1294).

Facts: Issue III
("Duress" Instruction)

The defense never objected to the court's duress instruction or to its related answers to the jury's questions (R 1528, 1529, 1530).

Facts: Issue IV
(Heinous-Atrocious-Cruel)

The Appellant's brief correctly recites the sentencer's findings at (R 429-430 and R 432-433).

Mrs. Cannady was shot once through the heart, at close range, she was defenseless, she was at home, she was killed over marital problems, she died slowly and Cannady sat and watched her die.

Mr. Boisvert was shot seven times and did not die from any one shot, the shots were fired at close range, with Cannady exiting his truck to shoot extra rounds. Boisvert died slowly.

Facts: Issue V
(Cold-Calculated-Premeditated)

This factor was established as follows:

Count I (Georgia Cannady): The defendant had to retrieve his gun from its hiding place. Cannady took care to sit and clean the gun. Then Cannady reloaded the gun. Cannady must have aimed the handgun to put one shot right into Georgia's heart. There was no moral pretense for killing his wife (R 1541, 1542). Cannady told his son "I had to do it."

Count II (Gerald Boisvert): The court noted that Cannady brought an extra box of ammunition, Cannady had time to reflect as he drove to Boisvert's, Cannady declared his intentions to Chris, Cannady lured Boisvert to the truck, Cannady had to reload the gun, and Cannady's "pretense of rape" offered no moral justification (R 1545-1546).

Facts: Issue VI
(Proportionality)

No development is required.

SUMMARY OF THE ARGUMENT

The Appellant is not entitled to relief on any of his six claims.

The first issue (exclusion of biased jurors) was not preserved for review and lacks record support.

The second issue (exclusion of hearsay) was legally correct since the proffered hearsay was never connected to the Appellant (communicated to him) in any way which could arguably support admission.

The third issue (the definition of duress) was unpreserved and is meritless.

The fourth issue (heinous-atrocious-cruel) is resolved separately as to each murder, as is the "cold, calculated and premeditated" issue in argument five. Both of Cannady's murders qualified for these aggravating factors.

Finally, Cannady's death sentences were proportional given the nature and number of murders at bar and the absence of any substantial mitigation.

ARGUMENT

POINT I

THE APPELLANT IS NOT ENTITLED TO RELIEF ON HIS "WITHERSPOON" CLAIM

The Appellant contends that his right to an impartial jury under **Witherspoon v. Illinois**, 391 U.S. 510 (1968), and **Wainwright v. Witt**, 469 U.S. 412 (1985), was violated by the trial court. Mr. Cannady, however, failed to preserve the issue for appellate review and has failed to show either error or prejudice.

(A) The issue was not preserved

If, as required, all facts and inferences therefrom are taken in favor of the judgment, **Shapiro v. State**, 390 So.2d 344 (Fla. 1980); **Gilvin v. State**, 418 So.2d 996 (Fla. 1982), it is apparent from this record that Cannady failed to preserve this issue for review.

First, counsel for the Appellant put two general objections to the exclusion of "**Witherspoon**" jurors into the record, but counsel never objected to the exclusion of any particular juror by name. Thus, even in his appellate brief, Cannady has had to guess at the identify of the "wrongfully" excluded jurors while not discussing the exclusion of other "**Witherspoon**" jurors at all. We have no guarantee that appellate counsel's choices are the same as trial counsel's choices or that trial counsel felt that any particular juror was redeemable under **Witt, supra.**

Second, the attorney for Mr. Cannady, perhaps because it would have been futile to do so, did not attempt to rehabilitate

any of the excluded jurors. This point is conceded in Mr. Cannady's brief. (Brief of Appellant, page 12). Since each stricken juror stated both opposition to capital punishment and an inability to ever vote "for death", there is no record basis for speculation regarding rehabilitation.

To cover up this record deficiency, the Appellant suggests that the State should have attempted "rehabilitation" in defense counsel's stead. This odd suggestion clearly lacks legal or logical support. The simple fact is, defense counsel had a duty to preserve and construct the record so that his general "**Witherspoon**" objection could be tied to particular jurors.

In **Floyd v. State**, 15 F.L.W. S465 (Fla. 1990), defense counsel raised an objection to the State's peremptory exclusion of a black juror. The State offered a race-neutral explanation for the exclusion (opposition to the death penalty), which, as it turned out from the transcript, was wrong as to that juror. Trial counsel, however, failed to challenge the State's "race neutral" reason or develop the record. This Court held that the issue was not preserved for appellate review despite counsel's initial objection.

We have the same scenario. Counsel's general objection did not attach to any particular juror. No record was developed or preserved. We cannot identify, therefore, the "wrongfully excluded" jurors. In the absence of either a specific objection or a complete record, Mr. Cannady's claim is barred from appellate review.

(B) Error or prejudice

Each of the challenged jurors expressed both opposition to capital justice and an unwillingness to ever vote to impose a death sentence. There is absolutely nothing in the transcript reflecting vacillation, a willingness to vote for death or an intent to honestly consider death as a possible sentence. Mr. Cannady's brief, while gamely trying to "interpret" the cold transcript, offers nothing more than bald speculation. Florida does not reverse on speculation, **Sullivan v. State**, 303 So.2d 632 (Fla. 1974), especially from a cold transcript.

In **Wainwright v. Witt**, 469 U.S. 412 (1985), the United States Supreme Court held that jurors were not immune from exclusion, under **Witherspoon**, unless they made it "unmistakenly clear" they would "automatically vote against" capital punishment. Since it is impossible, at times, to obtain a desired, unequivocal, confession of bias, the United States Supreme Court said that it would defer in such an assessment to the decision to the trial judge who could see and hear the juror.

In our case, the transcripts do not convey the juror's "body language" or tone of voice. It could be that the juror's answers were delivered in such a way as to make the speaker's bias crystal clear.

In **Randolph v. State**, 562 So.2d 331 (Fla. 1990), this Court followed the principles set forth in **Witt** and refused to second-guess the trial court's assessment of "equivocal" voir dire responses from a venirewoman. This Court said that the record did not evince a "clear ability to set aside" the juror's beliefs and, in turn, did not demonstrate an abuse of discretion.

The venirewoman in **Randolph** gave contradictory answers. The jurors at bar did not. Every one of them said they would not vote for "death", and none were rehabilitated or even challenged by the defense on this issue.

Finally, we submit that Mr. Cannady has not shown bias. He has not alleged that he was left with a biased jury nor has he shown that his jury automatically voted for death. Quite the contrary, this jury asked questions about "duress" while carefully deliberating over his sentence and several voted for "life". Absent a showing of prejudice, Cannady is not entitled to relief even if we were to speculate as to the existence of "error". **Penn v. State**, 16 F.L.W. S117 (Fla. 1991); **Trotter v. State**, 16 F.L.W. S17 (Fla. 1991); **Hitchcock v. State**, 16 F.L.W. S23 (Fla. 1991); **see Ross v. Oklahoma**, 487 U.S. 81 (1988).

Mr. Cannady failed to preserve this issue, failed to make a record, failed to show actual error and failed to show prejudice. He is not entitled to relief.

POINT II

THE TRIAL COURT DID NOT ERR IN EXCLUDING THE IRRELEVANT HEARSAY TESTIMONY OF ANGELA CANNADY

The Appellant contends that the hearsay statement of Georgia Cannady, to Angela Cannady, that Gerald Boisvert raped her should have been admitted to prove the truth of the matter asserted. We submit that this argument flies in the face of the very definition of hearsay evidence and is totally meritless, if not nonsense.

The use of Georgia's statement to prove a "rape" is the very sort of conduct prohibited by §90.802, Fla.Stat. Furthermore, the hearsay statement falls within no known exception to the rule.

First, we must never forget that Cannady's state of mind was at issue, not the factual basis for that set of beliefs. Thus, the issue at bar was not whether Georgia was raped but, rather, whether Douglas thought she was raped. Georgia's statements to Angela do not prove or disprove "what Douglas thought", especially when we consider the fact that Angela never reported Georgia's statements to Douglas anyway.

Second, since Angela did not repeat Georgia's statements to Douglas, Georgia's statements were unknown to Douglas and were irrelevant to the creation or maintenance of any beliefs Douglas might have had. As the State noted at trial, if Angela had told Douglas what Georgia said, the statements would have been admissible. No such proffer was ever made even after this open invitation. Why? Because Angela never, in fact, told Douglas about Georgia's statements and Douglas never acted in reaction to or response to said statements.

On appeal, Cannady cites to **Breedlove v. State**, 413 So.2d 1 (Fla. 1982). **Breedlove**, however, defeats Cannady's claim. First, **Breedlove**, recognizes that hearsay cannot be used to prove the truth of the matter asserted. Second, **Breedlove** recognizes that to establish an exception to the hearsay rule, the defendant must show communication of the statement to him and action in reliance upon it. Thus, the admissibility of the statement is

dependent upon communication and reliance, but never on the truth of the matter asserted.

Similarly, in **Downs v. State**, 16 F.L.W. S106 (Fla. 1991), this Court held that it was error for a trial court to admit the hearsay statements of another victim-wife because: (1) they were offered to prove the matter asserted (fear of the defendant), and (2) they were irrelevant to the issue of the defendant's state of mind. **See Correll v. State**, 523 So.2d 562 (Fla. 1988).

Downs and **Breedlove** apply to this case. Douglas Cannady could not "prove" his wife was raped by admitting his wife's hearsay statements to Angela. Again, Cannady's brief, by confessing that this was the defendant's intent in offering this evidence, defeats his claim.

Finally, we note that any "error" was harmless. Cannady testified that his wife told him she was raped and testified to scratches and sores on her body. Other witnesses testified that Cannady thought Boisvert had raped his wife. There can be no doubt that the jury knew what Cannady thought and what he did in response. Even if the court had erred, any error was harmless. **Ciccarelli v. State**, 531 So.2d 129 (Fla. 1988); **State v. DiGuilio**, 491 So.2d 1129 (Fla. 1986).

POINT III

THE APPELLANT DID NOT PRESERVE THE "DURESS INSTRUCTION" ISSUE FOR REVIEW AND IS NOT ENTITLED TO RELIEF

Mr. Cannady's brief not only concedes that the trial court correctly defined "duress" (Brief of Appellant, page 23), but also conspicuously fails to advise the court that defense counsel

did not object to the trial court's definition and, in turn, did not preserve this issue for appellate review. **Clark v. State**, 363 So.2d 331 (Fla. 1978); **State v. Cumbie**, 380 So.2d 1031 (Fla. 1980); **Jacobs v. Wainwright**, 450 So.2d 200 (Fla. 1984); **Steinhorst v. State**, 412 So.2d 332 (Fla. 1982); **Floyd v. State, supra; Hitchcock v. State**, 16 F.L.W. S17 (Fla. 1991).

It is submitted that defense counsel did not object because the trial court correctly defined "duress". Mr. Cannady's brief confesses, as it must, that **Toole v. State**, 479 So.2d 731 (Fla. 1985), describes "extreme duress" as duress stemming from external, not internal, forces such as physical threats, physical force or the threat of imprisonment. Georgia Cannady did not exert such external pressure on the defendant. She did not impose a physical threat, nor did she force Douglas Cannady to kill her by other means.

While Cannady may have hated Gerald Boisvert, Boisvert did not pose a physical or external threat to Cannady. The undisputed standard of **Toole**, therefore, did not apply to the Boisvert murder either. Thus, counsel had no reason to object to the Court's answers. Mr. Cannady has not demonstrated any entitlement to review or to relief.

POINT IV

THE TRIAL COURT DID NOT ERR IN FINDING THESE MURDERS HEINOUS, ATROCIOUS AND CRUEL

The "heinous-atrocious-cruel" (hereafter "H-A-C"), statutory aggravating factor was applied to both murders by the sentencer. The facts supporting this factor differ significantly as to each murder so the crimes will be discussed separately.

The State recognizes that the H-A-C factor is intended for application in those homicides accompanied by such additional facts as to set them apart from the "norm" of capital felonies. In particular, the murder must be conscienceless, pitiless and unnecessarily torturous to the victim. **State v. Dixon**, 283 So.2d 1 (Fla. 1973); **Amoros v. State**, 531 So.2d 1256 (Fla. 1988).

"Heinous" and "atrocious" are terms attached to wicked or shockingly evil crimes while "cruel" refers to the infliction of a high degree of suffering with utter indifference to the plight of the victim. **Dixon, supra.**

(A) Georgia Cannady's Murder

In keeping with the jury's suggestion of death, which was entitled to great weight, **Tedder v. State**, 322 So.2d 908 (Fla. 1975), the sentencer imposed a death sentence for the murder of Georgia Cannady.

There was only one eyewitness to the shooting itself: Douglas Cannady. Cannady, however, departed from his alcoholism defense and testified with great particularity that the shooting of Georgia was nothing more than an accident. At (R 150), Cannady told Dr. Walker that the gun discharged when he gripped his chair to get up. At trial, Douglas Cannady claimed that a spring broke on his chair as he got up from it and his ankle "popped" (R 1241). His gun butt hit the arm of the chair and perhaps his finger was on the trigger (R 1241). The gun discharged and killed his wife (R 1241). Cannady said that his son Chris came into the room and Cannady "comforted" Chris and said Georgia's suffering was over (R 1241-1242).

This story was refuted by the firearms expert, Dave Williams (R 1042-1092), who testified in detail that the murder weapon could not have gone off by accident. Chris Cannady, of course, testified to the defendant's statement, "I had to do it" (R 859), and how Douglas just sat and watched Georgia die, never once rising to check his (so-called) "accidental victim".

The jury, at trial and at sentencing, rejected the Appellant's version of the events, thus leaving us clear findings of guilt and of death eligibility. On appeal, all facts and all inferences from the known facts must be taken in favor of the verdict and sentence. **Shapiro v. State**, 390 So.2d 344 (Fla. 1980); **Gilvin v. State**, 418 So.2d 996 (Fla. 1982).

Since Douglas Cannady's version of the events has no credibility, the operative facts and inferences are these:

(1) Douglas Cannady argued with his wife.

(2) Douglas Cannady retrieved his gun and ammunition.

(3) Douglas Cannady methodically cleaned and reloaded his gun.

(4) Douglas Cannady aimed his gun at Georgia.

(5) Douglas Cannady shot Georgia in the heart.

(6) Douglas Cannady watched Georgia bleed to death (internally) while doing nothing to help her.

The State recognizes that the H-A-C factor is not always applied in single-shot murder cases, including **Williams v. State**, 16 F.L.W. S167 (Fla. 1991); **Robinson v. State**, 16 F.L.W. S107 (Fla. 1991), but, as Mr. Cannady concedes, this factor has been

applied to some single-shot or execution style killings. **Huff v. State**, 495 So.2d 145 (Fla. 1986); **Phillips v. State**, 476 So.2d 194 (Fla. 1985); **Harvard v. State**, 414 So.2d 1032 (Fla. 1982); **see also Breedlove v. State**, 413 So.2d 1 (Fla. 1982).

In those cases in which "H-A-C" was not proven, the victim's near instantaneous death was usually caused by a stranger and/or was the result of a sudden, unexpected confrontation. For example, in **Williams, supra**, a bank guard was shot "with little delay", while in **Robinson, supra**, the victim was killed at once without any apprehension of death. In **Parker v. State**, 458 So.2d 750 (Fla. 1984), the victim knew the defendant but never knew she was about to be executed when Parker took her to her boyfriend's "grave".

On the other hand, in **Huff v. State**, 495 So.2d 145 (Fla. 1986), the H-A-C finding was upheld since Huff killed his own father. Even though there was no evidence that the victim knew his son was going to kill him, this Court recognized the shock and anguish the victim must have felt when he turned around and saw Huff about to shoot him. The Court may also have considered the conscienceless nature of the murder.

In our case, Mrs. Cannady (who had been drinking), did not reflexively raise her hands as Mr. Huff (who was sober) did, but she had to have been as shocked as the senior Mr. Huff was when a trusted family member opened fire on her. She should not, therefore, be denied the equal protection of the law due to the speed of her reflexes.

In **Harvard v. State**, 414 So.2d 1032 (Fla. 1982), a finding of H-A-C was upheld where the defendant killed his wife with a single shot, before she could react, as he pulled up next to her in traffic. The finding was upheld due to his earlier threats and his stalking of his victim. In our case, we had a month of marital problems, a wife who was scared of being beaten (R 1011), and a methodical, conscienceless execution-style murder.

Mr. Cannady relies heavily on the fact that Mrs. Cannady had no warning that she was to be shot. There is, of course, no way to verify this and Mr. Cannady's credibility was found wanting by the advisory jury. Still, the mere lack of warning will not defeat on "H-A-C" finding by the sentencer. In **Breedlove v. State**, 413 So.2d 1 (Fla. 1982), the victim, who was asleep, died from a single stab wound administered by a burglar. Like Mrs. Cannady, the victim did not die at once and was in the safety of his own home. On the other hand, "H-A-C" was not found in **Gorham v. State**, 454 So.2d 556 (Fla. 1984), when the victim was shot twice in the back, but in **Gorham**, there was no evidence of emotional shock as in **Huff**.

The bottom line seems to be that this Court does not engage in the mechanistic categorization of murders as "death eligible" or not on the basis of listed but undescribed events (i.e., "single shot deaths"). Since the function of this Court is one of review rather than **de novo** sentencing, the facts and inferences must be considered as supporting the sentence imposed and the sentence should, if supported, be upheld even if this Court might have ruled differently. Again, this is especially

true given the great weight to be given to the jury's recommendation of death.

This murder was similar enough to **Harvard** and **Huff** to support the "H-A-C" finding even if Mr. Cannady would have weighed the evidence differently. It would be error to overrule the jury and the court. **Hallman v. State**, 15 F.L.W. S207 (Fla. 1990).

(B) Gerald Boisvert's Murder

The second murder falls squarely within the realm of heinous, atrocious and cruel murder.

The record shows us that Boisvert and Douglas Cannady had not gotten along after the alleged rape. Cannady allegedly beat Boisvert up prior to the day of the murder (R 897).

On the day of the murder, Cannady lured Boisvert to his car, and when Cannady pulled his gun Boisvert was heard to call out "Oh, no" or "No, don't" (R 925). Cannady shot Boisvert, non-fatally, exited his car, reloaded his gun and pumped more bullets into his suffering victim.

Boisvert's reaction compares to the anguish suffered by both victims in the **Huff** case, **supra**. The repeated shooting of Boisvert as the victim slowly died compares with **Phillips v. State**, 476 So.2d 194 (Fla. 1985), while the attack upon Boisvert at his home (albeit in the yard), on a Sunday compares to **Breedlove, supra**. Assuming as we must the victim's apprehension of his fate during this execution-style killing, we would even compare Boisvert's murder to **Bruno v. State**, 16 F.L.W. S65 (Fla. 1991) (victim beaten and shot); **Hansbrough v. State**, 509 So.2d

1081 (Fla. 1987) (defensive wounds and slow death); **Jackson v. State**, 522 So.2d 802 (Fla. 1988).

This case is distinguishable from **Teffeteller v. State**, 439 So.2d 840 (Fla. 1983), and **Amoros v. State**, 531 So.2d 1256 (Fla. 1988), due to the victim's familiarity with the defendant, his shock or anguish, the way in which he was killed and the pitiless and conscienceless nature of this killing.

Again, the jury's recommendation must receive great weight and all facts and inferences must be taken in the State's favor. Since there is an articulable evidentiary basis for the court's and the jury's decisions, those decisions must be affirmed.

Finally, as we will demonstrate below, the death sentence imposed in these two cases should be affirmed even if the "H-A-C" factors are disallowed.

POINT V

THE MURDERS AT BAR WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF JUSTIFICATION

Each murder will again be discussed separately:

(a) Georgia Cannady

The only "hypothesis" offered by the Appellant was that this killing was an accident. The theory was disproven through expert testimony and was rejected by the jury.

Mr. Cannady contends, however, that under **State v. Law**, 559 So.2d 187 (Fla. 1990),[3] he is entitled to relief from the "cold,

[3] This opinion underwent a minor revision at 15 F.L.W. S241 (Fla. 1990).

calculated and premeditated" ("C.C.P.") finding if he can offer any reasonable alternate theory. He is wrong. **State v. Law** discusses circumstantial evidence of guilt, not sentencing. Even so, **Law** follows the decisions in **Heiney v. State**, 447 So.2d 210 (Fla. 1984), and **Rose v. State**, 425 So.2d 521 (Fla. 1982), in holding that the determination of "reasonableness" is a jury question, not an appellate issue. On appeal, the court looks for the existence of evidence from which the jury could exclude the defendant's theory. The court does not concoct unargued or novel theories and reweigh the evidence for the defense.

The Appellant said the gun discharged by accident when his chair popped a spring. The State proved this did not happen and the Appellant's credibility was destroyed. Thus, the operative evidence was that Cannady, at some point, decided to kill his wife. With heightened premeditation, Cannady fetched his gun, cleaned the gun, reloaded the gun, aimed the gun and dispatched his wife with a single shot to the heart. This was not a crime of passion.

The careful consideration, preparation and execution of this murder compares favorably with a host of this Court's precedents.

In **Porter v. State**, 564 So.2d 1060 (Fla. 1990), a "C.C.P." finding was upheld where the defendant cased his girlfriend's home and then went there, armed, and murdered her. Cannady did not need to case his own home, but he was every bit as prepared.

In **Occhicone v. State**, 15 F.L.W. S531 (Fla. 1990), the defendant angrily left his girlfriend's home, armed himself, returned, cut her phone lines and embarked or a series of

killings (her parents were killed). Cannady fetched his gun and carefully unloaded, cleaned and reloaded it prior to executing his wife. Occhicone was angry, Cannady was cold and calculating. If Occhicone's crime qualified, Cannady's must.

In **Gunsley v. State**, 16 F.L.W. S117 (Fla. 1991), the defendant murdered a convenience store clerk whom Gunsley mistakenly believed had beaten up one of his friends. This aggravating factor was supported by evidence of Gunsley arming himself and having time to consider his action.

In **Bruno v. State**, 16 F.L.W. S65 (Fla. 1991), this factor was established by the care used by the defendant (particularly his use of a pillow to silence his gun), during the murder.

Since the Appellant has neither alleged nor shown that the murder of his wife was a crime of passion or the product of some alcohol-fed frenzy, he cannot hide behind his experts or his alcoholism. Cannady recalled his actions in great detail in relating his "accidental discharge" defense. The accident theory was rejected, and the cold, calculated and premeditated nature of this crime was proven beyond any reasonable doubt.

(b) Gerald Boisvert

As noted below, Cannady took pains to retrieve his extra shells and properly arm himself before going to visit Boisvert. Cannady specifically announced his intent to murder Boisvert. Cannady drove his truck to Boisvert's home (showing he was not "blacked out" or out of control), and, once there, used a trick to lure Boisvert up close for a better shot. Cannady put his gun to Boisvert's forehead and began shooting. When Boisvert fell,

Cannady got out of his truck, reloaded his gun, and shot Boisvert again. Cannady then fled the scene and went hunting for his next victim, Mr. Russ.

Cannady's "moral pretense" of killing Boisvert for allegedly raping Georgia was rejected by the sentencer. In support of that finding, we would note that a significant period of time had passed since the alleged rape, that Cannady had hit Boisvert in the past (over the rape) but did not kill him, that there was a legitimate question about whether Georgia was raped (or was Boisvert's lover)[4] and at least the intimation that Cannady was out to simply settle scores against people he generally did not like. (Again, Cannady went to Russ' home next and would have visited yet another enemy but for the intercession of his son, see R 871).

At trial, Cannady testified on his own behalf without offering any explanation for killing Boisvert. (R 1244-1246). Cannady said he did not recall the shooting. In fact, during the penalty phase, Cannady insisted he did not murder his wife but he did murder Boisvert and deserved to be executed for doing so. (R 1501-1502).

Cannady's preparation, travel, declaration of intent, trickery, shooting, reloading, shooting and flight establish "cold, calculated and premeditated" murder similar to that found in these cases:

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[4] Georgia would not press charges, and at least once she hid at Boisvert's home out of fear of Cannady. Would a victim logically hide out with a rapist out of fear of her "protector"? Also, if Boisvert raped Georgia, why murder her?

Brown v. State, 565 So.2d 304 (Fla. 1990), where the defendant armed himself and brought a bolt-cutter to use in entering the victim's (a girlfriend's daughter who "lied" about him) home.

Haliburton v. State, 561 So.2d 248 (Fla. 1990), where the defendant broke into a home and killed the occupant just to see if he could do so.

Pardo v. State, 563 So.2d 77 (Fla. 1990), cold, calculated and premeditated found despite defense "justification" of killing drug dealers.

Porter v. State, 564 So.2d 1060 (Fla. 1990), murder of girlfriend planned and not justified by fact she had a new boyfriend.

Occhicone v. State, 15 F.L.W. S531 (Fla. 1990), discussed above.

Gunsly v. State, 16 F.L.W. S117 (Fla. 1991), discussed above, "revenge" did not justify or provide a pretense for the murder.

Koon v. State, 513 So.2d 1253 (Fla. 1987), defendant lures victim from home and executes him with one shot.

On appeal, a "pretense" of justification seems to be implied from Cannady's alleged desire to avenge the "rape" of his wife. Again, the attack upon Mr. Russ and Cannady's stated intent to go take care of Mr. Hall, neither of whom was involved in the alleged "rape", calls this claim into question.

More to the point, however, is the danger of establishing vigilante tactics as a defense to capital punishment. The

purpose of §921.141, Fla.Stat., is to deter crime through the threat of capital punishment. The deterrent value of the law is lost if we begin constructing arcane exceptions to it such as "the victim was merely the object of revenge" or "the crime was merely domestic."

As Justice Stewart warned us in his concurrence to **Furman v. Georgia**, 408 U.S. 238, 308 (1972):

> The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve", then there are sown the seeds of anarchy - of self help, vigilante justice, and lynch law.

We submit that any claim of self help justice or vigilante law should not be recognized as a defense to capital justice when, as here, the murder was cold, calculated and premeditated.[5] To do so would seriously undermine legislative intent in creating this statute as well as the deterrent value of the law.

In conclusion, we would note once again that the exclusion of this aggravating factor would not necessarily compel rendition of a life sentence, for reasons to be discussed in the final section.

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[5] We do not address here the commission of a homicide, out of revenge or anger where the defendant did not plan his crime or where the killing was spontaneous or impulsive. We are only discussing calculated revenge, such as in this case.

POINT VI

THE DEATH PENALTY WAS PROPERLY IMPOSED

In reviewing the proportionality of the death sentence at bar it is appropriate to begin with a discussion of **Echols v. State**, 484 So.2d 568, 576 (Fla. 1986). In **Echols**, the trial court, for reasons unknown, failed to find that the defendant's robbery and armed burglary convictions were "prior" convictions for the purposes of sentencing and failed to use them as an additional statutory aggravating factor. This Court said:

> We cannot determine whether the trial judge overlooked this fourth aggravating factor or was uncertain as to whether convictions for crimes committed concurrently with the capital crime could be used in aggravation. However, we note its presence in accordance with our responsibility to review the entire record in death penalty cases and the well established appellate rule that all evidence and matters appearing in the record should be considered which support the trial court's decision.

Douglas Cannady committed two separate murders and attempted a third which was not related to the alleged "rape" incident. These contemporaneous offenses qualified as cross-aggravating factors at sentencing[6] and, as in **Echols**, were inexplicably overlooked.

The trial judge, as actual sentencer, weighed the two listed aggravating factors against Cannady's proffered mitigation and decided that death was appropriate (in keeping with the advisory jury). Even if this Court would have sentenced differently, the

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[6] **See Pardo v. State**, 563 So.2d 77 (Fla. 1990); **Porter v. State**, 564 So.2d 1060 (Fla. 1990).

trial judge's decision must be affirmed if it has evidentiary support. **Stano v. State**, 460 So.2d 890 (Fla. 1984).

The proffered mitigation in this case was weak. Thus, in referring to the statutory mitigating factors the sentencer found "some" but not "extreme" mental or emotional disturbance and only minor incapacitation. The non-statutory mitigation (including some brain atrophy), again was found to carry little weight. These findings enjoy substantial record support.

First, although Cannady was an alcoholic, his condition did not incapacitate him nor did it prevent him from running two successful businesses (a gas station and, of all things, a bar). Cannady also maintained a home and, according to the record, was "sound" enough to be approved for financing on a new truck. (R 22-24). Alcoholism is an illness which is capable of incapacitating its victim, but the mere presence of this condition does not, per se, insulate the sufferer from the death penalty any more than mild retardation, **see Penry v. Lynaugh**, 492 U.S. ____, 106 L.Ed.2d 256 (1989), would.

Second, Cannady's "brain atrophy" was a mild form of organic brain damage that did not inhibit the Appellant. The mere existence of this condition did not compel relief. **James v. State**, 489 So.2d 737 (Fla. 1986); **Bundy v. Dugger**, 850 F.2d 1402 (11th Cir. 1988).

Third, a startling thing about this record is the absence of any actual, hard, proof of how much alcohol Cannady consumed. It is given that Cannady and his wife both drank some beer that day. No one, however, counted the empty beer cans in the home or

verified that all "empties" were the product of Sunday morning consumption. No one knew for certain how much beer Cannady consumed.

We know that claims of 14-26 (R 1336), beers were accepted by various experts. Cannady's moment-by-moment testimony did not mention precisely how much he drank, but Cannady did say he ate breakfast and drank coffee in addition to drinking beer. Given Cannady's record height of six feet and weight of 185 pounds, it strains credibility to believe he ate a full meal (plus coffee) and then drank 26 cans of a carbonated alcoholic beverage, and then acted as he did in the course of his crimes. This brings us to the next point.

Fourth, Dr. Macaluso, who relied upon 26 beers, was simply not credible. Macaluso's evasive testimony included the assertion that intoxication destroys mental intent without impeding physical performance. (R 1333-1349). For example, Macaluso said that a motorist who drinks and drives is "impaired" because he is showing bad judgment but, if his blood alcohol is below .1, he is not presumed to be physically impaired. (Some impairment is presumed once blood alcohol levels exceed .05 according to Florida law. **See** §316.1934(a), Fla.Stat.). Thus, to Macaluso, Cannady could divest himself of "criminal intent" without impairing motor skills or such noncriminal intent as going to a particular location, going to Angela's store to retrieve her house key or refusing to speak to the police or hiding his gun under the truck seat - all intentional acts Macaluso ignored and did not explain.

Fifth, Macaluso's testimony was rebutted by that of Dr. MacLaren and Dr. Walker, who both agreed that Cannady was sane and competent during these murders. Furthermore, despite the "atrophy" of Cannady's brain, Cannady's CAT scans and EEG were all normal.

While speculation can abound about how much Cannady drank or his "appreciation" of his conduct, we cannot digress into a "psychiatric shouting match." **Chestnut v. State**, 538 So.2d 820 (Fla. 1989). It is clear that professional opinion will vary in this case. The trial judge was not bound by the testimony of the experts but rather was free to accept those opinions which best matched the known facts; i.e., that Cannady intended to kill Georgia, that he retrieved, cleaned and loaded his gun, that he aimed and fired the gun, that he told Chris he "had to do it", that he declared his intent to kill Boisvert, that he remembered to bring extra ammo, that he drove his truck to Boisvert's, that he lured Boisvert to his truck, that he shot, reloaded and shot (Boisvert) again, that he proceeded to attack Mr. Russ the same way (but Russ escaped), that he went home, realized he had no key, went to Angela's store to get her key, went home, saw the police, hid his gun and tried to evade the police by going into his home. This person was not mentally impaired.[7]

Given the inconclusive and incomplete nature of the mitigating evidence, we submit that death would be proportional even if one aggravating factor was stricken. Indeed, the

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[7] As noted in **Boag v. Raines**, 769 F.2d 1341 (9th Cir. 1984), a post-arrest suicide attempt does not prove insanity either.

presence of a valid "replacement" factor in this record could support a death sentence as well. Thus, even if Georgia's murder was "cold, calculated and premeditated", but not "heinous, atrocious or cruel", her case would still qualify for capital justice. The same would hold true for the Boisvert murder - the murder for which Cannady agreed he should be executed.

On appeal, Cannady argues that his case should be disposed similar to **Ross v. State**, 474 So.2d 1170 (Fla. 1985); **Rembert v. State**, 445 So.2d 337 (Fla. 1984); and **Caruthers v. State**, 465 So.2d 496 (Fla. 1985). These cases, however, are readily distinguished.

Ross, supra, involved only a single murder, not two murders and an attempted third as in our case. In **Ross**, the defendant was drinking and was involved in a heated marital dispute. The case at bar did not involve a heated dispute but rather reflects three calculated and premeditated crimes (including two murders). While we do not accept the notion that housewives are not entitled to the equal protection of §921.141, Fla.Stat., or that "domestic violence" is somehow less serious than other kinds, we need not debate the issue because of the clear distinction between **Ross** and this case.

In **Caruthers, supra**, there was (again) only a single killing and it was committed during a convenience store robbery. (This was the only aggravating factor). The presence of many non-statutory mitigating factors led this Court to reverse Caruthers' death sentence. In this case, again, we have a multiple murderer who coldly set out to eliminate people he did not like. The case at bar is far more egregious than **Caruthers**.

In **Rembert v. State**, 445 So.2d 337 (Fla. 1987), we again find a felony murder with no other aggravating factors and a substantial body of mitigation.

We continue to compare this case with **Porter, supra; Parker, supra; Occhicone, supra** and **Gunsly, supra**. Douglas Cannady was a cold, murderous person who, without excuse, anger or mental impairment set out to simply eliminate people he did not like. His actions were not controlled by any "rape" since Mr. Russ was not involved in that incident. Cannady simply decided to solve all of his problems with a gun. This form of self-help cannot be tolerated.

CONCLUSION

The judgments and sentences should be affirmed.

Respectfully submitted,

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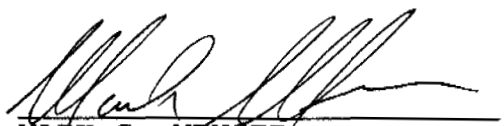
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. David A. Davis, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32302, this 25th day of March, 1991.



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