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

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This a capital case. The record on appeal consists of three volumes of pleadings, which will be referred to by the letter "R." The transcript of the trial will be indicated by the letter "T."

STATEMENT OF THE CASE

An indictment filed in the circuit court for Jackson County on October 20, 1989 charged Douglas Cannady with two counts of first degree murder and one count of attempted first degree murder (R 1-2). A motion was later filed to determine his competency to stand trial (R 15-16), and the court ordered the required examinations (R 156). Although one expert had some question of his competence when he examined him, he later changed his opinion and found Cannady competent to stand trial (R 213-14). Cannady also filed a notice that he intended to plead insanity at the time he committed the homicides (R 279).

Cannady was tried before Judge McCrary and found guilty as charged on all counts (T 375-77). At the penalty phase of the trial, the jury recommended two death sentences (T 406-407). The court followed those recommendations, and it sentenced the defendant to death for both murders (R 423-28). It sentenced him to 22 years for the attempted murder (T 427). All sentences are to run consecutive to each other.

In justifying each death sentence, the court found the same aggravating and mitigating circumstances, namely, in aggravation, it found:

> 1. The murders were especially heinous, atrocious, and cruel.
> 2. The murders were committed in a cold, calculated, and premeditated manner without any moral or legal justification.

In mitigation, the court found:

> 1. The murder was committed while Cannady was under the influence of some mental or emotional disturbance (but not extreme)

2. Cannady was under a mental stress but not under any physical duress or domination of another.
3. Cannady was an alcoholic and suffers from depression.

(R 429-435).

This appeal follows.

STATEMENT OF THE FACTS

Douglas Cannady was an alcoholic, and he had probably been so since he was in high school in the mid 1950's (T 1148). Almost everyone that had had any dealings with him mentioned that he drank, and some people had never seen him sober (T 908, 942). By 1989, he would drink one or two six packs of beer every day after work, and Fridays were the start of his "beertime." (T 1169) Predictably, he had accumulated over the years several drinking related convictions, and he estimated he had been charged with or convicted 17 to 23 times for driving while under the influence of intoxicants (T 1212-1216).

Cannady was married and had two children, Christopher, 15, and Angela 18 (T 849-850). He and his wife lived in a doublewide trailer behind the gas station he ran in Greenwood, a small community near Marianna (T 850).

He also owned a bar (T 940) at which he had had problems with fights. On one occasion in the spring of 1989, Steve Russ had gotten into a fight in front of Cannady's bar, and the defendant had broken it up by firing his gun, apparently at no one in particular and probably into the air to stop the brawls (T 940-41). Russ was placed on community control for the incident (T 941), and in return, he filed a complaint against Cannady for shooting the gun at him (T 940). He quickly dropped it after the two men resolved their differences (T 940). Cannady's wife nevertheless worried that Russ might "mess with him," and she bought some bullets for her husband's gun (T 900).

On Sunday, July 23, Cannady, his wife and children, had finished working around the house when they received an invitation from some friends to come over for a bar BQ dinner (T 1190). They accepted and Cannady and his wife, Georgia, went to the party which lasted into the night. Sometime during the evening, the hostess' daughter called from the hospital telling her mother that she was going into labor (T 1191). Several guests left, but Cannady's wife and Gerald Boisvert stayed at the house (T 1193). Cannady passed out (T 1194).

He came to about 9 p.m. and asked for his wife, but no one seemed to know where she was. By this time, Cannady was too drunk to drive, and his daughter took him to various places to look for her (T 1305). He could not find her that night, so he called the sheriff's office to tell them that she was missing (T 1201). The next morning he found Boisvert who said he had let Georgia Cannady out of his car at a truck stop (T 1199). About noon, someone brought her home, and she told her husband the same story Boisvert had given him (T 1208). She added that after Boisvert had left her, she left the truckstop with another woman (T 1209).

Over the next several days, Cannady noticed scratches on Georgia's shoulders and that she did not want to have sexual intercourse with him because she was "hurting." (T 1221) He suspected that Boisvert had raped his wife (T 1222), and he took her to the sheriff's office to file a complaint. He had been drinking, but according to the officer that interviewed the couple, he was not drunk (T 1035). Cannady apparently

dominated the conversation, and he told officer Cloud that his wife had been raped. After a while he became so obnoxious and impossible to talk to that Cloud asked to speak with his wife in private (T 1036). A short time later, she came out of his office and said she was ready to go. She did not want to press charges against Boisvert (T 1036).

Over the next two months, Georgia was despondent and on several occasions said that she wished she were dead (T 1238). Cannady again suspected Boisvert and other men had raped his wife, and at one point he lured him into his house and beat him (T 1166).

On October 1, Cannady, his wife, and Christopher were at home, Angela having already gone to work (T 851). Mrs. Cannady was again depressed over being raped by Boisvert and wished he were dead (T 1238). Cannady had already drunk at least 14 beers since waking and his wife 4 (T 917). Upset, Cannady got a .38 caliber pistol from a hiding place in the trailer and began cleaning it (T 1234). His wife asked that he sit next to her on the living room couch, and as he started to get up with the gun in his hand, he tripped or his ankle gave out on him, and the gun fired (T 1240-41). The bullet hit his wife in the chest, killing her (T 1106). Christopher came out of his room where he had been watching television, and Cannady told his son that "He had to do it." (T 859) That she was "gone. She's not suffering." (T 1242)

Cannady then told his son to get in their truck, and he did so (T 859). The defendant then drove to where Boisvert

lived, and on the way there he told Christopher that he was going to kill Boisvert (T 861). Though he drove fast, it took him fifteen minutes to get to Boisvert's house, and once there he asked Boisvert, who was standing in his front yard with another man and his two children, for a beer (T 861-63). Boisvert came to Cannady's truck, and Cannady shot him in the head several times (T 865). He then reloaded his gun, got out of his truck, and shot him again (T 865-66).[1]

The defendant drove away, and as he did so, he reloaded his gun after Christopher refused to do so for him (T 867). Cannady then drove to where Steve Russ lived, and the defendant said he was going to kill him because of the problems he had caused at his bar (T 869). When he got to Russ' house, he asked Russ for a beer (T 870), but Russ, who was on community control, said he did not have any (T 936-37). Cannady then shot at Russ, who was standing in the front doorway, missing him (T 870). Russ turned and fled through the house (T 870). Cannady ran after him and shot at him again, missing him as he had done with the three other shots (T 871).

Cannady and his son then went home, but they did not have the key to the front door of their trailer, so they drove to where Angela worked, and while Cannady waited in the truck, Christopher went inside to get the key from his sister

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[1]Boisvert was shot seven times (T 1109).

(T 872-73). He did not tell her what had happened; instead he took the key and got back in the truck.

As the pair returned home, a police car followed them, and when Cannady finally reached his trailer, he placed the gun and bullets under the seat and went inside (T 874). Before doing so, he told his son that he knew he was going to prison (T 874), and he waved the police aside, telling them that "he was not going to talk with anyone now." (T 963) Undeterred, the police arrested Cannady. After his arrest, the defendant tried to commit suicide three times (T 1181).

SUMMARY OF THE ARGUMENT

Cannady presents six issues for this court to review: two guilt and four penalty phase errors. The first question this court must resolve involves jury selection. During that process, several jurors, when asked their views on the death penalty, said they did not "believe in it." No further inquiry was made as to the depth of that belief and whether the prospective juror could set aside his or her views and follow the law and oath as a juror. The law allows jurors who are opposed to imposition of the death penalty to be excused only if such views would substantially impair their ability to sit as an impartial juror. In this case, the inquiry regarding the depth of the death penalty beliefs of these prospective jurors was so anemic that this court cannot say with assurance that they were unqualified to sit.

During the trial, Cannady called his daughter, Angela, to testify about, among other things, her mother telling her that she had been raped. The court granted the State's objection to this testimony on hearsay grounds. Such testimony, however, was not hearsay because it was not offered for its truth. Instead, Cannady wanted it admitted to show the effect such knowledge had upon him, and it was particularly relevant to why he shot Boisvert.

While the jury deliberated over the appropriate sentence, it asked the court what "duress" meant as used in the mitigating factor that "The defendant acted under extreme duress. . ." The court correctly told it that duress referred

to an external force. It erred, however, in not fully instructing the jury that it could consider mental "duress" as mitigation. Normally, the scope of any reinstruction lies within the trial court's discretion. But, when it gives such guidance, the additional instructions must be complete and accurate. In this case, without fully instructing the jury regarding what it could find as mitigation, the court unconstitutionally limited what the jury could consider in recommending a sentence of life in prison.

In justifying its death sentences for the murders of Georgia Cannady and Gerald Boisvert, the court found each murder to have been especially heinous, atrocious, and cruel. That was error because both killings were quickly done and without prolonged mental or physical suffering by either victim. Georgia Cannady was shot only once, and except for Cannady's statement that "he had to do it," it would have been an accidental homicide. Gerald Boisvert's killing was quickly done and the victim had no forewarning of what was about to happen. He died either immediately or shortly after the first shot. In any event, he was not tortured and suffered no prolonged agony.

The court also found Cannady committed both murders in a cold, calculated, and premeditated manner. As to Georgia Cannady, the court said what the defendant did immediately before he shot his wife showed the necessary heightened premeditation. That was error because there was obviously no plan. That is, Cannady killed his wife in the middle of the

day while his son was in the next room of their home. He made no effort to hide the body, and in fact left it when he decided to kill Boisvert.

Although the murder of Boisvert may have been committed in a cold, calculated, and premeditated manner, the defendant had a pretense of legal or moral justification for doing so. That is, he believed this man had raped his wife, and such a belief may not have been sufficient to avoid a first degree murder conviction, but it was sufficient to prevent this aggravating factor from applying.

Finally, this is not a death case. Douglas Cannady was 48 years old when he committed this double homicide. For well over half of those years he has been an alcoholic, and it is doubtful he has been sober for at least the last twenty years. He had committed a burglary when a youth, but since then he has not had any serious offenses, especially violent crimes. If he did not believe Boisvert had raped his wife, he would not have committed these murders. As it was his alcohol soaked brain conjured up a picture of his wife being either unfaithful or wronged. He was determined to correct the crimes the police were unwilling to prosecute, so he killed his wife and Boisvert. This court has traditionally been unwilling to impose a death sentence for murders arising out of domestic problems, and particularly when the defendant has been under the influence of alcohol. So here, these murders do no justify imposing death sentences on Cannady.

ARGUMENT

ISSUE I

THE COURT ERRED IN EXCUSING FOR CAUSE SEVERAL PROSPECTIVE JURORS BECAUSE OF THEIR VIEWS ON THE DEATH PENALTY, VIOLATING CANNADY'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

During jury selection, the state questioned a prospective juror Smith regarding her views on the death penalty. The entire colloquy is as follows:

> Q. Thank you, sir. Mrs. Smith, do you believe in the death penalty?
>
> A. I don't.
>
> Q. You don't?
>
> A. Not really.
>
> Q. Okay, that's fine, ma'am, that's fine. Since you don't believe in it you could not vote for it then in a case?
>
> A. I don't think so.
>
> Q. You don't think so. Thank you, ma'am.

(T 558).

Counsel for Cannady did not ask Ms. Smith any questions, but he did object to the state's challenge for cause of this prospective juror (T 599). The court, despite this objection, excused Ms. Smith for cause (T 600).

Later, almost the same conversation occurred between the prosecutor and three other prospective jurors:

> Let me just start off over here. Ms. Goodson, do you believe in the death penalty, ma'am?
>
> A. No.

Q. By not believing in it, Ms. Goodson, that means you could not vote for it then in a case?

A. (Indicating in the negative)

Q. Okay, thank you, ma'am? Mr. Garrett, do you understand how I explained how the death penalty works in Florida?

A. Yes.

Q. Do you believe in the death penalty?

A. No?

Q. Thank you, sir. Ms. Elliot, do you believe in the death penalty?

* * *

Q. Okay. Ms. Hayes, do you believe in the death penalty?

A. I do not.

Q. Does that mean, Ms. Hayes, you could not then vote for it?

A. Right.

Q. Thank you, ma'am. Mr. Holmes, do you believe in the death penalty?

(T 754-55).

The court, at the state's request, excused these prospective jurors for cause because of their views on the death penalty (T 795). That was error.

The law in this area is simple. In Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court adopted language from its decision in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d (1980), concerning the standard courts should apply in excusing for cause death scrupled prospective jurors:

> We therefore take this opportunity to clarify our decision in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) and to reaffirm the above quoted standard from Adams as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." We note that in dispensing with Witherspoon's reference to "automatic" decision-making, this standard likewise does not require that a juror's bias be proven with "unmistakable clarity."

Witt, at 424 (Footnote omitted.)

Applied to this case, the question is whether any of the challenged prospective juror's views would have substantially interfered with their determination of the proper sentence. The problem is that from the sparse questioning by the prosecutor, we do not know what their views were. That is, there is no evidence that whatever they may have believed about the death penalty, that attitude would have affected their decision regarding Cannady's guilt. Additionally, the state made no effort to determine if, despite those views on the death penalty, they could have listened to and followed the court's instructions regarding the weighing of the aggravating and mitigating circumstances. In other words could they have followed their oaths as jurors and render a decision based solely upon the facts and law?

The inquiry is not so much different from that required when a case has some notoriety. In such cases, the central

question is one of fairness. Can the juror put aside what he has learned outside the courtroom, and base his decision solely upon what he has heard at trial? If so, then the prospective juror is eligible to sit. So, here. The proper inquiry is whether prospective jurors could have set aside any preconceived notions regarding imposition of the death penalty and follow their oaths as a juror. On that question there was precious little inquiry, the only question being an ambiguous "Do you believe in the death penalty?"

Belief in the death penalty, however, is not an article of faith, to which a person must swear loyalty before he is eligible to sit as a juror. People who oppose sentencing men to death are not ineligible to sit merely because of that opposition. Instead, Witt focuses upon the proper inquiry. Conduct, not belief. Would those views prevent or substantially impair the performance of the prospective juror's duties as contained in the court's instructions and in the oath?

Thus, the State here never focussed its inquiry upon the Witt requirements. The challenged prospective jurors were uncertain about imposing a death sentence, and such uneasiness was understandable considering the sparsity of information given to them about their role in imposing the death penalty. The prosecutor never asked them if they could set aside their views about the death penalty in the abstract and apply the law to the facts in this case. Often when beliefs, which a person thinks are firm, are tested in the crucible of a trial, they

melt, harden or are transformed. Without asking any of these prospective jurors if they could listen to and follow the court's instructions, the trial court and this court have no idea whether they were unqualified to sit as jurors.

This court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

MS. SESSIONS.

Regarding prospective juror Sessions, all that was asked her regarding the death penalty was the following:

> Q. Ms. Sessions, do you believe in the death penalty?
>
> A. Yes.
>
> A. Could you vote for it under the appropriate circumstances?
>
> A. Yes.

Other questions were asked of her (T 625, 634, 652), but none of them had to do with her imposition of the death penalty. Inexplicably, the State asked, over defense objection (T 667),[2] to excuse this prospective juror because "She answered that no, she could not vote for it. . . . She said she didn't believe in it." (T 667) Without any further inquiry or questioning, the court granted that challenge (T 669-70).

Unless appellate counsel has missed something, he can find absolutely no reason to believe Ms. Sessions was opposed to the

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[2]Defense counsel objected to the state's challenge for cause, but he also said he thought it was correct.

death penalty. She never said she was opposed its imposition; to the contrary, she said she could vote for it under the appropriate circumstances. Under the Witt test, she was qualified to sit as a juror, and the court erred by granting the state's challenge for cause for her.

ISSUE II

THE COURT ERRED IN EXCLUDING ANGELA CANNADY'S TESTIMONY THAT HER MOTHER HAD TOLD HER BOISVERT HAD RAPED HER.

During Cannady's case in chief, the defendant called Angela Cannady, Cannady's daughter. As part of his direct examination, he asked her about what happened the night in July her mother disappeared. Specifically, he wanted to question her about Boisvert's rape of Georgia Cannady.

> Q. And after that did you ever, did your mother ever confide in you with regard to what happened that night?
>
> MR. WRIGHT [the prosecutor]: Let me object. Can we approach the bench?
>
> MR. ADAMS [defense counsel]: That just calls for a "yes" or "no". Maybe it is premature. (Conference at bench-on record)
>
> MR. WRIGHT: He's getting into absolutely the purest rank hearsay. We have gone all week with it. He's asking the daughter what her dead momma told her.
>
> MR. ADAMS: I didn't ask her that.
>
> MR. WRIGHT: He's fixing to.
>
> THE COURT: Has she . . .
>
> MR. ADAMS: Sure she verified it. She said in the deposition she said she had been raped. It is an exception to hearsay rule. The declarant is unavailable.
>
> MR. WRIGHT: It could be admissible for the defendant to know about it but is is not important whether his daughter heard that. I didn't object to the defendant testifying about the rape business. What somebody else knows about rape is not admissible or relevant. But, the daughter hearing it is pure hearsay. If he wants to offer it for what his client believes, that's all right, but his client is not on the stand.

MR. ADAMS: It shows his pleas were justified.

THE COURT: I will sustain the objection.

(T 1293-94).

The court erred in excluding this testimony because it would have been relevant, not for its truth, but to corroborate Cannady's belief that Boisvert had raped his wife. Such evidence would have bolstered his reason for killing Boisvert, and although provocation is not a perfect defense to murder, the jury could have believed he was sufficiently angered to have committed only a second degree murder. See. e.g. Tien Wang v. State, 426 So.2d 1004 (Fla. 3rd DCA 1983).

Not all out of court statements, of course, are hearsay. Only when a nontestifying declarant's statement is offered for its truth is it considered hearsay. Section 90.801 Florida Statutes (1989). If a statement explains why a defendant acted the way he did, it is not hearsay.

In Breedlove v. State, 413 So.2d 1 (Fla. 1982), two police officers testified, over defense objection, about what Breedlove's mother and brother had told them. Neither of the defendant's relatives testified at trial. This court approved admitting this testimony.

> The court properly admitted the detectives' testimony about what the Gibsons said because it came in to show the effect on Breedlove rather than for the truth of those comments. The informal statements, therefore, were not hearsay and could be admitted into evidence. Id. at 7.

Similarly here, the purpose of this evidence was to support Cannady's claim that he was provoked into shooting Boisvert because he believed his wife had been raped. Whether she had or had not was irrelevant. The import of what Mrs. Cannady told her daughter was to confirm Cannady's belief that Boisvert had sexually battered his wife. As such, the evidence was admissible, and the court erred in not admitting it.

Also, the error was not harmless because the jury could have believed Mrs. Cannady was not raped, and the defendant, therefore, was not justified in believing she was. That conclusion could be drawn from the results of the interview Mrs. Cannady had with the police. Once she was alone with investigator Cloud of the Jackson County Sheriff's office, she decided not to press charges against Boisvert (T 1036). Why she did so is unknown, but the jury could have discounted Cannady's story at trial that his wife was upset about the rape on the day she was killed because she refused to allege Boisvert had committed that crime. Thus, independent verification from Angela that her mother had indeed been sexually battered would have bolstered the credibility of Cannady's version that he shot his wife accidentally. It is not clear beyond a reasonable doubt that the court's error was harmless. State v. DiGuillo, 491 So.2d 1129 (Fla. 1983).

ISSUE III

THE COURT ERRED IN FAILING TO GIVE A COMPLETE INSTRUCTION OF THE MEANING OF "DURESS" WHEN THE JURY ASKED FOR A DEFINITION OF THAT WORD.

During its penalty phase deliberations, the jury asked the court to define the word "duress" as used in the mitigating factor Section 921.141(6)(e), Florida Statutes (1989): "The defendant acted under extreme duress or under the substantial domination of another person." In particular, the jury wanted to know whether the duress was "physical or mental." (T 1529) After reading it a definition from Black's Law Dictionary, a juror said "That mainly physical is what you are saying." Another juror then offered that "In other words, it would not be correct to make the term synonymous of stress?" The court agreed, "No, it is a little bit more than stress." (T 1530) The jury then retired and returned a half hour later with its death recommendation (T 1530). The court, however, had erred in instructing the jury as it did regarding duress. Specifically, it had not told them that they could consider other evidence of "internal" duress as mitigating. By failing to do so, the court misled the jury about what it could consider in mitigation.

The court correctly told the jury that duress, as used in the statutory mitigating sense, refers to an external force. In Toole v. State, 479 So.2d 731 (Fla. 1985), this court held, regarding "duress":

> The trial court was correct, however, as to the inapplicability of (6)(e), acting under

> extreme duress or under substantial domination of another person. 'Duress' is often used in the vernacular to denote internal pressure, but it actually refers to external provocation such as imprisonment or the use of force or threats. See Guralnik, New World Dictionary of the American Language. (2d college ed. 1974)

Id. at 734.

The court, however, incorrectly informed them that duress was a little bit more than stress because what the jury was really asking about was whether it could consider as mitigation the pressures Cannady felt because of his alcoholism and Boisvert's rape of his wife. That is, Cannady was under considerable stress from his wife's depression over being raped and the police department's unwillingness to arrest Boisvert. What the jury wanted to know was whether this could amount to "duress." What the court should have retold that jury was that it could consider in mitigation "any other aspects of the defendant's character or record, and any other circumstance of the offense." (T 1526) In short, any reinstruction regarding what the jury could find in mitigation was incomplete without that last "catch-all" mitigating circumstance instruction.

The logic of this argument flows from Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and Hitchcock v. Dugger, 393 U.S., 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), which requires the sentencer to consider all mitigating evidence. If the jury must consider such evidence, then it logically follows that the trial court cannot, in effect, limit

their consideration of it by telling them only that "duress" applies to physical force. If that body wanted to consider some "internal pressure" that did not amount to "duress" the court should have told them it could do so. This is especially true when, as here, the jury obviously wanted to know how they could consider Cannady's alcoholism and trouble with his wife and Boisvert.

Normally, the scope of any reinstruction to the jury lies within the trial court's discretion. Henry v. State, 359 So.2d 864 (Fla. 1978). But, when it decides to give the jurors additional instructions they must be complete and accurate. For example, in Stockton v. State, 544 So.2d 1006 (Fla. 1989), during its deliberations of whether the defendant was guilty of second-degree murder, the jury asked to know the difference between second and third degree murder. The court reread the definitions of those crimes, and it also reinstructed them on manslaughter, but it refused to instruct on justifiable and excusable homicide. This court reversed Stockton's subsequent conviction for second-degree murder. If the court is going to instruct on manslaughter, it must define it completely, and a full definition of that crime includes the definitions of justifiable and excusable homicide. Failure to give the complete definition of manslaughter, although the jury had not asked to be reinstructed on that crime, was reversible error.

Similarly here. Although the court may have correctly reinstructed the jury on the meaning of duress, it did not give them a complete definition of that mitigating circumstance. To

be a full explanation, the court should have told the jury that it also could consider any other aspect of Cannady's character or nature of his crime as mitigation. Thus, although the jury may not have believed he was under "duress" to fit within the statutory mitigating factor, it could have believed he was under some "pressure" and that could have mitigated a death sentence. Failure to completely reinstruct the jury as has been suggested was reversible error.

ISSUE IV

THE COURT ERRED IN FINDING THAT BOTH MURDERS WERE COMMITTED IN AN ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL MANNER.

The court, in sentencing Cannady to death found that he committed both murders in an especially heinous, atrocious, and cruel manner. As to Georgia Cannady, the court's findings proving this aggravating factor beyond a reasonable doubt were:

> 1. Mrs. Cannady was shot from more than three feet away.
>
> 2. She was shot once in the heart.
>
> 3. She was defenseless and in her living room.
>
> 4. She was alive for a brief period after being shot.
>
> 5. Cannady made no effort to help her.
>
> 6. The Cannady's marital problems resulted in her death (T 429-30).

As to Boisvert's death, the court found the following facts established the heinousness of the murder:

> 1. The victim was shot seven times.
>
> 2. Five of those shots were in the back, and three of those five were to the back of the head.
>
> 3. Several shots were fired at close range.
>
> 4. Cannady got out of his truck and shot Boisvert several more times once he was on the ground.
>
> 5. Death was not immediate, and the victim was shot several times while still alive.
>
> 6. The murder was an execution style killing (T 432-33).

While both murders may, as the court said, have been "indeed heinous, atrocious, and cruel" (T 433) they were not especially so, and the court erred in finding this aggravating factor applied to each murder.

As this court has said, a murder is especially heinous, atrocious, and cruel when it is "extremely wicked or shockingly evil" or the killer intended to "inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering" of the victim. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Murders committed without pity or that involve an unnecessary amount of torture to the victim become especially heinous, atrocious, or cruel. Consequently, murders in which the victim was shot only once and died instantly or nearly so do not qualify for this aggravating factor. Jackson v. State, 502 So.2d 409 (Fla. 1986). Even those in which the victim was shot once but lingered for several hours before dying, do not necessarily become especially heinous, atrocious, and cruel. Tefteller v. State, 439 So.2d 840, 846 (Fla. 1983).

The mental anguish suffered by the victim before his death can support this aggravating factor. Swafford v. State, 533 So.2d 270 (Fla. 1988). In Swafford, although the victim died almost instantaneously, Swafford had kidnapped her and taken her to a remote location where he raped her and then shot her nine times. Most of the shots were in her torso, and she died from a loss of blood. This murder was especially heinous, atrocious, and cruel. If the victim knows that he will be murdered, his awareness of the inevitability of his death can

make the murder especially heinous, atrocious, and cruel. Harvey v. State, 529 So.2d 1083 (Fla. 1988). In Harvey, this aggravating factor applied because the victims, a husband and wife, learned of their impending deaths when Harvey and his co-defendant discussed the need to dispose of witnesses. When the elderly couple tried to flee, Harvey shot both of them, killing the husband instantly. He shot the wife at point blank range when he heard her moaning.

GEORGIA CANNADY'S MURDER.

Georgia Cannady was shot once through the heart. Because her body was found sitting on the couch in her house, death, if not instantaneous, came so quick that she did not have time to move. The body position also shows she had no idea of her impending death, a fact that can make a single shot killing especially heinous, atrocious, and cruel. Jackson v. State, 522 So.2d 802 (Fla. 1988). Since, however, she was killed by a single shot, with no warning and no unnecessary torture or pain inflicted, this murder was not especially heinous, atrocious, and cruel.[3] Copeland v. State, 457 So.2d 802 (Fla. 1988).

GERALD BOISVERT'S MURDER.

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[3]Appellate counsel is aware of no case where the sentencing court used factors similar to the ones used by the trial court to find this aggravating factor. To the contrary, the facts related by the court in this case to justify this aggravating factor are rather anemic, and have none of "shock" value that makes a murder especially heinous, atrocious, and cruel.

The court also erred in finding the murder of Boisvert to have been especially heinous, atrocious, and cruel. His death differs from Cannady's wife primarily in its deliberateness and the number of shots Cannady fired. Those distinctions, however, do not make this aggravating factor applicable in this case.

In Lewis v. State, 377 So.2d 640 (Fla. 1977), Lewis shot the victim once in the chest and as he fled, the defendant shot him several more times. This court said that murder was not committed in an especially heinous, atrocious, and cruel manner. Also, in Amoros v. State, 531 So.2d 1256 (Fla. 1988), the defendant shot his victim several minutes after the defendant had entered her apartment. He shot her at close range as she tried to run to avoid him. As in Lewis, this court refused to find this murder different from the norm of capital felonies so that this aggravating factor applied. Thus, shooting the victim several times, like Cannady did here, does not, by itself, make the killing especially heinous, atrocious, and cruel.

Of course, here, Cannady got out of his truck and reloaded his gun before shooting Boisvert some more. In Philips v. State, 476 So.2d 194 (Fla. 1985), Philips shot his parole supervisor once, who then fled. The Defendant then stalked his wounded victim, reloaded his gun, and shot him in the back of the head several times, killing him. That murder was especially heinous, atrocious, and cruel because the victim must have agonized over his impending, inevitable death.

Such is not so here. Cannady's first shot hit Boisvert in the head and he probably became immediately unconscious because he fell to the ground. Thus, although Cannady had to get out of his truck and reload his gun, Boisvert was unaware that he was about to die (if he was not already dead), and he could not have agonized for any appreciable length of time about his impending death as Philip's victim did. Amoros.

Cannady's alcoholism also reduces the likelihood that Cannady "enjoyed" his wife's and Boisvert's suffering. In Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), Fitzpatrick, in a bizarre scheme to rob a bank, kidnapped several hostages and barricaded himself in an office and killed a policeman in the resulting shoot-out. This court noted that the court had not found that the murder to be especially heinous, atrocious, and cruel. It was the product of a seriously disturbed "man-child" not that of a person who could fully appreciate what he was doing. So here, the state and defense experts agreed that Cannady was an alcoholic (T 1320, 1358, 1487). Moreover, some witnesses testified that whenever they saw him, he was drinking or drunk. One wonders if Cannady has ever been sober since 1965. Like Fitzpatrick, Cannady is a seriously disturbed man who did not fully appreciate what he was doing. These murder were not especially heinous, atrocious, and cruel.

ISSUE V

THE COURT ERRED IN FINDING THAT BOTH MURDERS WERE COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The court found that Cannady murdered both his wife and Boisvert in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. For different reasons, the court erred in both findings.

The leading case in defining cold, calculated, and premeditated murders is Rogers v. State, 511 So.2d 526 (Fla. 1987). See, also, Amoros v. State, 531 So.2d 526 (Fla. 1988). Focussing upon the calculation required, this court said, "'calculation' consists of a careful plan or prearranged design." Rogers at 533. The evidence supporting this factor, in short, must show there was at least a careful plan or prearranged design to murder before it can be found. Amoros, at 1261. Of course, circumstantial evidence can show this heightened intent, but as with all such evidence, it cannot be susceptible to any other reasonable explanation than that advanced by the State. State v. Law, 559 So.2d 187 (Fla. 1990).

AS TO CANNADY'S WIFE.

In summary, the court found Cannady killed his wife in a cold, calculated and premeditated manner because:

1. Cannady took the .38 caliber pistol from its hiding place.

2. He cleaned the weapon to make sure it worked properly.

3. He loaded the gun.

4. He shot his wife from more than three feet away, suggesting he had to aim the weapon.

5. Cannady was not crying or upset when his son entered the room immediately after the shooting.

6. Cannady was already calculating his next murder.

(R 430-431).

The court erred in two respects as to Georgia Cannady. First, the facts it found proving this aggravating factor are ambiguous about the defendant's intent. Second, the court ignored a wealth of other facts that weaken the court's conclusion and, to the contrary, support the reasonable explanation, that Cannady accidentally killed his wife.

In Thompson v. State, Case No. 73,300 (Fla. June 14, 1990) Thompson and his wife had separated, and Thompson had moved in with his girlfriend. They apparently were not getting along very well either because one morning he awoke before she did, and thirty minutes later he shot her in the head and stabbed her. Although the trial court said that Thompson committed in the murder in a cold, calculated, and premeditated manner because of the time he had to formulate his plan, this court rejected that reasoning holding that there was no evidence Thompson had contemplated the murder for thirty minutes. Instead, the court noted that the defendant had been very emotional, and he had as likely reached his breaking point shortly before committing the murder. Thus, although the

defendant may have had time to plan a murder, more was needed to show that he did so, and mere time by itself cannot support a finding that a defendant committed a murder in a cold, calculated, and premeditated manner.

Here, the court apparently assumed Cannady planned to kill his wife sometime before he got the gun from the bathroom, and then he deliberately cleaned, loaded, and shot it. But like the evidence supporting this factor in Thompson, there is no evidence Cannady had formed this heightened premeditation when he got the gun. To the contrary, until the fatal shot, Cannady had made no threats against his wife, or, as far as the record shows, shown any animosity toward her. See, Porter v. State, Case No. 72,301 (Fla. June 14, 1990).

The court also said that because the gun was fired more than three feet from Mrs. Cannady, it had to have been aimed. That is sheer speculation on the court's part, and the inference that arises from following that conclusion is that there are no accidental killings when a gun is fired more than three feet from the victim. That is absurd, and the evidence the court used to justify finding this aggravating factor does not exclude the reasonable hypothesis that Cannady killed his wife as he described: by accident.

The court also ignored a wealth of evidence that showed Cannady had no plan or well thought-out idea of how to commit the murder of his wife. First, Christopher, his 15 year old son was at home (T 851), and he would be the states' key witness against his father not only about his mother's killing

but also for Boisvert's murder. It is hard to imagine anything less calculated than to take along a witness to memorialize every crime he committed. Second, the murder occurred at the Cannady home. If this was a well planned killing Cannady would have taken his wife to some isolated location. By killing his wife at home on a Sunday afternoon, he left a crime scene rich with evidence. That is, he left her body in the trailer when he went to kill Boisvert (T 859). The bullet that killed her was recovered because it was found in the couch on which Mrs. Cannady was sitting. Also, any blood from the wounds would have been left on the couch. Even the angle of the track of the bullet through Mrs. Cannady's body refutes the cold, calculated nature of the murder. The exit wound was about one half inch higher than the entrance wound (T 1122-23). That would tend to support Cannady's version of what happened, because if Cannady was going to aim the pistol, he probably would have brought it up at least shoulder height. Even if he was sitting when he shot his wife, who was sitting on the couch, the exit wound probably would have been lower, not higher, than the entrance wound.

Thus, the circumstantial evidence relied upon by the court does not exclude, as it must, the reasonable hypothesis that Cannady had no heightened premeditation or plan to kill his wife.

THE BOISVERT KILLING.

Conceding that Cannady coldly and with calculation planned the murder of Boisvert does not mean that the aggravating

factor applies. It can be found only if Cannady lacked a pretense of moral or legal justification for committing the murder. Such pretense 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 v. State, 536 So.2d 221, 224 (Fla. 1988). In Cannady v. State, 427 So.2d 723, 730-31 (Fla. 1983), Cannady claimed that a mild mannered minister he had kidnapped jumped him, and the defendant shot him five times. This court found this sufficient evidence of a pretense of legal justification to defeat finding this aggravating factor. Thus, if the unrebutted evidence supports the defendant's claim of pretense, this aggravating factor does not apply.

Here, Cannady believed Boisvert had raped his wife in July (T 904, 1035). The unrebutted evidence showed that Georgia Cannady had disappeared overnight, and Boisvert admitted being with her at least part of the evening (T 1199). The defendant believed so strongly about the wrong Boisvert had committed that he took his wife to the sheriff's office to file a complaint (T 1035). When she decided not to press her claim, that did not resolve the matter. On the day of the killings, Georgia continued to be depressed over what Boisvert had done to her, and wished "she was dead." (T 1237-38) Cannady was mad at his wife for being depressed, and he got the gun out to call her bluff that she also wished Boisvert dead (T 1236). After shooting his wife, he was determined to get the man who had caused his wife's depression.

This logic would not have reduced the murder of Boisvert to manslaughter or second degree murder because it was provoked, but just as the earlier Cannady's claim of self defense defeated a finding of the cold, calculated factor in Cannady, so here, Douglas Cannady's claim of provocation provided at least a pretense of legal justification to defeat a finding that this factor should apply in this case.

Thus, the court erred in finding this aggravating factor applied to both of the murders Cannady committed.

ISSUE VI

THE COURT ERRED IN SENTENCING CANNADY TO DEATH BECAUSE SUCH A SENTENCE IS NOT PROPORTIONATELY WARRANTED UNDER THE FACTS OF THIS CASE.

As part of its review of death sentences, this court in recent years has shown an increasing willingness to reduce such penalties to life in prison despite a jury recommendation of death. It has done so because it has the obligation to review a death sentence to insure that in a particular case it is deserved when compared with other cases involving similar facts.

> Our function in reviewing a death sentence is to consider the circumstances in light of our other decisions and determine whether the death penalty is appropriate. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974).

Menendez v. State, 419 So.2d 312, 315 (Fla. 1982). Thus, this court will compare the facts of the case under consideration with other cases involving similar situations to decide if a death sentence is warranted. Proffitt v. State, 510 So.2d 896 (Fla. 1987). Accordingly, this Court has reduced several death sentences (though the jury recommended death and one or more valid aggravating factors were present) when the murder arose out of a domestic dispute or the defendant had been drinking at the time he committed the murder. Ross v. State, 474 So.2d 1170 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Caruthers v. State, 465 So.2d 496 (Fla. 1985). Cannady's case falls within the rationale of these cases, and his death

sentence should be reduced to life in prison without the opportunity of parole for 25 years.

In Ross, this Court approved the trial court's finding that Ross killed his wife in an especially heinous, atrocious, and cruel manner. This Court, however, also said that the trial court had given insufficient consideration to the conflicting evidence of Ross' drunkenness on the night of the murder. In addition, the court found that Ross' lack of a history of prior violent criminal activity and his lack of a long period of reflection were significant, and it reduced Ross' death sentence to life in prison.

In Caruthers, Caruthers robbed and killed a clerk at a convenience store. In sentencing Caruthers to death (following the jury's death recommendation), the trial court found that the murder was committed:

> 1. while Caruthers was engaged in the commission of an armed robbery.
>
> 2. to avoid or prevent a lawful arrest.
>
> 3. in a cold, calculated, and premeditated manner.

In mitigation, the court found that Caruthers lacked a significant history of prior criminal activity.

On appeal, this Court rejected the factors that the murder was committed to avoid lawful arrest and that it was cold, calculated and premeditated. That holding left only one aggravating factor and it was part of the criminal transaction that included the murder. In addition, this Court considered that Caruthers had drunk a considerable amount of beer while on

a fishing trip on the day of the murder. Despite the jury's recommendation and the trial court's order, this Court reduced Caruther's sentence of death to life in prison.

In Rembert, Rembert entered a bait and tackle shop, hit the elderly victim once or twice on the head, and stole $40 or 60 dollars from her. Rembert also had been drinking for part of the day. The jury recommended death, and the trial court sentenced Rembert to death. The court found in aggravation, that the murder was 1) a felony murder, 2) committed to avoid or prevent arrest, 3) heinous, atrocious and cruel, and 4) cold, calculated, and premeditated. It found nothing in mitigation.

On appeal, this Court rejected three of those aggravating factors and affirmed only that the murder had been committed during a felony. It then reduced Rembert's death sentence to life in prison because nothing distinguished this murder from the norm of capital felonies.

Two facts link these cases. First, each defendant had been drinking before he committed his murder. (In Ross, though the evidence was conflicting on this point, this Court said that Ross had been drinking heavily immediately before the homicide). Second, only one or two aggravating factors were present, and those tended to be inherent in the type of murder committed. For example, in Caruthers the only factor applicable was that Caruthers committed the murder while he committed an armed robbery. In Rembert, a similar situation existed. In all cases, this Court gave more weight to the

mitigating evidence than the trial court had done, and in comparison to other capital murders, these men did not merit execution. A similar result should be reached here.

The uncontradicted and unrebutted evidence showed that Cannady was a 48 year old man who had been an alcoholic for all his adult life (T 1148, 1211-16). By the early afternoon of October 1, he had drunk at least 14 beers (T 891, 1243). His wife, who also had been drinking (and had a blood alcohol content of .11 (T 1108)), was depressed over Boisvert raping her in July, and she said that if she had a gun she would kill him (T 1233-34). Cannady, in a fit of drunken anger, got his gun to call her bluff, and then killed her. The homicide became murder only because he told his son, immediately after the killing, that he "had to do it." (T 859) All the other evidence points to an accidental shooting. It also points to a murder arising out of a heated domestic confrontation, and Cannady could have premeditated the murder for only a short time. It is thus, for these reasons, a crime for which a death sentence is unwarranted. Wilson v. State, 493 So.2d 1019 (Fla. 1986).

A death sentence for Boisvert's murder, on the other hand, seems more justified, yet upon closer examination of the cases and the facts in this case, a similar result should obtain as that for the killing of Mrs. Cannady. First, of course, we have Cannady's alcoholism and in particular his drunkenness when he killed Boisvert. Second, Boisvert's murder, like that of Georgia Cannady arose out of a domestic dispute. Cannady

must have blamed Boisvert for his wife's death because he was the one who had raped her and thus started the defendant on the path that could only end with the rapist's death. Why else would he kill him? He probably had such thoughts immediately after the death of his wife and while he drove to Boisvert's house. But such brooding, under these emotional circumstances, does not elevate a murder into one that is death worthy. In Kampff v. State, 371 So.2d 1007 (Fla. 1979), this court reduced Kampff's death sentence for killing his wife to life in prison in part because Kampff was a long time alcoholic who killed his wife. In particular, this court noted that he must have brooded over killing her for several years. Thus, Cannady, who probably had not known a completely sober day in over twenty years, fixed upon Boisvert as the source of his problems, and like Kampff (although for considerably shorter time) "brooded" over killing him. Thus, with the provocation a man under the sway of passion and alcohol can have, Cannady killed Boisvert. While the killing was murder, it was not one for which a death sentence is justified. See, Irizarry v. State, 496 So.2d 822 (Fla. 1986) (Death sentence unwarranted where the defendant killed his former wife and tried to kill her boyfriend two weeks after learning that the boyfriend was living with Irizarry's ex-spouse.) This is particularly true in light of Cannady's lack of significant history of committing any violent crime. Herring v. State, 501 So.2d 1279 (Fla. 1986); Hudson v. State, 538 So.2d 829 (Fla. 1989). This court should,

therefore, reduce Cannady's death sentences to life in prison without the possibility of parole for twenty-five years.

CONCLUSION

Based upon the arguments presented here, Douglas Cannady respectfully asks this honorable court to grant the following relief: 1. reverse the trial court's judgment and sentence and remand for a new trial, 2. reverse the trial court's sentence and remand for imposition of two sentences of life in prison without the possibility of parole for twenty-five years, 3. reverse the trial court's sentence and remand for a new sentencing hearing before a new jury.

Respectfully submitted,

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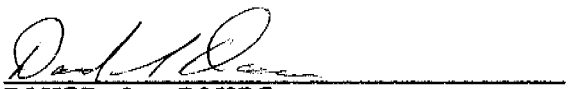

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, DOUGLAS CANNADY, #A-009898, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 4TH day of January, 1991.

DAVID A. DAVIS