IN THE SUPREME COURT OF FLORIDA

TOMMY RICHARDSON,

Appellant,

v. CASE NO. 76,829

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

Tommy Richardson is the appellant in this capital case. The record on appeal consists of five volumes, and references to the record proper will be by the the letter "R" and references to the transcript by the letter "T."

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Jackson County on April 6, 1990 charged Tommy Richardson with one count of first degree murder (R 1). Subsequently, the State and Richardson filed several pre-trial motions or notices relevant to this appeal:

> 1. Motion to Suppress Statements (R 66-68). Denied (T 278, 317).
>
> 2. Notices of Similar Fact Evidence (R 84).
>
> 3. Motion in Limine (R 88-89). Denied in part (R 325).
>
> 4. Motion for Appointment of Expert and Motion for Continuance (R 93-95). Denied (R 332).

Richardson proceeded to trial before the honorable Robert L. McCrary and was found guilty as charged (R 131). The jury also recommended the court sentence the defendant to death (R 145-46). He moved for a new trial (R 162-63), but the trial court denied that request (R 763). It then sentenced Richardson to death, and in support of that sentence, it found in aggravation:

> 1. that Richardson had committed the murder in an especially heinous, atrocious, and cruel manner.
>
> 2. the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

In mitigation, the court found that Richardson:

> 1. had no significant history of prior criminal activity.
>
> 2. committed the murder while he was under

the influence of an extreme mental or emotional disturbance.

3. was sincerely remorseful.

4. had attempted suicide shortly after committing the murder.

(R 173-76).

This appeal follows.

STATEMENT OF THE FACTS

By the end of 1989, 38 year old Tommy Richardson had lived with Irene Newton and her six children for four or five years (T 492). For the past three years they had lived in a trailer in Campellton, a small community near Marianna and just south of the Florida-Alabama state line (T 492). Shortly after Christmas, Irene tossed Tommy out of the trailer (T 492). He returned several times during the week before New Years Eve asking his common law wife to talk with him (T 506). In particular he came to the trailer on December 30, but Irene told him to go away, and she told one of her children to call the police (T 505). When they showed up, Richardson ran into the nearby woods, but he returned as soon as they had gone (T 505). He told Irene that he had heard everything she had said to them, and he was going to kill her (T 505).

On New Years Eve, Irene planned to go to a fish fry, and she was dressed up to go out (T 517). She also had been drinking, and had a blood alcohol content of .21 (T 664). Shortly before 8 p.m. Richardson showed up and again wanted to talk with Irene. He was told she did not want to talk with him, but Irene cracked the door to the trailer a bit, and the defendant forced his way in (T 495). They began arguing until Richardson pulled a pocketknife out (T 496). Apparently, he was not very forceful with it because as Irene advanced on him, he backed up. By this time, the couple was outside of the trailer and so were some of her children (T 496-97). They

continued to argue and Richardson walked down the side of the trailer with Newton following him (T 497).

When Richardson got to the end, he reached for the shotgun he had laid on the tongue of the trailer and brought it up under his arm and shot Irene (T 498). She fell down, and as her children ran for help, Tommy stood over her in shock, looking at her body (T 550). A few minutes later he shot himself (T 599).[1]

When the police showed up, Irene was dead from the blast to her chest (T 650), and Richardson was taken to a hospital in Alabama (T 260, 558). He recovered from his wound and was discharged from the hospital, and he went to stay with his sister nearby (T 283-88). He stayed with his sister in Madrid, Alabama where the police found him on January 18, 1990 and arrested him for the murder of Irene Newton. He willingly went with the arresting officer, and on the way to jail, he told the policeman that he loved Irene, and he had bought the shotgun from a stranger near Graceville and had carried it under his coat as he walked to the trailer in Campellton (T 596).

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[1]Richardson later said he shot himself when he threw the shotgun down, but the firearms expert said the gun could not have discharged accidentally (T 614-15).

SUMMARY OF THE ARGUMENT

Richardson presented nine arguments: three guilt phase and six penalty phase issues. Before trial, the court denied Richardson's motion to suppress statements he had made to the police. The police questioned the defendant while he was on pain medication. Because Richardson is mentally retarded, the combination of drugs and low intellect combine to render the statements he made to the police involuntary.

Immediately before trial, the State disclosed the results of the firearm expert who had examined a shotgun shell found at the scene of the homicide. Richardson complained about the tardy discovery and requested a continuance so he could find an expert to examine the evidence, but the court said "we can go ahead without too much damage to you." The court should have granted the continuance especially since this evidence was important (there being the possibility of another shotgun used) and the imminence of the trial precluded any independent verification of the State expert's testimony.

During its closing argument, the State characterized Richardson's defense as asking for mercy. It responded to that argument by urging the jury to "give him, the same mercy that he gave Irene Newton that night." Such a plea improperly asked the jury to disregard their oaths to view the evidence dispassionately and instead give vent to the natural emotional revulsion one feels towards murderers.

The court, in sentencing Richardson to death, found that he killed Newton in an especially heinous, atrocious, and cruel manner. That was error because the murder was instantaneous, and Newton could not have been aware of her impending death for more than a few seconds before Richardson fired the fatal shot.

Likewise, the murder was not committed in a cold, calculated, and premeditated manner largely because the facts relied upon by the sentencing court do not show the heightened premeditation this court has required for this aggravating factor to apply. Looking at the totality of the evidence available to the court abundantly demonstrated that Richardson was mentally retarded, under the influence of drugs or alcohol, and acting "crazy" on the night of the murder. The manner in which the defendant committed the homicide does not show the heightened premeditation, the deliberate planning this court has required for this aggravating factor to apply.

The court also overlooked the significant mitigation present. In its sentencing order, it never acknowledged that Richardson was mentally retarded or that on the night of the murder he was "most certainly" under the influence of drugs or alcohol. Failing to consider this mitigation, especially when defense counsel specifically urged it was error.

When the last three issues are looked at together, it becomes very evident that this is not a death case. Instead it falls into the "domestic dispute" category which has almost (but not always) mitigated a death sentence.

The court failed to define what the terms "heinous," "atrocious," or cruel meant. Recent United States Supreme Court case law strongly suggests that the language used by this court in State v. Dixon, 283 So.2d 1 (Fla. 1972) to define those terms is inadequate. That the trial court in this court failed to provide even that definition only compounds the court's error.

Finally, relying upon the law in the previous issue, Richardson argues that the court never informed the jury that the premeditation required to find the murder was committed in a cold, calculated, and premeditated manner, had to be a "heightened" type. Merely reading the jury the standard instruction on this aggravating factor, which only tracked the statutory language, insufficiently apprised that body of the important limitation this court has put on applying that aggravating factor.

ARGUMENT

ISSUE I

THE COURT ERRED IN DENYING RICHARDSON'S MOTION TO SUPPRESS STATEMENTS HE HAD MADE TO THE POLICE ON TWO OCCASIONS, IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Richardson, because he had shot himself in the chest, was taken to a hospital in Alabama on New Year's Eve for treatment of his self-inflicted wound (T 260). About two weeks later, on January 12, two police officers went to the hospital where the defendant was recovering, and after reading him his rights, questioned him (T 264-65). The police left, and some time later, Richardson was discharged from the hospital, and he went to live with his sister to complete his recovery (T 280). On January 18, officer Walter Davis of the Jackson County Sheriff's office arrested and handcuffed Richardson at her house (281-83). Before leaving, his sister gave him his medication (T 287-89). On the return trip, Richardson began talking with Officer Davis, who had known the defendant for most of his life (T 280). Mostly, he talked about how he felt about Irene (T 291), and Davis did not say much more than "I know, Tommy." Finally, however, he told him that he was going to have to read him his rights if continued talking to him, which he did (T 292-93). Davis then asked him about the killing, and Richardson told him he had bought a shotgun and used his coat to cover it as he walked from Graceville, a town four miles from where Irene lived (T 294). He also related

that he had hidden the gun at the trailer and had gotten Irene outside on the pretense of talking with her (T 295). He ended his statement by saying how much he loved her and regretted shooting her (T 301).

As to the statement made on January 12, Richardson denied understanding what the police had told him about his rights (T 275-77). At the time they questioned him, he was on pain medication and he could not think clearly (T 273-74). Regarding the January 18 statement, he said he was still feeling "pretty bad." (T 312) When Davis asked him what had happened, Richardson said he did not know anything more than Irene had gotten shot (T 312). He then laid down in the back seat and rested until he got to the jail (T 313).

The court, after hearing Richardson's motions to suppress his statements, simply denied them saying, "Okay. I'm going to deny your motion. I believe it is admissible." "And I will deny this one, too." (T 278, 314) That was error because the court never made the unequivocal and explicit finding of voluntariness this court has required. McDole v. State, 283 So.2d 553 (Fla. 1973). The court also erred in denying Richardson's motions because the State never established by a preponderance of the evidence that the defendant freely confessed. Brewer v. State, 386 So.2d 232 (Fla. 1980).

In McDole, this court, relying upon law from the United States Supreme Court[2], said,

> We do not believe that such `unmistakable clarity' appears simply from the trial judge's statement that the motion to suppress the confessions is denied.

Id. at 554.

Although the court need not say the magical word "voluntary," Antone v. State, 382 So.2d 1205 (Fla. 1980), merely denying the motion without more does not satisfy the need for unmistakable clarity. Moreover, because Richardson was under arrest when he made his last statement, the court had to make a such a finding. DeConingh v. State, 433 So.2d 501, 503 f.n. 3. (Fla. 1983).

In McDole, this court also explained why the law required such a specific, "nit-picking" finding:

> Without a specific finding, we do not know if the judge properly based his ruling of admissibility on the issue of voluntariness, and we cannot infer a specific finding of voluntariness simply from a specific denial of a motion to suppress. The judge might have based his denial of the motion on the idea that any error in admitting the confessions would be harmless, or he might have felt that the primary determination of voluntariness should have been left to the jury.

Id. at 554.

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[2]Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967) held that "Although the judge need not make foral findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity."

In a normal case, the State has a heavy burden to carry when it wants to show that a defendant freely and voluntarily gave a statement to the police. See, Tennell v. State, 348 So.2d 937 (Fla. 2d DCA 1977); Hall v. State, 421 So.2d 571 (Fla. 3rd DCA 1982). In this instance, it was particularly onerous because Richardson presented ample evidence suggesting that he was mentally retarded (R 168). His lack of schooling beyond the sixth grade (T 272) and his inability to read or write even though he was 38 years old (T 273) should have alerted the court that Richardson lacked at least an average mental capacity.[3]

Richardson is not saying the mentally retarded cannot freely and voluntarily confess. But when his mental deficiency was so painfully obvious, as this court can see by reading his garbled statement of January 12 (SR 1-35), the State and the court should have taken extra precautions to ensure that this retarded defendant had voluntarily talked with the police.[4]

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[3]Ellis and Luckason, "Mentally Retarded Criminal Defendants," 53 George Washington Law Review, 414, 449-50. "A number of indicators might provide early warning of a capacity problem. One would be to identify whether the suspect is literate. Another approach is to ask about the suspect's educational background." Id. (footnotes omitted.)

[4]For example, the police, when they interrogate a retarded defendant, could make sure the Miranda warning is "given in a clear and unhurried fashion." Ellis and Luckason, "Mentally Retarded Defendants" p. 450. Richardson's counsel raised the issue of the defendant's competency first by a "Suggestion of Insanity" (R 16) in which he alleged Richardson was not

(Footnote Continued)

Mentally retarded defendants present unusual problems for the police and courts because of their intellectual deficiency. For example, those suffering from this learning disability typically want to please authority figures:

> However, the desire to please authority figures does appear to be a powerful motivator. Many persons with mental retardation, especially those who have experienced institutionalization, have a particular susceptibility to perceived authority figures and will seek the approval of these individuals even when it requires giving an incorrect answer.[5]

Their learning disability manifests itself in other ways, which, to one unaware that a suspect is retarded, may pass unnoticed. Many retarded persons cannot speak well and do not understand what is spoken to them. "Therefore, it would not be unusual for a mentally retarded individual to be . . . able to provide only garbled or confused responses when questioned."[6] In this case, Richardson's January 12 statement readily supports this point (SR 1-35). For example, on page 8, Officer

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(Footnote Continued)
"mentally competent at the time of the alleged crime and is not now mentally competent to stand trial." (R 16) His motion to suppress statements (R 67-68) also raised the voluntariness issue.

[5]Ellis and Luckason, "Mentally Retarded Criminal Defendants," pp. 414, 431-32; See also Mental Subnormalities of Accused as Affecting Voluntariness or Admissibility of Confessions, 4 ALR 4th 16.

[6]Id. at 428

Birge asked Richardson how he had gotten to Newton's trailer on the night of the killing:

> BIRGE: How did you get there that night?
>
> RICHARDSON: Sir?
>
> BIRGE: How did you get down to her place that night?
>
> RICHARDSON: I walked.
>
> BIRGE: Walked from where?
>
> RICHARDSON: Well I ain't never leave you know, cause she had never, I had never took all my clothes from there, she had never told me definitely (sic) you know to get out.
>
> BIRGE: Right.
>
> RICHARDSON: Cause I didn't have where to go.

On subsequent pages, Richardson's narrative wanders, and it is unclear whether he is talking about the events on the night of the killing or some earlier time (SR 13-16). The temptation is just to skip reading the statement because its disjointed meanderings are confusing and difficult to follow. Yet, such garble clearly indicates a feeble mind unused to mental demands attempting to answer questions beyond its capabilities.

This brick layer also had "never been in nothing like this in [his] life," (T 276) and that unfamiliarity with the criminal justice system as well perhaps as the basic facts of

society must have some weight in evaluating the totality of the circumstances surrounding the voluntariness of his statement.[7]

Other evidence also suggests that Richardson did not voluntarily confess while in the hospital. When the police questioned the defendant, he had just been taken out of the intensive care unit at the hospital (T 271). He was in pain, though he had just been given some medication, and he could not think clearly (T 274). As he told the policemen at the start of their interrogation, he felt "pretty bad now." (SR 2)

The statement made after his arrest fares no better. He was still in a lot of pain and on medication when the police arrested him and returned him to Florida (T 308, 312). The pain apparently was so bad that he had laid down on the back seat of the car on the trip (T 313).

In DeConingh v. State, 433 So.2d 501 (Fla. 1983), the defendant was hospitalized shortly after she had killed her husband. She was admitted for having "lost touch with herself" and her attending physician had treated her with thorazine and valium. A friend, who also happened to be a police officer, tried to get a statement from her then, but her lawyer told him to leave, which he did. Two days later he returned, and over her attorney's advice she told the officer what had occurred.

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[7]Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); Ellis and Luckason, Mentally Retarded Defendants, p. 431, 450.

This court affirmed the trial court's suppression of the statement because the officer had taken advantage of his friendship with DeConingh, she was incapacitated because she had been drugged, and the officer failed to make sure she understood her rights. Id. at 503. In this case, particularly as to the January 18 statement, we have a similar situation.

Officer Davis had known Richardson for most of his life (T 280), and when questioned, the defendant was in pain and feeling the effects of his medication. Also, in light of Richardson's mental retardation, Davis as well as the other officers should have taken greater care to insure Richardson understood his rights. But there was no evidence that any policeman made any special effort to insure the defendant actually understood anything.

The State, in short, presented nothing to rebut Richardson's claim that when the police questioned him that he was under the influence of his pain medication. And when that evidence is coupled with his mental retardation and all that necessarily means, the court erred in not making a specific finding that Richardson freely and voluntarily gave the statements to the police officers. More significantly, the court also erred in denying the motion because the State never carried its heavy burden of showing by a preponderance of the evidence that Richardson freely, intelligently and voluntarily agreed to talk with the police.

Of course, to merit a reversal such error must have been harmful, and how could it have been so when so many people watched Richardson shoot Newton? As to that fact, there is no dispute, but as to the defendant's intent, there is plenty, and his statements clearly had important relevance there. For example, he told one officer that he had bought the shotgun that killed Irene in Campellton and had walked from the state line to the trailer with it under his coat (T 596). Such evidence could have supported a conclusion that he had thought about killing Irene for a long time. The court, in fact, used this part of Richardson's statement to justify finding the aggravating factor that murder cold, calculated, and premeditated (R 174). Thus, if the court recognized the importance of Richardson's confession to prove his premeditation, it cannot be said beyond a reasonable doubt that the jury would have ignored it in finding him guilty of premeditated murder.

The harmfulness of admitting these statement becomes more compelling in the penalty phase of the trial as just pointed out. Thus, the court's error in summarily denying Richardson's motion to suppress without making an express finding of voluntariness was error. It was also error to deny the motions to suppress because there was an abundance of evidence that Richardson lacked the mental capacity to make a voluntary statement. Finally, these errors cannot be harmless in either the guilt or penalty phases of the trial. This court should,

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

ISSUE II

THE COURT ERRED IN DENYING RICHARDSON'S MOTION FOR A CONTINUANCE BECAUSE THE STATE'S FIREARM EXPERT'S REPORT WAS NOT RELEASED UNTIL THE WEEK BEFORE TRIAL WAS SCHEDULED TO START, A VIOLATION OF THE DEFENDANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL AND SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Before trial, Richardson had asked the court to appoint an expert witness on his behalf and to delay the start of the trial so the expert could have time to examine the two shotgun shells found at the scene of the murder. The State had had those shells since the night of the murder and had turned them over to the firearms expert at the Florida Department of Law Enforcement to examine (T 327-28). Five weeks before trial (in September), the State subpoenaed the expert and learned that he had not examined the shells but he "was going to get right on it." (T 329) He had not done so a week or so before trial, but a few days later, the prosecutor got a verbal report from this anticipated witness (T 329). The prosecutor immediately called Richardson's counsel and told him of the report, and as a result he filed his motion for appointment of an expert and to continue the trial (T 329).

The gist of the expert's testimony would be that the two examined shells had come from the shotgun found at the murder scene. Originally, he had not been able to say that, at least as to one of the shells, but upon further examination he modified that opinion (329-30).

The State argued against delaying the trial because Richardson had known about the shells for eight or nine months, and there was no prejudice since it had four eye witnesses to say what had happened (T 330). Richardson argued in response that the expert initially had not been able to tell whether a rusty shell found at the scene had come from the murder weapon, and there was an "indication in the area there was at least another 12 gauge shotgun." (T 331) The court denied the motions believing "we can go ahead without too much damage to you." (T 332) That was error.

Richardson recognizes, of course, that the trial court has discretion in whether or not to grant or deny a motion for continuance and whether to appoint an expert to assist defense counsel. Valle v. State, 394 So.2d 1004 (Fla. 1981); Williams v. State, 438 So.2d 781 (Fla. 1983); Martin v. State, 455 So.2d 455 (Fla. 1984). A court abuses that discretion, however, when a defendant's right to a fair trial and assistance of counsel are violated by denying those requests. Thus, a reviewing court looks to the procedural prejudice a defendant has suffered rather than any substantive harm he may have suffered by the court's ruling.

In Smith v. State, 525 So.2d 477 (Fla. 1st DCA 1988) Smith's defense counsel did not get actual notice of the State's disclosure of an additional witness until the day before the scheduled sentencing hearing. This witness provided new and damaging information regarding the sexual battery and

lewd conduct charges filed against Smith, and the trial court's reasons for departing from the recommended sentenced tracked language found in her report. Given the short time Smith had actual notice of the State's intent to use this expert and the harmfulness of her anticipated testimony, the court erred in not granting Smith's request to continue the sentencing hearing. Thus, the defendant in that case could point to some definite harm he would suffer by the court's refusal to postpone the hearing.

On the other hand, if the defendant's need for further investigation is speculative, the court does not abuse its discretion by denying a defense request for delay. Woods v. State, 490 So.2d 24 (Fla. 1986). In that case, counsel for Woods wanted more time to determine Woods' involvement in a prison gang which may have coerced him into killing a guard. A prison investigation, however, had never linked Woods with that group, and thus the basis for that request for a continuance was based on "nothing more than conjecture and speculation." Id. at 26.

Thus, courts should liberally grant defense requests for more time when the State has deliberately or inadvertently given counsel new evidence shortly before trial. Robert Smith v. State, Case No. 90-929, 90-1397 (Fla. 3rd DCA April 9, 1991) 16 FLW D965). It need not be so free when the purported need for more time has only a speculative basis.

In this case, the State disclosed the crucial evidence regarding the firearm used and the shells fired only a few days before trial. Richardson does not claim the State deliberately delayed disclosing this evidence, and to the contrary, it appeared that the State promptly gave defense counsel whatever information it had as soon as it got it (T 329-31). Nevertheless, Richardson's lawyer had only a few days to check out the validity of the report, and some of that time apparently would have been during the weekend before trial (T 328). The firearm expert's testimony became crucial because he originally could not say that one of the shotgun shells found at the scene came from Richardson's gun, and there was some evidence of second shot gun in the vicinity of where the murder occurred (SR 16). Only upon the prosecutor's further prompting did he conduct more tests to eliminate the possibility that the shell came from any other gun than the one the defendant used (T 330).

In Songer v. State, 419 So.2d 1044 (Fla. 1982), this court held that the trial court had not erred in denying the defendant's request for a thirty day continuance so it could gather find an expert to testify about demographics and the effects of extended drug use. Counsel had had six months to find its expert to support his theories of defense, and he was vague about who he needed and why.

In this case, Richardson at most had only a few days notice of what the firearms expert would say, and his request

for a continuance and appointment of an expert, specifically named, was to refute State evidence. The defendant also specifically identified why he needed more time and an expert (T 327-28). That is, he needed the time so his expert could examine the shells to determine if they came from the same gun, as the State's witness now claimed.

The court therefore erred in not delaying the start of Richardson's trial so a court appointed firearms expert could independently examine the shotgun and shells found at the murder scene. By doing so, the court denied Richardson his right to the effective assistance of counsel. Smith v. State, 525 So.2d 477 (Fla. 1st DCA 1988).

ISSUE III

THE COURT ERRED IN ALLOWING THE STATE TO SAY, AT THE CONCLUSION OF ITS CLOSING ARGUMENT THAT THE JURY SHOULD SHOW RICHARDSON THE SAME MERCY HE SHOWED NEWTON, WHICH WAS INTENDED TO ELICIT SYMPATHY FOR HER, IN VIOLATION OF THE DEFENDANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

Immediately before concluding its closing argument, the state said:

> Mr. Griffith says, `Well, I submit to you that he committed second degree murder, find my man guilty of second degree murder.' What he's asking for is mercy. He's wanting ya'll to give his man a pardon for first degree murder. He wants y'all to give him some mercy. I will tell you what you give him, the same mercy that he gave Irene Newton that night. Did he give her mercy or did he shoot her down in cold blood? He shot her down and he's guilty of first degree premeditated murder and I ask that you come back guilty as charged.

(T 700).

Immediately after, Defense counsel stood up and denied ever asking for mercy. The court should have agreed, and it should have told the jury that appeals to mercy had no relevance to their decision of whether Richardson was guilty of first degree murder. That it did not do so was error.

The law concerning what constitutes proper closing argument is simple, and its application straight forward. The purpose of closing argument is to assist the jury in analyzing and applying the evidence presented at trial. United States v. Door, 636 F.2d 117, 120 (5th Cir. 1981). The prosecutor, therefore, commits error when, during its closing argument, it

elicits the jury's sympathy for the victim's family. Johnson v. State, 442 So.2d 185 (Fla. 1983). (The victim's family will be facing the holiday season one short.); Harper v. State, 411 So.2d 235 (Fla. 3rd DCA 1982) (The defendant is sorry and so are the victim's wife and three children. They are sorry too.)

Several times courts of this state have reversed convictions because of the emotional pleas prosecutors have made during closing argument. Lucas v. State, 335 So.2d 566 (Fla. 1st DCA 1976) (Think how you ladies would feel if that [sexual battery] happened to you.); Perdomo v. State, 439 So.2d 314 (Fla 3rd DCA 1983) (send a message to robbers); Gomez v. State, 415 So.2d 822 (Fla. 3rd DCA 1982) (Don't let the victim with three children and a wife walk away without justice in this case.) Directly on point, this court in Rhodes v. State, disapproved of the same plea the State in this case made:

> Finally, the prosecutor concluded his argument by urging the jury to show Rhodes the same mercy shown to the victim on the day of her death. This argument was an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation.

Id. at 1206.

Murders inherently evoke the strongest feelings of sympathy for the usually innocent victims and their families. There is nothing wrong with this, and it is only natural that we sympathize with the grief of the family who has lost a member by a senseless, violent killing. The law recognizes these natural feelings, but it tries to minimize their impact

on the jury. For example, unless absolutely necessary, a relative of the victim should not testify at a murder trial to identify the murdered relative. Justus v. State, 438 So.2d 358 (Fla. 1983) ("The rule is designed to avoid the potential of prejudice due to jurors' sympathy for the victim's family.")

In this case, the prosecutor made his plea at the end of his closing argument, which is typically the time for the greatest emotional appeal. In this case, the jury must have looked at Richardson and asked itself, "Yes. Why should we be lenient with you? You killed this mother in front of her children. Regardless of Richardson's drug and alcohol use, his crazy appearance, and his heavy emotional strain, he is guilty of first degree murder because he showed no mercy towards Irene Newton Irene." Planting or encouraging such thoughts was plain error, and the evidence, while clear Richardson killed Newton, was not so evident that he did so with a premeditated mind, to make the prosecutor's comment harmless beyond all reasonable doubt. State v. DiGuillio, 491 So.2d 1129 (Fla. 1986). This court should reverse for a new trial.

ISSUE IV

THE COURT ERRED IN FINDING THAT RICHARDSON KILLED IRENE NEWTON IN AN ESPECIALLY HEINOUS ATROCIOUS, AND CRUEL MANNER.

In sentencing Richardson to death, the court found that Richardson had committed this murder in an especially heinous, atrocious, and cruel manner. Supporting that finding the court said:

> The defendant shot the victim, Irene Newton, with a 12-gauge automatic shotgun, the most powerful in common use. He shot Ms. Newton from a distance of seven feet or less. Her heart was still beating for minutes after the shooting. Ms. Newton had no chance to escape or flee once the defendant leveled the shotgun in her direction. Ms. Newton was shot on her own premises in front of three of her own children, who were within ten feet of her at the time of the murder, where her other children huddled terrified inside the house.

(T 173).

As this court has said many times, 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. 1972). 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); Tefftellers v. State, 439 So.2d 840 (Fla. 1983).

This murder was not especially heinous, atrocious, or cruel, and this court's decision in Tefftellers controls the

resolution of this issue. In that case, Teffteller pulled his car beside a jogger and shot him once in the chest with a shotgun. The victim lingered several hours in obvious agony before he died. In sentencing the defendant to death, the trial court said the murder was especially heinous, atrocious, and cruel. This court, however, rejected that finding:

> The criminal act that ultimately cause death was a single sudden shot from a shotgun. The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies.

Id. at 846.

That holding controls this case. Shooting Irene Newton certainly was a heinous act, but it was no more so than what Teffteller did. Even shooting her while her children looked on does not make this aggravating factor applicable. In Riley v. State, 366 So.2d 19 (Fla. 1979), a father's murder was not especially heinous, atrocious, and cruel because the son watched it. See, Clark v. State, 443 So.2d 973 (Fla. 1984). In Garron v. State, 528 So.2d 353 (Fla. 1988), Garron killed his wife and one step-daughter as she tried to call for help, and he may have tried to kill another step-daughter as she fled. This court rejected the trial court's conclusion that the murder of the mother was especially heinous, atrocious, and cruel. If that aggravating factor was inapplicable in Riley and Garron, it should be inapplicable in this case.

Nor does killing Newton in or near her house justify finding this aggravating factor. Garron, supra.

The court, therefore, erred in finding this murder to have committed in an especially heinous, atrocious, and cruel manner.

ISSUE V

THE COURT ERRED IN FINDING THAT RICHARDSON COMMITTED THIS MURDER IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

In sentencing Richardson to death the court found in aggravation that he had committed the murder of Irene Newton in a cold, calculated, and premeditated manner without any moral or legal justification. In justifying this finding, the court said:

> 1. Richardson was infuriated because Newton had kicked him out of her trailer because of his lack of financial support and continued drug use.
>
> 2. For several days before the murder he terrorized Newton and her family, and he made repeated threats to kill her unless she let him move back in.
>
> 3. Richardson obtained a shotgun and carried it the four miles to the trailer.
>
> 4. The defendant hid the gun at the end of the mobile home.
>
> 5. He then banged on the front door and convinced Newton to come outside and talk with him alone.
>
> 6. As Newton approached Richardson, he backed towards the shotgun.
>
> 7. Once he got to the gun, he grabbed it and shot her.

(R 174-75).

While these facts may show some premeditation, other evidence raises a reasonable doubt about whether Richardson had sufficiently formulated a plan to kill Newton to make this murder one done in a cold, calculated, and premeditated manner.

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 1256 (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 this aggravating factor 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).

In this case, the court took a very selective reading of the evidence produced at trial to support its finding regarding this aggravating factor. If it had considered the totality of the circumstances it may have reached a different result because what they show is a mentally retarded defendant acting upon a poorly thought-out plan of how to win back what he had lost.

Of primary significance to refuting the court's finding of this aggravating factor is Richardson's mental retardation (T 764). At the sentencing hearing the court accepted evidence that the defendant had been diagnosed as being "mildly mentally retarded." (R 168) In particular, his "judgment is poor" and his "insight is lacking." (R 168) Such descriptions typify the

mentally retarded because as a class they uniformly manifest their learning disorder in the following ways:

> 1. They have poor communication skills and a short memory.
>
> 2. They are impulsive and have short attention spans.
>
> 3. They tend to have immature or incomplete concepts of blameworthiness and causation.
>
> 4. They tend to lack motivation to solve their problems.[8]

Evidence developed at the sentencing phase of the trial supported the analysis of Richardson's low intellectual ability. He quit school when he was in the sixth grade, ostensibly to work, but it is evident he had learned little because he cannot read or write (T 730). When he killed Newton he was 38 years old and worked as a self-employed brick layer. His last job was "Putting blocks around a lady's house," but he could not "recall her name now." (T 732-33) Further depressing this already low mental capacity was the forensic psychiatrist's conclusion that Richardson "was almost certainly under the influence of alcohol, cocaine, or both" and looked "crazy" and acted "upset" when he killed Irene Newton (R 169, T 509).

What he did after the murder also shows Richardson had no well thought out plan. Although he may have gone to Newton's

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[8]Ellis and Luckason, "Mentally Retarded Criminal Defendants," 53 George Washington Law Review, 414, 428-32.

trailer at night, he certainly did not do so when only she was at home. To the contrary, on this particular night not only was she home, but all of her children and a nephew had crowded into the trailer (T 492-93). Moreover, had he come over much later, he more than likely would not have found her at home because she intended to go to a party (T 517).

Richardson also did not shoot Newton in some remote part of the county, nor had he prevented her from calling for help. Occhicone v. State, 570 So.2d 902 (Fla. 1990). Instead, she was shot outside her trailer, and when she came outside she would not have had to call very loudly because several of her children followed her or went to a neighbor's house to call the police (T 500, 520).

After he shot her, he just stood over the body for what must have been several minutes (T 522, 538-39). Rather than fleeing, he shot himself (T 599), and when the hospital in Alabama inadvertently released him without telling the police, he went to his sister's house where he stayed until the police came to arrest him (T 283-88).

The murder, in short, was the product of a deficient mind running out of control over the loss of his girlfriend. This court, however, has said that murders committed under the sway of unchecked emotions were not the type suitable for finding as having been committed in a cold, calculated and premeditated manner. Thompson v. State, 565 So.2d 1311 (Fla. 1990). In Thompson, the defendant and his wife had separated, and he had

moved in with his girlfriend. They apparently wee 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 had committed 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 had had time to plan a murder, more evidence was needed to show that he did so with a heightened intent to justify a finding that he had committed this homicide in a cold, calculated, and premeditated manner.

This court should reverse the trial court's sentence and remand for resentencing.

ISSUE VI

THE COURT ERRED IN IGNORING, IN ITS SENTENCING ORDER, THE WEALTH OF MITIGATING EVIDENCE RICHARDSON PRESENTED, IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

In sentencing Richardson to death the court found in mitigation Richardson's lack of criminal record, his being under the influence of an extreme mental or emotional disturbance, and his remorse (R 175-76). The court, however, ignored the other mitigation Richardson presented, and by doing so, it committed reversible error.

This Court's recent opinion in Campbell v. State, 571 So.2d 4152 (Fla. 1990) controls this issue. In that case, this court established guidelines to clarify how trial courts are to treat mitigation.

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating circumstance each proposed factor that has been reasonably established by the evidence, and is mitigating in nature . . . The court next must weigh the aggravating circumstances against the mitigating factor and, in order to facilitate appellate review, must expressly consider in its written order each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be support by `sufficient competent evidence in the record.'

Id. at 419-20 (Cites and footnotes omitted). Thus, the court must consider in writing every mitigating factor Richardson established, and if he had presented evidence to support a finding of certain mitigation the court should have found it. In this case, there was sufficient evidence to justify a life sentence.

1. Richardson's mental retardation (R 168). Such a learning disability can mitigate a death sentence, see, Penry v. Lynaugh, ___ U.S. ___, ___ S.Ct. ___, 106 L.Ed.2d 256 (1989). Also, at least three members of this court believe the state cannot constitutionally execute persons afflicted with this disability. Woods v. State, 531 So.2d 79 (Fla. 1988).

2. Richardson's alcohol and drug use can mitigate a death sentence (R 168). Campbell, supra, C.f. Kokal v. State, 492 So.2d 1317 (Fla. 1986).

3. The combination of low IQ, drugs, and alcohol blurred whatever thinking ability he had and removed his normal inhibitions on the night of the murder so that he could not control his behavior.

Campbell, besides controlling this case legally, has some compelling factual similarities. In that case, as here, the defendant had presented evidence of his low IQ (in the retarded range), his poor academic skills (he could read on a third grade level), his chronic drug and alcohol abuse, and his abusive childhood. The trial court apparently made no mention of this mitigation in its sentencing order, and that omission

prompted this court to reverse for a new sentencing hearing before the trial judge. The trial court in this case, like the one in Campbell, ignored the abundance of mitigating evidence presented. This court, as it did in Campbell, should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE VII

THE COURT ERRED IN SENTENCING RICHARDSON TO DEATH BECAUSE SUCH A SENTENCE IS NOT PROPORTIONALLY 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). In this case, the comparable cases involve killings that arise out of domestic disputes. When compared with those cases, the murder Richardson committed becomes one of the least aggravated and most mitigated this court has considered. It is not a death case. Porter v. State, 564 So.2d 1060 (Fla. 1990) (Barkett, concurring in part and dissenting in part, and cases cited therein.)

Typically, when this court has reduced death sentences of defendant's who have killed their wives, girlfriends, or lovers, the method of killing has been irrelevant. Amoros v. State, 531 So.2d 1256, 1261 (Fla. 1988) (Shooting); Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985), Blakely v. State, 561 So.2d 560 (Fla. 1990) (Bludgeoning). Likewise murders resulting from a "heated domestic confrontation" have not been death worthy. Garron v. State, 528 So.2d 353, 361 (Fla. 1988). Even the number of aggravating factors legitimately found by the trial court and a death recommendation by the jury has not prevented this court from reducing a death sentence. Blakely, supra. Domestic violence cases, however, involving defendants who have convictions for prior violent crimes do not benefit from this proportionality review. Lemon v. State, 456 So.2d 885 (Fla. 1984) (prior conviction for assault with intent to commit murder.); King v. State, 436 So.2d 50 (Fla. 1983) (prior conviction for axe murder of woman.) Several cases in which this court reversed a trial court imposition of a death sentence illuminate this area of the law.

In Irizzary v. State, 496 So.2d 824, 825 (Fla. 1986) Irizzary brooded over the recent split up with his former wife. Two weeks after he learned that she had taken a new lover, he killed her with a machete and tried to kill her boyfriend. This court, rejecting the trial court's override of the jury's life recommendation, reduced his sentence to life in prison.

Likewise, in Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985), the court reduced Ross' sentence because he had bludgeoned his wife to death. Ross had been drinking and had a hard time controlling his emotions. He also had not reflected long about killing his wife.

In Blair v. State, 406 So.2d 1103 (Fla. 1981), Blair planned to murder his wife, and he had gone so far as to dig her grave before killing her and sending their three children away from the house while he killed her. The apparent motive for the killing was a threat his wife had made that she was going to call the police because Blair may have sexually molested their daughter. Even though the jury recommended death, this court reduced that sentence to life in prison.

In Kampff v. State, 371 So.2d 1007 (Fla. 1979), the defendant and his wife had been divorced for three years. During that time, Kampff repeatedly harassed his wife, trying to convince her to remarry him or making veiled threats on her life. He also was a chronic alcoholic. On the day of the murder, he followed her to where she worked and shot her twice. This court held that Kampff did not deserve to die because there was no evidence he had planned to kill her for three years, the killing was quick, and it was the result of Kampff's obsession with his former wife.

Finally, although there are more cases that could be cited,[9] in Penn v. State, 574 So.2d 1079 (Fla. 1991) Penn bludgeoned his mother to death while she slept. This court reduced his subsequent death sentence in part because of his heavy drug use, but also in part because his wife had told him that as long as his mother lived, they could not be reconciled.

This case compares favorably with the cited cases. First, the court found two statutory and one non-statutory mitigating factors: Richardson had no significant history of prior criminal activity, he was under the influence of an extreme mental or emotional disturbance, and his suicide attempt immediately after the murder demonstrated his remorse for what he had just done (R 175-76). Other mitigation also exists. At the sentencing, Richardson's counsel said his client had been evaluated as being mentally retarded (R 764), and further depressing this already low mental capacity was the forensic psychiatrist's conclusion that Richardson "was almost certainly under the influence of alcohol, cocaine, or both" when he killed Irene (R 169). Newton's children confirmed this, and they said he looked "crazy" and acted "upset" when he came to their trailer on New Year's Eve (T 509).

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[9]See, Justice Barkett's concurring and dissenting opinion in Porter v. State, 564 So.2d 1060, 1063 (Fla. 1990) for an excellent summary of the case law on this area of the law.

As to the murder itself, it was a "simple" one which was the result of Richardson's inability to accept Irene's throwing him out of their trailer. During the week after she had tossed him out, he returned several times trying to convince her to take him back. Finally, on New Year's Eve he returned and saw her dressed up and about to go out for the evening. When she refused to talk with him, he produced the knife and for reasons unknown, she followed him out of the trailer as he backed up. The subsequent murder was quickly completed, and as he stood over her body, he tried to kill himself.

Like the evidence in Kampff, there is no indication Richardson brooded for a long time about killing Irene. True, he carried the shotgun to the trailer and laid it next to the house, but there is no evidence he planned to use it once he saw Irene or that he derived any pleasure from killing her. To the contrary, he tried to kill himself when he realized what he had done. Richardson's slow mind could not accept the loss of Irene, as is evidence by his persistent but futile efforts to convince her to take him back.

In short, the murder in this case is not one of the most aggravated and least mitigated this court has considered. To the contrary, it has few compelling aggravating facts and an abundance of mitigation so that this court can only conclude that a death sentence is not warranted. This court should reverse the trial court's sentence and remand for the

imposition of a sentence of life in prison without the possibility of parole for twenty-five years.

ISSUE VIII

THE TRIAL COURT ERRED IN GIVING PENALTY PHASE JURY INSTRUCTIONS WHICH FAILED TO ADEQUATELY ADVISE THE JURY AS TO THE LIMITATIONS AND FINDINGS NECESSARY TO SATISFY THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.

The court's error arose from the inadequate jury instruction it gave on the heinous, atrocious or cruel aggravating circumstance. The trial court used the standard penalty phase jury instructions and instructed on the aggravating circumstances provided for in Section 921.141(5)(h) Florida Statutes as follows:

> The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, or cruel.

(R 2181). The court, moreover, never defined the terms "heinous," "atrocious" and "cruel," or in any way explained what those words meant. State v. Dixon, 283 So.2d 1, 9 (Fla. 1972). Such a bare instruction inadequately guided the jury in deciding what sentence to recommend. The instruction given was unconstitutionally vague because it failed to inform the jury of the findings necessary to support the aggravating circumstance and a sentence of death. Amends. VIII, XIV U.S. Const.; Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Shell v. Mississippi, 498 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 1 (1990).

In Maynard, the Supreme Court held that Oklahoma's "especially, heinous, atrocious or cruel" aggravating circumstance was unconstitutionally vague under the Eighth

Amendment. The Court concluded that language of the circumstance failed to apprise the jury of the findings it must make to impose a death sentence. The jury was left with unchannelled discretion in reaching its sentencing decision. Relying on Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 998 (1980), the Court affirmed the decision of the Tenth Circuit Court of Appeals invalidating the death sentence.

> We think the Court of Appeals was quite right in holding that Godfrey controls this case. First, the language of the Oklahoma aggravating circumstance at issue -- "especially heinous, atrocious, or cruel" -- gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in Godfrey. The State's contention that the addition of the word "especially" somehow guides the jury's discretion, even if the term "heinous," does not, is untenable. To say that something is "especially heinous" merely suggests that the jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous." Godfrey, supra, at 428-429, 64 L.Ed.2d 398, 100 S. Ct. 1759. Likewise in Godfrey the addition of "outrageously or wantonly" to the term "vile" did not limit the overbreadth of the aggravating factor.

100 L.Ed.2d at 382.

Florida's "especially heinous, atrocious or cruel" aggravating circumstance is identical to Oklahoma's and suffers the same fatal flaw. Although this Court has attempted to narrow the class of cases to which the factor applies, e.g., Brown v. State, 526 So.2d 903, 906-907 (Fla. 1988); State v.

Dixon, 283 So.2d at 9, the jury was not adequately instructed on the limitations imposed via this Court's opinions. The instructions, as given, could have led the jurors to "believe that every unjustified, intentional taking of human life is `especially heinous'." Maynard, 100 L.Ed.2d at 382. Richardson's jury was left with no guidance and it had an unchannelled discretion to determine the applicability of the aggravating circumstance.

In Shell v. Mississippi, the state court instructed the jury on Mississippi's heinous, atrocious or cruel aggravating circumstance using precisely the same wording as the trial judge used in this case. The Mississippi court told the jury the definitions of "heinous," "atrocious" and "cruel," which the trial judge never told Richardson's jury. 112 L.Ed.2d at 4, Marshall, J., concurring. Despite this further clarification, the Supreme Court remanded to the trial court stating, "Although the trial court in this case used a limiting instruction to define the `especially heinous, atrocious, or cruel' factor, that instruction is not constitutionally sufficient." 112 L.Ed.2d at 4. Since the court in this case did not even give the definitions employed similar to the ones used in Shell, the instructions to Richardson's jury were especially constitutionally inadequate.

Proper jury instructions were critical in the penalty phase of Richardson's trial. The defendant was entitled to have a jury's recommendation based upon proper guidance from

the court concerning the applicability of the aggravating circumstances. The deficient instructions deprived him of his rights as guaranteed by the Eighth and Fourteenth Amendments. This Court must reverse his death sentence.

ISSUE IX

THE TRIAL COURT ERRED IN GIVING PENALTY PHASE JURY INSTRUCTIONS WHICH FAILED TO ADEQUATELY ADVISE THE JURY AS TO THE LIMITATIONS AND FINDINGS NECESSARY TO SATISFY THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR.

Like the trial court had done for the heinous, atrocious, and cruel aggravating factor, it did similarly for the cold, calculated, and premeditated aggravating factor. All it did was read the standard jury instruction which merely tracked the language of section 921.141(5)(i) Fla. Stat (1989):

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R 134).

The court erred when it simply read that instruction without defining what "cold," "calculated," and "premeditated" meant in the context of this aggravating factor.

The need for an additional instruction is particularly important in this instance because the jury could very well have concluded that the premeditation necessary to find the murder cold, calculated, and premeditated was only the intent needed to be guilty of first degree murder. This court, however, has rejected that approach; instead it has required a "heightened premeditation" to distinguish this aggravating

circumstance from the premeditation element of the first-degree murder." Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990)[10]

Similarly, this court has defined the calculation necessary to justify applying this aggravating factor as consisting "of a careful plan or prearranged design." Rogers v. State, 511 So.2d 526 (Fla. 1987). The court did not give the jury a limiting instruction on the definition of "calculated" and it could have reasonably believed that every first-degree murder was calculated, just as it was "cold." Maynard at 364.

Hence, the jury in this case was left to fashion its own definitions applicable to this aggravating instruction, which was impermissible.

This court should reverse the trial court's sentence and remand for a new sentencing hearing.

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[10]In light of the Supreme Court's opinion in Maynard v. Cartwright, it is doubtful that merely telling the jury that Richardson needed to have a "heightened premeditation" would have been sufficient. Id. at 364.

CONCLUSION

Based upon the arguments presented here, Tommy Richardson respectfully asks this honorable court to either reverse the trial court's judgment and sentence and remand for a new trial, or reverse the trial court's sentence and remand for imposition of a sentence of life in prison without the possibility of parole for twenty-five years or for a new sentencing hearing before a jury.

Respectfully submitted,

NANCY A. DANIELS
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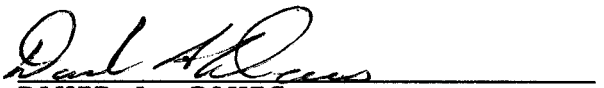
SECOND JUDICIAL CIRCUIT



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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, TOMMY RICHARDSON, #121201, Florida State Prison, Post Office Box 747, Starke, Florida 32901, on this 9th day of August, 1991.

DAVID A. DAVIS