IN THE SUPREME COURT OF FLORIDA

CARLOS SANTOS, :

Appellant, :

vs. : Case No. 79,860

STATE OF FLORIDA, :

Appellee. :

_____ :

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Appellant, CARLOS SANTOS, was the defendant in the trial court and will be referred to in this brief as Appellant or by name. Appellee, the State of Florida, was the prosecution and will be referred to as the State. The original record on appeal (case no. 74,467), which includes the trial transcript will be referred to by use of the symbol "OR". The present record on appeal on resentencing will be referred to by use of the symbol "SR".

STATEMENT OF THE CASE

Carlos Santos was charged by Indictment on September 10, 1987, with the first degree murders of Irma Torres, Diedre Torres, and the attempted murder of Jose Torres (R2-4). The case went to trial for the first time on September 12, 1988, before Circuit Judge J. Dale Durrance (R71-72). Appellant decompensated in the early stages of trial, was examined by mental health experts, and was ultimately declared incompetent to proceed to trial (OR72-84).

Appellant was subsequently found competent to proceed and a second trial commenced on June 5-9, 1989, before Judge Durrance and a jury (OR95-1029). Appellant was found guilty as charged on Counts I and II and guilty of aggravated assault on Count III (OR1019-20,1187-89). The case proceeded to penalty phase on June 12, 1989 (OR1032-1172), after which the jury returned a recommendation of death by a vote of 10 to 2 (OR1190).

On July 18, 1989, the trial judge imposed a sentence of death as to each murder conviction (OR1195-1203).[1]

The trial judge found three aggravators present, no statutory mitigators, and was unclear as to other mitigation (OR1195-99). A written order was filed that same day (OR1204-07).

On September 26, 1992, this Court affirmed Appellant's conviction, but ordered that he be resentenced (SR4-23). See Santos v. State, 591 So. 2d 160 (Fla. 1991). The opinion of this court struck as aggravating factors that the crimes were cold, calculat-

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[1] A sentence of fifteen years consecutive to Count II was imposed for the aggravated assault conviction.

ed, and premeditated; and heinous, atrocious, or cruel (SR9-12). This Court's opinion further held that evidence of two statutory mitigating factors were present, as well as evidence of a valid, nonstatutory mitigating factor (SR13). The case was remanded for a new sentencing hearing (SR15).

Appellant was resentenced by Circuit Judge Durrance on April 1, 1992 (SR24-48). The court reimposed the death penalty for Count I and II (SR34-60). This appeal follows (SR63-64).

STATEMENT OF THE FACTS

I. Trial Testimony

The evidence presented at Appellant's trial is summarized in this Court's opinion in Santos v. State, 591 So.2d 160 (Fla. 1991).[2] To briefly recapitulate, the evidence showed that Mr. Santos and Irma Torres had lived together without marrying for at least eight years (OR385,676-77,779-80). Initially, Appellant and Irma lived in New Jersey with Irma's two children, Jose Torres and Cynthia Torres (OR381-83). Appellant and Irma had one child together, Deidre Torres (OR381,675) Deidre was twenty-two months old at the time of the crimes (OR381). Much of Irma's extended family was living in New Jersey until the early 1980's when they moved to Winter Haven, Florida (OR383-84). In 1986 Irma and her children moved to Winter Haven, living on 16th Street (OR384,656-57). Several months later, Appellant also moved to Florida and moved in with Irma at her urging (OR384, 416,656-57).

Appellant and Irma had a somewhat stormy relationship. In New Jersey, Appellant had struck Irma once with a telephone (OR387, 416,679,682-83). They argued a lot (OR385,407,649-50,682-83,698-99,702-03,783-84).

Ultimately, Appellant moved out of Irma's home and returned to New Jersey. Irma moved in with her sister (OR424-25). Irma continued to call Appellant in New Jersey, asking him to return.

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[2] Record references to the original trial transcript will be used only with respect to those facts not specifically set forth in the opinion.

A month or so later he did return to Florida, although he did not move in with Irma (OR677). Appellant would visit frequently while the family was staying with the aunt (OR424-25). About one month before the murders, Irma and the children moved to The Landings apartments in Winter Haven (OR650,662,678,782). After Irma moved into the Landings, Appellant would come over almost every day (OR684). Irma would leave notes on the apartment door about Deidre and job offers for Appellant (OR710).

A great bone of contention between Irma and Santos was Irma's refusal to give Deidre his last name (OR389,668-69).

Several days before her death, Irma met Appellant at a park (OR651). She came with Deidre and her brother's girlfriend, Geraldine Owens (OR651). Carlos wanted to move back in with Irma (OR651).

Two days before the murder, on Wednesday, August 19, Appellant went to Irma's apartment to see Deidre (OR408,686). He and Irma fought (OR389,686). Cynthia Torres testified that Carlos threatened to kill Irma and take Deidre if she left (OR713). Jose Torres recalled Carlos threatening to kill Irma and Deidre (OR410-12,386-87). Cynthia Torres and Jose Torres stated they observed what they believed was the butt of a gun in Appellant's purse (OR387-88,413-14,687). Irma called the police (OR726-27).

Officer Charles Buckner responded to Irma's call. Irma believed Mr. Santos was suicidal (OR718,720). Mr. Santos told Irma he would come back and kill himself (OR718). Irma wasn't nervous or shaky, but seemed concerned for Mr. Santos according to

Buckner (OR719). She was also concerned he might return with the gun and feared that he would do something to her (OR723). The family stayed at the Landings apartment that night.

On Thursday, August 20, 1993, Deputy Lisa Albury was dispatched to the apartment and came upon Carlos walking along Recker Highway next to the Landings (OR728). Albury performed a search of Appellant and his pouch, but found no weapons (OR729). While Albury was speaking to Appellant, Irma and her father pulled up (OR729,733). Irma and Carlos began arguing (OR729-30). Albury testified the argument was concerning Deidre and her name (OR730, 732). Officer Albury then barred Appellant from the Landings (OR731).

That evening, Irma and the children went to her mother, Gloria Hernandez' house (OR689,691,707,784). Mrs. Hernandez picked Irma up from the Landings (OR786). She saw Appellant at Irma's that day (OR786).

On Friday, August 21, Irma and Jose were walking down Avenue T and 31st Street, going from the Hernandez house to the Owen house (OR392-94,433,460-61). Irma was carrying Deidre (OR395,433,754-55). Jose was in front of them (OR394-97). Beverly Kelly was in her yard, which borders Avenue T, watering plants (OR431). Ian Kistler was riding his bike on 31st Street (OR457). Sean Bennett was coming home from work (OR753). Tina Mashburn was at her brother's house on 31st, preparing to move in (OR478-79). It was afternoon.

Mrs. Kelly saw Mr. Santos come up 31st Street heading north toward Irma (OR434-35,446,755). Mr. Santos was jogging (OR435, 755). Kelly noticed that when he reached two parked cars, Mr. Santos pulled out a gun (OR436). He began to run faster toward Irma (OR437,755). Ian Kistler saw Mr. Santos run by him toward Irma with something silver in his hand (OR461-62).

Mr. Santos came nearer to Irma (OR436). She turned, saw him and screamed, then began to run with Deidre in her arms (OR396,436-37,463-64). Mr. Santos quickly caught her, spun her around and fired three fatal shots (OR398-99,436-39,464,468-69,759-60). Ian Kistler testified Mr. Santos had a "nasty" look on his face and was "grunting" in an inhuman fashion as he approached Irma (OR471).

Mr. Santos ran west from the scene, passing Tina Mashburn (OR442,480-81). Mashburn testified Appellant's face was devoid of expression when he passed (OR488-89).

Glenda Musselwhite, a clerk at the Hop N' Save on Havendale Boulevard testified that Mr. Santos had bought a Pepsi around 2:00 p.m. the day of the shooting (OR491,494) About 3 hours later he returned, his chest bare, carrying his shirt on his arm, and asked to use the phone (OR491,494,500). She refused and he left (OR493). A short time later, she saw him leave in a cab, now wearing his shirt (OR494).

John Weeks Jr. operated a taxi for Winter Haven Taxi Service (OR504). He picked Mr. Santos up for the first time on August 21 around 5:00 p.m. (OR505) Santos asked initially to go to 31st Street and Inwood, (also known as Avenue T where Gloria Hernandez

lived), but then changed his mind and asked to go to The Landings (Irma's apartment complex) (OR506). Mr. Santos went up to one apartment, returned to the cab, said "They're not here," then returned to the apartment and left a note on the door (OR508). Mr. Weeks let Mr. Santos off at 17th Street Northwest, near Lake Howard, a mile and a half from 31st Street and Avenue T (OR509, 518). During the ride, Mr. Santos spoke about going to Disney with his daughter (OR517).

Mr. Weeks was later dispatched to the Hop N' Save, where he again picked up Mr. Santos (OR510) Mr. Santos stated he wanted to go to The Landings (OR513). The cab was stopped by police on Spirit Lake Road (OR514,568-69). Mr. Santos was arrested without incident (OR569-73,584-87).

While in the cab on the second trip, Mr. Santos appeared calm, but sweaty (OR522-25). He never displayed any weapons (OR524). Mr. Santos' demeanor was no different on the second ride than on the first (OR526).

Irma died of two shots into the face and head. Deidre died of one shot into the top of the head.

Ballistic comparisons showed that the firearm found on the floorboards of the cab after Appellant was arrested had fired the fatal shots. Appellant's hands tested positive for having fired a weapon.

II. Penalty Phase

The State presented no evidence in penalty phase (OR1029). Appellant presented the testimony of Dr. Kremper, a clinical psychologist, and Dr. Ainsworth, a psychiatrist.

Dr. Kremper first examined Appellant on September 13, 1987 (OR1038). This examination was ordered by the court following a display of bizarre behavior by Mr. Santos during his first trial (OR1038).

Dr. Kremper found Mr. Santos to be highly agitated (OR1038). Dr. Kremper performed a battery of tests on Mr. Santos, concluding he was in the borderline range of intellectual functioning[3] and comparably low memory functioning (OR1042). Dr. Kremper also administered the MMPI (OR1043). His conclusions were that Mr. Santos was an individual who is emotionally unstable, easily aroused emotionally, and, at the time of testing, was in significant psychological distress (OR1043). Dr. Kremper also concluded that Mr. Santos has a strong need for emotional support from others, is overwhelmed by day to day challenges, and tolerates stress very poorly (OR1044).

Dr. Kremper testified that "manhood" is of utmost importance to Mr. Santos (OR1048). Masculinity is of overwhelming importance (OR1049). Dr. Kremper opined that if Appellant's manhood was threatened he would be under "tremendous psychological pressure"

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[3] Mr. Santos scored 71 on the Weschler Adult Intelligence Scale, where a score of 69 or below signifies mild mental retardation (OR1040). His full IQ was 72 (OR1041). On the Peabody Picture Vocabulary Test, Mr. Santos scored 78, considered to be within a borderline range (OR1041-42).

and he would "have to do something, something to change the situation" (OR1049).

Dr. Kremper concluded that Appellant was incompetent to stand trial in September 1988 (OR1049-50). Since May 5, 1989, Dr. Kremper had seen Mr. Santos on an approximately weekly basis in order to provide supportive counseling and to prevent mental deterioration in order for Appellant to remain competent to proceed to trial (OR1050).

Dr. Kremper testified that, in his opinion, Mr. Santos was under extreme emotional distress at the time of the murders (OR1052, 1056). Mrs. Torres' refusal to give Deidre his name was perceived by Mr. Santos as a threat to his manhood and caused him great problems (OR1053). This conclusion was based upon Mr. Santos' test results, his past history, Dr. Kremper's observations, his interviews with Appellant and interviews with Appellant's ex-wife (OR1056). Dr. Kremper stated that Appellant was involved in a denial phenomena (OR1053), which he believed was partly due to the intense emotions Appellant was experiencing at the time of the homicide (OR1055).

Dr. Kremper was also of the opinion that at the time of the offenses Mr. Santos had an impaired capacity to appreciate the criminality of his conduct and an impaired capacity to conform his conduct to the requirements of the law (OR1057). This conclusion was based upon psychological testing of Appellant, direct observation of Appellant, interviews with Appellant, and interviews with Appellant's ex-wife (OR1057). Dr. Kremper stated that when

Appellant is emotionally aroused he does not appreciate the total consequences or legal consequences of his acts (OR1058). He cannot control himself to conform to legal requirements (OR1058). Dr. Kremper stated that separation from Irma created a tremendous amount of distress for Appellant (OR1075). He could no longer control the situation (OR1075). He was also under tremendous stress over his daughter's name (OR1075). These stresses were consistent with the stress felt by Appellant which rendered him incompetent when he came to trial in September 1987 (OR1080,1082-83).

Dr. Kremper was aware that Appellant was diagnosed with borderline personality disorder while at the State Hospital (OR1058-59).[4] He agreed that diagnosis fit Appellant's personality characteristics (OR1059).

Dr. Gary Ainsworth first evaluated Mr. Santos in September 1987 (OR1097). The purpose of this examination was to determine Appellant's competency to proceed with his trial which was already in progress (OR1098). Dr. Ainsworth found Mr. Santos "chained to a little metal bed" and exhibiting bizarre and agitated behavior. Mr. Santos was mumbling and incoherent. He was suffering paranoid delusions, "hearing voices" of a persecutory nature, and "was making strange noises, grunts and snorts" (OR1099). Dr. Ainsworth

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[4] Dr. Ainsworth defined borderline personality disorder as a well-recognized mental illness which is manifested by certain disturbances in how those diagnosed with this disorder relate to other people. Their relationships are overly intense and highly volatile. They have unstable periods. They are prone to decompensation to a psychotic state (OR1116).

believed Santos was psychotic (OR1099). Dr. Ainsworth found Mr. Santos to be incompetent to proceed with his trial (OR1102-06).

Mr. Santos was hospitalized (OR1107-08). While there, he was diagnosed as having a mixed personality with borderline and dependent features and in denial regarding his role in the homicides (OR1108-1110). Dr. Ainsworth found Mr. Santos' reactions to be consistent with having borderline personality disorder (OR1116).

Dr. Ainsworth concluded that at the time of the homicides, within a reasonable medical certainty, Appellant was under a great deal of emotional stress (OR1111). This stress was the result of reacting to his separation from Irma, her refusal to change Deidre's name to his, and facing his life without Irma and his child, whom he depended on (OR1111-12).

Dr. Ainsworth further concluded that Appellant's ability to appreciate the nature of his act was impaired and his ability to conform his conduct to the requirements of the law even more so (OR1112). Mr. Santos' personality is such that he tends to decompensate into a psychotic condition every once in awhile, especially when under great stress (OR1113).

Dr. Ainsworth concluded it was "likely" that Appellant had descended into a similar condition when committing the murders because of the stress associated with his and Irma's ongoing domestic dispute. In Dr. Ainsworth opinion, it was consistent with Appellant's diagnosis as borderline that he would have "lost control" in August 1987 when the homicides were committed (OR1117).

When questioned concerning Appellant's "denial," Dr. Ainsworth

stated that borderline individuals who decompensate in an incarcerative environment usually have little recollection of their behavior (OR1117). Mr. Santos' denial of any knowledge of the homicides is also consistent with borderline personality disorder (OR1110,1117). To Dr. Ainsworth, Appellant consistently maintained that Irma was not dead (OR1122). He claimed to have telephone conversations with her and to write her letters to which she would respond (OR1122). When asked by the State if he believed Appellant was fabricating these delusions, Dr. Ainsworth stated:

> At first I did. At first I really did in many ways. As I said earlier, that is a possibility, but the pattern of his consistency in denying these things to me is unusual and I would say denial is probably - now knowing all that I know, that denial is probably more likely . . .

Dr. Ainsworth further testified that most borderline personalities are not often hospitalized until they get in a situation which causes them to decompensate (OR1129). Their behavior is not such that a lay person would be aware of their disorder (OR1129).

Dr. Kremper also testified that Appellant experienced instances of abusive conduct in his childhood home environment, including episodes where his father abused his mother. According to unrebutted testimony, Mr. Santos' father disciplined him as a child by such methods as forcing him to kneel on hard grains of rice and forcing him to sit in his own excrement for hours (SR7).

III. Resentencing

Defense counsel urged Judge Durrance to impose a life sentence under the Parker[5] standard and a proportionality analysis (SR26-27).

The State requested the Court to find two statutory mitigating factors: (1) that Mr. Santos was under the influence of extreme emotional disturbance and (2) Mr. Santos's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (SR29). The State also asked the Court to find one nonstatutory mitigating factor, that Mr. Santos lived in an abusive environment as a child (SR29). The State asked for only one aggravator, previous conviction of another capital felony (SR29-30). However, the State still sought the death penalty under a proportionality analysis, while simultaneously conceding that a death sentence would again be reversed (SR30-31).

Nevertheless, Judge Durrance again imposed two death sentences (SR46,57-60). Ignoring the opinion of this Court, Judge Durrance again found, both orally and in his written order, that the homicides were committed in a cold, calculated, and premeditated manner (SR38-40,51-3). Judge Durrance found that no statutory mitigators were proved by the greater weight of the evidence (SR43,53-55). The court then found one nonstatutory mitigating factor existed -- an abusive childhood environment (SR44,55-56).

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[5] Parker v. Dugger, 111 S. Ct. 731 (1991).

The court rejected the domestic situation as any mitigation (SR44-45,56).

The court then found that under a proportionality analysis, death was warranted (SR46,56-57).

SUMMARY OF THE ARGUMENT

The trial court's finding that the instant homicides were cold, calculated and premeditated having been previously rejected by this Court is now barred by the doctrine of law of the case and the Fifth Amendment, United States Constitution. The facts of the instant case fail to support this aggravator.

The testimony of Dr. Ainsworth and Dr. Kremper was that Appellant met the criteria for statutory mitigating factors. There was nothing in the record to rebut their opinion. Consequently, the sentencing judge erred in finding that the mental mitigators were not established by a greater weight of the evidence.

The trial court erred in failing to find as a statutory mitigating factor that Appellant had no significant prior criminal history.

The death penalty is not proportionately warranted in this case, where homicides were domestic in nature and arose from passionate emotions. The extensive mitigation for outweighs the sole arguable aggravating factor. A life sentence is required.

The aggravator of prior violent felony arising out of a contemporaneous homicide is contrary to legislative intent and must be stricken.

ARGUMENT

ISSUE I

THE TRIAL COURT'S FINDING THAT THE INSTANT HOMICIDES WERE COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF LEGAL OR MORAL JUSTIFICATION IS BARRED BY THE DOCTRINE OF LAW OF THE CASE, DOUBLE JEOPARDY, AND NOT SUPPORTED BY THE FACTS.

The issue of whether the murders of Irma and Deidre were cold, calculated, and premeditated without any pretense of legal or moral justification [CCP] was addressed by this Court already in Santos v. State, 591 So. 2d 160 (Fla. 1991). This aggravating factor was rejected and the trial court's finding of CCP was reversed. This Court then ordered Mr. Santos to be resentenced.

The resentencing was again conducted by Judge Durrance. No additional evidence was presented. Both the State and defense counsel concurred that CCP would not apply.

Despite the clear directive of this Court and without additional evidence, Judge Durrance found that CCP was an appropriate aggravator. The court reasoned that "the facts do not support Santos' argument this was an irrational heated act of passion." The facts looked to by the trial court were Santos prior threats to Irma, the prior confrontation, the procurement of the gun in advance, and the taxi driver's observations of Mr. Santos after the homicides (SR52).

In its initial opinion in this case, the court considered the prior threats and acquisition of the gun in advance and still

rejected CCP. Santos' demeanor, post-homicide, certainly does not provide the heightened standard required for CCP. This Court found the State's proof fell short of establishing CCP beyond a reasonable doubt. Absent any additional evidence, this Court's initial finding must stand.

The question of whether the trial court may "refind" an aggravating factor previously stricken by this Court is governed by the doctrine referred to as "law of the case." Law of the case doctrine requires that whatever is once established between the same parties in the same case continues to be the law of the case, whether correct on general principles or not, so long as the facts on which the decision is predicated continue to be the facts in the case. See McGregor v. Providence Trust Co., 119 Fla. 718, 162 So. 323 (Fla. 1935); Alford v. Summerlin, 423 So. 2d 482 (Fla. 1st DCA 1982).

This Court, in discussing the law of the case doctrine, stated that ". . . an exception to the general rule binding the parties at the retrial and all subsequent proceedings should not be made except in unusual circumstances and for the most cogent reasons -- and always, of course, only where a manifest injustice will result from a strict and rigid adherence to this rule." Strazulla v. Hendrick, 177 So. 2d 1 (Fla 1965). This Court went on to state that "the exception to the rule should never be allowed when it would amount to nothing more than a second appeal on a question determined on the first appeal." Id., at 4. The purpose behind the doctrine is to lend stability to judicial decisions, to avoid

piecemeal appeals, and to bring litigation to an end as quickly as possible. Id., at 2. The doctrine of the law of the case has been previously applied in capital criminal litigation. See Johnson v. Dugger, 523 So. 2d 161 (Fla. 1988).

No new evidence was presented at resentencing hearing for the trial court's consideration. Appellant's case does not fall into that small group of cases where enforcing the doctrine of law of the case would create a manifest injustice. Thus, absent additional evidence, the trial court was precluded from refinding the aggravator of cold, calculated, and premeditated under the law of the case. The State should not be given a second chance on a question conclusively ruled on by this Court in the first appeal.

The trial court's refinding that the murders were CCP is also barred by the Double Jeopardy considerations of the Fifth Amendmentto the United States Constitution. In its first opinion in this case, this Court rejected the trial court's finding of CCP because the State failed to prove CCP existed beyond a reasonable doubt. No additional evidence was presented at the resentencing. This Court's finding that the evidence was insufficient to support CCP amounts to an acquittal of that aggravating factor. The State, quite simply, failed to prove its case regarding CCP. This Court's finding regarding the failure of proof bars the trial court from making this finding again based upon precisely the same evidence which has already been found inadequate. The Fifth Amendment prohibits the trial court's action.

Even if this Court answers the questions of whether this aggravator is barred by the operation of the law of the case in the negative, or finds no Fifth Amendment violation, the facts still preclude a finding that the homicides were cold, calculated, and premeditated.

In order to establish the aggravator of "cold, calculated, and premeditated," the State must establish a "heightened" premeditation substantially greater than that necessary to sustain a conviction for premeditated murder. Holton v. State, 573 So. 2d 284 (Fla. 1990). Heightened premeditation is premeditation which is "cold, calculated, and without any pretense of moral or legal justification." A finding of heightened premeditation is not based upon the amount of time the defendant reflects on what he is about to do. As will be shown, the facts of this case fall short of this standard.

Cold and Calculated

The CCP aggravating factor is intended to separate out the defendant convicted of premeditated murder from the cold, vicious person who kills without excuse, without any emotional reason for the killing, or any moral explanation for his acts.

Mr. Santos was not an unemotional person or a cold blooded killer; he was an individual who, under tremendous emotional stress and turmoil, did a terrible act. Dr. Ainsworth stated that at the time of the murders, Appellant was under a great deal of emotional stress by virtue of his separation from Irma, facing life without her and Deidre, and Irma's refusal to give Deidre Appellant's name

(OR1111-1112). Dr. Ainsworth found it likely that Santos had deteriorated into a psychotic state at the time of the homicides due to this stress. Dr. Kremper stated Santos was under intense emotion at the time of the homicides. Such testimony belies the trial court's finding that these acts were "cold." Santos was a severely deranged man at the time of the homicides. Further, this conclusion is not negated by the procurement of the gun or his leaving the scene of the murders. Some advance preparation does not support the finding of CCP.

In Douglas v. State, 575 So. 2d 165 (Fla. 1991), the defendant obtained a rifle, accosted his former girlfriend and her new husband, and drove them to a wooded area. Douglas then forced the two to commit various sexual acts at gunpoint. Douglas eventually bludgeoned the husband with his rifle, then shot him in the head in front of the wife. The Douglas court rejected the finding that this killing was cold and calculated. Instead, this Court found it was one which arose from passion as evidenced by the relationship between the parties and the events leading up to the homicide. As in Douglas, Irma and Santos were involved in a domestic relationship. As in Douglas, Irma would first reject Appellant, telling him their relationship was over then call him back, creating enormous stress and emotional turmoil for Santos. Additionally, Irma and Santos together had Deidre, whom Santos was terrified of losing. The same level of violent emotions present in Douglas were found by this Court to exist in Santos' case. To quote from this Court's opinion, "There was no deliberate plan formed through calm

and cool reflection [see Rodgers], only mad acts prompted by wild emotion." Santos, 591 So. 2d at 163.

This Court has consistently recognized the turbulent and stormy nature of domestic situations and the volatile emotions which can sweep reason away. The very existence of these emotions have been repeatedly used to render the "cold" portion of CCP void. Most recently this Court again rejected the findings of CCP in a double murder arising from a domestic situation. In Maulden v. State, 18 Fla. L. Weekly S179 (Case No. 75,595)(Fla. March 25, 1993), this Court found that the defendant's killing of his ex-wife and her fiancee were not subject to the CCP aggravator. The defendant awakened one night and decided to kill his ex-wife. He drove to her apartment and saw her boyfriend's car there. He left, drove to a park, where he dug up a gun he had previously buried, and returned to the apartment. He crawled through a window and shot his ex-wife and her boyfriend while they slept. The defendant then altered his vehicle and drove to Nevada, where he was arrested. According to mental health experts, the defendant was a schizophrenic. He was under extreme emotional stress at the time of the murders. Relying heavily on the Santos opinion, this Court found that the murders were not "cold," but were also mad acts of passion.

In Kampff v. State, 371 So. 2d 1007 (Fla. 1979), the defendant planned and carried out the shooting of his ex-wife. Three years had elapsed since their divorce. Kampff begged his wife to return, and when she refused, he bought a gun. The following day he went

to the restaurant where she worked and shot her five times. In rejecting the trial court's claim that the murder was heinous, atrocious, or cruel because it was planned for three years, this Court inferred the homicide was not cold, calculated, and premeditated. Noting the death penalty was not proportionately warranted, this Court directed the death sentence vacated, despite a jury recommendation for it.

In Garron v. State, 528 So. 2d 353 (Fla. 1988), the defendant shot his wife and stepdaughter during a domestic confrontation. The death sentence for killing the stepdaughter was reversed and, although the girl was shot at "point blank" range, this Court held it was not cold, calculated, and premeditated because the act resulted from a family quarrel.

Again, in Richardson v. State, 604 So. 2d 1107 (Fla. 1992), this Court rejected the premise that the defendants killing of his girlfriend was "cold." Again, relying on Santos, the Court found that Richardson's actions were without "calm and cool reflection" and involved an "obvious intensity of emotion." Richardson had made prior death threats toward his girlfriend. A day later Richardson went to her trailer, forced his way in, and pulled out a knife. The victim retreated from the trailer with Richardson following. When they reached the end of the trailer, Richardson picked up a shotgun he had placed there earlier and shot her. This Court reversed the case for a life sentence, despite a jury recommendation of 11 to 1 for death.

As this Court has emphasized in later cases, Santos' acts were not "cold." The murders were the result of great intensity of motion in a man whose mental condition prevented him from controlling his emotions. As such, the State failed to establish beyond a reasonable doubt this aggravating factor.

Calculated

Neither do the instant murders meet the level of calculation necessary for a finding of CCP. Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988) requires that calculation consist of a "careful plan or prearranged design." Santos, at some point in the late afternoon, took a taxi to a place near Irma's parents' house and saw Irma, Deidre, and Jose walking. He left the cab, ran to Irma and shot her and Deidre. He kept running, ultimately ending up in the same cab he had been in prior to the homicides, and was on his way to Irma's apartment when arrested. The trial court found these homicides were calculated because of the prior threats and the advance procurement of a gun. (OR52) This alone is not sufficient to establish the degree of calculation and deliberation necessary to support a finding of this aggravating factor.

For example, in Farinas v. State, 569 So. 2d 425 (Fla. 1990), the defendant became obsessed with his former girlfriend, who had moved out with their child two months previous. After harassing her during that period, the defendant chased the girlfriend and forced her into his car. When she tried to escape, he shot her once, paralyzing her. While she lay face down on the pavement, he

unjammed the gun three times and shot her in the head. This Court found the crime was not calculated because there was no "careful plan or prearranged design." Id., at 431.

While Santos may have intended to kill Irma (Deidre's death more likely occurred because Irma was holding her), it was certainly not calculated, carefully planned, or deliberately planned through calm and cool reflection.

Because a homicide is not totally spontaneously committed during the course of a heated argument does not mean that they are carefully planned, rather than acts of one deranged by emotion and passion. See Maulden, 18 Fla. L. Weekly S 129 (defendant shot ex-wife and fiancee while they slept); Douglas, 575 So. 2d 165 (killed boyfriend of former girlfriend four hours after abduction of both); Kampff, 371 So. 2d 1007 (went to wife's place of employment and shot her); Blair v. State, 406 So. 2d 1103 (Fla. 1981) (arranged to have wife's grave dug before killing her).

The same is true in this case. Santos loved Irma and Deidre. He was terrified at losing them both, yet could not convince Irma to reunite with him. It was likely that Santos was in a psychotic state at the time of the killings. His continued denial of any participation is a result of his mind blocking out an episode which is too painful for him to confront. Santos was overwhelmed by his emotions and continued to be so after the murders. His mental state left little room for cold calculation.

Pretense of Legal or Moral Justification

A pretense of legal or moral justification has been defined as "something alleged or believed on slight grounds: an unwarranted assumption." Banda v. State, 536 So. 2d 221, 14 224 n.2, cert. denied, 489 U.S. 1087, 109 S. Ct. 1548, 103 L. Ed. 2d 852 (1989). A pretense of justification, while not reducing the degree of a homicide, nevertheless can rebut the cold or calculating nature of it. Id., at 224.

Santos had at least a pretense of moral justification. Santos considered Irma his wife. Irma had left him and is doing so she had taken Appellant's child. She was restricting Santos' access to his child and refused to give Deidre his name. These refusals were a direct affront to Santos' sense of worth and masculinity, however misguided.

Santos suffered from borderline personality disorder, a characteristic of which is overly intense and highly volatile relationships. Borderlines are prone to decompensation into psychotic states, especially when under stress (OR1116).

The defendant's state of mind is the essence of the cold, calculated and premeditated aggravation factor. Mason v. State, 438 So. 2d 374 (Fla. 1983), cert.denied, 465 U.S. 1051, 104 S. Ct. 1330, 79 L. Ed. 2d 725 (1983). Because of Santos' exaggerated sense of masculinity, high level of stress, and probable psychotic state, he may have believed he was justified in killing Irma to prevent her from taking Deidre from him. Thus, he had at least a pretense of legal or moral justification for his actions.

The trial court improperly found the instant homicides were CCP. Absent any additional evidence, this Court's original disposition of this factor must stand. The absence of this aggravator compels the reversal of the sentences of death. In the interest of judicial fairness and ecomony, this Court should reverse this case for a life sentence.

ISSUE II

THE TRIAL COURT ERRED IN ITS FINDING THAT TWO STATUTORY MITIGATORS WERE NOT ESTABLISHED BY THE GREATER WEIGHT OF THE EVIDENCE AND THEIR EXISTENCE WAS UNREBUTTED.

The penalty phase of Appellant's trial consisted solely of the testimony of Drs. Kremper and Ainsworth (OR1029-1129). Dr.Kremper found Mr. Santos to have been, at the time of the homicides, under extreme emotional distress and incapable of appreciating the criminality of his conduct or conforming his conduct to the requirements of the law. Dr. Ainsworth confirmed Mr. Santos' highly emotional state and significant duress at the time of the murders and Mr. Santos' inability to conform his conduct to the requirements of the law. Each physician based these conclusions upon Mr. Santos' results on psychological tests, direct observation of Appellant, interviews with Appellant, and interviews with Appellant's ex-wife (OR1057).

In its first opinion in this case, this Court detailed the findings of each doctor and stated that "this evidence suggests that two statutory mitigators may be present. These are that Santos was under the influence of extreme mental or emotional disturbance, section 921.141(6)(b), Florida Statutes (1987), and that Santos was substantially impaired in his capacity to conform his conduct to the requirements of the law. § 921.141(6)(f), F. S. (1987)." Santos, 591 So. 2d at 163-164 (SR13). This Court went on to caution the trial court against improperly ignoring mitigating evidence as underscored by the United States Supreme Court's

decision in Parker v. Dugger, 111 S. Ct. 731 (1991). Appellant's case was remanded to the trial court and the trial court was ordered to evaluate this mitigation.

Nevertheless, on remand, Judge Durrance chose once again to ignore unrefuted and uncontroverted testimony which clearly established the presence of the two statutory mitigators. Absolutely no new evidence was presented to challenge the testimony of Drs. Ainsworth and Kremper. The State, at the resentencing, conceded these mitigators had been proven and urged the court to find as such. Yet the trial court still declined to do so, instead stating that testimony by lay witnesses who observed Santos briefly just before and after the actual shooting contradicted the expert's findings of the two mental mitigators. The court found these mitigators were not proven by the greater weight of the evidence (SR55). This finding is incorrect.

A mitigating circumstance must be "reasonably established" by the greater weight of the evidence. In Campbell v. State, 571 So. 2d 415, 419-420 (Fla. 1990), this Court described the duties of the trial judge in considering evidence offered in mitigation:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant [footnote omitted] to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. See Rogers v. State, 511 So.2d 526 (Fla. 1987), cert.denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The court must find as a mitigating circumstance each proposed factor that is mitigating in nature [footnote omitted] and has been reasonably established by the greater weight of the

> evidence: [footnote omitted] "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established" Fla.Sad.Jury Instr. (Crim.) at 81. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given 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 supported by "sufficient competent evidence in the record." Brown v Wainwright, 392 So.2d 1327, 1331 (Fla. 1981).

Id., at 419-420.

Continuing to discuss the proof required in regard to mitigation, this Court in Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990) stated:

> Where uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established. See Campbell. Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. (Emphasis added)

In order to reject a mitigating circumstance, there must be competent substantial evidence to support that rejection. Id. at 1062.

Without question, the testimony of Drs. Kremper and Ainsworth provides a reasonable quantum of competent proof of the existence of each mental mitigator. Not only was it the expert opinion of

each doctor that the mental mitigators were proven, but it was also established that Santos was seriously mentally ill. He suffers from borderline personality disorder, has a low IQ in the borderline retarded range, and is emotionally unstable. He decompensates into a psychotic condition when under stress, and is in a denial phenomena -- refusing to acknowledge the deaths of Irma and Diedre.

Such evidence clearly supports by a greater weight of the evidence a finding that both mental mitigators exist. See Campbell (where both mental mitigators established evidence of impaired capacity was extensive and unrefuted, including that the defendant's IQ was in the retarded range, he had poor reasoning skills, a reading ability on a third grade level, chronic drug and alcohol abuse, was subject to borderline personality disorder, and was suicidal).

The opinions of Drs. Kremper and Ainsworth were based upon ample data. There certainly is no requirement that an expert opinion on mental mitigators be based upon observations by the experts of the defendant during the commission of the crime. Such a requirement would be ludicrous. For example, in Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988), this court upheld the findings of the mental health experts that the defendant had an impaired capacity to conform his conduct to the requirements of the law and was under extreme emotional disturbance when that opinion was based on their examination, counseling, and study of the defendant after the homicide.

The trial court rejected Dr. Ainsworth's and Dr. Kremper's findings stating, "These claims are refuted by the numerous eyewitnesses who saw Santos' actions. In advance of the killings, Santos acquired a gun and used it to intimidate Irma and her children." (SR53-55)

The trial court's finding that Appellant's actions prior to the murders belied the existence of the mental mitigators is error. On the contrary, sparse testimony regarding Appellant's behavior in the few days and immediately before the killings is indicative of Appellant's severe mental anguish, his obsession with Irma and their disintegrating relationship. Cynthia Torres described an argument between Santos and Irma two days before the murders after which Santos was so distraught Irma contacted the police fearing Santos was suicidal (OR389,386,726-727,718,720).

The next observations of Appellant were those which immediately preceded the homicides. Ian Kistler testified that Appellant had a "nasty" look on his face just prior to shooting Irma, and was making "unhuman grunting" sounds (OR471). Significantly, Dr. Ainsworth also observed Appellant making "grunts and snorts" while chained to a bed in September, 1987, when Santos was psychotic and found incompetent to proceed to trial (OR1099,1102-1106). Kistler's testimony supports the expert's opinions that Santos was likely psychotic at the time of the homicides.

The lay testimony also established that the fight between Irma and Santos two days prior to the murders concerned Deidre not having Appellant's "name" (OR68-69). This situation created

enormous stress for Santos. Coupled with the separation from Irma, Santos reached the breaking point. Unable to control his emotions or his situation with Irma, Mr. Santos committed the instant homicides characterized by this Court as "mad acts prompted by wild emotion." Santos, 591 So. 2d at 163.

The fact that an individual is ambulatory and can leave the scene of a crime does not have any relation to his mental state. The testimony of other individuals on the street who observed Santos after the shooting, and the cab driver who took Santos to the general area and later picked him up again, do not refute the conclusions of Drs. Ainsworth and Kremper. None of these witnesses were asked to give an opinion regarding Appellant's mental state. See Garron v. State, 528 So. 2d 353 (Fla. 1988). Certainly none but Jose would have been able to give such an opinion. The other persons on the street that day did not observe Santos long enough and did not know him at all. Under Garron, they would not be qualified to offer any such opinions. They were merely asked to state their observations. These observations were entirely consistent with the conclusions reached by the doctors. Mr. Santos was described as having no emotion on his face after the homicides. The cab driver noticed little difference in Santos' behavior after the homicides than before. Santos requested to return to Irma's after the shooting and spoke of going to Disney World with Deidre. Such behavior is entirely consistent with the denial phenomena from which Appellant suffers, and is consistent with the diagnosis of Drs. Kremper and Ainsworth. Thus, the lay testimony supports,

rather than rebuts the conclusion that both mental mitigators are present. A trial court is not allowed to disregard uncontroverted expert testimony. Judge Durrance did just that, for the testimony of the "eyewitnesses" does not contradict the conclusions of Drs. Ainsworth and Kremper. As this Court stated in its prior opinion in this case, "The unrebutted expert testimony indicated this dispute severely deranged [him]. (SR8)

This Court has consistently recognized that domestic situations such as Appellant's are capable of producing passionate, obsessive emotions which rise to the level of extreme emotional disturbance. For example, in Farinas v. State, 574 So. 2d 1059 (Fla. 1990), this Court found the mitigator of extreme mental or emotional disturbance was established by testimony concerning the defendants intense jealously and obsession with the victim, his estranged girlfriend. The testimony established that Farinas and the victim had lived together for two years and had a child. Two months prior to the homicide, the victim moved out during which time he repeatedly called her, became upset if he didn't speak to her, and was obsessed with having her return to him. The trial court had found Farinas to be under a mental disturbance, but that it was not extreme. In comparison, Santos and Irma were together for 8 years (OR385,676-677,779-780) After separating from Irma, Santos came to her apartment almost every day (OR684). Santos wanted to move back in with Irma (OR651). Santos was obsessed with Deidre having his name and threatened to kill both Irma and Deidre if Irma left him (OR389,668-669,713). As in Farinas, the domestic

situation alone establishes Santos was under extreme mental or emotional disturbance.

The trial court clearly refused to follow the dictates of Campbell and Nibert which require that a mitigating circumstance must be found if it has been reasonably established by the greater weight of the evidence. The record in this case does not contain competent substantial evidence to support the trial court's rejection of the two mental mitigators.

Under Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990), this Court is not bound to accept the trial court's findings concerning mitigation if the findings are based upon a misconstruction of undisputed facts or a misapprehension of law. Judge Durrance has certainly misconstrued the unrebutted, undisputed testimony of Drs. Ainsworth and Kremper and numerous lay witnesses. Because Santos has, without a doubt, reasonably proved that both mental mitigators exist, the trial court's conclusions must be rejected.

Judge Durrance's order fails to make a reasoned independent weighing of these two mental mitigating factors. It does not exhibit a "responsible and reliable exercise of sentencing discretion" as required by Caldwell v. Mississippi, 472 So. 2d 320 at 329 (1985), and under the Eighth and Fourteenth United States constitutional amendments. Appellant's death sentences must be reversed for a sentences of life.

ISSUE III

THE COURT ERRED IN FAILING TO FIND AS A MITIGATING FACTOR THAT APPELLANT HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

Under Section 921.141(6)(a), Florida Statutes (1990), the fact that a defendant has no significant history of prior criminal activity is a statutory mitigating circumstance which must be found and weighed when present. In instructing the jury during penalty phase, the trial court stated that Appellant's lack of significant prior criminal activity could be considered in mitigation (OR1174). In his initial sentencing order imposing two death sentences, the trial court noted:

> In considering the mitigating circumstances, the Court reviews the statutory circumstances.
>
> 1. No significant history of prior criminal activity. The presentence investigation reveals that the defendant does not have a lengthy and significant history of criminal activity, however, the defendant has previously been convicted of another capital offense and a felony involving the use or threat of violence to another.

(OR1206)

The prior capital offense and felony referred to arise from the instant case and are, therefore, contemporaneous. The same justification for rejection of the mitigator was given at Appellant's resentencing (SR53).

The existence of the aggravator of a prior conviction for a prior violent felony when based upon contemporaneous crimes does not preclude the finding of the mitigator of no significant prior

history. Bello v. State, 547 So. 2d 914 (Fla. 1989); Cook v. State, 542 So. 2d 964 (Fla. 1989), appeal after remand, 581 So. 2d 14 (Fla. 1990); Scull v. State, 533 So. 2d 1137 (Fla. 1988), cert.denied, 109 S. Ct. 1937, 104 L. Ed. 2d 408 (1989).

Lack of significant prior criminal history is given substantial weight in cases involving domestic disputes. See Blair v. State, 406 So. 2d 1103 (Fla. 1981); Klokoc v. State, 589 So. 2d 219 (Fla. 1991); Ross v. State, 474 So. 2d 1170 (Fla. 1985).

In Blakely v. State, 561 So. 2d 560 (Fla. 1990), this Court reversed the death sentence on proportionality grounds where this was the only mitigator present, and both the HAC and CCP aggravators were present where the homicide arose from an ongoing and heated domestic dispute. Under Blakely alone, Appellant's case is subject to reversal.

Thus, where the instant record demonstrates that Appellant had no significant prior criminal record, and this finding was made by the trial court previously, it is error for the trial court to reject it as a mitigating factor.

ISSUE IV

THE SENTENCE OF DEATH IS DISPROPORTIONATE WHEN COMPARED WITH OTHER CAPITAL PENALTY DECISIONS OF THIS COURT.

This Court has always adhered to the proposition that a sentence of death is reserved for only the most aggravated and least mitigated of first degree murders. State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert.denied, 416 U.S. 943 (1974). While it is truly terrible that a woman and child were killed, this case does not fit into the narrow category of the worst of murders as drawn by Dixon.

The first factor to be considered is that these murders arose from a domestic situation. This Court has traditionally found the death penalty inapplicable to murders which are domestic in nature and committed as a result of great passion or wild emotion. See e.g., Maulden v. State, 18 Fla. L. Weekly S179 (Fla. March 25, 1993); White v. State, 18 Fla. L. Weekly S184 (March 25, 1993); Richardson v. State, 604 So. 2d 1107 (Fla. 1992); Klokoc v. State, 589 So. 2d 219 (Fla. 1991); Douglas v. State, 575 So. 2d 165 (Fla. 1991); Farinas v. State, 569 So. 2d 245 (Fla. 1990); Blakely v. State, 561 So. 2d 560 (Fla. 1990); Amoros v. State, 531 So. 2d 1256 (Fla. 1988); Garron v. State, 528 So. 2d 353 (Fla. 1988); Irizarry v. State, 496 So. 2d 822 (Fla. 1986); Wilson v. State, 493 So. 2d 1019 (Fla. 1986); Ross v. State, 474 So. 2d 1170 (Fla. 1985); Blair v. State, 406 So.2 d 1103 (Fla. 1981); Kampff v. State, 371 So. 2d

1007 (Fla. 1979); and Chambers v. State, 339 So. 2d 204 (Fla. 1976).

While the trial court's order cited several cases in support of the death sentences, each is inapplicable to Appellant's case. In Occhicone v. State, 570 So. 2d 902 (Fla. 1990), the defendant shot his girlfriend's mother and father. He had made numerous prior threats that he would kill the parents because he disliked them. There was no showing that the killings were domestic in nature or involved any type of intense emotion. In Porter v. State, 564 So. 2d 1060 (Fla. 1990), the defendant threatened to kill his former lover who was living with another man. He watched her house for two days, and stole a gun just to kill her. He also told a friend that she would read about him in the paper. This Court determined that, although domestic, the killing was "well planned," a cold-blooded murder.

In the cases of King v. State, 435 So. 2d 50 (Fla. 1983), and Lemon v. State, 465 So. 2d 88 (Fla. 1984), cert. denied, 469 U.S. 1230 (1985), each of the defendants had a prior record of violent felonies. In Lemon, the defendant had a prior conviction for assault to commit first degree murder for the stabbing of a female and had stabbed his girlfriend to death. In King, the defendant had a prior conviction for the axe-murder of another woman. Santos, on the other hand, had no prior record, and certainly no record of prior violent crimes.

Neither Phillips v. State, 476 So. 2d 194 (Fla. 1985), nor Hudson v. State, 538 So. 2d 829 (Fla. 1989), involved domestic

situations. In Phillips the victim was of no relation to the defendant, but was a parole supervisor over several of the defendants' probation officers. A finding of CCP was also made because the defendant reloaded his gun during the homicide. Phillips relied on Herring v. State, 446 So. 2d 1049 (Fla.), cert.denied, 469 U.S. 989 (1984) for this proposition. This proposition was receded from in Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert.denied, 484 U.S. 1020 (1988).

The victim in Hudson was the roommate of the defendant's ex-girlfriend. Hudson gone to seek out his girlfriend at her apartment, and finding her gone, shot her roommate. This Court specifically found this was not a domestic confrontation. Hudson, at 831.

In Howard v. State, 414 So. 2d 1032 (Fla. 1982), the defendant stalked and harassed his ex-wife, ultimately following her home for a considerable distance as she left work and then shooting her. Two aggravating factors -- HAC and the previous conviction of a violent felony -- were present. Neither of these aggravators is present in the Santos' case. Thus, under a proportionality analysis, Appellant's sentence should be life as opposed to death. Appellant's case is far more mitigated and far less aggravated than any domestic case cited by the trial judge.

There are numerous other reasons which require that Appellant's sentence be commuted to life under a proportionality analysis. As argued to this Court in Issue I, the finding of cold, calculated, and premeditated must be stricken, leaving only a contemporaneous capital offense for a total of one aggravating factor.

Evidence of three statutory mitigators was proved by the greater weight of the evidence, contrary to the trial court's order. These are: (1) that Santos was under extreme mental or emotional disturbance; (2) that Santos was substantially impaired in his ability to conform his conduct to the requirements of the law; and (3) that Santos had no significant prior criminal record. The court did find that two nonstatutory mitigators were present -- an abusive childhood environment and that Santos and Irma had a domestic relationship. The court also found that these factors did not reduce culpability. Thus, a total of one aggravator is properly found and three statutory mitigators and two nonstatutory mitigators are present. For purposes of comparison, this Court should focus on the cases of Maulden v. State, 18 Fla. L. Weekly S179 (Fla. March 25, 1993) and White v. State, 18 Fla. L. Weekly S184 (Fla. March 25, 1993) which also involve domestic murders.

Beginning the comparison with White, both White and Santos shot their victims. Each had had a long, ongoing relationship with the victim. In each situation the woman was seeking to end the relationship. In White, this Court found one aggravating circumstance, White's previous conviction of a violent felony. These prior crimes consisted of a burglary, assault, and aggravated battery committed on the victim and her companion. In White, three mitigators were found, both statutory mental mitigators and a third, the existence of a drug problem and White's distress about severance of the relationship.

Santos, unlike White, had no prior criminal history. His one aggravating factor is the contemporaneous killing of Irma in Diedre's case and vice versa. Santos also established the same statutory mitigators as White did, and at least one additional statutory and nonstatutory mitigator. In rejecting the death penalty for White, this Court found the mental mitigating factors were extensive and outweighed the single aggravating factor. As the court noted, "death sentences are supported by one aggravating circumstance only in cases involving either nothing or little in mitigation." White, at S 186 [quoting Nibert v. State, 574 So. 2d 1059, 1163 (Fla. 1990), and Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989)].

Like White, Santos has one aggravating circumstance; but the mental mitigation evidence, both statutory and nonstatutory, and the absence of any prior criminal record far outweigh that sole aggravating circumstance. Thus, the death sentences for both Irma's and Deidre deaths are subject to reversal.

Turning to Maulden, it is important to note Maulden also committed two murders. He killed his girlfriend and her fiance. Maulden involved the same two statutory mental mitigators as present in Appellant's case, and three other nonstatutory mitigators. An additional aggravator, that the murders occurred during the commission of a burglary, was also found in Maulden. Maulden's sentences of death were reduced to life. Like Maulden, Appellant's sole aggravator should be the contemporaneous capital crime; and unlike Maulden, Appellant has no other established aggravators.

Appellant also has an additional statutory mitigator, his lack of a prior record. Like Maulden, Appellant's sentences must be reversed under a proportionality analysis.

The death sentence imposed for Deidre's death is subject to an additional mitigating factor, the lack of intent to kill. In discussing proportionality in his concurring and dissenting opinion in which Justice Barkett concurred, Justice Kogan pointed out that the evidence was consistent with the conclusion that Deidre died only because Irma was holding her. Santos at 166. Lack of intent to kill is a valid mitigating circumstance. Norris v. State, 429 So. 2d 688, 690 (Fla. 1983); Reilly v. State, 601 So. 2d 222 (Fla. 1992). The aggravator of contemporaneous capital conviction should not be used as an aggravator with regard to the sentence imposed for the death of Irma. In Cannady v. State, 18 Fla. L. Weekly S 67 (Fla. January 14, 1993), this Court struck the aggravator of prior violent felony conviction as applied to one sentence of death. Cannady first shot his wife in the chest, killing her; then drove to one Boisvert's house and shot him also. This Court found that the aggravator for a prior violent felony conviction could only apply to Boisvert, the second homicide. It was predicated upon the conviction for the murder of the wife, which occurred first. Under Cannady, the aggravator of prior violent felony conviction should only apply to the murder of Diedre and be excluded from that of Irma, who was shot first and died first. The contemporaneous conviction aggravator should be given less weight than the aggravator of a prior violent criminal history.

Even if this Court should uphold the CCP aggravating factor, death is still not proportionally warranted. In Klokoc v. State, 589 So. 2d 219 (Fla. 1991), the defendant suffered mental problems and was obsessed with the return of his ex-wife. He continually tried to find her and threatened to kill their children if he could not. After one such threat made if his ex-wife refused to call him, the defendant shot their 19-year-old daughter while she slept. In upholding cold, calculated, and premeditated, this Court found the death penalty unwarranted. Five mitigating circumstances, including both mental mitigators, outweighed the CCP aggravator.

Although Appellant's case involves two deaths, this fact does not warrant the death penalty. Also 2 deaths, as previously noted, also occurred in Maulden. In the case of Wilson v. State, 493 So. 2d 1019 (Fla. 1989), two persons were killed in a domestic murder, and the one sentence of death was reversed for life despite a jury recommendation to the contrary. Two aggravators, heinous, atrocious, or cruel, and a prior conviction of a violent felony were not balanced by any mitigators; yet the sentence was reduced to life due to the domestic nature of the offense. In Garron v. State, 528 So. 2d 353 (Fla. 1988), the defendant killed two people and his penalty was reduced to life where the killings were part of an intra-family dispute.

Because it is clear that death is not a proportional penalty, this Court, in the interest of fairness and judicial economy, should reverse the sentences of death and impose life sentences.

ISSUE V

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND FINDING THE AGGRAVATING CIRCUMSTANCE THAT APPELLANT WAS PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OF VIOLENCE, BASED SOLELY UPON HIS CONTEMPORANEOUS CONVICTION OF FIRST DEGREE MURDER ARISING FROM THE SAME EPISODE.

The trial court instructed the jury that it could consider as an aggravating circumstance that appellant was previously convicted of a felony involving the use of violence, and the contemporaneous first degree murders were such felonies. In sentencing appellant to death on each count, the trial court found this aggravating factor, based solely upon his contemporaneous conviction of the murder of Deidre in Irma's case and the murder of Irma in Deidre's case.

In enacting the aggravating circumstance provided for in section 921.141(5)(b), Florida Statutes, the legislature never intended for the circumstance to be applied where a contemporaneously committed violent felony supplies the "previous conviction," and this aggravator should not have been considered in the sentencing process in appellant's case.

Chapter 72-72, Laws of Florida, in its initial form as Senate Bill No. 465, listed the following two relevant aggravating circumstances:

> (b) The defendant was <u>previously</u> convicted of another capital felony or a felony involving the use or threat of violence to the person.

> (c) At the time the capital felony was committed the defendant also committed another capital felony.

This language was derived directly from the Model Penal Code, Section 210.6(3)(b)(c). The Commentary to the Model Penal Code, from which the language of the Florida Statutes was drawn, explains that the first aggravator quoted above was intended to be limited to offenses committed prior to the instant offenses;

> Paragraph (b) deals with the defendant's past behavior as a circumstance of aggravation. Perhaps the strongest popular demand for capital punishment arises where the defendant has a history of violence. Prior conviction of a felony involving violence to the person suggest two inferences supporting the escalation of sentence: first, that the murder reflects the character of the defendant rather than any extraordinary aspect of the situation, and second, that the defendant is likely to prove dangerous to life on some further occasion. Thus, prior conviction of a violent felony is included as a circumstance that may support imposition of the death penalty.

The second aggravator quoted above, which was eliminated from Senate Bill 465, was directed at contemporaneous convictions;

> Paragraphs (c) and (d) (knowing creation of homicidal risk to many persons) apply this rationale to two cases in which the contemporaneous conduct of the defendant is especially indicative of depravity and dangerousness. These are multiple murder and murder involving knowing creation of homicidal risk to many persons.

When the Legislature subsequently eliminated paragraph (c) quoted above, it expressed its intention that the aggravator at issue only be applicable where the prior conviction was obtained in a prior case and was not a part of the case giving rise to the capital conviction on which the defendant is being sentenced. This is

a reasonable position since the legislature was focusing (a) on the issue of failed rehabilitation, i.e., the defendant was already given a second chance, and (b) the issue of propensity or future dangerousness. The interpretation of this aggravator which has allowed its application to cases involving more than one homicide does not address this historical concern and, in effect, becomes a multiple-offense aggravator rather than a failed rehabilitation/ propensity aggravator. In this regard, this Court's conclusion in King v. State, 390 So. 2d 315, 320 (Fla. 1980), that:

> The legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance

for which this Court gave no authority, is contradicted by the above facts. Furthermore, this Court has placed a significant limitation upon its holding in King that contemporaneous convictions prior to sentencing can qualify for the aggravator in question. In Wasko v. State, 505 So. 2d 1314, 1317-18 (Fla. 1987), this Court adopted a new policy that if there is but one incident and one victim, then contemporaneous crimes cannot be used as a prior violent felony. Appellant submits that the Wasko decision does not go far enough. Contemporaneous convictions arising out of a single incident should not be permitted to be considered regardless of the number of victims. The rationale of Wasko seems to be that contemporaneous convictions should not be used if the incidents are not separated in time, but are rather a single incident; it makes no sense for this rationale to require only a single vic-

tim. "Prior" means "prior", not "different victims even though at the same time."

Also relevant to this discussion is State v. Barnes, 595 So. 2d 22 (Fla. 1992), in which this Court recently construed the habitual offender statute concerning predicate felony convictions which contained virtually identical language to that found in section 921.141(5)(b), Florida Statutes (1991). Section 921.141(5)(b) provides for an aggravating circumstance if the defendant "was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." The habitual offender statute discussed in Barnes, section 775.084(1)(a), Florida Statutes (Supp. 1988), provided for habitual offender treatment if, among other requirements, "The defendant has previously been convicted of two or more felonies in this state." This Court held in Barnes that the predicate felony convictions required for the habitual offender statute did not require sequential convictions. However, in Barnes, the convictions did arise from separate incidents, and the holding did not remove the requirement that the predicate convictions arise from separate incidents. Justice Kogan, concurring specially wrote,

> I concur with the rationale and result reached by the majority, but only because this particular defendant's felonies arose from two separate incidents. Were this not the case, I would not concur. I do not believe the legislature intended that a defendant be habitualized for separate crimes arising from a single incident, and I do not read the majority as so holding today. Under Florida's complex and overlapping criminal statutes, virtually any felony offense can give rise to multiple charges, depending only on the prose-

> cutor's creativity. Thus, virtually every offense could be habitualized and enhanced accordingly. If this is what the legislature intended, it simply would enhance the penalties for all crimes rather than resorting to a "back-door"method of increasing prison sentences.

Barnes, 595 So. 2d at 32. Since the language used in the two statutes is virtually identical, the legislature must have intended a previous conviction under Section 921.141(5)(b) to likewise arise from a separate criminal incident. Any other construction violates the rule of lenity set forth in section 775.021(1), Florida Statutes (1991), as well as principles of due process of law, and subjects the defendant to unconstitutional cruel and unusual punishment. Amends. VIII and XIV, U.S. Const.; Art. I, §§ 9 and 17, Fla. Const.

Since the jury was instructed on an invalid aggravating factor on a theory flawed in law, it must be presumed that this factor was weighed by the jury in reaching its death recommendation. See Sochor v. Florida, 504 U.S. __, 112 S. Ct. __, 119 L. Ed. 2d 326, 340 (1992); Espinosa v. Florida, 505 U.S. __, 112 S. Ct. __, 120 L. Ed. 2d 854 (1992). Appellant's death sentences must therefore be reversed for sentences of life.

CONCLUSION

For the foregoing reasons, this Court should reverse the sentences of death and order that life sentences be imposed. Alternatively, this case should be remanded to the trial court for the imposition of life sentences.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 30th day of April, 1993.

Respectfully submitted,

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