IN THE SUPREME COURT OF FLORIDA

WILLIAM FRANCES SILVIA,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC09-220
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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POINT I

IN REPLY AND IN SUPPORT THAT THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT COMMITTED THE MURDER IN A COLD, CALCULATED AND PREMEDITATED MANNER.

The state argues that this Court's decisions in ***Farina v. State***, 801 So.2d 44 (Fla. 2001) and ***Bell v. State***, 699 So.2d 674 (Fla. 1997) is authority for this Court to find that there was advanced planning to commit murder and uphold the CCP aggravating factor. The ***Farina*** and ***Bell*** cases are distinguishable from the instant case.

In ***Bell***, in upholding the CCP aggravating factor this Court held:

> Here, the State proved such a prearranged plan to kill. Cold, calculated, premeditated murder can be indicated by the

> circumstances showing such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. ***Swafford v. State***, 533 So.2d 270 (Fla.1988), *cert. denied*, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989). ***Our review of the record shows that appellant told several people that he planned to kill Theodore Wright, and he purchased a gun for that purpose.*** (Emphasis added) Although West and Smith were not the actual subjects of the planning, this fact does not preclude a finding of cold, calculated premeditation. Heightened premeditation necessary for a CCP finding does not have to be directed toward the specific victim.

Bell at 677. In the Bell case the appellant told several people that he planned to kill Theodore Wright, and he purchased a gun for that purpose. This a critical distinction from the facts in Sylvia. In ***Farina***, in upholding the CCP aggravating factor this Court held:

> In the instant case the following facts support the CCP aggravating circumstance: this specific Taco Bell restaurant was chosen as the target for the robbery because Anthony was familiar with its employees and procedures; Anthony visited the restaurant earlier in the evening to see who was working and the brothers discussed the fact that Anthony knew three of the employees present that night; the brothers purchased bullets for their gun before the robbery; the employees were rounded up and confined to small area where they would be easier to control; the brothers' discussion just before the shooting began and ***Anthony's comment that it was "[Jeffery's] call"*** (Emphasis added) shows intent to carry out plans to kill; and none of the victims offered resistance. Therefore, we find competent, substantial evidence in the record supporting the finding that the murder was cold, calculated, and premeditated without

> any pretense of moral or legal justification. Accordingly, we hold that the trial court did not err in its finding of the CCP aggravating circumstance.

Farina at 53-54. Like, ***Bell*** in Farina there is evidence of an advanced plan to kill that does not exist in the instant case.

The state further argues that prior to the appellant firing the fatal shot, he could have left the scene. Since the appellant did not abandon his crime and killed an unresisting victim, the CCP aggravating factor is proper. The state relies upon this Court's decisions in ***McCoy v. State***, 853 So.2d 396 (Fla. 2003) and ***Looney v. State***, 803 So.2d 656 (Fla. 2001). Both of these cases are distinguishable from the instant case. In ***Looney***, the victims were bound and gagged for two hours where the defendants had ample opportunity to calmly reflect upon their actions, following which they mutually decided to shoot the victims execution-style in the backs of the their heads. In ***McCoy***, the defendant took a store clerk hostage while robbing an ABC liquor store. After completing the robbery and attempting to disarm the video surveillance and alarms, the defendant took the hostage back to a storage room and shot her execution-style. The cold "execution-style" murders in Looney and McCoy are not comparable to the emotionally charged domestic violence shooting in Sylvia.

The state argues that this Court's decisions in ***Owen v. State***, 862 So.2d 687

(Fla. 2003) and ***Evans v. State***, 800 So.2d 182 (Fla. 2001) is authority for this court to ignore the weighty mental mitigation in this case and uphold the CCP aggravating factor. The ***Owen*** and ***Evans*** case are distinguishable from the instant case.

In ***Owen*** and ***Evans*** there was substantial planning and a series of actions taken by the defendants that belie the subsequent findings of mental mitigation. In ***Owens*** the defendant had murdered before and used the same methods of preparation to commit this murder. Moreover, the defendant had broken into the home and observed his victim and left the scene, to only return later in commit the murder. In upholding heighten premeditation this Court held:

> When Owen first entered the home and saw the fourteen-year-old babysitter styling the hair of one of her charges, he had the opportunity to leave the home and not commit the murder. While he did exit the home at that time, he did not decide against killing Slattery. Instead, he returned a short time later, armed himself, confronted the young girl, and stabbed her eighteen times. Owen clearly entered the home the second time having already planned to commit murder. Heightened premeditation is supported under these facts.

Owen at 701.

In ***Evans,*** the defendant was a gang leader that was left behind by a fellow gang member (the victim) after a botched home invasion. Evans was angry and felt betrayed over being left behind. In finding CCP this Court held:

> The trial court in the sentencing order recognized that irrespective of Evans' mental illness at the time of the crime he was able to control his actions and plan his next steps. The trial judge said that Evans was quite capable of recovering from the sudden break down in the plans to commit the home invasion robbery. He was capable of making his way to a nearby residence and securing transportation back to Orlando. He managed to get back to Orlando before Mr. Lewis so that he could await his victim's arrival. Defendant was in control enough to first interrogate Mr. Lewis and then have him bound and gagged. He was thinking clearly enough to avoid connection to the murder by removing Mr. Lewis from the apartment before shooting him. Mr. Lewis [sic] [Mr. Evans] was rational enough to place a silencer over the barrel to further avoid detection.

Evans at 193.

In the case at bar, Sylvia was not a serial rapist/murderer or gang leader engaging in home invasions. Sylvia was suffering from emotional turmoil over the loss of his job and the impending divorce with his wife. To medicate the emotional turmoil, Sylvia would abuse alcohol.

Due to the Sylvia's drinking and emotional turmoil, Sylvia was incapable of the extensive planning described in ***Owen*** and ***Evans***. The shooting at the Woodward home was not the action of a rational, calm and calculating man, but rather the actions of an emotionally crippled man that lost his job and was spurned by his wife. The trial court's finding that the killing was the product of cool and calm reflection, and with a careful plan or prearranged design to commit murder

before the fatal incident was in error.

The conclusion of the trial court should be rejected. The instruction to the jury and the finding of this weighty aggravating circumstance requires that the death sentence must be vacated and reduced to life or remanded for a new penalty phase.

POINT II

IN REPLY AND IN SUPPORT THAT THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

The state argues that the appellant's actions created a great risk of death to many persons. The state claims that there were six unarmed innocent people in the carport when appellant pointed his shotgun and started shooting. This claim is not supported by the evidence.

When the appellant fired the first shot in the air outside the Woodward home, there were seven people other than the victim at the Woodward household. The placement of the people when the shooting started was as follows: Beth Parker was in the master bedroom; Patrick Woodward was in the master bedroom; Ross Shadron was in the living room watching television; Patricia Sylvia was in the kitchen; Betty Woodward was in the kitchen; Jerome Woodward was sitting in the carport area; Rachel Shadron was standing in the carport area; and Robin McIntyre's location is unknown.[1] The only intended victim in this case was Patricia Sylvia.

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[1] Robin McIntyre did not testify. Jerome Woodward did not see McIntyre outside when the shooting started; and Ross Shadron found McIntyre with Beth

The appellant likely fired the first shot in the air to make bystanders flee for safety. There is no evidence of indiscriminate shooting of bystanders. When Betty Woodward went to investigate the sound of firecrackers outside, she was shot instantly as she open the door to the carport. The victim was also impacted by that shot to Woodward as she stood next to Woodward or was shot by a subsequent shot. The appellant never entered the home to shoot at other family members.

The evidence does not support the trial court's determination that the appellant knowingly intended to create a great risk of death to many persons. The evidence suggests otherwise. When the appellant approached the house with the shotgun, six of the eight people at the house where inside the house. The appellant fired warning shots in the air to get the outside bystanders to flee, which they did. The fact that several of the household members where in the vicinity of the shooting of Patricia Sylvia, without more, is insufficient to prove this aggravating factor beyond a reasonable doubt. The finding of this weighty aggravating circumstance requires that the death sentence be vacated and reduced to life or this matter be remanded for a new penalty phase.

Parker inside the house once the shooting began.

POINT III

IN REPLY AND IN SUPPORT THAT THE DEATH SENTENCE IS DISPROPORTIONATE WHEN COMPARED WITH SIMILAR CASES WHERE THE AGGRAVATING CIRCUMSTANCES ARE FEW AND THE MITIGATION, ESPECIALLY THE MENTAL MITIGATION, IS SUBSTANTIAL.

The state argues that this case is proportional to other cases where is this Court has upheld the death penalty. The state argues that the following cases of ***Buzia v. State***, 926 So.2d 1203 (Fla. 2006); ***Robinson v. State***, 761 So.2d 268 (Fla. 1999); ***Floyd v. State***, 850 So.2d 383 (Fla. 2002) and ***Evans v. State***, 838 So.2d 1090 (Fla. 2002) are comparable to the instant case, and this Court affirmed the death penalty after proportionality review. The appellant argues that these cases can be distinguished from the instant case.

In ***Buzia***, unlike Sylvia, the trial court did not find any statutory mitigating factors. Moreover, in ***Buzia***, the trial court found and this Court upheld the weighty CCP aggravating factor.[2] In ***Robinson***, the trial court found weighty mental mitigation, however, this Court upheld the weighty CCP aggravating factor, as well as witness elimination and pecuniary gain. (Robinson went out to his truck and obtained a drywall hammer and waited for his victim to fall asleep before

[2] Sylvia argues that it was error to find the CCP aggravating factor. **See** Point 1

battering her to death with a hammer) In ***Floyd*** this Court upheld three statutory aggravating circumstances, and there was no statutory mitigation, and very little non-statutory mitigation. In ***Evans***, the trial court found two statutory aggravating factors, and no statutory mitigation. (Evans shot his brother's girlfriend, and then denied her medical attention as she pleaded for help)

The state's argument presented in their answer brief is not persuasive. This murder is not one of the most aggravated and least mitigated of capital crimes. The death penalty is not the appropriate punishment for Sylvia, and this Court should reverse his death sentence and remand for imposition of a sentence of life imprisonment with no possibility of parole.

POINT IV

IN REPLY AND IN SUPPORT THAT THE THE PROSECUTOR'S REPEATED IMPROPER AND INFLAMMATORY ELICITATION OF IRRELEVANT EVIDENCE TAINTED THE PENALTY PHASE TRIAL AND RENDERED THE ENTIRE PROCEEDING FUNDAMENTALLY UNFAIR.

The appellant relies upon the initial brief in reply to the appellee.

POINT V

IN REPLY AND IN SUPPORT THAT REVERSIBLE ERROR OCCURRED WHEN THE COURT PERMITTED THE VICTIM IMPACT EVIDENCE TO INCLUDE IRRELEVANT AND PREJUDICIAL MATTERS SUCH THAT IT DENIED DUE PROCESS, FUNDAMENTAL FAIRNESS, AND A RELIABLE JURY RECOMMENDATION.

The appellant relies upon the initial brief in reply to the appellee.

IN REPLY AND IN SUPPORT THAT THE FLORIDA'S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO ***RING V. ARIZONA***.

The appellant relies upon the initial brief in reply to the appellee.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief and Reply Brief, Appellant respectfully requests this Honorable Court to vacate the sentence of death and remand for a new penalty phase, or remand with directions that the appellant receive a life sentence as to Point I and Point II; and vacate the sentence of death and remand with directions that the appellant receive a life sentence as to Point III, IV, V and VI.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Bill McCollum, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to William F. Sylvia, Jr., DC#V29754, Florida State Prison, 7819 N.W. 228th St. Raiford, FL 32026, this 4th day of January, 2010.

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER