

IN THE SUPREME COURT OF FLORIDA

JOEL DIAZ, :
 :
 Appellant, :
 :
 vs. : Case No. SC01-278
 :
 STATE OF FLORIDA, :
 :
 Appellee. :
 :
 _____ :

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

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Joel Diaz was charged by indictment filed November 18, 1997 in Lee County with first degree murder of Charles Shaw, attempted first degree murder of Lissa Shaw, and aggravated assault with a firearm upon Roy Isakson (R1/7-8). After the Public Defender was permitted to withdraw, private attorneys J. Frank Porter and Neil Potter were appointed to represent appellant (R1/13-15; R2/22-24; R/49-51; SR22,28). The defense file a notice of intent to rely on an insanity defense (R2/32-33; SR27-30).

The case proceeded to trial on July 25-28, 2000 before Circuit Judge Thomas S. Reese and a jury. Just before jury selection, it was put on the record that the state had made a plea offer that it would not seek the death penalty if appellant pled guilty or no contest to the charges in the indictment (T1/6-7). Appellant stated on the record that it was still his desire to proceed to trial (T1/7).

At the end of the four day trial, the jury found appellant guilty as charged on each of the three counts (R4/84-86; T4/793).

The penalty phase took place on October 10, 2000, and resulted in a 9-3 advisory verdict recommending the death penalty (R5/138; T5/892-93). After a November 3, 2000 Spencer hearing (SR48-74), the trial court imposed a death sentence for the murder of Charles Shaw on January 29, 2001 (R5/170-97,203-16; R6/234-35). Appellant also received a consecutive 151 month sentence for the attempted murder of

Lissa Shaw, and a consecutive five year sentence for the aggravated assault upon Roy Isakson, each with a three year mandatory minimum for use of a firearm (R5/196-97,199-202; R6/238-44).

Notice of appeal was filed on February 1, 2002 (R5/218-19).

STATEMENT OF THE FACTS

A. Trial - State's Case

Barbara Shaw lived with her husband Charles, her daughter Lissa, and Lissa's four year old daughter Taylor on Dresden Court in the Cross Creek subdivision in Fort Myers (T2/204-41,244-45, see T2/293). Barbara¹ is a quadriplegic and uses a wheelchair; she retains movement of her arms and has good use of (but no strength in) her right hand and limited use of her left hand (T2/248).

Joel Diaz (appellant) had dated Lissa for about two years, and they had lived together for about a year. There were problems in the relationship, and in late August, 1997 (two months before the charged offenses) Lissa moved back home with her parents (T2/241-42). Joel would continue to call and try to see her, but Lissa wouldn't take his calls (T2/242). To the best of Barbara's knowledge, Lissa did

¹ For clarity Barbara, Charles, and Lissa Shaw will be referred to by their first names.

not see Joel during this period, although she did go to his house on one occasion to move her things out (T2/242,265).

In the early morning of October 28, 1997, around 6:30, Barbara was lying in bed with her husband; she could hear Lissa bumping around in the kitchen fixing her lunch and getting ready for work (T2/242-43). She heard Lissa go through the laundry room into the attached garage, and she heard her get in the car, slam the door, start the engine, and raise the garage door (T2/243). The next thing Barbara heard was gunshots; about five of them (T2/243). She started yelling, "Oh my God, that sounds like gunshots and Lissa just went out the door to work" (T2/246). Her husband Charles sat up and oriented himself, then jumped out of bed and ran outside, wearing only the underwear he'd been sleeping in (T2/246-47).

Some time elapsed. It seemed like forever to Barbara, but she realized it was probably only a couple of minutes (T2/247). She could hear Charles' voice in the bedroom, talking very softly, saying "Calm down, put it down . . . take it easy", things like that (T2/247). Barbara did not know who he was talking to at first. She rolled back into a position where she could see, and she saw that Charles was talking to Joel Diaz (T2/248,251,267-68). Joel was standing on the right side of the chest of drawers right by the bathroom door (T2/249-51). Joel was holding a gun in his two hands, pointed at Charles' chest from a distance of 6-8 inches (T2/251).

According to Barbara, Charles "had one hand on the chest of drawers and he was talking to him with the other hand this way pleading with him to put it down, calm down, you know don't do this, and Joel pulled the trigger" (T2/251). Barbara testified that Joel pulled the trigger only once, but "[t]here apparently was no shell. It just clicked" (T2/252). She saw Charles "sort of visibly relax", relieved that the gun was empty, "but Joel was just very fast. He had the gun in his left hand and he flipped it open so the cylinder fell out, tipped it up so the shells fell out and reloaded. When my husband realized that he was reloading, he ran in the bathroom because he had nowhere to go except over the top of me or through Joel" (T2/252-53). When Charles retreated into the bathroom, there was no other way for him to get out (T2/253). Joel stepped inside the bathroom door. Charles stopped in front of the shower, turned around and looked at Joel, put his hand up and said, "Oh, man why you got to do this" (T2/253-54). Joel fired three times (T2/253-54). Barbara saw Charles' knees buckle, and he grabbed his midsection and fell face first onto the floor (T2/254). Joel then came back into the bedroom beside Barbara. He had the gun in his hand and was sort of moving it around, and he ran his other hand through his hair some, and Barbara was screaming at him "Why did you do this, you don't have to do this" (T/254). Appellant said he deserved to die (T2/254). Barbara thought that Joel was going to kill her because she'd seen

him shoot Charles (T2/255). Instead, after he was in the room with her for only a very short time ("I don't imagine it was more than 30 seconds, maybe a minute"), Joel suddenly turned around and went back into the bathroom (T2/255). Barbara testified that her view was not restricted and she was able to see completely into the bathroom (T2/267). "I saw him -- he walked up to my husband's body where he was laying and he bent over him and extended his right arm and he pulled the trigger. I saw him put the gun to my husband's lower back and pulled the trigger. He moved his arm further toward his left and pulled the trigger again" (T2/255). Barbara could not see what he was pointing at when he fired the second time, but she judged by the span of movement of his arm that it was in the direction of Charles' head (T2/255-56).

Joel was in the bathroom for 30 seconds at the most (T2/256). When he came back out he started talking to Barbara (T2/265,270). He remained in the house for 45 minutes to an hour before the police came (T/256-57,273). In addition to spending some time in the bedroom talking to her, he was all over the house, checking out the rooms, including Lissa's bedroom and Taylor's bedroom (T2/257). [Her granddaughter Taylor had slept in Lissa's bedroom that night (T2/257). To the best of Barbara's knowledge, Joel never encountered Taylor at any point during the incident (T2/273,276)]. There was no phone in Barbara's bedroom. She heard Joel in the kitchen making a

phone call, which she assumed was to his mother because he was speaking in Spanish (T2/257). The phone rang on three occasions; the first two times Joel did not answer it, while the third time he did answer it (T2/274).

While appellant was in her bedroom talking to her, he would pass the gun back and forth from one hand to the other. He would unload it and load it again, walk around, come back, put the gun under her bed, take it out again (T258,271,274). He did that three, maybe four, times (T2/258). Barbara described him as acting nervous, but not irrational (T2/274-75). During this time, appellant made many comments to Barbara (T2/256,270). He told her "I've never been in trouble before", and she said, "You are now" (T2/256). He said "If that bitch of a daughter of yours, if I could have got her, I wouldn't have had to kill your husband" (T2/ 256). Joel told her that he had just wanted to talk to Lissa, and she asked him why he brought a gun if he just wanted to talk to her (T2/259). He replied that he didn't feel he could come to her dad's house without being able to defend himself (T2/271-73). At one point Joel said "I should just blow my brains out", and Barbara told him she just thought that would be one more senseless killing (T2/258).

Among the other comments Joel made to Barbara -- all while walking around loading and unloading the gun -- were that there is more than one kind of abuse, that he didn't know why Lissa had left

him, that her husband was prejudiced and deserved to die and she was probably prejudiced too (T2/270-71). He said to Barbara, "You'll probably never forgive me for this" (T2/270).

Barbara testified that, throughout the 45 minute to an hour period before the sheriff's department arrived, there was nothing preventing Joel from leaving (T2/271). When the police pulled up and she heard their engines outside, Joel went into the hallway and then into the laundry room (which connects to the garage) and out of her line of sight (T2/273-74, see 243). She heard the officers tell him to get down on his face and put his hands over his head (T2/274).

Later that day, after Joel was gone, Barbara inspected her house and found that Lissa's room "was a wreck. All the drawers were pulled out of her chest -- like, gone through" (T2/275). Lissa did not normally leave her room in that condition (T2/275). On cross-examination, Barbara acknowledged that prior to hearing and seeing her husband and Joel in the bedroom, she did not know what had happened that might have caused Joel to become upset (T2/268). On redirect, she stated that she never saw Charles make any overt movements or actions toward Joel while they were in the bedroom or the bathroom (T2/277-78). Barbara did not recall observing an abrasion or cut on Joel's left eye (T2/269). Asked if it would refresh her memory to look at a photograph, she replied, "I have seen

a photograph with it on, but I don't remember seeing him look like that" (T2/270, see T3/504-05; T4/665; R4/74-75).

Barbara testified that when you enter her bedroom door, the chest of drawers is on the right, between the bedroom door and the bathroom (T2/268). Propped up against the wall and the chest of drawers were two hunting rifles; one sealed and wrapped in a green vinyl case, the other broken down, wrapped in a blanket, and tied with rope (T2/252,268,278-79).

Lissa Shaw testified that a year after she and Joel Diaz began dating she and her then three year old daughter Taylor moved in with Joel (2/281-83). Lissa described her relationship with Joel as not always good and not always bad, but it was a rocky relationship (T2/283,306). The two of them had trouble communicating all the time, whether it was over "problems, friends, money, house things", everything (T2/306,313). Joel was jealous and controlling, but he had trouble controlling his impulses and his temper (T2/283,306,313-14):

MS. GONZALEZ [prosecutor]: Was he the kind of person that got mad easily?

LISSA SHAW: Yes.

Q. If things didn't go his way?

A. Sometimes it didn't make sense why he was mad.

(T2/314)

Their live-in arrangement was "on and off", and Lissa had moved out and moved back in on two prior occasions before she moved out a third time in August, 1997 (T2/283-84,306-07). One time, when Joel was getting ready to leave for a vacation in Mexico, he told Lissa it would be a good time for them to think about things (T2/307). When she moved out in August, 1997, it was sort of a joint decision; they had discussed it and Joel said he didn't care, so Lissa decided to move back to her parents' house (T2/284-85,312).

After she moved out, Joel continued to call her on the phone and try to see her, but she did not want to have any contact with him (T2/285). She testified that she was afraid of him because he had beaten her up more than once (T2/314). She was trying not to communicate with Joel "but there were some other circumstances" (T2/308-09). On two occasions she had to go back to the trailer which they had shared, and the two of them talked "[a] handful of times", the last time in mid-September (T2/307-08). She decided she didn't want to talk to Joel any more, but she knew that he did want to talk to her (T2/312).

On October 28, around 6:30 in the morning, Lissa went into the garage and got in her car (a dark blue Iroc Camaro) to go to work (T2/285). She locked the doors, started the engine, and hit the garage door opener (T286,288). The she caught a glimpse in the rear view mirror that somebody had come underneath the door, so she

checked to make sure her car doors were locked and sat back in the seat (T2/286). When she turned, Joel was standing at the driver's side window with a gun pointing at her head (T2/286-87,309). She believed the gun was a revolver, because it had a cylinder (T2/286-87). Joel tried to open the door, and he kept telling her to get out of the car (T2/287,309). He never made any statements that he was going to kill her or hurt her (T2/312-13). Lissa was telling him "Please don't do this, don't do this, don't hurt me", and when she saw this wasn't going anywhere she told him "Okay, okay, hold on a second, let me get my stuff" (T2.287-88). She leaned down like she was getting things from the floorboard, and as she was doing so, she reached for the gearshift, put it in reverse, hit the gas, and took off (T2/288). She heard about three gunshots (T2/288). She backed out of the garage and driveway, bumping into a landscaped island in the street, and drove away at a high rate of speed (T2/289-90). At the stop sign she hesitated and looked in her side mirror to see what was going on. She saw Joel in the grassy area walking in her direction (T2/290-91). Her car went up in the grass, hit the sprinklers, and spun around (T2/291, 297).

The last thing Lissa saw as she was driving away was her dad, in his underwear, coming out of the garage area and walking toward Joel until they were facing each other in the front yard (T2/303, 310,316). Joel was holding the gun in both hands and pointing it at

her dad (T2/303,310). Her dad, with his left hand swinging and his right hand pointing at Joel, continued to walk toward Joel until there was about five feet between them (T2/303,311). Asked if her dad appeared to be angry, Lissa said 'Oh, yeah"; he appeared to be yelling at Joel, though she couldn't hear anything he might have been saying (T/303,311).

On her way out of the neighborhood Lissa encountered a jogger. She slowed down to tell him to call the police, that somebody was in her house with a gun and there were still people left in the house (T2/291). Lissa then drove to the hospital, where she realized for the first time that she had been shot (T2/289,291-92). Lissa testified that the gunshots did not cause her window to completely shatter; "[i]t crackled because of the tint on it" but "[i]t didn't fall apart" (T288). "There was a hole in the middle of it, but the basic -- it was up" (T2/288-89). There was also a hole in her passenger door (T2/297). Bullet fragments were recovered from her car, and there was glass all over the seats and on the floor (T2/295-97).

At the entrance to the residential community where Lissa lived with her parents there are small gates which resemble railroad crossing gates. These are opened by remote control, or by telephoning a resident to open them for you. Joel Diaz did not have a remote control to open the gates, nor did Lissa open them for him

that morning (T2/293). When she backed out of the garage that morning, her mom's van was in the driveway, but there was no other vehicle around which Joel might have been driving (T2/286,294).

Lissa's daughter had slept in the bed with her that night, and was still in bed when Lissa left for work (T2/298). When Lissa left the house that morning she did not leave her bedroom in disarray, and her dresser drawers were not pulled out (T2/298).

Delores and Roy Isakson were neighbors of the Shaws (T2/317-18,327). Roy is a retired New Jersey police lieutenant (T2/321, 327). A little before 6:30 a.m. on October 28, as daylight was breaking, Delores -- who was planning to go jogging with some other neighbors -- came out of her house to take out the garbage (T2/317-18,325). She noticed a man standing between the Shaws' closed garage door and the back of Barbara's van (which was parked in the driveway facing the street) (T2/318-20). The man, whom she had never seen before, was of average height with dark skin and dark colored work-type clothing (T2/324). Delores tried to wave to him, but she wondered what he was doing there since there were no other vehicles that did not belong to the Shaws (T2/319-20). She thought the man saw her, and he walked around to the passenger side of the van where she couldn't see him (T2/320,325).

Delores awakened her husband, told him there was a stranger outside who was kind of suspicious, and asked him to investigate

(T2/320-21). Then, from her kitchen, Delores heard squealing of tires and what sounded like two gunshots (T2/321-22). She telephoned Barbara Shaw and got no answer (T2/322). Delores and her husband went outside and up the street toward the Shaw home; they were joined by the woman Delores jogged with (T2/322). The Shaws' garage door was now open (T2/322-23). The door between the garage and the laundry area was partially opened, and Delores could see a figure moving back and forth (T2/323). She couldn't tell if it was the same person she'd seen earlier in the driveway (T2/324). Delores left almost immediately, while her husband remained (T2/325).

Roy Isakson testified that, after his wife awakened him and asked him to check out an individual up the street, he went outside with his dog and proceeded to the Shaws' home (T2/327-29). His wife did not accompany them (T2/329,335-36). The Shaws' garage door was up, the door from the garage to the interior of the house was open, and there was a individual pacing back and forth (T2/329). Roy entered the garage with his dog, and called for Charlie Shaw (T2/329-30,336). A person Roy didn't know stepped into the garage, raised a black revolver, pointed it at his face, and said, "Get the fuck out of here" (T2/330-31). He seemed "somewhat agitated", though not intoxicated (T2/331). Roy, concerned for his life, said "You've got it" and proceeded to leave (T2/330-31,334-36). Roy went home and called the police (T2/337). The encounter in the garage took a

matter of seconds (T2/333-35). Roy Isakson identified Joel Diaz in court as the person who pointed the gun at him (T2/330-31,333).

Another neighbor, Patricia Hadgehorn, was in her house when she heard five gunshots in succession (T2/338-39). She heard tires screeching, and what she took to be a car going up on the curb or embankment, and then coming back down and speeding away (T2/340-41). She called to her husband to come look, and they recognized Lissa Shaw's blue car on the street, leaving (T2/340-41). Her curiosity aroused, Mrs. Hadgehorn went outside to see what was going on, but Roy Isakson yelled at her to get back in the house, so she did (T2/342-43). Later, through her window, she saw some policemen in the Shaw driveway (T2/343).

Deborah Wilson, also a neighbor of the Shaws, was returning home from her morning walk when she heard five or six gunshots (T2/344-46). She heard tires squealing and saw a bluish green car come around the corner, hit the curb, and spin its wheels (T2/346-47). The car got untracked and headed out of the subdivision (T2/347-48). A minute or two later, Ms. Wilson saw a man in dark pants and shirt walking backwards into the street with his hands behind his back (T2/348-49,355). She couldn't tell if he had anything in his hands (T2/349). Then Charles Shaw, clad in just briefs, came into her vantage point (T2/349). The prosecutor asked,

"And where did this confrontation wind up going?", and Ms. Wilson answered that the man in dark clothing was standing in the street, and Mr. Shaw was standing on the corner pointing at him (T2/349-50). Ms. Wilson (who was hiding behind some palm trees) assumed they were having a conversation, but she couldn't hear what was being said (T2/350,354-55). At some point Mr. Shaw left and she could not see where he went (T2/350-51). The other man -- who had not removed his hands from behind his back while Mr. Shaw was there -- went over to an electrical box or telephone box, laid an object [Ms. Wilson couldn't see what it was] on top of the box, pulled something out of his right pocket, and did a motion which led Ms. Wilson to believe he was loading a gun (T2/351-53). Frightened, she backed along the hedge and walked toward the clubhouse where she knew there would be a phone (T2/352-53).

Lee County sheriff's deputy Denise Wohmer² met with Lissa Shaw at the Gulf Coast Hospital emergency room at 7:30 a.m. (T2/357-60). Lissa was nervous and excited, but alert and able to talk (T2/360). She had sustained "what appeared to be a gunshot wound to her right side of her neck and also to the right shoulder area" (T2/360). Lissa told Deputy Wohmer that her ex-boyfriend Joel Diaz had approached her and started shooting at her (T2/361). Wohmer

² Although the transcript refers to Deputy Wohmer as "Dennis" (T2/357), the index lists her as Denise, and the latter appears to be correct (see T2/369).

wasn't positive if Lissa said she was in the vehicle or getting in the vehicle at the time (T2/361). Wohmer also testified that Lissa said the last thing she remembered seeing as she took off "was her ex-boyfriend chasing her father across the yard with a gun in his hand" (T2/361). Lissa told Deputy Wohmer that her parents and her four year old child were in the residence (T2/361). Wohmer, by radio, relayed this information back to the units which were arriving at the scene (T2/362).

Other Lee County sheriff's deputies were dispatched to the scene of the shooting incident (T2/365-67,375-76; T3/388-89,430-32). Deputy Roger Turner was flagged down near the gates by a man who had heard gunshots, and he received information from other people narrowing it down to a particular house (T2/367-68). As more police units responded they set up a perimeter, and information "kind of trickled in" that there were people still inside the house, and possibly a suspect still inside the house (T2/368-69,375-76). Communication was established with the suspect, whom they later learned was Joel Diaz, and he agreed to come out (T2/371, 376). Joel exited into the garage where he was taken into custody (T2/371-74,376). According to Deputy Turner, who made the arrest, he was compliant and cooperative (T2/373-74).

After the residence was secured by law enforcement, paramedic Mitchell Price entered the bathroom adjoining the master bedroom and

observed a mature male lying on the floor on his left side. Price assessed him for life signs and determined that he was dead (T2/381-85).

Deputy Sheriff Richard Joslin of the forensic unit recovered a firearm under the edge of the bed in the master bedroom of the Shaw residence, along with six live cartridges and six spent shell casings, all .38 caliber (T3/391-400). The six live cartridges were lying beside the gun under the bed; there were no live cartridges inside the firearm (T3/395,399). The firearm holds five rounds (T3/398-99).

Blood samples were taken from the floor and walls of the bathroom (T3/400). The glass portion of the shower door was shattered, and a spent projectile was found in the shower (T3/400-02). In the master bedroom, leaning in the corner between the chest of drawers and the bathroom door, were two guns; one was disassembled and wrapped in a towel and tape, and the other was in a zippered vinyl-type case (T3/413-14). A pack of Newport cigarettes were located in the garage³ (T402-03). In a subsequent inventory of Lissa Shaw's car, a number of projectiles and fragments were recovered (T3/405-12, see T3/433-34).

³ Other testimony in the trial established that Joel, who was ordinarily not a smoker but had recently started smoking a lot, smoked Newports (T3/473), while Charles Shaw -- the only smoker in his household -- did not smoke that brand (T2/261).

On cross-examination, Deputy Joslin testified that, in addition to the blood samples from the master bathroom, bloodstains were also found in other locations in the house, including the entrance to the northeast bedroom on the other side of the house; the inner side of the right (french-type) door to the northeast bedroom; a child's drawing paper on the dresser in the northeast bedroom; the telephone in the kitchen; and the southeast corner of the kitchen counter near the telephone; as well as several other areas in the master bedroom (T3/415-17; see T3/505-06). Deputy Joslin did not know whose blood this was, but the samples were sent by crime scene investigator Robert Walker to the FDLE for analysis (T3/417-18). A copy of the FDLE's report dated June 1, 1998 sent to the attention of Technician Walker was marked for identification as Defense Exhibit 2 (T3/418-19). A short time later in the trial, during the cross-examination of investigator Walker, it was brought out that 12 pieces of evidence were submitted to the FDLE for blood analysis (T3/437). Walker obtained the results back from the FDLE (T3/437). When defense counsel asked, "Do you know whose blood was in the different --", the state objected on the grounds (1) that no foundation had been laid, and (2) that introduction of DNA evidence requires a Frye hearing (T3/437-38). Defense counsel argued that the state had submitted the blood samples for comparison, and the results -- if they matched either Charles Shaw or Joel Diaz -- should be admissible as business

records (T3/438). The prosecutor countered, "They would have been, Judge, had the proper foundation been laid, and then that again is subject to a Frye hearing which the Defense counsel cannot go over or circumvent" (T3/439). The trial judge sustained the state's objection (T3/439), and subsequently (prior to the testimony of the defense's psychological expert, Dr. Kling) granted the state's request that Dr. Kling not be allowed to refer in his testimony to any DNA results (T3/523-24,528,530-31). The trial judge stated, "Now as far as blood and DNA and whose blood it was and that sort of thing, I think we have the same problem with this that we had with the Frye test and we haven't gotten that far" (T3/530). The judge agreed that Dr. Kling could talk about a struggle, but not in relation to DNA (T3/531).

The crime scene investigator, Walker, also testified that he traced the ownership of the firearm which was found under the edge of the bed in the Shaws' master bedroom. It was identified as having been purchased by Joel Diaz from Rick's Pawn Shop in Fort Myers (T3/435-37).

The manager of Rick's Pawn Shop, Philip Primrose, testified that Joel Diaz came in to purchase the firearm -- a Rossi .38 Special -- around October 6, 1997 (T341-42). According to Primrose, Joel "wanted to buy a gun in a hurry. He was eager to purchase a firearm" (T3/442). Because there is a three day waiting period for buying a

handgun, during which a background check is done, Joel was not able to take immediate possession of the gun (T3/442-43). When he came in on the third day to pick it up, he was still unable to do so, because "he was called a conditional non-approval. There was something in his background they couldn't clear up at the time . . .", and it was necessary to wait until he was actually cleared to take the gun (T3/443). During the waiting period, Joel continued to call just about every day; he was a little irate or irritated by the delay and he wanted to cancel the transaction (T3/444). Primrose explained that they could not cancel the transaction and he was "kind of, like, in limbo" while they were trying to clear up his background; "we would like to sell him the gun, but until I get an okay, he can't do anything" (T3/444). On October 16 -- about ten days after he first came in -- Joel was allowed to take the gun with him because the background check had finally come back clean (T3/445,447).

Asked on cross whether Joel had told him anything about why he wanted the gun, Primrose stated that he had said he wanted it for target shooting (T3/447-48).

FDLE firearm and toolmark examiner Gerald Styers examined the Rossi .38 five shot revolver, as well as six live cartridges, and a number of fired bullets, bullet jackets, fragments, and cartridge cases (T3/420,423; R3/63-64). He was able to identify the fired bullets and cartridge cases as having been fired by the Rossi .38

firearm in question (T3/425,427-29; R3/63-64). The gun was in good condition, with a trigger pull of 3 3/4 to 4 pounds single action and 11 1/2 to 11 3/4 pounds double action (T3/424; R3/64). Styers also determined, by performing stipple pattern distance tests with the Rossi .38 and comparing the results to the stipple pattern which appeared in the photograph of the wound to the back of Charles Shaw's head, that the gunshot which caused that wound was fired from a distance of greater than 2 inches but less than 24 inches (T3/423-24; R3/64).

The district medical examiner, Dr. Carol Huser performed an autopsy on Charles Shaw on October 28, 1997 (T3/451,454). Mr. Shaw was 54 years old (T3/462-63; R3/61). The cause of death was listed as "Gunshot wounds (five) to the head, chest, abdomen (two) and right lower extremity" (T3/461; R3/61).

Dr. Huser testified, both on cross and on redirect, that she was not able to determine the sequence in which the gunshot wounds took place (T3/464,465). She detailed the five wounds "just going in order of my report, which isn't specific to how they occurred" (T3/455). One shot entered (at a shallow angle) the upper right side of the chest, a little above the nipples, and perforated both lungs and the heart (T3/455-56). That wound would have been almost immediately fatal, from a matter of seconds to perhaps a minute or two at most (T3/456,464). It would have caused unconsciousness very

quickly (T3/464-65). The two wounds to the abdomen, one entering on the right side and the other on the left, would not have been immediately fatal; a person could survive them with proper medical attention, while if they were untreated the person could live for hours or maybe longer (T3/456-58). Dr. Huser testified that she would expect a gunshot wound to the belly to be quite painful (T3/457-58). There was a flesh wound to the right calf, "the middle fleshy part of the calf. All it did was go through the skin basically; in and out" (T3/458). That injury would not be fatal (T3/458). Asked if there is "any amount of pain involved in this particular injury", Dr. Huser answered "Sure" (T3/458).

The gunshot wound to the back of the head went through the brain and the brain stem and would have been instantly fatal (T3/459,464). There was some stippling on this entrance wound, which Dr. Huser did not observe on any of the other wounds (T3/459). This told her that that shot would have had to have been from closer range than any of the others (T3/459-60).

Greg Chiapetta of the Sheriff's Office was the agent in charge of this investigation (T3/493,495-96). He had interviewed Lissa Shaw at the hospital, and she told him her ex-boyfriend Joel Diaz had caused her injuries (T3/494). Later that day, he attended the autopsy and took custody of three projectiles recovered from the body of Charles Shaw (T3/496-98).

Around 5:00 p.m., after the autopsy and before the search of Joel's residence, Agent Chiapetta had occasion to come in contact with Joel Diaz (T3/503). Asked (on cross) if he appeared to have any injuries, Chiapetta answered no; "I noticed that he had an abrasion of some sort, but I thought it was the birth mark that he has on his face. I wasn't sure. I was only with him momentarily. I didn't ask him" (T3/504). Defense counsel showed Chiapetta Joel's booking photo (Defense Exhibit 1), which refreshed his memory as to how Joel appeared on the day of his arrest (T3/504-05; R4/75). Chiapetta reiterated that he thought Joel had an abrasion on the left side of his face "but I didn't know whether it was a birth mark or not" (T3/505).

That night Agent Chiapetta participated in a search of Joel Diaz' trailer (T3/498-99,503). Joel's brother Jose was present (T3/498-99,503). The investigators located a zippered pouch containing 36 live rounds (out of a 50 round box) of .38 caliber ammunition (T3/499). Underneath Joel's bed were some letters from Lissa Shaw to him, and some photographs of the two of them together (T3/502,506-07). On the headboard of Joel's bed was a handwritten note addressed to his brother Jose (T3/502). Chiapetta showed the note to Jose, who had not known it was there (T3/502-03).

Jose Diaz, called as a prosecution witness, testified that during the month of October 1997, he and his girlfriend Marsol were

living with his brother Joel, in the same residence where his brother had previously lived with Lissa Shaw (T3/467-68,480). Joel had been depressed for a while; "we worked in the same place. He quit his job and stopped coming for work. He stopped seeing his friends. He stopped hanging out" (T3/489). After his breakup with Lissa, Joel was quieter than usual and -- while he had previously been only an occasional smoker -- he started smoking a lot; "Every time I seen him he had a cigarette in his hand" (T3/490, see 473). Jose was unaware that his brother had recently purchased a gun (T3/491, see 471).

Some time during the night of October 27, Joel asked Jose for a ride to a friend's house at 5:30 the next morning (T3/469-70). Jose usually goes to work at 7:00, and his girlfriend Marsol usually drops him off there due to his bad eyesight (T3/470-72). When Jose, Marsol, and Joel left the trailer early in the morning it was still dark, and Joel was driving (T3/470-71). Joel was quiet and smoking cigarettes and -- consistent with his demeanor of late -- he seemed depressed (T3/472-73,489-90). Because he cannot see well, Jose had no idea where they were headed, other than that he thought it was somewhere in the direction of San Carlos (T3/471-72,474). They eventually arrived at a place where there were gates. Joel stopped the car and got out, and Marsol got in the driver's seat and drove Jose to work (T3/472,474).

Later, police officers came to the trailer with a search warrant (T3/474-75).⁴ The officers showed him a letter they found in Joel's room which was addressed to Jose (T3/475,477-78).⁵ The letter was introduced into evidence as State Exhibit 77; and it reads as follows:

Jose First I want to apoligize for using you or to lieing to you to take me where you did I felt so bad but there was no other way. Theres no way to explain what I have to do but I have to confront the woman who betrayed me and ask her why because not knowing is literly killing me. What happens than is up to her.

If what happen is what I predict than I whant you to tell our family that I love them so much. Believe me I regret having to do this and dieing knowing I broke my moms heart and my [dad?] makes it even harder but I cant go on like this it's to much pain. Well I guess that all theres to say. I love you all.

Joel

P.S. Someone let my dad know just because we werent close does'nt mean I don't love him because I do.

(R3/62)

B. Trial - Appellant's Testimony

⁴ Jose thought it was a couple of days after he dropped Joel off, but the agent testified that the warrant was served the same evening (T3/474-75,487; see T3/498-99).

⁵ The defense objected to introduction of the letter on authentication grounds (T3/475-88). The judge ruled it admissible (T3/487-88). Joel subsequently testified that he indeed had written the letter (T3/586,605,632,637).

Joel Diaz testified that he met Lissa Shaw in 1995, and they dated for a year before she and her daughter moved in with him (T3/577). Joel met Lissa's parents, but after he learned from Lissa how they were he just sort of avoided them. It was very clear that they didn't like him and didn't approve of their living arrangement (T3/578-79). Lissa and Joel had problems in their relationship and difficulty communicating with each other; they argued frequently about little things (T3/578-79; T4/606). The main problem was that Joel had a hard time dealing with the fact that Lissa had been married before (T3/578; T4/606). When they would argue, Joel would often lose control of his temper; "I used to say a lot of bad things and at the time when I'm saying them I don't know what I'm saying, but once I look back at it, I can't deny it" (T4/634-35).

Lissa and Joel lived together for about a year (T3/579). The first time they separated it was her idea; the second time -- in August 1997 -- it was his idea (T3/579-80). After the August separation they didn't see each other at first. Since he wasn't allowed to call over to her house when he wanted to, they had a system where he would page her using 247 instead of his own phone number (T3/580-81). Lissa called him right back; he told her he missed her and she said she missed him too (T3/580-81). After that they started being friends, and for a while they saw each other often during her lunch breaks and such, although she did not spend the

night with him (T3/581-82). Joel felt like they were both trying to work things out, and then some time in October "all of a sudden she just cut communication with me and I was left with no answers because I was not allowed to call her house. She changed beeper numbers. So, yes, I was very depressed" (T3/582, see T4/607). He had no idea why she had broken off all communication with him (T4/607) and he did not know whether their relationship was over; she had "done that before but then she would always call back. So I was left hanging" (T3/582-83).

Asked why he purchased a gun from Rick's Pawn Shop, Joel said there had been some break-ins at his house (T3/583). Lissa's dad had some tools and things on his patio, and he didn't know if they were involved or not (T3/583). He never said he wanted the gun for target practice; it was Mr. Primrose's co-worker who made that comment (T3/584; T4/608). Joel testified that if he had wanted to he could have bought a gun on the street (T/583). They gave him a three-day waiting period, and he was okay with that, but on the third day when they still wouldn't give him an answer he was angry; "I'm like, well, what's the problem. I was like why don't you give me my money back" (T3/584). After he got the gun, he usually kept it in the house, but because his brother's kids were coming over, he started keeping it in the car (T3/588).

On October 27, Joel came home very late at night, started drinking some Crown Victoria his sister had given him, and got depressed (T3/584). He doesn't usually drink, and he got no sleep that night (T3/584-85). Around 1:00 or 2:00 a.m., before Jose went to bed, Joel asked his brother for a ride (T3/585-86). He lied to Jose, just telling him he was going over to a friend's house (T3/586). Because he had lied to his brother and he wanted to tell him where he was actually going, Joel wrote a letter to Jose to tell him the truth (T3/586). Joel was drinking and emotional when he wrote the letter, but he was not planning on killing himself, nor was he planning on killing or shooting anyone else (T3/587,592; T4/632,637-38). He just wanted to confront Lissa to find out answers, and (because he was aware of his own tendency to overreact when his and Lissa's discussions would escalate) he thought that at worst he might wind up in jail for domestic violence (T3/587,592).

Early in the morning, when they got in the car, Joel took the gun and put it in his pants (T588-89,610; T4/629-32). He testified

that he didn't want to leave it in the car because it was loaded and he didn't want Jose's kids (who were with Jose that day, though he wasn't supposed to have them) to find it (T3/588-89,592; T4/629, 635). Joel -- accompanied by Jose and Marsol -- drove to the Cross Creek subdivision, a twenty minute drive (T3/589; T4/628-29). Joel got out of the car at the gate and walked for about five minutes, arriving at Lissa's house around 6:30 (T3/589-90; T4/629,631). Since he knew she left for work at 6:30, he waited for a little less than ten minutes, thinking he'd missed her (T3/590). He was standing by the back of the van, smoking. When he went to the grass to put out the cigarette a passerby glanced at him and kept walking (T3/590). Then the Shaw's garage door went up, and Joel approached the car and told Lissa he needed to talk to her about their relationship, but he didn't think she was hearing him (T3/590-91). She didn't want to open the door. He kept saying, "All I want to do is talk to you", and when she wouldn't listen he went to the front of the car, pulled the gun out and pointed it at her (T3/591). When he realized what he'd done, he lowered it and went back to the driver's side window (T3/591; T/610-11). He was standing very close to the car, still telling her he just wanted to talk, when she suddenly threw the car in reverse and backed out fast and not too straight (T3/591-93, T4/610-12). Startled, Joel kind of pushed himself away from the car with one hand and started firing the gun into Lissa's car (T3/592;

T4612-13). He acknowledged that he shot the gun, and that Lissa was hit in the neck and shoulder (T3/592; T612-13); his firing was a bad reaction to her throwing the car in gear and backing up (T3/ 592).

Joel had exited the garage and was near the sidewalk by the time he first saw Charles Shaw (T3/593). Mr. Shaw came out of his house in his briefs, and ran toward Joel. Mr. Shaw kept coming toward him and Joel was backing up, until they wound up on the road, and then in the yard (T3/593-94). Joel wanted to walk away and Mr. Shaw didn't want him to; he kept yelling at him that the cops were coming over and he was in big trouble and he wasn't going to get away (T3/594; T/619-20). Mr. Shaw was considerably the bigger and heavier of the two men (T4/616,625), and he kept trying to get ahold of Joel (T3/594; T4/614-16). Joel was keeping him off by holding the gun on him (T3/594; T4/615-16). Asked why he didn't shoot Mr. Shaw while they were having this confrontation in the yard, Joel answered, "Because I was succeeding, just keeping him off of me" (T4/634, see 616,618-19). At one point, Mr. Shaw tried to grab Joel and got his hands on him and they scuffled momentarily (T4/614-15).

The confrontation moved from the street to the yard and from there into the garage (T3/594; T4/616-18). Joel, although he was holding the gun, was walking backwards and Mr. Shaw was trying to corner him so he wouldn't go anywhere (T4/617). Inside the garage it was dark, and Mr. Shaw kept being aggressive; yelling and screaming

and trying to jump on him (T4/618,634). Joel continued to try to fend him off as he was doing before, but then they fought and Mr. Shaw tried unsuccessfully to wrestle the gun away from him (T3/594; T4/618-19). In so doing, Mr. Shaw struck Joel in the face with something -- he didn't know if it was his fist or an object such as a tool -- and that is when Joel "lost it" and (when Mr. Shaw ran into the house) started chasing him (T3/594; T4/596-97,619-20).

[Joel was shown the booking photograph (Defense Exhibit 1) which was taken at the time of his arrest (T3/595; R4/75). The cut on his left cheek which appears in the photograph was caused when Mr. Shaw struck him in the garage (T3/595). Joel does have a birthmark, but that is on the right side of his face (T3/595)].

After he got hit and lost control of his temper, "everything happened so quickly" (T4/596-97, see 619-20). Joel doesn't remember it all clearly after that; he is going by flashbacks (T4/597-98,621,634). He remembered Mr. Shaw reaching for something and then letting it go quickly; Joel didn't know what it was at first, but it turned out to be a rifle in its case (T4/597-99,627). Mrs. Shaw was lying on her stomach facing away from him and Mr. Shaw; she managed to get to her side and she kept asking what was going on (T4/597).

Joel admitted that he shot Mr. Shaw, although he hadn't planned on doing anything of the kind (T4/598). Asked why he did it, he said "I don't know. It was just -- like I said, I lost it" (T4/598).

Joel denied that he reloaded the gun in the bedroom; Mr. Shaw "wouldn't have let me. If I were to stop and reload it, he would not have let me. It's not like he's got a big bedroom. We were close to each other" (T4/598, see 599, 623-24). Instead he believed he reloaded earlier, while they were outside and he was trying to keep Mr. Shaw away (T4/599,624). Joel also stated that he fired all the shots at Mr. Shaw at one time, rather than going back into the bathroom a second time (T4/599,608,624-25).

After the shooting, Joel was in shock and panicking; he couldn't believe what had just happened (T4/599-600). He recalled loading and unloading the gun; he didn't know how many times (T4/600). He swore a couple of times, and then when he'd calmed down some he told Mrs. Shaw he was sorry for swearing, because "even though me and her never really did have a relationship, I still have respect for her, so I apologized" (T4/600-01).

Joel remembered going through the dresser drawers in Lissa's room and going through the rest of the house (T4/601,628). He was still bleeding (T4/601). He was looking "for some kind of answer, which was the first reason I was there" because Lissa had "left without giving no kind of closure" (T4/601). Asked what he expected to find in her dresser drawers, Joel explained that Lissa would know that the only thing that would make him mad would be if she was with someone else, because "we were friends. We were dating. We were

still -- even though we were not living together, we were still boyfriend and girlfriend" (T4/628). He didn't think she was seeing someone else, but "like I said I was just looking for answers because I did not know" (T4/628).

Asked why he did not leave before the sheriff's officers arrived, since -- as Mrs. Shaw had said -- there was nothing keeping him from leaving, Joel answered that it "[j]ust wouldn't have felt right. I mean, I was in shock. I was panicking. It just wouldn't have felt right for me to just kill somebody and just run" (T4/602).

C. Expert Psychological and Psychiatric Testimony and Evaluations (Defense Case and State's Rebuttal)

Dr. Paul Kling, a clinical psychologist called by the defense, interviewed Joel Diaz twice at the jail, administered psychological tests, and spoke with family members (T3/533,536-41,584-49). Dr. Kling initially concluded that Joel was sane at the time of the offenses (T3/542; R4/82-83). Subsequently, after reviewing additional documents including the depositions of Barbara Shaw and Lissa Shaw, he changed his opinion and concluded that Joel was not sane at the time of the offenses (T3/538,543; R4/76-77). Dr. Kling testified at trial that Joel suffered from a disease of the mind resulting in a defect of reason, and because of his emotional state (extremely agitated, enraged, and out of control) he was unable to distinguish between right and wrong the way other people would (T3/543-47,557-

58,571). Joel did, however, have an abstract or general sense of right and wrong (T3/546). Dr. Kling's diagnosis was that Joel has both an impulse control disorder and intermittent explosive disorder (T3/570; R4/76). His behavior on the day of the shooting was impulsive throughout, and he was in such a state that his ability to think rationally was impaired (T3/558-66; see R4/76).

Dr. Kling's reports dated May 28, 1998 and March 30, 1999 were introduced into evidence as Defense Exhibit 3 (T3/575; R4/76-83).

Dr. Richard Keown, a psychiatrist called by the state in rebuttal, interviewed Joel Diaz and administered screening tests (T4/640-41,644-48). One test indicated that Joel has a lot of anger, which he tends to suppress, and has trouble letting go of it. He tends to be very jealous and sensitive to criticism, and to project his anger. When he is angry, he perceives that the other person is angry with him or doesn't like him, and he gets upset with them for that (T4/647,662). Another test suggested that Joel has a mild to moderate degree of ADHD (attention deficit hyperactivity disorder) which -- while not proof positive that he has it -- did fit in with the other test results to suggest a tendency to be impulsive, yet not necessarily assertive at times (T4/648,662-63; see R/68-99). Dr. Keown evaluated Joel as having an adjustment disorder with a depressed mood at the time he interviewed him; the depression was likely situational (i.e., due to his legal situation and

incarceration), but Dr. Keown agreed that "[h]e certainly was upset and depressed" by the events which led up to the shootings as well (T4/649,655). When Lissa moved out, Joel thought they would continue to date, and when he found that she did not want to see him or talk to him he became depressed and began to drink (which he ordinarily avoided) and use marijuana and stay out late (R3/66-67). Dr. Keown testified, "I think he probably had very strong feelings for Lissa Shaw, but I think he was also very angry and I think it got the better of him" (T4/655). Joel had been drinking from a bottle of Crown Royal until 4:00 in the morning and, while not drunk, he had a "buzz" (T4/652; R3/71). [According to Dr. Keown's report (which was introduced in the guilt phase as State Exhibit 88), "There does not appear to be any alcoholic amnesia or blackouts. The difficulty with his memory is most likely due to the quickness with which everything transpired and the intense emotional state that he was in" (R3/71; see T4/656-57)]. In Dr. Keown's opinion, when Joel went to Lissa's house that morning he "clearly wanted some kind of confrontation. Whether he had the gun with him for the purpose of forcing her to deal with him or whether he had any prior contemplation of using it cannot be known for sure. In any event, he likely came armed more as a way to increase his control than for any defensive purposes. The events with Lissa seem to have occurred quickly and caught him by

surprise. The events with Mr. Shaw took longer and involved more deliberation" (R3/71).

Similarly, Dr. Keown viewed Joel's actions after the shooting of Charles Shaw -- his nervous pacing about, his statements to Mrs. Shaw, his unloading and reloading the gun -- as "more evidence of emotional turmoil and the shock of his behavior than any indication of disordered thought" (R3/72). Joel was shaken up, his anger spent, and he was confused as to what to do now (T4/654-55). His behavior, including his going through Lissa's drawers searching for answers about their relationship was, Dr. Keown acknowledged, strange behavior in light of what had just happened, but it was not psychotic nor did it amount to legal insanity (T4/666-67). Joel was aware he had done something wrong, as evidenced by his statement to Mrs. Shaw that he expected she would never be able to forgive him, and his comment, when he called home using the Shaw's telephone, that he had done something bad and was going to have to pay for it (T4/654; see R3/72).

Dr. Keown testified that in his opinion Joel was sane at the time of the offenses; he knew what he was doing and he knew the difference between right and wrong (T4/652-53,656; see R3/72). He also based this conclusion in part upon Joel's goal-directed behavior before and during the incident, particularly his going back into the

bathroom a second time to shoot Mr. Shaw at close range in the back of the head (T4/653).

Based on his history (including the relative lack of prior violent incidents), Dr. Keown doesn't think Joel has intermittent explosive disorder, but he exhibits a dependent personality with passive/aggressive features (T4/650-51, see R3/69,72). Joel's personality factors (including his probable ADHD and the slight paranoid flavor to his thinking) coupled with his drinking prior to the events "may certainly have set the stage for greater impulsivity and . . . poor judgment" (R3/72).

D. Charge Conference Regarding Transferred Intent

In the charge conference, on the question of premeditation, the trial judge observed that the doctrine of transferred intent did not apply (T4/680). Defense counsel agreed, but the prosecutor suggested it might:

MS. GONZALEZ [prosecutor]: Actually, it may, if the instruction refers to while trying to shoot him. If shoot a person right next to him, obviously, we don't have that here.

THE COURT: Right.

MS. GONZALEZ: But if it refers to him, his intention to actually kill one person failing to do so and killing another because of it, which is what Joel Diaz did.

MR. PORTER [defense counsel]: Judge, I don't agree with that.

MS. GONZALEZ: There's two different ways of looking at it.

MR. PORTER: The purpose of that paragraph is if someone is in the heat of -- or in the position --

THE COURT: Well, taking the facts as you say, his attempt to kill the young woman would have been completed but for the fact that she left, and then he was out on the street and then they went into the house and then according to what you've presented, he then killed that father, so I'm not -- I don't see the transferred intent.

MS. GONZALEZ: Right.

THE COURT: I think there's a separation in time between the two.

MS. GONZALEZ: Right. There is a separation in time. I agree. The only statement we have that may fall into this is when he tells Mrs. Shaw that the reason that her husband --

THE COURT: You can keep your seat.

MS. GONZALEZ: That the reason her husband had to die or would not have had to have died is if he would have killed the daughter.

MR. PORTER: Judge, that's not what transferred intent is though and that's why the rules -- it says give if applicable.

THE COURT: Okay. I'm going to accede to the Defense request and we'll just take that page out.

(T4/680-81)

E. Closing Arguments Regarding the Altercation in the Garage

On the issue of premeditation, defense counsel argued that "this was a shooting that resulted after there was a confrontation outside in the yard, in the street, in the garage. This was a shooting that resulted in death after there was anger, rage, passion" (T4/730). After noting that prosecution witnesses Lissa Shaw and Deborah Wilson had corroborated that outside on the lawn Lissa's dad was angry and advancing while Joel was backing up (T4/731), defense counsel turned his attention to what took place in the garage:

Mr. Diaz told you without anyone to contradict this, none of these other witnesses told you anything about this, that the confrontation worked its way into the yard, Mr. Shaw said the police were on their way, don't leave. They went into the garage and while they were in the garage, as depicted in Defense Exhibit 1, Joel Diaz ends up with a gash on the left side of his face.

I'm not submitting to you that Mr. Shaw didn't have the right to protect his house; passion, anger, rage, not premeditation, this is what occurred prior to Mr. Shaw being shot.

Take a look at this when you go back there, even considering this is a copy of the booking photograph, that's pretty -- no doubt, that's a serious wound there.

What did Mr. Diaz say? What did Joel say happen after he was hit? I lost it. Does that make it right? Is that an excuse? If you think that he's sane, it's not an excuse, but it sure addresses the issue of planning and premeditating something; he lost it.

(T4/731-32)

To counter this point, the prosecutor -- who in her initial closing statement had said "Who had the gun in this case? . . . We would not be here today if Mr. Shaw had gotten ahold of Joel Diaz" (T4/710) -- in her turn argued:

The photograph that they are showing you of the Defendant, he says well, he punched me. Well, that's an abrasion and you heard the testimony, that's an abrasion. That's not a punch. Where did he get that? Who knows? When did it happen? Who knows?

The deputies told you apparently nobody paid much attention. Apparently they thought it was some type of a birth mark. It was all dried up already because it was an old injury, who knows.

You heard the evidence that there were some blood drops in different areas of the home. Well, what we also know is that when Joel Diaz was in the garage shooting at Lissa Shaw that her windows broke and you saw in the pictures, that there's glass all over her seat. There was glass outside. There was glass everywhere. Did he cut himself somewhere and left little drops of blood in the home, we don't know.

(T4/750)(emphasis supplied)

F. Penalty Proceedings

At the beginning of the penalty phase, the prosecution announced that it would present no additional evidence but would rely on the evidence presented in the guilt phase (T5/809-10,816, 820).

The defense called Joel's sister, Minerva Diaz. She testified that there was a great deal of violence and abuse in the family,

which continued for quite a number of years, throughout Joel's childhood and adolescence (T5/823,831). Their father was -- and is -- an alcoholic and drug addict who would beat their mom real bad in front of the kids; they all grew up scared of any loud noises (T5/824). When the brothers (Jose, Joel, and Raul) grew old enough to try to protect their mom, their father became very abusive to them as well; it became like a war (T5/824). Despite all the abuse, Joel was close to his father when he was a kid (T5/831).

At some point, their father decided it was time for his kids to take care of him, because he'd already done all he could for them; Minerva characterized it as "his excuse [to] stop working" (T5/825). The burden fell on the brothers to support the family, and Joel had to quit school in the ninth grade and go to work (T5/825-26). He was a responsible person at work (T5/832-33). Sometimes, however, he was hesitant to go to work and leave their mom at home alone with their dad, because he was afraid he would hit her (T5/829). One day, when he was 17 or 18, Joel came home frustrated and angry from the pressure from his family situation. He locked himself in his room and was heard "banging and banging"; he was very disturbed and in a rage, and he basically destroyed the room and tore up the fan (T5/826-28,836-37).

Eventually -- after the oldest brother Jose had moved out and Joel had assumed the role of taking care of his sister and youngest

brother -- the family just reached the point where they'd had enough of their dad (T5/829-30). Joel made arrangements to move him out; basically threw him out of the house (T5/830). After that, their dad would come to the house and he "just started hounding us" (T5/830). One time he vandalized Joel's car, kicking out the back window with his feet (T5/830). Minerva testified that their father currently has no permanent address; "[h]e stays in shelters and stuff" (T5/832).

Minerva thought that the domestic violence Joel had witnessed growing up affected him in his later relationships with girlfriends (T5/826). When Joel was dating Lissa, Minerva and Lissa became good friends and Lissa would confide in her about the relationship (T5/834). Minerva observed that Lissa and Joel would fight on a regular basis; "they both would hit each other and, yeah, [Joel] was abusive towards her" (T5/833-36). Joel had had two other girlfriends before Lissa and there was domestic violence in those relationships as well. According to Minerva, they "would fight like any other couple would fight", and the girlfriends also used to hit Joel (T5/834-35).

The reports of Drs. Keown (State Exhibit 88) and Dr. Kling (Defense Exhibit 3) also discussed Joel's upbringing in this alcoholic and abusive family environment (R3/66; R4/76,79-81). Minerva told Dr. Kling that there is a significant family history of sexual abuse, physical abuse, violence, anger, legal problems, and

alcoholism (R4/81). In addition to his having a bad temper, Joel often became very quiet and isolated as a child, and was probably depressed a good deal of the time (R4/80). The results of the Millon personality test administered by Dr. Kling showed significant degrees of depression and anxiety, characterized by agitation and erratic qualities, as well as low self-esteem, feelings of helplessness and hopelessness, physical symptoms such as muscular tension, headaches, fatigue, palpitations, and "general edginess and distractibility" (R4/81; see T3/540). In his initial report, Dr. Kling was of the opinion that, while "[t]here is no doubt that Mr. Diaz was indeed agitated, anxious, and distressed" at the time of the incident, it was unclear whether this "existed to a sufficiently extreme degree to be considered a mitigating circumstance" under the statute (R4/82-83). In his subsequent re-evaluation, however, Dr. Kling indicated that he now believed that Joel did meet the statutory criterion that the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance (R4/77).⁶

Joel Diaz took the stand in the penalty phase and said:

This all has been a very bad night, living nightmare for me. Just something that I wish I could take back. The words I'm sorry doesn't even express the remorse I feel. I want to

⁶ Dr. Keown's report, introduced by the state, is directed solely to the issue of sanity or insanity at the time of the offense, and does not contain any findings as to the applicability or inapplicability of mental mitigating factors (R3/65-72).

apologize to the victim's family for all the pain and suffering I caused them. I also want to apologize to my family for everything I put them through. Regardless of -- regardless what everyone may think, I didn't mean for this to happen. Please forgive me, dear mom, for all the pain I caused you. That's all.

(T5/841).

Joel testified that he has no unrelated prior convictions, other than traffic violations and suspended driver's license (T5/840). He acknowledged that, besides Lissa, there was one other relationship in which he and the girl became physically abusive to each other (T5/843-44). He testified that he did not beat Lissa on a regular basis, but when they would get into arguments he would blow things out of proportion and beat her (T5/844). She would say it was a phase he was going through because he'd never lived with a woman before, and they would work things out (T5/845).

In her penalty phase closing argument, the prosecutor told the jury that "[t]he interesting thing about this last aggravator [CCP] is that it doesn't matter who his initial target was" (T5/858). She then began arguing the circumstances of Joel's buying the gun, lying to his brother about where he was going, writing the letter to his brother, as evidence of the "cold, calculated, and premeditated" aggravator in the killing of Charles Shaw (T5/858). Defense counsel objected to the prosecutor's use of a transferred intent theory as "a clear misstatement of the case law", but the trial judge overruled

the objection, whereupon the prosecutor continued in the same vein (T5/860).

G. State and Defense Penalty Memoranda

TRANSFERRED INTENT. Similarly in its two memoranda of law arguing for a death sentence, the state primarily relied on a transferred intent theory of CCP ("Therefore, the principle of transferred intent applies where a defendant's premeditated design for death results in the death of a person other than the one that was intended" (R4/133)), and on evidence relating to the attempted murder of Lissa (R4/133-34; R5/146-47).

The defense agreed with the state that, where applicable under the facts, the CCP circumstance can be applied to the murder of an unintended victim during a planned homicide under a theory of transferred intent, but added "it is important to note when the State brings up this notion of transferred intent that it is not applicable to Joel Diaz' case" (R5/161)(emphasis in memorandum).

THE ORDER OF THE SHOTS. In arguing that a death sentence would not be disproportionate, the state asserted "There is substantial case law upholding the death penalty in cases where the victim has lived and suffered prior to the fatal injury" (R5/149), and that Mr. Shaw's death was not instantaneous or painless (R5/150). In making this argument -- since the medical examiner had been unable to

determine the order in which the gunshot wounds were inflicted (T3/455,464-65), and since Barbara Shaw had described the last two shots as Joel bending over and putting the gun to Charles' lower back and pulling the trigger, then moving the gun in the direction of his head and firing again (T2/255-56), but none of the gunshot wounds described by the medical examiner was to the lower back (see T3/455-59,461; R3/61) -- the prosecutor argued what she termed a "logical inference" from the circumstantial evidence that the non-fatal injuries (to the abdomen and lower leg) resulted from the first three shots while the two quickly fatal injuries (to the chest and head) were caused by the last two shots (R5/149-50). The prosecutor based this scenario on the shattering of the lower end of the shower glass (which, according to the prosecutor, must have been caused by the through-and-through shot to the leg and further, according to the prosecutor, "[t]he angle could not have been accomplished had Mr. Shaw been down on the floor first"), coupled with Mrs. Shaw's testimony that her husband's knees buckled and he doubled over before falling to the ground, and the blood smearing around Mr. Shaw as depicted in the photographs (R5/150). In support of her position on HAC, the prosecutor argued "[t]hat the defendant did not shoot Mr. Shaw in the head initially is indicative of his desire that Mr. Shaw suffer from his gunshots. The evidence showed that the first shot would have been to the back of the leg. This is indicative of and

substantiates a desire to inflict pain and suffering on Mr. Shaw" (R4/132).

H. Sentencing Order

In his written sentencing order, the trial judge found as aggravating factors that (1) the capital felony was especially heinous, atrocious, or cruel (HAC); (2) it was committed in a cold, calculated, and premeditated manner (CCP); and (3) there were contemporaneous convictions of violent felonies (attempted murder of Lissa Shaw and aggravated assault upon Roy Isaakson) (R5/204-10). The judge assigned each of these aggravators great weight (R5/207,209-10). In his finding of HAC, the trial judge twice stated that Joel Diaz "slowly reloaded" the revolver as Mr. Shaw retreated into the bathroom (R5/205,207). The judge also set forth in his finding of HAC that the medical examiner, Dr. Carol Huser, had stated that the final two shots at Mr. Shaw were those to the upper chest and back of the head (R5/206-07). In the CCP finding most of the evidence relates to the attempted murder of Lissa Shaw (R5/208-09).

The judge found three statutory and two nonstatutory or "background" mitigating factors, and made an ambiguous finding as to a fourth statutory factor: (1) no significant history of prior criminal activity (given very little weight due to testimony regarding domestic violence); (2) extreme mental or emotional disturbance

(moderate weight); (3) impaired capacity (very little weight)⁷; (4) age (24) (moderate weight); (5) remorse (very little weight because trial judge doubted its sincerity); and (6) Joel's upbringing in a violent family environment (moderate weight) (R5/210-14). Concluding that any one of the aggravators standing alone would outweigh all of the mitigation in this case and in Joel Diaz' "28 years of existence on this earth", the judge imposed a sentence of death (R5/215-16).

SUMMARY OF THE ARGUMENT

The circumstantial evidence in this trial strongly tended to corroborate rather than contradict Joel Diaz' testimony that he "lost it" after he was struck in the face by Charles Shaw in the garage [Issue I]. The state did not prove beyond a reasonable doubt in this gunshot homicide either that Charles Shaw was tortured physically or emotionally, or that Joel Diaz intended to inflict prolonged pain and suffering. The trial judge erred in (1) instructing the jury on the HAC aggravator and allowing it to be argued extensively as a basis for a death recommendation; (2) finding HAC; and (3) misstating the evidence pertaining to this aggravator [Issue II]. The judge also

⁷ The judge found that Joel's capacity to appreciate the criminality of his conduct may have been impaired, but "does not find that it was substantially impaired within the meaning of Florida law. Accordingly, the Court finds that this statutory mitigating circumstance has not been proven and therefore affords it very little weight" (R5/212)(emphasis in sentencing order).

erred in instructing on and finding the CCP aggravator, both because it wasn't proven beyond a reasonable doubt, and because both he (in his sentencing findings) and the prosecutor (in her argument to the jury, over defense objection) relied primarily on a transferred intent theory which was legally inapplicable to the evidence. Moreover, even if the theory had been sound, there was no "heightened premeditation" to transfer since as to the attempted murder of Lissa Shaw the state failed to prove three of the four elements of CCP. In fact, one of the essential elements -- "coldness" -- was negated by all of the evidence in this case, including the evaluation of the state's own psychiatric expert. As to the manner of the killing of Charles Shaw, the state again failed to prove three of the four elements of CCP [Issue III]. This is neither among the most aggravated (the only valid aggravator found by the trial court is the contemporaneous offenses which Joel committed in the same heated emotional state) nor among the least mitigated of first degree murders, and the death sentence is disproportionate [Issue IV].

ARGUMENT

ISSUE I

THE CIRCUMSTANTIAL EVIDENCE PRESENTED BY THE STATE AS WELL AS BY THE DEFENSE DID NOT DISPROVE, BUT INSTEAD STRONGLY TENDED TO CORROBORATE, APPELLANT'S TESTIMONY THAT HE WAS STRUCK IN THE FACE DURING AN ALTERCATION WITH MR. SHAW IN THE GARAGE JUST PRIOR TO THE HOMICIDE.

This is in the nature of a preliminary point on appeal, since it relates to the issues of CCP, HAC, and proportionality. The state's own evidence clearly establishes that intervening events took place between the time Joel Diaz shot into Lissa Shaw's car, wounding her, and the time he shot and killed her father Charles Shaw. Mr. Shaw came out of the house -- angry as he had every right to be -- and there was a confrontation between him and Joel which moved from the street and the yard to the garage, and then into the house. Something happened to suddenly change the nature and momentum of the confrontation. The only evidence as to what that was is Joel's testimony that, in trying to wrestle the gun away from him, Mr. Shaw struck him in the face with something -- either his fist or an object such as a tool -- and at that point Joel "lost it." Not only does the other evidence in this case fail to disprove that this occurred, and not only does it fail to even suggest an alternative explanation of what occurred to shift the momentum and suddenly change the

behavior of both of the individuals involved, the evidence actually tends to corroborate that Joel was indeed struck in the face. This is a very significant occurrence in the chain of events which led to Mr. Shaw's death, and it further weakens the state's already weak circumstantial arguments for the CCP and HAC aggravating factors.⁸ The trial judge in his sentencing order did not say he disbelieved that this occurred, or give any reason for disbelieving it; he just simply omitted it as if it were an inconsequential detail.⁹

"It is axiomatic that the state is required to establish the existence of an aggravating circumstance beyond a reasonable doubt", and where the evidence is circumstantial it "must be inconsistent with any reasonable hypothesis which might negate the aggravating factor." Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992); see

⁸ Even apart from the evidence suggesting that Joel's behavior changed after he was struck by Mr. Shaw in the garage, the state failed to prove three of the four elements of CCP [Issue III] and failed to prove that the victim was subjected to prolonged physical or emotional torture beyond the norm of capital felonies as required for a finding of HAC [Issue II].

⁹ The judge's HAC finding jumps immediately from Charles Shaw being awakened by his wife and running outside in his shorts to Barbara Shaw hearing her husband saying "Calm down, take it easy" to Joel in the bedroom (R5/205). The CCP finding says "Even though confronted by an unarmed older man, Joel Diaz turned his attention to that man, Charles Shaw. When Charles Shaw retreated, Joel Diaz stalked him through his own home and slowly and deliberately executed him" (R5/209). Nothing is said about what took place in the garage, nor the fact that prior to that occurrence two state witnesses (consistent with Joel's testimony) described Charles Shaw as angrily advancing toward Joel while Joel was backing up.

Mahn v. State, 714 So. 2d 391, 398 (Fla. 1998). In this case, a reasonable hypothesis which negates CCP and HAC is that Joel never intended to shoot Charles Shaw (much less torture him) until he was struck in the face in the garage and lost his temper. The circumstantial evidence not only fails to disprove this hypothesis, it strongly tends to support it. See Fowler v. State, 492 So. 2d 1344, 1350 (Fla. 1st DCA 1986); cited with approval in State v. Law, 559 So. 2d 187, 188-89 (Fla. 1989); see also Randall v. State, 760 So. 2d 892, 901-02 (Fla. 2000).

Lissa Shaw, a prosecution witness and the daughter of Charles Shaw, saw her father coming out of the garage and walking toward Joel until they were facing each other in the front yard. Joel was holding the gun in both hands, and pointing it at her dad. He dad, with his left hand swinging and his right hand pointing at Joel continued to walk toward Joel until there was about five feet between them. Her dad appeared to be angry and yelling at Joel (T2/303,310-11,316). A neighbor, Deborah Wilson, also a prosecution witness, saw a man in dark clothing (Joel) walking backwards into the street with his hands behind his back, and then Charles Shaw came into her view. The prosecutor asked "And where did this confrontation wind up going?", and Ms. Wilson answered that Joel was in the street and Mr. Shaw was on the corner pointing at him; they appeared to be having a conversation (T2/348-50,354-55). While neither of these two state

witnesses observed the entire chain of events outside, their testimony is basically consistent with what Joel said took place, and corroborates that at that point in time Mr. Shaw was angry and assertive and (from Lissa's testimony) did not appear to be particularly intimidated by the gun.

This behavior is also consistent with what was presented at the Spencer hearing regarding Charles Shaw's personal characteristics. Mr. Shaw, who was 54 years old and quite a bit larger than Joel Diaz (R3/61; T4/616,625), was a Vietnam veteran, decorated for bravery under fire, who did physically demanding work and recreational activities, and was very protective of his disabled wife, whose care required considerable strength and exertion on his part (SR53-70). Obviously, Mr. Shaw was at a severe disadvantage in that he was unarmed and Joel had the gun, but that is also the situation in the overwhelming majority of gunshot homicides. It is misleading (and even unfair to him) to portray Mr. Shaw, for purposes of a HAC finding, as being "essentially defenseless throughout his encounter with Joel Diaz" and "obviously in abject terror" (R5/207). During the first part of the encounter -- prior to what took place in the garage -- Mr. Shaw was angry and aggressive because Joel had come to his house and had apparently shot at his daughter. It was only after he struck Joel in the face while trying to wrestle the gun away that Joel lost his temper and started after Mr. Shaw. For that short

time, it is fair to assume that Mr. Shaw was frightened, as he asked Joel in a soft voice to "calm down, put it down . . . take it easy" and said (just before he was shot) "Oh, man why you got to do this" (T2/247,251,253), but there is no evidence that would support a finding of "abject terror" or that Mr. Shaw was subjected to prolonged physical or emotional torture.

Also tending to corroborate Joel's testimony about being struck by Mr. Shaw in the garage are the booking photograph and the bloodstain evidence. The photograph shows that at the time of his arrest, Joel had an abrasion on the upper left side of his cheek, near the corner of his eye. Sheriff's officers noticed the abrasion but paid it little attention; they "didn't know whether it was a birth mark or not", and seemed content to assume it was (R4/75; T3/503-05). [Joel testified that the cut on his left cheek which appears in the booking photo was caused when Mr. Shaw struck him in the garage (T3/595). He does have a birthmark, but that is on the right side of his face (T3/595)].

Joel also testified that when he was going through the dresser drawers in Lissa's room looking "for some kind of answer", and going through the rest of the house, he was still bleeding (T4/ 601). Barbara Shaw testified that she could hear him in Lissa's bedroom, in Taylor's bedroom, and in the kitchen, and she heard him make a phone call which she assumed was to his mother (T2/257).

Deputy Joslin testified that, in addition to the master bathroom and bedroom where the shooting occurred, bloodstains were also found in other locations in the house, including the entrance to the northeast bedroom on the other side of the house; the inner side of the right (french-type) door to the northeast bedroom; a child's drawing paper on the dresser in the northeast bedroom; the telephone in the kitchen; and the southeast corner of the kitchen counter near the telephone (T3/415-17). As Agent Chiapetta put it, the blood was collected for "Testing. It's evidence. We would have wanted it collected" (T3/505). The blood samples were sent to the FDLE for analysis; crime scene investigator Walker received the results in a report dated June 1, 1998 (T3/417-19, 437). When defense counsel sought at trial to cross-examine investigator Walker with the results of the FDLE's bloodstain analysis,¹⁰ the state successfully objected on two grounds, thereby blocking this line of cross-examination.¹¹

¹⁰ The FDLE report was marked for identification as Defense Exhibit 2 (T3/418-19), but it was not received by the clerk (R4/74) and therefore was not included in the record on appeal.

¹¹ The state's objection was based on two grounds: (1) hearsay and lack of a proper foundation for the business records exception, and (2) that no Frye hearing had been held (T3/437-39). While the first ground is valid [see Evans v. State, ___ So. 2d. ___ (Fla. 2001) [26 FLW S823, 826], the second ground is not. This Court has judicially noticed that DNA test results are generally accepted as reliable in the scientific community [Hayes v. State, 660 So. 2d 257, 264 (Fla. 1995); see also Brim v. State, 779 So. 2d 427, 436 (Fla. 2d DCA 2000)], and a Frye hearing is required only when the party opposing introduction of the DNA evidence has challenged the

(continued...)

However, while the prosecution had succeeded in keeping out DNA evidence which was developed by a state law enforcement agency at the request of the Sheriff's Department, there still remains a strong

¹¹(...continued)

reliability of the testing procedures used and requested a Frye hearing. See McDonald v. State, 743 So. 2d 502, 506 (Fla. 1999); Kimbrough v. State, 700 So. 2d 634, 637 (Fla. 1997); Robinson v. State, 610 So. 2d 1288, 1291 (Fla. 1992); Timot v. State, 738 So. 2d at 387, 389 (Fla. 4th DCA 1999); Vargas v. State, 640 So. 2d 1139, 1142-43 (Fla. 1st DCA 1994). Here, the state did not object to the reliability of the DNA testing, nor is it surprising that it didn't, since the testing was commissioned by the Sheriff's department and performed by a state law enforcement agency. The problem was not that the prosecution didn't trust the results, but simply that it didn't like the results.

While the trial court did not err in sustaining the state's objection based on the hearsay ground, that would not have precluded the defense from introducing the FDLE's DNA findings in the penalty phase, since hearsay is admissible in a capital sentencing proceeding as long as the other party has an adequate opportunity to rebut it. Fla. Stat., §921.141(1); Cannady v. State, 620 So. 2d 165, 169 (Fla. 1993); Blackwood v. State, 777 So. 2d 399, 411-12 (Fla. 2000); Zack v. State, 753 So. 2d 9, 23 (Fla. 2000). Since the state -- if it questioned the reliability of its own agency's testing procedures -- could have called the FDLE blood analysts as rebuttal witnesses, the opportunity to rebut is evident. [The record on appeal contains a letter from Joel Diaz' penalty phase trial counsel to the judge in which he states that he "felt obliged to call Mr. Esposito from the FDLE [as a penalty phase defense witness] as he was a crucial witness who, for whatever reason, was not brought forth to testify at trial" (R4/127). The letter states that the prosecutor had agreed to allow the defense to proceed with Mr. Esposito alone, without going through chain of custody witnesses (R4/147). However, at the penalty phase, neither Mr. Esposito nor anyone from the FDLE was called to testify, nor did defense counsel seek to introduce the FDLE report as admissible hearsay. Since this omission -- inexplicable though it appears -- could conceivably have been a strategic decision, appellant is not raising it as an issue on direct appeal, but reserves the right to raise it as part of a Rule 3.850 motion in the event that his conviction and death sentence are affirmed. See Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987)].

circumstantial inference that the bloodstains in the northeast bedroom and on and near the telephone in the kitchen were likely Joel Diaz' blood, since -- according to Barbara Shaw as well as Joel -- Joel was in those areas of the house shortly after the shooting. The prosecutor was well aware of this inference because -- after defense counsel had shown the jury the booking photograph and argued that it showed a pretty serious gash which corroborated Joel's testimony that he lost control after being struck in the garage (T4/731-32) -- this is how she attempted to counter it:

The photograph that they are showing you of the Defendant, he says well, he punched me. Well, that's an abrasion and you heard the testimony, that's an abrasion. That's not a punch. Where did he get that? Who knows? When did it happen? Who knows?

The deputies told you apparently nobody paid much attention. Apparently they thought it was some type of a birth mark, It was all dried up already because it was an old injury, who knows.

You heard the evidence that there were some blood drops in different areas of the home. Well, what we also know is that when Joel Diaz was in the garage shooting at Lissa Shaw that her windows broke and you saw in the pictures, that there's glass all over her seat. There was glass outside. There was glass everywhere. Did he cut himself somewhere and left little drops of blood in the home, we don't know.

(T4/750)(emphasis supplied)

This litany of could've beens, we don't knows, and nobody paid attentions demonstrates the truth of what defense counsel told the

jury about the altercation between Joel and Mr. Shaw in the garage; i.e., that there was absolutely no evidence contradicting Joel's testimony that he was hit in the face, causing the abrasion and causing him to "lose it" (T4/731-32). Was it a birthmark? The prosecutor ultimately agreed that it was indeed an abrasion. Besides, if the state had ever really thought it was a birthmark, there were at least two or maybe three state witnesses -- Lissa Shaw, Jose Diaz, and possibly Barbara Shaw -- who would have been able to so testify. Was it "all dried up already because it was an old injury, who knows"? Well, Jose Diaz would have known, and Lissa Shaw might have known. Besides, if it was all dried up already, it probably wouldn't have been bleeding. On this point, the prosecutor again seemed to tacitly acknowledge that the blood drops were found in the areas where Joel went, and were likely his blood, but "[d]id he cut himself somewhere and left little drops in the home, we don't know"? The prosecutor suggested that maybe Joel was cut by flying glass from Lissa's car windows. Well, first of all, this Court can look at the booking photo (Defense Exhibit 1) and see if the dark bruise under Joel's left eye looks more like a cut from an airborne piece of window glass, or a blunt trauma wound (R4/75).¹² Moreover,

¹² There was no evidence that Joel had any other cuts or injuries on any exposed parts of his body, or any other part of his body, besides the abrasion near the corner of his left eye. If there had been any other injuries, they would presumably have been

(continued...)

Lissa was accelerating backwards out of the garage, away from Joel, when the shots were fired. She testified that her car window did not completely shatter; "[i]t crackled because of the tint on it" but "[i]t didn't fall apart" (T2/288). "There was a hole in the middle of it, but the basic -- it was up" (T2/288-89).

Since the state presented no evidence (nor even any coherent alternative hypothesis) to contradict Joel's explanation of what took place in the garage which caused him to stop backpedaling and start chasing Mr. Shaw, and since the circumstantial evidence introduced by the state as well as by the defense strongly tends to support Joel's explanation, the elements of the CCP and HAC aggravating factors are negated [see Geralds, Mahn] unless the state can establish them beyond a reasonable doubt based on actions taking place in the very short time span between the events in the garage and those in the master bathroom. Since CCP requires, among other things, calm and

¹²(...continued)
documented at the time of his arrest. [When cuts, scratches, bruises, or bite marks on a suspect are believed by law enforcement to be inculpatory, they are scrupulously documented; in the instant case, the arresting officers seemed less interested (see T3/504-05)]. The state may also suggest on appeal, based on Barbara Shaw's testimony that she didn't recall seeing the abrasion under Joel's eye (T2/269-70), that he could have sustained the injury when he was taken into custody (see T2/274,371-72). But Deputy Turner, who made the arrest, testified that it was a "controlled situation", and Joel was compliant and cooperative (T2/371-74). If Joel had been injured during the arrest, Deputy Turner could have so testified in the state's case in chief or in its rebuttal case. Moreover, that theory wouldn't explain the blood in the areas inside the house where Joel had been prior to the arrest.

cool reflection and a careful, prearranged plan to kill, the state cannot prove this aggravator under the facts of this case.¹³ [The state will try, as it did at trial, to circumvent its inability to prove these elements by relying on a "transferred intent" theory of CCP; however, it is the chain of intervening and unexpected events which occurred between Mr. Shaw and Joel, after Lissa was gone from the scene, which makes the doctrine of transferred intent legally inapplicable to this case.] HAC requires proof that the victim endured physical torture or prolonged emotional suffering, beyond the norm of first degree murders, and it may also require, at least in gunshot homicides, some showing of intent on the part of the defendant to inflict a high degree of pain and suffering. The state cannot prove this aggravator either.¹⁴

ISSUE II

THE TRIAL COURT ERRED IN FINDING, AND INSTRUCTING THE JURY ON, THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING FACTOR; AND FURTHER ERRED BY MAKING MATERIALLY INACCURATE FACTUAL FINDINGS IN SUPPORT OF THAT AGGRAVATOR.

¹³ See Issue III, infra.

¹⁴ See Issue II, infra.

All first degree murders involve the wanton infliction of pain and death, and the vast majority of these crimes can fairly be characterized as vile and senseless. See Lewis v. State, 377 So. 2d 640,646 (Fla. 1979); Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993). To accord with the legislature's intent, and to withstand constitutional scrutiny by meaningfully narrowing the class of first degree murders to which it applies, the HAC aggravating factor may be applied only to those crimes which are especially heinous, atrocious, or cruel; i.e., brutal beyond the norm of capital felonies. Lewis, 377 So. 2d at 646 (emphasis in opinion); see Knight v. State, 746 So. 2d 423, 438 (Fla. 1998) (Harding, C.J., concurring). Accordingly, this Court has consistently recognized that a finding of HAC is appropriate only when the victim has endured prolonged or torturous suffering -- whether physical or emotional or both -- prior to death. See e.g., Cook v. State, 542 So. 2d 964, 970 (Fla. 1989); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991); Bonifay v. State, supra, 626 So. 2d at 1313; Buckner v. State, 714 So. 2d 385, 390 (Fla. 1998).

An aggravating factor must be proven beyond a reasonable doubt before it may be weighed by the judge or jury in deciding whether to recommend or impose a death sentence. See Atkins v. State, 452 So. 2d 529, 532 (Fla 1984). The judge may instruct the jury on an aggravator only when the evidence is legally sufficient to support a finding of that aggravator. Ford v. State, __ So. 2d __ (Fla. 2001)

[26 FLW S817, 819]. Specifically, the HAC aggravator requires "proof beyond a reasonable doubt of extreme and outrageous depravity exemplified either by the desire to inflict a high degree of pain or an utter indifference to or enjoyment of the suffering of another". Wickham v. State, 593 So. 2d 191, 193 (Fla. 1991); see Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990). The standard of review for this mixed question of law and fact is whether the trial court applied the right rule of law and whether his finding of the aggravator is supported by competent, substantial evidence. Ford, supra, 26 FLW at S189; Beasley v. State, 774 So. 2d 649, 669 (Fla. 2000).

As this Court has repeatedly made clear, gunshot homicides as a matter of law cannot be found to be "especially heinous, atrocious, or cruel" within the meaning of the aggravating factor, except where the evidence proves that the defendant "intended to cause the victim unnecessary and prolonged suffering". Kearse v. State, 662 So. 2d 677, 686 (Fla. 1995); Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993); see Buckner v. State, 714 So. 2d 384, 390 (Fla. 1998); Hamilton v. State, 678 So. 2d 1228 (Fla. 1996); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991); McKinney v. State, 579 So. 2d 80, 81 (Fla. 1991).¹⁵

¹⁵ In non-gunshot cases, such as strangulations, drownings, and deaths caused by multiple stab wounds, which ordinarily do support a
(continued...)

In the instant case, the state (in arguing to the judge and jury that HAC should be instructed upon and found) and the judge (in finding it and giving it great weight) relied heavily on the testimony that Joel reloaded the gun just before firing the first three shots (T5/854-55; R4/131-32; R5/146,205,207) and on the order in which the shots were purportedly fired (T4/711-12; T5/855-56; R4/131-32; R5/146,149-50,206-07) to contend that this gunshot homicide was set apart from the norm of capital felonies. Aside from the fact that the trial judge materially misstated the evidence as to each of these occurrences upon which he based his finding of HAC, they would be insufficient to support the finding in any event. See Hamilton, 678 So. 2d at 1231-32; Buckner, 714 So. 2d at 386-87 and 390; Bonifay, 626 So. 2d at 1311 and 1313.

¹⁵(...continued)

finding of HAC, there appears to be a 4-3 split on this Court as to whether HAC simply requires proof that the victim experienced prolonged suffering or torture (as stated in the majority opinion joined by Justices Wells, Harding, Lewis, and Quince), or whether it also requires an intent on the part of the defendant to inflict prolonged suffering (as stated in Justice Pariente's concurring opinion, joined by Justices Shaw and Anstead). Francis v. State, ___ So. 2d ___ (Fla. 2001)(case no. SC94385, decided December 20, 2001). In Francis, the two victims were stabbed 16 times and 23 times, while the defendant claimed he was mentally ill and therefore incapable of forming an intent to cause prolonged suffering or torture.

In gunshot homicides, in contrast, the manner in which death is inflicted is presumptively not HAC, and the necessity of proving that the defendant intended to cause unnecessary and prolonged suffering has long been recognized. Buckner; Hamilton; Kearse; Bonifay; Santos; McKinney.

Buckner, for example, exchanged words and "tussled" with the victim, then shot him twice and walked away. The victim exited his vehicle and yelled "Oh my God, somebody help me", whereupon Buckner walked back to the victim, said to him "Mother fucker, you ain't had enough?", and shot him three more times. 714 So. 2d at 386-87. On appeal, this Court wrote:

Only when a murder evinces extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another is a finding of HAC appropriate. Cheshire v. State, 568 So. 2d 908 (Fla. 1990). In this case, the entire episode took only a few minutes and no evidence reflected that Buckner intended to subject the victim to any prolonged or torturous suffering. See, e.g., Hamilton v. State, 678 So. 2d 1228 (Fla. 1996) (fact that the gun was reloaded does not, without more, establish intent to inflict high degree of pain or otherwise torture victims); Brown v. State, 526 So. 2d 903 (Fla. 1988) (no HAC where victim shot in arm, begged for life, then shot in head). Consequently, we conclude that the trial judge erred in finding the murder to be HAC.

Buckner v. State, supra, 714 So. 2d at 1390.

In Hartley v. State, 686 So. 2d 1316, 1323-24 (Fla. 1996), a finding of HAC was disapproved where "the medical examiner could not determine the order in which the shots had been fired and there is no evidence that Hartley deliberately shot the victim to cause him unnecessary suffering."

In Hamilton v. State, supra, 678 So. 2d at 1231-32, this Court observed that "the fact the gun was reloaded, does not, without more, establish intent to inflict a high degree of pain or otherwise torture the victims." Whether or not the act of reloading might support a finding of intent to torture depends on the context in which it occurs, and in homicides arising from domestic passions it "can be consistent with a rage killing that lacks the intent described in Santos." 678 So. 2d at 1231-32.

Santos, like the instant case, arose out of a stormy live-in relationship. When Santos and Irma broke up -- due, Santos thought, to Irma's meddling family -- she tried to stay away from him, and he responded by trying to find her. Santos was particularly upset by Irma's refusal to give their two year old daughter Deidre his last name, which he viewed as an affront to his masculinity. Two days before the murders, Santos went to Irma's house, purportedly to visit his daughter. At this time, he threatened to kill Irma, and she saw him carrying a pistol. She called police, but when they searched Santos they found no weapon. On the day of the murders, Santos went to where Irma was staying and saw her walking along the street with Deidre and her son from a prior marriage, Jose. Santos proceeded at a fast pace toward them, and when Irma saw him coming she screamed and began running, with Deidre in her arms. Santos caught her, grabbed her, spun her around, and fired two pistol rounds into her

face and head at extremely close range. He also shot Diedre in the top of the head, killing her as well. 591 So. 2d at 160-61. This Court struck the trial court's finding of HAC:

As we recently explained in Cheshire v. State, 568 So. 2d 908 (Fla. 1990), this factor is appropriate in torturous murders involving extreme and outrageous depravity. A murder may fit this description if it exhibits a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. Id. at 912. The torture-murder in Douglas, which involved heinous acts extending over four hours, illustrates a case in which this factor was appropriately found. Douglas, 575 So. 2d at 166. The present murders happened too quickly and with no substantial suggestion that Santos intended to inflict a high degree of pain or otherwise torture the victims. Accordingly, the trial court erred in finding this factor to be present.

Santos v. State, supra, 591 So. 2d at 163.

In Kearse v. State, supra, 662 So. 2d at 680 and 686, the victim, a police officer, was shot at fourteen times; thirteen of the shots struck him (nine in the body and four in his bullet-proof vest). As in Hartley and the instant case, the medical examiner could not determine the sequence in which the wounds occurred. The victim could have remained conscious for a short time or could have rapidly gone into shock. This Court reversed a finding of HAC, saying "[w]hile the victim . . . sustained extensive injuries from the numerous gunshot wounds, there is no evidence that Kearse `intended to cause the victim unnecessary and prolonged suffering.'"

In Wickham v. State, 593 So. 2d 191, 192-93 (Fla. 1991), the victim was flagged down on the road by a woman accomplice. Wickham came out of a hiding place and pointed a gun at the victim, who then tried to walk back to his car. Wickham shot him once in the back, and when the impact spun him around, Wickham shot him a second time, high in the chest. Then, while the victim pled for his life, Wickham shot him twice in the head. This Court struck the trial court's finding of HAC, stating

. . . this aggravating factor requires proof beyond a reasonable doubt of extreme and outrageous depravity exemplified either by the desire to inflict a high degree of pain or an utter indifference to or enjoyment of the suffering of another. The facts of the present case do not meet this standard.

In Amoros v. State, 531 So. 2d 1256, 1257 and 1260-61 (Fla. 1988), Amoros threatened to kill his former girlfriend. The next night she went to the police station to report the threat, while Rivero (her current boyfriend) remained inside her apartment. As she left, she padlocked the back door from the outside at Rivero's request. While she was gone, Amoros entered the premises "for the purpose of confronting and probably shooting his former girlfriend." Instead, he encountered Rivero, whom he did not know. Amoros shot Rivero three times at close range, twice through the right arm and once to the chest, the latter wound proving fatal. The victim had made a futile attempt to save his life by running to the rear of the

apartment, only to find himself trapped by the padlocked back door. This Court reversed the trial court's finding of HAC, noting that while first degree murder is a heinous crime, the statutory aggravating factor requires it to be especially heinous, atrocious, or cruel. 531 So. 2d at 1260 (emphasis in opinion).

Finally, in Bonifay v. State, supra, 626 So. 2d at 1311 and 1313, Bonifay was recruited by his cousin to kill a store clerk whom the cousin blamed for getting him fired. The plan was to rob the store to cover up the motive for the killing. However, Bonifay and two friends of his failed to carry out the plan. After being chastised by Bonifay's cousin, the trio returned to the store the next night. A different clerk was working. Bonifay and one of his cohorts each shot the clerk once in the body from outside the store. Then they crawled through the window, and -- as they were breaking open the cash boxes -- the wounded victim "was lying on the floor begging for his life and talking about his wife and children. Bonifay told him to shut up and shot him twice in the head." 626 So. 2d at 1311. The next day, the cousin refused to pay Bonifay because he'd killed the wrong person.

On appeal, this Court struck the trial court's finding of the HAC aggravator, and -- because this aggravator was extensively argued to the jury and its effect on the sentencing process could not be

determined -- reversed Bonifay's death sentence for a new penalty phase before a newly empaneled jury. The Court said:

The medical examiner testified that the two shots to the head would have resulted in the victim's immediate unconsciousness with death following in minutes, and Bonifay now argues that the facts do not support finding the heinous, atrocious, or cruel aggravator. As stated earlier, both Bonifay and Barth shot the victim once in the body before entering the store. Both Bland and Tatum testified that Bonifay told them the victim begged for his life. Bonifay, himself, said this in his tape-recorded statement as did Barth in his live testimony. Even so, we find that this murder, though vile and senseless, did not rise to one that is especially cruel, atrocious, and heinous as contemplated in our discussion of this factor in State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert.denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed. 2d 295 (1974). The record fails to demonstrate any intent by Bonifay to inflict a high degree of pain or to otherwise torture the victim. The fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find this aggravating factor absent evidence that Bonifay intended to cause the victim unnecessary and prolonged suffering. Santos v. State, 591 So. 2d 160 (Fla. 1991).

Bonifay v. State, supra, 626 So. 2d at 1313.

In the instant case, as in Buckner, Hartley, Hamilton, Santos, Kearse, Wickham, Amoros, and Bonifay, there is no evidence that Joel Diaz intended to cause Charles Shaw unnecessary and prolonged suffering.

Unlike Pooler v. State, 704 So. 2d 1375, 1377 and 1378 (Fla. 1997) and Wyatt v. State, 641 So. 2d 1336, 1338 and 1341 (Fla. 1994),

Joel did not taunt Mr. Shaw, and nothing in his behavior suggested that he was getting any enjoyment from what was occurring.¹⁶ In fact, the state's own psychiatric expert Dr. Keown, in his report which was introduced into evidence as State Exhibit 88, expressed the opinion that immediately after the shooting Joel's "nervous pacing about, talking to the victim's wife, and unloading and reloading his

¹⁶ Taunting of the victim by the killer -- which did not occur in the instant case -- could be a circumstance supporting a HAC finding, both because it shows depravity and suggests that the killer is enjoying the victim's suffering, and because it may add to the victim's fear. In Buckner (where the defendant told the already wounded victim, who was yelling for someone to help him, "Mother fucker, you ain't had enough?," before firing the last three shots) and in Bonifay (where the wounded victim was lying on the floor begging for his life and talking about his wife and children, and the defendant told him to shut up before shooting him twice in the head), the taunting or mean comments were still not enough to support a HAC finding. In cases where the taunting reached a higher degree of cruelty it -- in combination with other circumstances -- did support a valid finding of HAC. In Pooler, the victim (Kim) learned of Pooler's threats to kill her two days before her murder, "giving her ample time to ponder her fate." On the day of the murder, Pooler forced his way into her apartment and shot her fleeing brother in the back. Kim's fear caused her to vomit into her hands. She temporarily succeeded in locking Pooler out, but he broke back in and caught her as she tried to run. Pooler struck her in the head with his gun (causing it to discharge) and dragged her to his car as she screamed and begged for him not to kill her. Pooler's final words to her, as he shot her five times, were "Bitch, didn't I tell you I'd kill you?" and "You want some more?" In Wyatt, the two armed robbers entered a pizza restaurant and put two employees (Bornoosh and Mrs. Edwards) in the bathroom and forced a third (Mr. Edwards) to open the safe. Wyatt then raped Mrs. Edwards. When Mr. Edwards begged for his life, and said he and his wife had a two year old daughter at home, Wyatt shot him in the chest. Mrs. Edwards began to cry and Wyatt then shot her in the head while she was in a kneeling position. Bornoosh started to pray. Wyatt put his gun to Bornoosh's ear and told him to "listen real close and hear the bullet coming", then pulled the trigger.

gun are more evidence of emotional turmoil and the shock of his behavior than any indication of disordered thought" (R3/72). Joel's statement to Mrs. Shaw that he expected she would never be able to forgive him, and his phone call (apparently to his mother) saying he had done a bad thing and would have to pay for it (see R3/72), also show that this was not a crime from which Joel was deriving any perverse pleasure. Contrast Wyatt.

As in Gorham v. State, 454 So. 2d 556, 559 (Fla. 1994) "[t]here was evidence disproving any possibility of prolonged and torturous captivity" ¹⁷ Moreover, there are several circumstances in the instant case which make the trial judge's HAC finding even more inconsistent with the statutory requirement of an especially heinous or cruel murder than in most of the opinions previously discussed. Both the defense and prosecution experts agreed that Joel was in intense emotional turmoil at the time of this chain of events (R3/71-72; R4/76-77,83; T3/543-47; T4/654-55). See Santos; Hamilton. The evidence indicates that when Mr. Shaw confronted Joel outside the

¹⁷ The common element in most of the cases where this Court has upheld HAC findings in gunshot homicides is that the killing was preceded by a prolonged period of time in which the victim was abducted, bound, or otherwise rendered helpless and subjected to physical or emotional torture. See, e.g., Hertz v. State, ___ So. 2d ___ (Fla. 2001) [26 FLW S725,730]; Looney v. State, ___ So. 2d ___ (Fla. 2001 [26 FLW S733,738-39]; Cave v. State, 727 So. 2d 227, 229 (Fla. 1998); Wyatt v. State, supra, 641 So. 2d 1338 and 1341; Koon v. State, 513 So. 2d 1253, 1257 (Fla. 1987); Francis v. State, 473 So. 2d 672, 673-74 and 676 (Fla. 1985); Routly v. State, 440 So. 2d 1257, 1260 and 1264 (Fla. 1983).

house, it was Mr. Shaw -- a good-sized and physically strong man -- who was angry and aggressive and Joel who was backpedaling; pointing the gun but not attempting to fire it. Something happened in the garage to change the behavior of both men, and the only evidence of what it was is Joel's testimony -- circumstantially corroborated by other state and defense evidence -- that Mr. Shaw in trying to wrestle the gun away struck Joel in the face with his fist or a hard object. [See Issue I]. This (consistently with all of the testimony relating to Joel's personality and temper) caused him to lose control and pursue Mr. Shaw, who was now retreating, into the house. The murder occurred within minutes or less.

It is also significant that, as to each of the two circumstances which the prosecution and the trial judge thought set this killing apart from the norm of capital felonies, the judge materially misstated the evidence in his sentencing order. See Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990) (reviewing court is not bound to accept the trial court's sentencing findings "when . . . they are based on misconstruction of undisputed facts and a misapprehension of law." Here, the only testimony that Joel reloaded the gun in the bedroom came from Barbara Shaw, who said that after the gun clicked, her husband gave a sigh of relief "but Joel was just very fast. He had the gun in his left hand and he flipped it open so the cylinder fell out, tipped it up so the shells fell out and reloaded. When my

husband realized that he was reloading, he ran in the bathroom because he had no where to go except over the top of me or through Joel" (T2/253).

Somehow, in the finding of HAC in the judge's sentencing order, "Joel was just very fast" became transformed into "Joel Diaz then slowly reloaded the revolver as Charles Shaw retreated through the master bedroom into the master bathroom" (R5/205) and "The victim was essentially defenseless throughout his encounter with Joel Diaz on the morning of his killing and was obviously in abject terror. Even after the Defendant first unsuccessfully tried to kill Mr. Shaw, Joel Diaz slowly reloaded his revolver, shot Mr. Shaw three times, and after a period of reflection went back into the bathroom and executed Mr. Shaw" (R5/207).

In a different context, an error as to whether something happened fast or slow might be inconsequential, but that is emphatically not true here. The judge's sentencing order subtly or not-so-subtly conveys a different (and worse) image than did the evidence taken in the light most favorable to the prosecution, i.e., Barbara Shaw's testimony. The finding misleadingly portrays Mr. Shaw as cowering in terror, and Joel as savoring his helpless victim's fear. The difference between the scenario envisioned in the judge's finding and the events described in Barbara Shaw's testimony is the

difference between a borderline case of HAC and a nonexistent case of HAC.

The judge, as factfinder, was free to resolve the conflicting evidence as to when the gun was reloaded by believing Barbara Shaw's testimony.¹⁸ He was not, however, free to embellish or misstate

¹⁸ Joel, who admitted that his memory of the events wasn't clear and he was going by flashbacks, denied that he reloaded the gun in the bedroom; Mr. Shaw "wouldn't have let me." The bedroom was not large, and they were standing close to each other (T4/598, see 599, 623-24). Instead, he believed he reloaded earlier, while they were outside and he was trying to keep Mr. Shaw away (T4/ 599, 624). Deborah Wilson, a state witness to some of what occurred outside, saw Joel pull something out of his pocket and do a motion which led Ms. Wilson to believe he was loading a gun (T2/351-53). Six spent shell casings were recovered in the master bedroom (T3/ 391-94) but according to Barbara Shaw, not at the exact spot where she saw Joel empty his gun (although in the same "general area") T2/262). In closing argument, defense counsel suggested that the spent casings in the room were likely the ones created when Mr. Shaw was shot, and that (based on the testimony of Deborah Wilson as well as Joel) the gun was reloaded outside (T5/737-38). He further argued that it was not reasonable to believe that Mr. Shaw, upon realizing the gun was empty, would have run into the bathroom and let Joel reload. "The reaction would have been to go right at him. The evidence was that Mr. Shaw wasn't [a] small man. He could have easily overtaken him and what would he have to lose at that point? The man had pointed a gun at him. If the gun didn't fire, he's going to reload the gun. It didn't happen that way" (T4/737-38). The prosecutor agreed that there were ten shots all together, five fired at Lissa and her car and five at Mr. Shaw, "and only six casings were found so where are the other four casings". "We don't know", he continued, "We have no idea what happened to those casings" (T4/748). He suggested that Joel might have started reloading outside but for some reason didn't finish; "What was going on? We have no idea because it happened within a certain period of time" (T4/749-50). The prosecutor also misinterpreted defense counsel's assertion that it would not be reasonable to believe that Mr. Shaw would have retreated into the bathroom while allowing Joel to reload as an attack on Mr. Shaw for behaving unreasonably: "Why didn't he jump him? Instead he runs into
(continued...)

Barbara's testimony in such a way as to create the misleading impression that Joel was intentionally trying to prolong Mr. Shaw's suffering or was enjoying his suffering. If Mr. Shaw retreated into the bathroom while Joel reloaded, it was a nearly instantaneous, instinctive reaction to something which was occurring very quickly. There is simply no way, under the evidence in this case, that he would have stood there "in abject terror" and watched as Joel "slowly reloaded" his revolver (see R5/205,207). That was not the only testimony which the trial judge got wrong. Dr. Huser, the medical examiner, testified both on cross-examination and redirect that she was unable to determine the sequence in which the gunshot wounds occurred (T3/464,465). See Hartley v. State, supra, 686 So. 2d at 1323; Kearse v. State, supra, 662 So. 2d at 686. Yet the trial judge asserted in his HAC finding that "Dr. Huser stated that the final two shots were to the upper chest and the back of the head" (R5/207).

According to Barbara Shaw, Joel stepped inside the bathroom door and fired three shots at her husband. Charles' knees buckled, he grabbed his midsection and fell face first onto the floor (T2/253-54). Joel came back into the bedroom; then 30-60 seconds later he

¹⁸(...continued)
the bathroom and basically traps himself in there. How dare we second guess Mr. Shaw because his actions were not what a reasonable person would do when he was under such extreme circumstances" (T4/751-52)

suddenly went back into the bathroom and fired two more shots. Barbara, who said her view was unobstructed, testified "I saw him -- he walked up to my husband's body where he was laying and he bent over him and extended his right arm and he pulled the trigger. I saw him put the gun to my husband's lower back and pulled the trigger. He moved his arm further toward his left and pulled the trigger again" (T2/255). Barbara couldn't see what he was pointing at when he fired the second time, but she judged from the movement of his arm that it was in the direction of Charles' head (T2/255-56).

The medical examiner found gunshot wounds to Charles Shaw's upper right side of the chest, right side of the abdomen, left side of the abdomen, back of the right calf (a flesh wound) and back of the head (T3/455-61). There was stippling on the head wound, which Dr. Huser did not observe on any of the other wounds, which indicated to her that that shot would have had to have been from closer range than any of the others (T3/459-60). [The FDLE firearms expert, Styers, determined from the stipple pattern that the gunshot which caused the wound to the back of Mr. Shaw's head was fired from a distance of more than 2 inches but less than 24 inches (T3/423-24, R3/64)]. From the physical evidence it is clear that the fifth and last shot described by Barbara Shaw must have been the one to the back of the head, but none of the other four wounds (based on location and the absence of stippling) is consistent with the fourth

shot described by Barbara; i.e., he "bent over him and extended his right arm" and "put the gun to my husband's lower back and pulled the trigger."

Since Dr. Huser had testified that the chest wound would have caused unconsciousness very quickly and death almost as soon, from a matter of seconds to perhaps a minute or two at most (T3/456,464-65), it became imperative for the state -- in order to assert as a theory of HAC that Joel intended for the first three shots to be especially painful (see T5.855; R4/132; R5/146) -- to persuade the jury and judge that the shot to the chest must have been the fourth shot. Since all four of the other wounds are inconsistent with Barbara's description of the fourth shot, the prosecutor argued, through a series of circumstantial inferences based on her own conclusions drawn from the photographs of the scene, that the shot to the chest was less inconsistent with Barbara's description than were the other three injuries, and therefore must have been the fourth shot (T4/711-12; R4/131-32; R5/150).

The trial judge, in his sentencing order, materially misstated the medical examiner's testimony: "Dr. Huser stated that the final two shots at Mr. Shaw were to the upper chest and the back of the head" (R5/207). Even assuming for the sake of argument that he could have reached the same conclusion via the circumstantial process of elimination theorized by the prosecutor -- untainted by his reliance

on testimony which the medical examiner did not give -- the order or the shots would not support a finding of HAC. The prosecutor elicited from the medical examiner that she would expect gunshot wounds to the abdomen to be quite painful (T3/457-58), but the evidence showed that Mr. Shaw (assuming that he remained conscious after the first three shots) was dead within 30 seconds to a minute and a half at most after sustaining these wounds (see T2/254-56). In Teffeteller v. State, 439 So. 2d 841, 842 and 846 (Fla. 1983), the victim sustained a massive shotgun blast to the abdomen, but remained conscious and coherent for about three hours. Nevertheless, this Court agreed that "this killing does not fall within that category of murders which the legislature has denominated as especially heinous, atrocious, and cruel"; "[t]he 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." 439 So. 2d at 846 (emphasis in opinion). See also McKinney v. State, 579 So. 2d 80, 81 and 84 (Fla. 1991) (victim was found, semiconscious but able to tell police what happened, suffering from seven gunshot wounds to the right side of his body and two acute lacerations on his head, and died in hospital a short time later; HAC was not proven beyond a reasonable doubt).

Barbara Shaw testified that when her husband was shot, his knees buckled, and he grabbed his midsection and fell face first onto the floor (T2/254). The final two shots, including the one to the back of the head, were fired only 30-60 seconds later (T2/255). Since the order of the shots does not prove actual physical or emotional torture beyond the norm of capital felonies, the state was left to argue that the (purported) order of the shots proved Joel Diaz' intent to inflict unnecessary pain and suffering to Charles Shaw. The prosecutor (evidently operating under the unfounded assumptions that Joel Diaz is an expert marksman, that he hadn't been up all night drinking and brooding, and that he was under no emotional stress) argued to the jury:

Joel Diaz very calmly, right in front of Mr. Shaw, unloads the gun, reloads it, and when Mr. Shaw sees this, he retreats back into the bathroom. Joel Diaz follows right behind him, very calmly, and shoots one round to the back of the leg. We know that he aimed very low because not only did the shot hit down below the knee in the back, but also the shot went through the lowest part of the glass area where the shower was.

Why would Joel Diaz, if he is trying to just kill Mr. Shaw, shoot him right there in the leg? Why don't you aim right for his back or why don't you shoot him in the chest or the head, as you eventually do. What is the purpose of shooting Mr. Shaw down on the leg? Suffering.

And even when Mr. Shaw turns around and says what did you do that for, what does Joel Diaz do? He pumps two more rounds right into his

belly where Mr. Shaw doubles over, his knees buckle, and he hits the ground. Why didn't you shoot him in the chest? Why didn't you shoot him in the head? Misery. Make him suffer, make him suffer.¹⁹

(T5/855)

This argument is a testament to the weakness of the state's position. It defies all reason to think that Joel "aimed" with the first shot to graze the back of Mr. Shaw's calf. If that was indeed the first shot (which was not proved beyond a reasonable doubt), that simply shows erratic shooting, which is consistent with the events which preceded and followed it. Similarly, there is no evidence that Joel aimed for Mr. Shaw's abdomen as a consciously chosen target to inflict maximum pain; he was just aiming at Mr. Shaw. Moreover, the state's "why didn't he?" argument gives rise to the more logical counter-argument of "Why did he?" Why -- if Joel was thinking as the state conjectures "Misery. Make him suffer, make him suffer" -- would Joel have ended the suffering thirty to sixty seconds later? He obviously wasn't in any hurry to leave, and there was nobody in the house who could have prevented him from torturing Charles Shaw, or taunting him, or just letting him lie there. Plainly, it was

¹⁹ See also the State's sentencing memoranda, R4/132 ("That the defendant did not shoot Mr. Shaw in the head initially is indicative of his desire that Mr. Shaw suffer from his gunshots. The evidence showed that the first shot would have been to the back of the leg. This is indicative of and substantiates a desire to inflict pain and suffering on Mr. Shaw", and R5/146.

never Joel Diaz' intent to inflict physical or emotional torture on Charles Shaw. In fact, until he was struck in the face in the garage and lost control of his temper, it wasn't even his intent to kill him. Based on the evidence in this trial and all of the applicable caselaw, the trial judge erred in instructing the jury on HAC, in giving it great weight, and in materially misstating the testimony of Barbara Shaw and Dr. Huser. Moreover, for the reasons stated in Justice Harding's concurring opinion in Knight v. State, 746 So. 2d 423, 439 (Fla. 1998), application of HAC to these facts would render the aggravating factor unconstitutionally overbroad. Since, as in Bonifay v. State, supra, 626 So. 2d at 1313, the prosecutor argued HAC extensively to the jury, and it could easily have had tremendous impact on the jury penalty recommendation, Joel Diaz's death sentence should be reversed for a new penalty trial before a newly empaneled jury based solely on the errors involving HAC. However, since CCP was also invalid, and since the death penalty, in this single aggravator, significantly mitigated homicide is disproportionate, a new penalty trial is unnecessary, because the sentence should be reduced to life imprisonment without possibility of parole.

ISSUE III

THE TRIAL COURT ERRED IN FINDING, AND INSTRUCTING THE JURY ON, THE "COLD, CALCULATED AND PREMEDITATED" AGGRAVATING FACTOR; AND FURTHER ERRED BY USING, AND ALLOWING THE PROSECUTOR

TO ARGUE TO THE JURY, A LEGALLY
INAPPLICABLE "TRANSFERRED INTENT"
THEORY TO FIND THIS AGGRAVATOR.

A. The Elements of CCP

CCP has four elements; the state proved one out of four for the attempted murder of Lissa Shaw [Part C]. Even if the state had proven CCP as to Lissa, the transferred intent theory which it relied on to then apply the aggravator to the murder of Charles Shaw is legally improper under the facts of this case, because the two shootings were separated by a series of unexpected intervening events involving Joel Diaz and Charles Shaw (during which time Lissa was leaving or had already left the scene), and at the time Joel shot Charles Shaw his intent was to shoot Charles, not Lissa [Part D]. Finally, as to the evidence relating to the murder of Charles Shaw, the state once again proved only one of the four elements of CCP [Part E].

Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994), and Walls v. State, 641 So. 2d 381, 387-88 (Fla. 1994) set forth the four essential elements which the state must prove beyond a reasonable doubt to establish the "cold, calculated, and premeditated" aggravating factor. [Undersigned counsel concedes that the fourth element, that the murder had "no pretense of moral or legal justification", was proven].

The first element is that "the killing was the product of cool and calm reflection rather than an act prompted by emotional frenzy, panic, or a fit of rage." Buckner v. State, 714 So. 2d 384, 389 (Fla. 1998); Jackson; Walls. The requisite "coldness" is not proven in heated murders -- often arising from stormy domestic relationships -- "in which the [defendant's] loss of emotional control is evident from the facts, through perhaps also supported by expert opinion" Walls, 641 So. 2d 388. See, e.g., Hamilton v. State, 678 So. 2d 1228, 1231 (Fla. 1996); Maulden v. State, 617 So. 2d 298, 302-03 (Fla. 1993); Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992); Santos v. State, 591 So. 2d 160, 162-63 (Fla. 1991); Thompson v. State, 565 So. 2d 1311, 1318 (Fla. 1990); Garron v. State, 528 So. 2d 353, 361 (Fla. 1988).

The second element is "calculation", which requires proof beyond a reasonable doubt that the defendant had formulated a "careful plan or prearranged design to kill". Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). See, e.g., Mahn v. State, 714 So. 2d 391, 398 (Fla. 1998); Hamilton v. State, supra, 678 So. 2d at 1231 (Fla. 1996); Wyatt v. State, 641 So. 2d 1336, 1341 (Fla. 1994).

Nibert v. State, 508 So. 2d 1, 4 (Fla. 1987) states the third essential element of CCP; "We have consistently held that application of this aggravating factor requires a finding of heightened premeditation; i.e., a cold-blooded intent to kill that is more

contemplative, more methodical, more controlled than that necessary to sustain a conviction for first degree murder" (emphasis in opinion); see also Buckner v. State, supra, 714 So. 2d at 389-90). In many cases, this Court has overturned CCP findings where simple premeditation was established but the requisite heightened degree of premeditation was not. See, e.g., Nibert; Buckner; Preston v. State, 444 So. 2d 939, 946-47 (Fla. 1984); Rogers v. State, supra, 511 So. 2d at 533; Amoros v. State, 531 So. 2d 1256, 1261 (Fla. 1988); Farinas v. State, 569 So. 2d 425, 431 (Fla. 1990).

B. Standard of Review

CCP, like any aggravating factor, must be proven beyond a reasonable doubt before it may be weighed by the judge or jury in determining whether to impose a death sentence. White v. State, 616 So. 2d 21, 25 (Fla. 1993). See, generally, Atkins v. State, 452 So. 2d 529, 532 (Fla. 1984); Ford v. State, __ So. 2d __ (Fla. 2001) [26 FLW S817, 819]. Where the state's evidence relied on to establish CCP is circumstantial, "to satisfy the burden of proof, the circumstantial evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor." Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992); Mahn v. State, 714 So. 2d 391, 398 (Fla. 1998). The standard of review for this mixed question of law and fact is whether the trial court applied the right rule of

law and whether his finding of the aggravator is supported by competent, substantial evidence. Ford, supra, 26 FLW at S189; Beasley v. State, 774 So. 2d 649, 669 (Fla. 2000). In the instant case, the trial court committed reversible error in both ways. First, he applied the wrong rule of law to the facts of this case by using (and allowing the jury to use) the theory of transferred intent to find CCP. Second, the evidence in this trial refutes the "coldness" element of CCP, and fails to prove beyond a reasonable doubt the "calculation" and "heightened premeditation" elements. As to the attempted murder of Lissa, there is no evidence that Joel had a "careful plan or prearranged design" to kill her; the evidence is at least equally consistent with the hypothesis that he intended to confront her, and kill himself if the encounter went badly. As to the murder which is actually at issue here -- that of Charles Shaw -- there is no evidence of preplanning (in fact, the evidence negates preplanning), and no heightened premeditation. Prior to whatever occurred in the garage (whether it was Charles Shaw hitting Joel in the face, or whether it was something else not apparent from the evidence), it appears that Joel did not intend to kill Charles Shaw, since he made no attempt to shoot him when Charles was angrily coming toward him in the yard.

C. The Attempted Murder of Lissa Shaw was not "Cold" Within the Meaning of the CCP Aggravator, Nor Was it Proven Beyond a Reasonable Doubt to be Preplanned.

The state's and the trial judge's hypothesis that Joel Diaz arrived at the Shaws' house with a coldly preplanned design to murder Lissa Shaw is not only based on speculation and conjecture, and not only subject to other reasonable hypotheses (such as that he intended to confront her about their relationship, using the gun to force her to deal with him, and perhaps that he expected to commit suicide if the encounter did not go as he hoped), it is undercut by expert opinion introduced by the state itself.²⁰ Dr. Keown, the psychiatrist who was called by the prosecution to rebut the insanity defense, stated that Joel had situational depression when he interviewed him, but "[h]e certainly was upset and depressed" by the events which led up to the shootings as well (T4/649,655). When Lissa moved out, Joel thought they would continue to date, when he found that she did not want to see him or talk to him he became depressed and began to drink (which he ordinarily avoided) and use marijuana and stay out late (R3/66-67). Dr. Keown testified, "I think he probably had very strong feelings for Lissa Shaw, but I think he was also very angry and I think it got the better of him" (T4/655). Joel had been drinking from a bottle of Crown Royal until 4:00 in the morning and, while not drunk, he had a "buzz" (T4/652; R3/71). [Dr. Keown believed that "[t]here does not appear to be any

²⁰ Dr. Keown's written evaluation was introduced into evidence in the guilt phase as State Exhibit 88 (R3/65-73; T4/656-57).

alcoholic amnesia or blackouts. The difficulty with his memory is most likely due to the quickness with which everything transpired and the intense emotional state that he was in" (R3/71; see T4/656-57)]. In Dr. Keown's opinion, when Joel went to Lissa's house that morning he "clearly wanted some kind of confrontation. Whether he had the gun with him for the purpose of forcing her to deal with him or whether he had any prior contemplation of using it cannot be known for sure. In any event, he likely came armed more as a way to increase his control than for any defensive purposes. The events with Lissa seem to have occurred quickly and caught him by surprise. The events with Mr. Shaw took longer and involved more deliberation" (R3/71). Similarly, Dr. Keown viewed Joel's actions after the shooting -- his nervous pacing about, his comments to Mrs. Shaw, his unloading and reloading of the gun -- as "more evidence of emotional turmoil and the shock of his behavior than any indication of disordered thought"; he was shaken up, his anger spent, and he was confused as to what to do now (R3/72; T4/654-55). His going through Lissa's drawers searching for answers about their relationship was, in light of what had just happened, "strange behavior". Dr. Keown acknowledged, but it was not psychotic or a basis for legal insanity (R4/666-67).

Thus, as shown by virtually all of the evidence including that provided by the state's own expert, this homicide was committed by a

young man under intense emotional pressure, arising from the (to him) unexplained loss of his girlfriend's love, who had been up all night drinking and brooding and probably thinking of killing himself if he failed to win her back or at least "find some answers." Joel's inflamed and disturbed emotional state is both "evident from the facts" and "supported by [the] expert opinion" [see Walls v. State, supra, 641 So. 2d at 387-88] of both the prosecution and defense mental health witnesses. Since the "coldness" element was disproven, the CCP aggravator could not have been applied to Lissa Shaw's murder if she had been killed. See Maulden v. State, supra, 617 So. 2d at 299 and 303; Richardson v. State, supra, 604 So. 2d at 1109; Santos v. State, supra, 591 So. 2d at 161-63.

In contrast to the "coldness" element, the evidence at trial does not affirmatively disprove "calculation". However, the evidence does not prove calculation either; certainly not beyond a reasonable doubt. While the circumstantial evidence might be consistent with Joel having a "careful plan or prearranged design" to kill Lissa and then himself (as the prosecutor contended, see T4/632-33,750), the circumstantial evidence is also consistent -- as Dr. Keown recognized -- with Joel having no plan to do anything other than confront Lissa and force her to talk to him, and maybe kill himself if the encounter went badly. Joel's letter to his brother Jose, written during a sleepless night of drinking and stewing in his own juices, reads:

Jose First I want to apologize for using you or to lying to you to take me where you did I felt so bad but there was no other way. There's no way to explain what I have to do but I have to confront the woman who betrayed me and ask her why because not knowing is literally killing me. What happens then is up to her.

If what happens is what I predict then I want you to tell our family that I love them so much. Believe me I regret having to do this and dying knowing I broke my mom's heart and my [dad?] makes it even harder but I can't go on like this it's too much pain. Well I guess that's all there's to say. I love you all.

Joel

P.S. Someone let my dad know just because we weren't close doesn't mean I don't love him because I do.

(R3/62)

That is a suicide note. While it doesn't expressly exclude the possibility of murder/suicide, neither does it say it or even imply it. To construe it that way requires speculation and hindsight; i.e., because he shot at Lissa (when she suddenly threw the car in reverse and backed out of the garage at a high speed), he must have preplanned to shoot Lissa.

None of the other circumstances relied on by the state prove a careful plan or prearranged design either. The state asserts, "This murder was characterized by a significant level of planning based upon the advanced purchase of the firearm and the letter the defendant wrote detailing his intent" (R4/135, see R4/133; R5/146-47). The evidence shows that Joel bought a gun three weeks prior to

the events of October 28, 1997, and the state makes much of the fact that he was annoyed by the delay. The pawnshop manager Primrose testified that after the three day waiting period he informed Joel that he was a "conditional non-approval", which meant that he could not take possession of the gun, nor could he cancel the transaction and get his money back; he was "kind of, like, in limbo" (T3/441-45). This is the sort of business encounter which makes anyone irate. Moreover, if Joel were in such a hurry to get the gun because he'd already formed a plan to kill Lissa then why -- after he finally got the gun -- did he wait another two weeks before acting on it? To infer a "careful plan or prearranged design" from these facts would be sheer speculation.²¹

Additionally, there is the fact that people who are coldly planning to murder someone don't generally go to the home of their intended victim without having an expeditious way to leave. Joel, late at night, asked his brother Jose for a ride. Very early the next morning, Joel drove the car himself to the entrance to the Shaws' neighborhood, then got out and walked the rest of the way, while Jose's girlfriend took the car to drop Jose off at work. In response to defense counsel's rhetorical questions to the jury asking why Joel -- if he was planning to murder Lissa Shaw -- would have

²¹ CCP, like any other aggravator, may not be based on speculation. Hoskins v. State, 702 So. 2d 202, 210 (Fla. 1997); Hamilton v. State, 547 So. 2d 630, 633-34 (Fla. 1989).

legally bought a gun under his own name (T4/733) or would have had his brother just drop him off instead of waiting for him (T4/740), the prosecutor suggested that it depends; you might do those things "[i]f you don't think you're coming out of it alive" (T4/750).

Therefore, the state's own hypothesis of "calculation", even if it had been proven, would further negate "coldness" and prevent a valid finding of CCP. While a cold, dispassionate murder/suicide might not be theoretically impossible, it would be entirely inconsistent with all of the evidence in this case, including the opinion of the state's own psychiatric expert. In Thompson v. State, supra, 565 So. 2d at 1312-13 and 1317-18, Thompson had had an argument with this girlfriend (Place) because Thompson decided to go back to his wife. Place objected and threatened to blow up the house. When Thompson awoke the next morning:

. . . he decided to kill Place and commit suicide. He said he shot Place as she lay sleeping, then he stabbed her because she was still moving and he wanted her to feel no pain. Thompson wrote a suicide note to his wife, which police found at the scene. He told police that he tried to shoot himself, but when he could not, he slashed his wrists with a razor blade. However, he could not go through with it. He later indicated to police that he wanted to die, and he asked one officer to shoot him to death.

The trial court found as a mitigator that "Thompson had been separated from his wife and considered suicide after the murder, thereby showing that he may have been suffering from emotional

stress." 565 So. 2d at 1317. However, the trial court also found CCP. The state argued that the thirty minute period between the time Thompson awoke and decided to kill Place and himself and the time he actually shot her gave him the opportunity to think about what he was doing. This Court found that CCP was not proven beyond a reasonable doubt, since there was no evidence in the record "to show that Thompson contemplated the killing for those thirty minutes. To the contrary, the evidence indicates that Thompson's mental state was highly emotional rather than contemplative or reflective." 565 So. 2d at 1318.

In the instant case, Joel's depression over his break-up and inability to communicate with Lissa, and the intense emotional state he was in at the time of these events, is evident in his letter to Jose, and supported not only by his own testimony but also by that of Jose, Barbara Shaw (in her account of Joel's erratic behavior and

statements after the shooting of Charles),²² and the evaluation of Drs. Keown and Kling.

In contrast to such cases as Santos v. State, supra, 591 So. 2d at 161; Amoros v. State, supra, 531 So. 2d at 1257, and Pooler v. State, supra, 704 So. 2d at 1377-78, there is no evidence of any prior threat by Joel to kill Lissa, or harm Lissa. According to Lissa herself, when he confronted her with the gun in the garage, he tried to open the door and kept telling her to get out of the car, but he never stated that he was going to kill her or hurt her (T2/312-13). Lissa was saying, "Please don't do this, don't do this, don't hurt me", and when she saw this wasn't going anywhere she told him "Okay, okay, hold on a second, let me get my stuff" (T2/287-88). She leaned down like she was getting things from the floorboard, and as she was doing so, she reached for the gearshift, put it in reverse, hit the gas, and took off (T2/288). Joel testified that he was standing very close to the car, still telling her he

²² According to Barbara, when Joel came back into the bedroom with her after shooting Charles, "[h]e just said many things to me", including "if that bitch of a daughter of yours, if I could have got her, I wouldn't have had to kill your husband" (T2/256). In context, and especially considering Joel's emotional state, that is an after-the-fact comment on what had just happened; not -- as the state will try to characterize it -- an "admission" of what he had intended to happen. Joel also told Barbara that he'd never been in trouble before; that he had just wanted to talk to Lissa; that he didn't know why Lissa had left him; that her husband was prejudiced and deserved to die and she (Barbara) was probably prejudiced too; that she would probably never be able to forgive him; and that he should just blow his brains out (T2/256,258,270).

just wanted to talk, when she suddenly threw the car in reverse and backed out fast and not too straight (T3/591-93, T4/610-12). Startled, Joel kind of pushed himself away from the car with one hand and started firing the gun into Lissa's car (T3/592; T4/612-13). She backed out of the garage and driveway, bumping into a landscaped island in the street, and drove away at a high rate of speed (T2/289-90).

The evidence is consistent with Joel -- already in an agitated emotional state but with no prior plan to kill her -- being startled by this sudden occurrence, and firing the shots almost instinctively and without deliberation; i.e., attempted second degree murder.²³

D. The Doctrine of Transferred Intent is Legally Inapplicable to the Facts of this Case

Since the state failed to prove the elements of CCP as to the shooting of Lissa, it could not transfer the unproven intent to the later occurring murder of Charles. However, even assuming for the sake of argument that CCP had been established as to Lissa, the doctrine of transferred intent is inapplicable as a matter of law to the facts of this case.

²³ Due to the length of this brief, undersigned counsel is not raising the insufficiency of the evidence of premeditation as to the attempted first degree murder of Lissa Shaw as a separate point on appeal, but based on the evidence discussed in this CCP issue he would request that this Court reduce that conviction to attempted second degree murder.

In a homicide case, the doctrine of transferred intent applies where an actor intends to kill one person, but (through mistake, accident, "bad aim" or otherwise) kills another person instead. See Gladden v. State, 330 A. 2d 176, 180-85 (Md. 1974), which contains a comprehensive review of the history and development of the common law doctrine of transferred intent, and a compilation of numerous decisions in various jurisdictions which recognize the principle. As it has sometimes been expressed, "the malice or intent follows the bullet." Murray v. State, 713 P. 2d 202, 205 (Wyo. 1986). Another common illustration of "transferred intent" is where the actor lays out poison, intending to kill A, but B drinks the poison instead. See Coston v. State, 139 Fla. 250, 190 So. 520 (1939). As in the "bad aim" situation, "[t]he original malice as a matter of law is transferred from the one against whom it was entertained to the person who actually suffered the consequences of the unlawful act". Coston v. State, supra, 190 So. at 522.

A bomb which is intended to blow up a particular individual but explodes prematurely and kills someone else is another example of transferred intent. See Howell v. State, 707 So. 2d 674, 676 and 681-82 (Fla. 1998).

The doctrine of transferred intent has long been recognized in Florida. See, e.g., Pinder v. State, 8 So. 837, 27 Fla. 370 (1891); Hall v. State, 69 So. 692, 70 Fla. 48 (1915); Coston v. State, supra;

Lee v. State, 141 So. 2d 257 (Fla. 1962); Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986); Provenzano v. State, 497 So. 2d 1177, 1181 (Fla. 1986). Where applicable to the evidence, this legal theory may be used to transfer "simple premeditation" to sustain a conviction of first degree murder, and -- as the state correctly asserted below (R4/133-34; T5/858-60) -- it can also be used to transfer "heightened premeditation" to establish CCP. See Howell v. State, supra, 707 So. 2d at 676 and 682; Provenzano v. State, supra, 497 So. 2d at 1180-81 and 1183; Bell v. State, 699 So. 2d 674, 675 and 677-78 (Fla. 1997); Sweet v. State, 624 So. 2d 1138, 1142 (Fla. 1993). However, this Court has recognized that in order to apply the doctrine of transferred intent the premeditated design to effect the death of A must exist at the time of the act which inadvertently results in the death of B. Compare Provenzano v. State, supra, 497 So. 2d at 1181 ("[T]he question here is whether at the time the murder [of bailiff Wilkerson] was committed, Provenzano was attempting to effectuate his premeditated design to kill Officers Shirley and Epperson. The facts indicate that he was") with Wilson v. State, supra, 493 So. 2d at 1023 (doctrine of transferred intent was inapplicable, where the evidence failed to show that the premeditated design to kill Wilson, Sr. existed at the moment Jerome Hueghley was accidentally stabbed").

What distinguishes the instant case from the decisions relied on by the state is that here there were two distinct shooting

incidents, separated not only by time but also by a chain of unanticipated events involving Joel Diaz and Charles Shaw, after Lissa Shaw had already left the scene. During the time the two men were outside, it appears that Joel had no intent to kill Charles Shaw, because he did not attempt to shoot at him when Charles was angrily advancing on him.²⁴ Instead -- during the sequence of events that occurred in Lissa's absence -- something occurred which caused Joel to form a premeditated (but not "cold" or "calculated") intent to kill Charles Shaw.²⁵ In sharp contrast to the facts in Howell, Provenzano, Sweet, and Bell, Charles Shaw was the intended victim of the first degree murder in this case, and "transferred intent" simply does not apply. The cases say that the "focus of the CCP aggravator is the manner of the killing, not the target" [Bell, 699 So. 2d at 678], but in the instant case that means the manner of the killing of Charles Shaw. Provenzano, Sweet, and Bell each involved a plan to

²⁴ The state may suggest that Joel didn't try to shoot Charles outside because there were witnesses. However, he could not have known at that point that Charles would go back into the house, and there is no evidence that Joel forced Charles into the garage. Moreover, it is evident that Joel, in his agitated and emotional state of mind, wasn't concerned about witnesses, since when he eventually did shoot Charles he did so in the presence of Charles' wife, whom he not only did not "eliminate", he conversed with her at length. See Besaraba v. State, 656 So. 2d 441, 445 (Fla. 1995).

²⁵ Joel's testimony that he "lost it" after he was struck in the face by Charles when the latter was trying to wrestle the gun away from him in the garage is corroborated by some of the circumstantial evidence and contradicted by none of it.

murder a specific individual or individuals, followed by a single shooting incident in which someone other than the original target was killed. Howell involved a bomb which was gift-wrapped for delivery to a specific intended victim, but after the driver was stopped by a state trooper for speeding the bomb went off, killing the trooper.

The precedent which does apply to the instant case is Amoros v. State, 531 So. 2d 1256 (Fla. 1988), an "incident of domestic violence [which] arose when Amoros murdered his former girlfriend's [Simmons] current boyfriend [Rivero]":

. . . [T]he night before the murder, Amoros had approached Simmons as she was leaving his parents' home in a new car. After Simmons refused to answer his questions about who owned the car, Amoros threatened to kill her. The next night, Simmons went to the police station to report the threat while Rivero remained inside her apartment. As she left, Simmons padlocked the back door from the outside at Rivero's request. Simmons went to Amoros' home with a police officer, but Amoros was not there. Upon returning to her own home, she found police investigating the shooting of Rivero.

Two of Simmons' neighbors testified that at approximately 12:30 a.m. on June 2, just prior to the shooting, a man asked them if a lady and a little girl lived in Simmons' apartment. Receiving their affirmative answer, the man headed toward the apartments and, about two minutes later, the neighbors heard gunshots which they immediately reported to the police. Later that night, they picked Amoros' picture out of a photopack as the man they had spoken to just prior to the shooting. They also identified Amoros at trial.

An autopsy of the victim revealed three gunshot wounds, two through the right arm and one to the chest, the latter proving fatal. Evidence reflected that the victim had futilely tried to escape through the padlocked back door.

531 So. 2d at 1257.

On appeal, this Court (in striking the trial court's finding of HAC) observed that "Amoros did not know the victim and shot him within two minutes after entering the premises for the purpose of confronting and probably shooting his former girlfriend." 531 So. 2d at 1260. In striking the trial court's finding of CCP, this Court found that although there was sufficient evidence of premeditation for a conviction of first degree murder of Rivero, "there was an insufficient showing . . . of the necessary heightened premeditation, calculation, or planning required to establish [the CCP] aggravating circumstance":

The only evidence of a plan was Amoros' threat to his former girlfriend. However, no evidence was presented to establish that Amoros knew the victim or was aware that the victim was residing with his former girlfriend at the time he entered the apartment. We reject the supposition that Amoros' threat to the girlfriend can be transferred to the victim under these circumstances.

531 So. 2d at 1261.

The evidence pertaining to the murder of Charles Shaw failed to prove three of the four elements of CCP [Part E, infra]. But even if the evidence could have supported a finding of CCP as to Charles'

murder, the prosecutor's heavy reliance on the legally invalid transferred intent theory in arguing CCP to the jury, and the judge's heavy reliance on that theory in finding and weighing the aggravator, tainted it beyond repair. See Sochor v. Florida, 504 U.S. 527, 538 (1992); Jackson v. State, 648 So. 2d 85, 90 (Fla. 1994); Kearse v. State, 662 So. 2d 677, 686 (Fla. 1985) (while jury is likely to disregard an aggravating factor which is unsupported by the evidence, it is unlikely to disregard a theory flawed in law). Therefore, apart from the issues of proportionality and the trial court's sentencing findings, the trial court's error in allowing the prosecutor, over defense objection, to argue transferred intent to the jury as his main basis for urging them to find CCP (T5/858-61) requires reversal for a new penalty trial.

E. The Murder of Charles Shaw was Neither Cold nor Preplanned Within the Meaning of the CCP Aggravator, and There was No Proof of Heightened Premeditation

There is no evidence that Joel planned to murder Charles Shaw, or even that he anticipated encountering him. Amoros. Thus the "calculation" element of CCP is not present. The "coldness" element is negated by virtually all of the evidence in this case, including the state's own psychiatric expert's description of "the intense emotional state that he was in" and "the quickness with which everything transpired" (see R3/71). These events arose from the

break-up of a stormy domestic relationship; Joel was depressed, possibly suicidal, and had been up all night drinking. See Hamilton; Mauldin; Richardson; Santos; Thompson; Garron. If he was in an agitated emotional state when he arrived at the Shaws' house, certainly nothing that happened thereafter between him and Lissa, or between him and Charles Shaw, would have calmed him down any. As for the third element, heightened premeditation (a "cold blooded intent to kill that is more contemplative, more methodical, more controlled" than the simple premeditation needed for a first degree murder conviction),²⁶ that is negated by the evidence that the murder occurred only after Joel lost his temper when he was struck in the face by Mr. Shaw. Compare the events leading up to the homicide in Padilla v. State, 618 So. 2d 165, 170 (Fla. 1993) (CCP invalid where the evidence supported the assertion "that this murder was more of a spontaneous act, resulting from Padilla's being beaten, than a preplanned act that was done with cold deliberation").

Finally, the manner of Charles Shaw's killing (taking the evidence in the light most favorable to the state) does not support a finding of heightened premeditation. In Farinas v. State, 569 So. 2d 425, 431 (Fla 1990), this Court rejected:

. . . the state's argument that because Farinas approached the victim after firing the first shot and then unjammed his gun three times

²⁶ Nibert, 508 So. 2d at 4; Buckner, 714 So. 2d at 390.

before firing the fatal shots to the back of the victim's head afforded him time to contemplate his actions, thereby establishing heightened premeditation. The fact that Farinas had to unjam his gun three times before firing the fatal shots does not evidence a heightened premeditation bearing the indicia of a plan or prearranged design. Because the state has failed to prove beyond a reasonable doubt that Farinas' actions were accomplished in a "calculated" manner, this aggravating factor is not applicable in the present case.

569 So. 2d at 431 (footnote omitted).

See also Buckner v. State, supra, 714 So. 2d at 386-87 and 389-90 ("While we found . . . that Buckner's actions and statements between the first two shots and the final three shots were sufficient to establish premeditation, we do not find such evidence to be sufficient to establish the "heightened" premeditation necessary to establish CCP").

Since the prosecutor not only argued CCP extensively to the jury, she urged them to find it mainly on the basis of a legally inapplicable theory of transferred intent, the state cannot show beyond a reasonable doubt that the jury's death recommendation was untainted. This would ordinarily require reversal for a new penalty trial, but in the instant case (where the only valid aggravator found by the trial court is the contemporaneous convictions, and where there is considerable statutory and nonstatutory mitigation), Joel Diaz' sentence should simply be reduced to life imprisonment on proportionality grounds. While there is no per se "domestic

exception" the death penalty,²⁷ this Court has consistently found death sentences to be disproportionate when the heated and emotional nature of the case negates cold calculation. See e.g., Santos v. State, 629 So. 2d 838 (Fla. 1994) (on facts set forth in Santos v. State, supra, 591 So. 2d at 161-63); Maulden v. State, 617 So. 2d 298 (Fla. 1993); White v. State, 616 So. 2d 21 (Fla. 1993); Farinas v. State, 569 So. 2d 425 (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); Wilson v. State, 493 So. 2d 1010 (Fla. 1986); Ross v. State, 474 So. 2d 1170 (Fla. 1985).

ISSUE IV

THE DEATH SENTENCE IS DISPROPORTIONATE.

As this Court stated in Urbain v. State, 714 So. 2d 411, 416 (Fla. 1998):

In performing a proportionality review, a reviewing court must never lose sight of the fact that the death penalty has long been reserved for only the most aggravated and least mitigated of first-degree murders. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973). See also Jones v. State, 705 So. 2d 1364, 1366 (Fla. 1998) (reasoning that "[t]he people of Florida have designated the death penalty as an

²⁷ See Spencer v. State, 691 So. 2d 1062, 1065 (Fla. 1996); Zakrzewski v. State, 717 So. 2d 488, 493-94 (Fla. 1998).

appropriate sanction for certain crimes, and in order to ensure its continued viability under our state and federal constitutions `the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of [the] most serious crimes.'" (footnote omitted).

The requirement that the death penalty be administered proportionately has a variety of sources in Florida law, including "several state constitutional provisions which collectively mandate proportionality review in capital cases". Knight v. State, 746 So. 2d 423, 437 (Fla. 1998), see Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991); Urbin v. State, supra, 714 So. 2d at 415.

While there is no per se "domestic exception" [Spencer; Zakrzewski], a comparison of the facts of this case with others in which the defendant's heated and emotional mental state negated cold calculation shows that the death penalty is disproportionate. See Santos; Maulden; White; Farinas; Blakely; Amoros; Garron; Wilson; Ross. Moreover, the only valid aggravator found by the trial court in this case is the contemporaneous offenses which Joel committed while in the same inflamed and agitated state of mind. Therefore -- even apart from the fact that the state cannot show beyond a reasonable doubt that the plethora of errors involving HAC, CCP, and transferred intent couldn't have affected the jury's penalty verdict or the judge's sentencing decision -- this Court has made it clear that it will not affirm a death sentence based on a single

aggravating factor, except in cases where there is very little or nothing in mitigation. See, e.g., Jones v. State, 705 So. 2d 1364 (Fla. 1998); DeAngelo v. State, 616 So. 2d. 440, 443-44 (Fla. 1993); McKinney v. State, 579 So. 2d 80, 85 (Fla. 1991); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989). There is substantial statutory and nonstatutory mitigation in the instant case; in addition to Joel's depression and drinking in the wake of his break-up with Lissa, and the intense emotional state he was in at the time of the offenses (as revealed in his letter to Jose, and documented in the evaluations of the state's psychiatrist as well as the defense's psychologist), Joel was abused as a child and young adolescent (especially when he would try to protect his mother from being beaten by his father), and he was raised in a violent, alcoholic, and emotionally scarring family environment. Domestic violence was the only way of life Joel saw growing up, and as often happens he repeated the pattern with Lissa and his previous girlfriends²⁸ (T5/826,834-36,343-35). Apart from

²⁸ Joel's sister Minerva thought that the domestic violence he had witnessed growing up affected him in his later relationships with girlfriends (T5/826). When Joel was dating Lissa, Minerva and Lissa became good friends and Lissa would confide in her about the relationship (T5/834) Minerva observed that Lissa and Joel would fight on a regular basis; "they both would hit each other and, yeah, [Joel] was abusive towards her" (T5/834-35). Minerva noticed bruises on her face and a couple of times a black eye (T5/835-36). Joel had had two other girlfriends before Lissa and there was domestic violence in those relationships as well. According to Minerva (who
(continued...)

the domestic violence (which was often mutual), Joel's juvenile and adult "criminal history" in the PSI includes only a few minor traffic and driver's license infractions, resulting in fines (SR90-91, see T5/840). Dr. Keown, the state's psychiatric expert, noted that Joel's behavior during the events which resulted in the shooting of Lissa Shaw and the fatal shooting of her father "is quite extreme in terms of his previous behaviors", and concluded that his lack of a long history of criminal involvement suggests that he does not suffer from an "intermittent explosive impulse disorder" (R3/72). However "[h]e may very well have a history of Attention Deficit Disorder which often has some degree of impulsivity connected with it. Additionally, he tends to be quite distrustful and even has a slight paranoid flavor to some of his thinking. These personality factors coupled with the fact that he had been drinking earlier may certainly have set the stage for greater impulsivity and greater poor judgment" (R3/72).

Thus the mitigating factors which apply to the events leading up to and during the homicide, and the mitigating factors evident in Joel's "28 years of existence on this earth" (see R5/215) all interrelate, and they all apply not only to the murder conviction but

²⁸(...continued)
was raised in the same environment as Joel), they "would fight like any other couple would fight", and the girlfriends also used to hit Joel (T5/834-35).

also to the contemporaneous offenses which constitute the only valid aggravator in this case. Under all of the comparable precedent, the death penalty is clearly disproportionate.

CONCLUSION

This is not one of the most aggravated first degree murders, nor is it one of the least mitigated first degree murders. In addition, the jury's death recommendation was affected by consideration of two invalid aggravators and an inapplicable legal doctrine, while the judge's sentencing order featured the same two invalid aggravators, the same inapplicable legal doctrine, and (as to HAC) misstatements of critical testimony. Joel Diaz' death sentence must be reduced to life imprisonment without possibility of parole.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of September, 2002.

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