IN THE SUPREME COURT OF FLORIDA

ROBERT JOE LONG, :

Appellant, :

vs. : Case No. 74,512

STATE OF FLORIDA, :

Appellee. :

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

A. ANNE OWENS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 284920

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Florida Rule of Appellate Procedure 9.210(c) provides that, in an answer brief, "the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified." See Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114, 1122 (Fla. 1984). "This simple, concise statement plainly means that the appellee's answer brief shall not contain a reiteration of the statement of the case and . . . facts stated in appellant's brief, but shall only state wherein appellee disagrees with appellant's statement and supplement that statement to the extent necessary to correct any material misstatements and omissions in appellant's statement." Metropolitan Life and Travelers Ins, Co. v. Antonucci, 469 So.2d 952, 954 (Fla. 1st DCA 1985).

In its brief in this case, Appellee has not indicated any disagreement with Appellant's statement of facts. Appellee merely emphasized the details of the homicide and minimized the mitigation evidence. Appellee reduced Appellant's 23 page statement to seven pages, omitting major portions of evidence supporting Long's arguments. With few exceptions, every piece of evidence in Appellee's statement of facts was mentioned in Appellant's statement of facts.

The few things Appellee added were not "material omissions." A number of Appellee's additions merely enumerated all the bad things that did not happen to Long when he was a child: Long's mother did not abandon him, was not abusive, made sure he had food and clothing and worked to support him rather than abuse drugs and alcohol; Long's wife, Cindy, never saw Long abuse his mom; Long's mother did not take cocaine or drugs but fed and provided a home for Long; Long's father testifiedthat Long's mother loved and supported Long. (Brief of Appellee at 3-4.) Appellant's initial brief instead described what did happen to Long. The description of Long's childhood showed that his mother supported him rather than abandoning or abusing him. (See Initial Brief of Appellant at 10-13.)

Some of the "facts" in Appellee's statement are taken out of context and misleading. For example, Appellee reiterated Latimer's description of Long's nontaped confession but failed to note that it differed materially from his taped statement. Appellee noted that a knife which Long admittedly used to kill Simms "was found" at Long's apartment but failed to mention that Long told the officers

where to find it. (See Brief of Appellee at 1-2; Brief of Appellant at 8.)

Another example is Appellee's recitation of the medical examiner's findings that Simms was alive when she was strangled, hit with a blunt instrument and cut in the throat. Appellee omitted the doctor's testimony that Simms may or may not have been conscious when those events occurred. Similarly, Appellee noted that "pain was associated with" death by asphyxiation and the knife wounds Simms sustained, but omitted the doctor's testimony that he could not determine the sequence of these events and did not know whether Simms was conscious during them. (See Brief of Appellee at 3.)

Although Appellee noted that Dr. Money found no inconsistency between his diagnosis of Long as a sexual sadist who became aroused by inflicting pain, and Long's statement to police that he hit Simms over the head with a board so she would not suffer, Appellee failed to explain why Dr. Money found no inconsistency. (Brief of Appellee at 5.) Thus, Appellee insinuated that Dr. Money could not explain the obvious inconsistency. Dr. Money opined that Long's statement to police was an example of Long's rationalization after returning to reality from an altered state of consciousness. (R. 568-70)

The most blatantly distorted part of Appellee's statement is the characterization of Dr. Money as having "limited experience." Appellee based this conclusion on Dr. Money's testimony that he had examined only two people charged with murder to determine mental status.[1] Appellee noted further that Dr. Money's expertise was not "forensic psychiatry"; that he could not quote the legal criteria to determine competency; and that he had not testified in court as to whether a defendant was legally insane. (See Brief of Appellee at 5.) None of these "facts" were relevant to his qualifications to testify concerning mitigation.

A professor of medical psychology at John Hopkins University School of Medicine, Dr. Money specialized in psychoendocrinology and sexology, both of which were extremely relevant to this case. (R. 524-25) He had treated about a hundred people with altered states of consciousness. (R. 591) He founded a clinic

---

[1] This information was included in Appellant's Initial Brief, along with a description of Dr. Money's vast experience, (See Brief of Appellant at 14.)

at John Hopkins University for the treatment of sexual disorders; taught or lectured at universities all over the world; and wrote hundreds of research papers, books, and textbook chapters. He was on the sexual disorder committee for the Diagnostic and Statistical Manual, Third Edition. (R. 526-30) Thus, Appellee's characterization of Dr. Money as inexperienced is extremely misleading.

Appellee's real complaint is that Dr. Money is a practicing psychiatrist, instructor and author, rather than a professional expert witness. Interestingly, Appellee later criticized Dr. Berland because he "conceded he was always called by the defense in the last three years." (Brief of Appellee at 6.) Dr. Money was not historically aligned with either the state or the defense.

If Appellee is offering its statement of facts as an alternative to Appellant's statement and is representing it as a summary of the evidence presented at trial, Appellant wishes to make clear that Appellee has omitted the majority of relevant evidence and has thus presented a misleading picture of the penalty proceeding.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY DENYING LONG'S MOTIONS TO WITHDRAW HIS GUILTY PLEAS.

Appellee argues that the plea withdrawal hearing presented a credibility issue and that Judge Lazzara did not believe Long. Although the judge may not have believed that Long did not read the plea agreement, he certainly must have believed Long's prior counsel, Charles O'Connor, when he testified that he did not discuss with Long the possibility that his pleas could be used against him in another county. O'Connor admitted that this possibility never came up in the conversations; that he did not think this Court would overturn Long's Pasco County conviction; and that he believed that Long could not be tried due to lack of evidence even if he did get a new trial in Pasco County.[2] (R. 79-82) Because he thought Long could not be retried, he obviously did not contemplate the state's use of the plea agreement, which he urged Long to sign, to convict Long and procure a death sentence in that case. In fact, O'Connor admitted his surprise at this turn of events. (R. 90)

Whether Long read the plea agreement is irrelevant because, even if he did, he would not have contemplated the state's use of it to later convict him of the Pasco County homicide. Long most likely never heard of "Williams Rule" evidence. The whole purpose of entering into the plea agreement was to protect him from death sentences resulting from the homicides to which he pled guilty (other than the Simms murder). Even O'Connor admitted that this was his intent and his understanding of the agreement.

Appellee's "law of the case" argument is also unavailing. Judge Lazzara

---

[2] O'Connor did not deny telling Long that the offenses could not be used against him "in court." (See Brief of Appellee at 13). He did not remember telling him that and did not know why he would have said something that "global." (R, 85) In Issue III of this case, when the judge was trying to determine why two experts were appointed to determine Long's competency and sanity, O'Connor told the judge that he did not remember filing a motion to determine competency. (H. 29-30) The prosecutor then found in his file a copy of a Notice of Intent to Rely on Insanity Defense filed by O'Connor, pursuant to which the court appointed the two experts. (H. 33) Apparently, O'Connor did not remember filing that either or he would have so informed the judge.

had authority to entertain Long's motion to withdraw his guilty pleas because a remand for resentencing places the defendant in the same position he was in prior to his initial sentencing. See Harris v. State, 474 A.2d 890 (Md. 1984). Even if this Court's opinion precluded the arguments already decided by this Court, Long had not before argued the issue in this appeal -- that he did not know the state could used the plea agreement to admit details of the Tampa homicides as Williams Rule evidence in another county. See Long v. State, 529 So.2d 286, 288 (Fla. 1988). The Pasco County case was not retried until after this Court's earlier decision and apparently no one (except perhaps the prosecutor) even thought of that possibility. This Court has jurisdiction to review Judge Lazzara's denial of the motion based on grounds that did not exist at the time of the prior proceeding.

In United States v. Harvey, 791 F.2d 294 (4th Cir. 1986), the defendant, like Long, told the judge in open court that the plea agreement he entered into was "a fair representation" and the "entire understanding." No questions were raised concerning the meaning of the agreement, The plea agreement stated in part that the "Eastern District of Virginia" agreed not to prosecute the defendant for any other crime arising from the offenses set out in the indictment. The PSI contained references to drug smuggling activities outside of the Eastern District of Virginia, including those in South Carolina. At sentencing, the judge said that he did not expect to see Harvey back in "this court or any other court." 791 F.2d at 296.

A few days after Harvey was released from prison, he was indicted on various drug charges in a federal district court in South Carolina. He filed a motion in the Eastern District of Virginia for an order enforcing the plea agreement by enjoining the South Carolina prosecution, even though the plea agreement technically obligated only the Eastern District of Virginia not to further prosecute.

Although the prosecutor had never made any specific representations that the agreement bound any other jurisdiction, the court found that the understanding between she and Harvey was that, "if executed, the agreement would 'put behind him' all of Harvey's possible exposure to criminal liability for all

violations 'arising from' the general investigation leading to his indictment." 791 F.2d at 98. Citing the use of "the Government" in other parts of the agreement, the judge found that the provision could easily have read "the Government,'' instead of "the Eastern District of Virginia," agreed not to prosecute. It was thus plausible to read the reference to the Eastern District of Virginia as a careless imprecision. 791 F.2d at 301. Accordingly, the Harvey court held that the agreement must be interpreted to prevent further prosecutions for the offenses in question anywhere and by any agency of government. 791 F.2d at 303.

Similarly, although the language of the plea agreement limited Long's immunity to Hillsborough County, the parties, unaware that the Pasco County case would be reversed and retried, believed that Long was totally protected from the use of his pleas against him. As in Harvey, the agreement should have been interpreted *to* include all Florida counties. Because it was not, Long must be allowed to withdraw his guilty pleas.

In People v. Garcia, 815 P.2d 937 (Colo. 1991) (en banc), the Colorado Supreme Court found that the defendant's guilty plea was vulnerable to attack because his defense counsel erroneously advised him that the plea would not affect his civil case. The appropriate standard to determine whether the defendant was prejudiced by the bad advise was whether there was a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty and would instead have gone to trial. In this case, Long most certainly would not have entered into the plea agreement had he known that the homicides to which he was pleading guilty in exchange for life sentences could be used to convict him and to procure a death sentence in his Pasco County case.

ISSUE II

THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTION TO EXCLUDE HEARSAY TESTIMONY BY TWO DETECTIVES RELATING DETAILS TOLD TO THEM BY THE VICTIMS OF TWO UNRELATED RAPES OF WHICH LONG WAS CONVICTED.

Appellee disagreed with the argument made by Long's trial counsel that Chandler v. State, 534 So.2d 701 (Fla. 1988), was wrongly decided, citing other cases in which this Court has reaffirmed the Chandler holding. Although Long's counsel made this argument at trial, Appellant did not pursue it in his Initial Brief. Instead, Appellant distinguished Chandler from this case. In Chandler, a detective repeated hearsay statements made by another detective, a police chief, and a state expert. The dcclarants also testified at trial, however, and their testimony was consistent with the hearsay. 534 So.2d at 703. In Long's case, neither rape victim testified, nor were the rape victims affiliated with law enforcement or the prosecution as were the declarants in Chandler.

In Lucas v. State, 568 So.2d 18 (Fla. 1990), cited by Appellee to support the dler holding, the two surviving victims also testified at trial. Defense counsel cross-examined the witnesses. In fact, the defendant complained on appeal that their testimony became a feature of the trial. Citing Rhodes v. State, 547 So.2d 1201 (Fla. 1989), the Court held that "[t]estimony by the victims, or others, about prior crimes is admissible if the defendant is given the opportunity to confront the witness." Lucas, 568 So.2d at 21 (citations omitted). Thus, the Lucas court not only reaffirmed the Chandler holding, but reiterated that the defendant must be given the opportunity to confront the witnesses. In Hitchcock v. State, 578 So.2d 685 (Fla. 1990), also cited by Appellee, this Court noted that, "[w]hile the rules of evidence have been relaxed somewhat for penalty proceedings, they have not been rescinded." Id. at 690.

In Tompkins v. State, 502 So.2d 415 (Fla. 1986), another case cited by Appellee, this Court found that the officers' testimony concerning prior crimes committed by the defendant was properly admitted as hearsay in the penalty phase. In Tompkins, however, the trial judge had sustained defense counsel's hearsay objection in part. He allowed one officer to testify only that the victim was a white female convenience store clerk who identified Tompkins in a lineup, The

officer was present at the lineup. Similarly, the judge limited the other officer's testimony to testimony that Tompkins pled guilty to another kidnapping and rape of a convenience store clerk. 502 So.2d at 420. Had the judge in the instant case similarly limited the detectives' testimony, Long would have no complaint. The fact that he refused to do so is the issue in this case.

The Tompkins court found that any error would have been harmless because certified copies of the defendant's prior convictions for kidnapping and sexual battery showed that the defendant pled guilty to one incident and no contest to the other, thus establishing the aggravating factor. Appellee cited this case as support for the conclusion that any error in Long's case would be harmless. Needless to say, the issue in this case is not whether the "prior violent felony" aggravating factor was established. Long's argument is that the hearsay was not necessary to establish the aggravating factar and violated his right to confrontation. Thus, Appellee's cases are not helpful.[3] (Brief of Appellee at 21 n.4.)

The fact that the police reports were correct and that Long pled guilty to the crimes does not make the hearsay admissible. In Rhodes v. State, 547 So.2d 1201 (Fla. 1989), this Court found hearsay error inadmissible because the statements of a Nevada victim "came from a tape recording, not from a witness present in the courtroom." Rhodes, like Long, pled guilty to the Nevada crime and the judgment and sentence were introduced into evidence.

The Rhodes Court noted that the tape recording was unnecessary to support the aggravating factor because, as in Long's case, the state introduced a certified copy of the Nevada judgment and sentence and a detective testified regarding his investigation of the incident. This was sufficient to establish the aggravating factor and circumstances of the crime. 547 So.2d at 1205. The victims' hearsay statements, in Rhodes and in Long, were unnecessary,[4]

---

[3] Appellee also cited Johnson v. State, 465 So.2d 499 (Fla. 1985), in which this Court found that any error in admitting the defendant's custodial statement that he was on parole would have been harmless because other evidence established the aggravating factor. Thus, neither Johnson nor Tompkins are on point.

[4] Finding that Rhodes was denied the opportunity to confront and cross-examine the witness, the Court noted that if Rhodss wished to deny or explain the hearsay he was left with no choice but to take the stand. 546 So.2d at 1204.

Appellee argues that the hearsay testimony was necessary not only to support the aggravating factors, but to help the jury determine whether Long was "a cunning rapist or somehow should be regarded as less culpable than his conduct would suggest," concluding that the testimony rebutted the mitigating factors. (Brief of Appellee at 23.) If, as Appellee suggests, the hearsay was used to convince the jury that Long was a cunning rapist rather than a mentally ill sex offender, it was crucial that the evidence of Long's behavior with Nuttal and Jensen be complete and correct.[5]

Even though Long's counsel told the judge he did not have anything specific to rebut, had the victims testified, they might have mentioned facts unknown to the detectives or their testimony might have caused thoughts to occur to Long or his counsel that would have brought out helpful information on cross-examination, If the detectives' descriptions of Long's behavior distorted or amitted facts, making Long appear less mentally ill than he really was, the hearsay was extremely harmful.

---

[5] Appellee characterized the testimony of the two defense experts as inconsistent. Although the experts did not come to the same conclusions, probably based in part on their awn particular expertise, their findings were not totally inconsistent. Furthermore, Appellee's examples, such as Dr. Berland's "acknowledgment" that Long was a con artist and manipulator, were taken out of context. These were symptoms of Long's psychoses and/or personality disorders. Dr. Berland said they were not diagnostic terms that he would use but, rather, labels offered by the prosecutor, often applied to persons with antisocial personality disorders. (R. 710)

ISSUE III

THE TRIAL COURT ERRED BY ALLOWING DR. SPREHE TO TESTIFY FOR THE STATE IN REBUTTAL BECAUSE HE WAS APPOINTED BY THE COURT TO DETERMINE COMPETENCE AND SANITY RATHER THAN TO DETERMINE AGGRAVATION AND MITIGATION.

Appellee did not attempt to rebut Long's argument that Dr. Sprehe's testimony should not have been admitted pursuant to Florida Rule of Criminal Procedure 3.211(e), except to note that the prosecutor did not believe that the rule barred his use of Dr. Sprehe's testimony to rebut an insanity defense, (Brief of Appellee at 24-25.) We agree that the doctor's testimony would have been admissible to rebut an insanity defense. Long did not present an insanity defense, however, nor did he argue that he was insane at the penalty proceeding. Thus, Dr. Sprehe's testimony was inadmissible.

Appellee instead argued that, "to the extent that appellant may now be complaining that the precepts of Estelle v. Smith . . . may have been violated, he is precluded from doing so."[6] (Brief of Appellee at 26.) Long's argument at trial and on appeal is not based on patella v. Smith, 451 U.S. 454 (1981), but on Florida Rule of Criminal Procedure 3.211. Appellant's only references to Estelle v. Smith were those necessary to distinguish this case from those cited by the judge to support his ruling that rebuttal by an expert appointed to determine competency and sanity is admissible when defense counsel files a notice of intent to use the insanity defense and introduces psychiatric testimony.[7]

---

[6] Although Appellant's argument is not based on Estelle v, Smith, we do not agree that the objection was not preserved on this basis. Although defense counsel's primary argument was that Rule 3.211 precluded Dr. Sprehe's testimony, the trial court injected Estelle v. Smith into the discussian and rejected the defense motion on that basis. The reason for a contemporary objection is to allow the trial judge to consider and correct potential errors. In this case, the trial court considered and rejected defense counsel's motion and objection based on Estelle v. Smith. To the extent, therefore, that Estelle may be relevant to this issue, it is our contention that the objection was preserved on that ground as well as the one urged by counsel.

[7] Appellant distinguished the instant case from Preston v. State, 528 So.2d 896 (Fla. 1988), and Hargrave v. State, 427 So.2d 713 (Fla. 1983), in the initial brief and will not repeat the discussion here in response to the Appellee's reliance upon those cases. (See Initial Brief of Appellant at 55-57.)

Appellee suggests that Appellant waived his objection to Dr. Sprehe's testimony by failing to object to Dr. Sprehe's testimony in a prior penalty phase proceeding. (Brief of Appellee at 27 n.6.) This is not so. Objections or lack of objection to error in prior proceedings reversed by this Court are irrelevant in the new trial. When this Court vacates the defendant's sentence, the defendant is returned to his position prior to his initial sentencing. See Harris v. State, 474 A.2d 890 (Md. 1984). Additionally, as the Appellee correctly noted earlier, a party "may not alter the basis of his objection on appeal." Steinhorst v. State, 412 So.2d 332 (1982). The prosecutor never mentioned waiver at trial.

Ponticelli v. State, 16 F.L.W. 5669 (Pla. Oct. 10, 1991), cited by Appellee, is not applicable to this issue. In Ponticelli, this Court held that the defense expert's opinion that the defendant was sane at the time of the offense was relevant in determining whether the mental mitigators applied. 16 F.L.W. at 5672. The court did not consider the issue here -- whether the expert witness's testimony should have been excluded pursuant to Rule 3.211(e). Similarly, the absence of Miranda warnings is irrelevant to Appellant's argument that Rule 3.211 precluded the testimony. If Rule 3.211(e) precluded Dr. Sprehe's testimony, whether it would have been admissible under other theories is irrelevant.

Appellee argues that the jury's death recommendation could not have been impermissibly based on Dr. Sprehe's testimony because the prosecutor did not argue nor the judge instruct on "witness elimination." Just because the jury was not told to consider witness elimination does not mean that their verdict was not affected by their having heard the testimony. Appellee asserts that Dr. Sprehe's testimony that Long said he would not have committed the murder had a policeman been there was relevant and helpful to rebut the "false impression" created by the defense experts.[8] Appellee's assertion supports Long's argument that the error must have affected the jury's verdict and, thus, was harmful. Moreover, as noted above, under Rule 3.211(e), relevance is immaterial.

---

[8] Dr. Sprehe admitted that he distinguishes between truths and untruths (in statements made by defendants) based upon whether the statements are incriminating or mitigating. (R. 766-77)

ISSUE IV

THE TRIAL COURT ERRED BY DENYING DEPENSE COUNSEL'S MOTION TO EXCLUDE REBUTTAL TESTIMONY OF STATE WITNESS, DR. SPREHE, THAT LONG TOLD HIM HE KILLED SIMMS TO ELIMINATE A WITNESS.

Appellee erroneously stated that defense counsel's motion for mistrial after the trial court decided not to instruct the jury on the "witness elimination" aggravating factor was his "first occasion to object on this point." (Brief of Appellee at 33.) Defense counsel first objected to the admission of this testimony in a pretrial motion in limine. (R. 1298-99)

Appellee argued that Dr. Sprehe's "witness elimination" testimony was relevant to several other aggravating factors and the statutory mitigating factors. This might be true if the testimony were helpful and reliable, Such was not the case, however. Both the judge and the prosecutor agreed that the "witness elimination" aggravating factor was not established. (R. 743) The judge did not find even enough evidence to instruct the jury on it, The evidence was contradicted by all other evidence in the case and, therefore, was of questionable reliability. Because the judge found the witness elimination aggravator inapplicable, he should not have allowed the jury to hear this testimony, thus misleading them as to what to consider in rendering their advisory verdict.

Even relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. § 90.403, Fla. Stat. (1989). Evidence which tends to obscure rather than illuminate the issues before the jury should be excluded. Perper v. Edell, 44 So.2d 78, 80 (Fla. 1949). The only logical conclusion, based on all evidence, was that Long killed Simms because she was a prostitute.[9] Accordingly, Dr. Sprehe's testimony "obscured rather than illuminated" the issue. It should have been excluded.

---

[9] In accordance with the plea agreement, the jury was not told that Long had killed other prostitutes, The judge and the prosecutor, however, were aware that Long raped various women but killed only prostitutes or "women of the night." The court should not have allowed the state to intentionally mislead the jurors who, without the additional facts, would be more likely to believe that Long killed Simms to eliminate a witness.

ISSUE V

THE COURT ERRED BY PERMITTING DR. BERLAND TO TESTIFY THAT LONG KNEW RIGHT FROM WRONG BECAUSE THE INSANITY STANDARD WAS IRRELEVANT.

Appellee argues that Ferguson v. State, 417 So.2d 631 (Fla. 1982), is not on point because Long's trial judge did not make the mistake of equating the M'Naghten insanity test with the mental mitigators. Although the judge understaod the distinction, the jury may not have realized that the mental mitigation might apply and be weighed against the aggravators even though Long was not legally insane.

Appellee's conclusory sentence -- that failure to allow the prosecutor to elicit Dr. Berland's testimony might have "lad the trial court to erroneously conclude that McNaughten [sic] was not satisfied" -- is nonsensical. Long was not presenting an insanity defense. Surely, the trial judge did not erroneously believe that the state was required to prove that Long was not insane.

ISSUE VI

THE TRIAL COURT ERRED BY DENYING LONG'S MOTION TO PROHIBIT TELEVISION CAMERAS WITHOUT HOLDING AN ADEQUATE HEARING.

Appellee argues that there is nothing in the record to suggest any prejudice resulting from cameras in the courtroom. Absent a hearing, however, "the contemplated broadcast may adversely affect the conduct of the participants and the fairness of the trial, yet leave no evidence of how the conduct or the trial's fairness was affected." Chandler v. Florida, 449 U.S. 560 (1981); see also State v. Green, 395 So.2d 532, 536 (Fla. 1981) (requiring a hearing when allegations would justify restraining order). In Long's case, the judge failed to hold a hearing and summarily dismissed Long's request to exclude cameras.

Appellee erroneously opined that Long's "rambling discourse" at his allocution hearing referred to Long's 1986 trial when Ellis Rubin filed a motion to bar cameras from the courtroom. (Brief of Appellee at 42.) Although Long first objected to Dr. Sprehe's testimony in the earlier trial, he then stated as follows:

> And I think the bailiffs who were in Daytona Beach understand well and clear why those cameras were bothering me in the courtroom.
>
> Every time there was a break and I was alone in the courtroom with the reporters and their cameras they were screaming questions at me.

(R. 933-34) (emphasis added) The earlier trial was not in Daytona Beach. Thus, Long was definitely referring to the instant trial, apparently analogizing the behavior of the cameramen during the instant trial to their behavior at his first penalty trial. This reference also refutes Appellee's earlier argument that Long's complaints referred only to the Hillsborough County courtroom and that the media in the Volusia County courtroom, as described by the trial judge, was "unobtrusive." (Brief of Appellee at 41.)

Appellee next accuses undersigned counsel of being "disingenuous and dishonest" because of a reference to a comment by defense counsel during a motion hearing on another subject. (Brief of Appellee at 42-43.) Appellee accused undersigned counsel of implying that defense counsel's comment was intended to be considered by *the trial* court in determining whether to allow cameras in the

courtroom. This was not the case. Undersigned counsel quoted this comment while arguing that the cameras may have affected the trial, as an example of the harm that might occur, and clearly identified the comment as one made during a different hearing:

> Defense counsel argued, duriaa his request for a jury instruction that the advisory verdict was sometimes binding, that such an instruction would tell the jury that "because the TV cameras are all over the courtroom, don't come back with what yau think the mob wants in terms of a verdict, because it might very well be carried out." (R. 977) The request was denied. (See Issue VII, infra.)

(Initial Brief of Appellant at 80) (emphasis added).

Appellee next accuses that "Appellant's propensity to misread the record and misinterpret the context is apparently boundless." This statement refers to undersigned counsel's argument that the prosecutor's reference in closing to a "Volusia County'' jury was intended to remind the jurors that their sentencing verdict would reflect on the community, that they were being televised, and thus would be held accountable for their sentence. Obviously, Appellee misread the Appellant's brief and misinterpreted or failed to comprehend the arguments. (See argument concerning this statement in Issue VIII, supra.)

ISSUE VIII

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY ALLOWING THE PROSECUTOR TO MAKE CLOSING ARGUMENTS THAT WERE NOT BASED ON EVIDENCE IN THE CASE AND BY URGING THE JURY TO CONSIDER FACTORS OUTSIDE THE SCOPE OF JURY DELIBERATIONS.

A.

Had the prosecutor been merely reciting the self-evident that this jury was to decide the recommended sentence of death or life imprisonment, he would have omitted the reference to Volusia County. Thus, the comment would have been:

> The question you will answer is clear. What * is the proper punishment for the murder of Michelle Denise Simms. That's the question you're going to answer.

The omitted portion, "is a jury in Volusia County going to say," was inserted at the asterisk above ("What is a jury in Volusia County going to say") to remind the jurors that their sentencing verdict would reflect on Volusia County. The "going to say" portion ingeniously inferred that the "proper" punishment was not what the law required, but whatever the jurors "said" it was, thus encouraging them to go with their gut feelings rather than following the legal criteria set out for determining the advisory verdict. The comment in section C, below, also encouraged the jurors to disregard the law, thus compounding the error.

C.

Appellee argues that the prosecutor's soliloquy concerning the joys of life in prison compared with death is an innocuous, self-evident declaration that victims prefer to live rather than being murdered and that people in prison are alive rather than dead. This Court has already determined that the prosecutor's argument is error. Jackson v. State, 522 So.2d 802, 809 (1988). Although the facts contained in the statement may be self-evident, the purpose of the argument is to convince the jurors that nothing but death will serve justice because the victim is dead -- "eye for an eye" rhetoric intended to create an emotional response from the jurors. In all murder cases, the victim is dead; yet the death penalty is reserved for only the most heinous of murders. Again, the prosecutor's argument encouraged the jurors to ignore the weighing of aggravating and mitigating circumstances and go with their gut reaction.

ISSUE IX

THE TRIAL JUDGE ERRED BY CONSIDERING TRANSCRIPTS OF PRIOR TESTIMONY OF DRS. MAHER, BERLAND, MONEY, SPREHE, GONZALEZ, HEIDI, AND MORRISON, IN SENTENCING BECAUSE THEY CONTAINED REFERENCES TO OTHER TAMPA MURDERS, THUS VIOLATING THE PLEA AGREEMENT.

Appellee repeatedly notes that defense counsel requested that the judge read the transcripts of prior testimony. Appellee failed to mention even once that the prosecutor also gave the judge transcripts of prior testimony by psychiatric experts, requesting that he read and consider them far the purpose of sentencing. (R. 1339) The judge knew what the plea agreement provided and, as in Issue XI, infra, should not have agreed to the ill-advised requests of counsel -- in this case, both counsel.

Although, unquestionably, the trial judge knew about the other homicides, reading numerous transcripts about additional rapes and murders just prior to sentencing must have constantly reminded the judge of what he was trying to disregard. We do not suggest, as Appellee asserts, that the judge's insistence that he disregarded his knowledge of other crimes was untruthful. Instead, we suggest that it is may be humanly impossible to totally disregard something that is uppermost in one's mind.

ISSUE X

THE TRIAL COURT ERRED BY FINDING THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Long's preparation to pick up a prostitute, reiterated by Appellee, shows only that Long premeditated a sexual battery, He also premeditated the rapes of Nuttal and Jensen, but did not kill them. Appellee argues in conclusion that Long killed Simms and not the two rape victims, although his preparation was similar, because Simms appeared to be a slut and reminded him of his mother, and that this somehow shows that the Simms murder was premeditated. The argument is specious. Although this may well be the reason Long killed Simms and not the two rape victims, it has absolutely no bearing on whether the killing was done with heightened premeditation. The evidence does not show that Long decided in advance to kill a slut. At some point after a sexual encounter with Simms, for an unknown reason, Long killed her.

Appellee againmisleadingly argued that Dr. Money's experience was limited. (Brief of Appellee at 64.) Appellee has expended significant effort attempting to discredit Dr. Money, by far the most experienced expert who testified. (See pages 2-3, supra.) Appellee reiterated that Dr. Money's expertise is not forensic psychiatry, he had not testified on competency issues in a criminal trial, and he could not quote the legal criteria to determine competency.[10] Dr. Money is not a professional expert witness. His expertise is sexology and psychoendoerinology, That he had not testified on competency and could not recite the legal criteria is irrelevant. This was not a competency hearing nor was Long's competency at issue. Moreover, the state's witness, Dr. Sprehe, who is a professional expert witness, could not even recite the two mental mitigators

---

[10] Appellee mistakenly equated this testimony with that criticized by this Court in Nowitzke v. State, 572 So.2d 1346 (Fla. 1990). (Brief of Appellee at 64 n.16.) In Nowitzke, the state's neurologist testified that Nowitzke appeared to be sane even though the expert admitted that he was not familiar with Florida law on insanity. Id. at 1355. Dr. Money did not testify on Long's competency to stand trial and had no reason to know the criteria for competency. He did not testify on sanity either.

about which he was testifying, "" (R. 771-73)

Appellee asserted that the experts contradicted each other and were "hopelessly in conflict with the facts." To support this assertion, Appellee cited, inter alia, Dr. Money's testimony that Long murdered Simms while in an altered state, although he did not kill the other two rape victims.[12] (Brief of Appellee at 64-65.) Appellee questioned Dr. Money's theory that Long was in an ''altered state" because Dr. Money could not answer why Long did not kill Sandra Jensen or Linda Nuttal while in the "altered state." Similarly, the state's witness, Dr. Sprehe, insisted that one reason Long killed Simms was to eliminate a witness; yet he could not explain why Long did not kill Nuttal and Jensen who were able *to* describe him to the police. (R. 752-53)

Admittedly, we do not know whether Long killed Simms in a "rage" as we commonly know it, in "an act of vengeance and anger," in an altered state of consciousness, or for some other unknown reason. (See Brief of Appellee at 64.) If, as Appellee argues, the testimony was "hopelessly in conflict as to the facts," an allegation with which we do not totally disagree, the "cold, calculated and premeditated" aggravating factor was not established beyond a reasonable doubt. Speculation will not support an aggravating factor. Hamilton v. State, 547 So.2d 630 (Fla. 1989); Thompson v. State, 456 So.2d 444 (Fla. 1984). If the facts are in "hopeless confusion," heightened premeditation has clearly not been proven beyond a reasonable doubt.

In Penn v. State, 574 So.2d 1079 (Fla. 1991), the defendant beat his mother to death with a hamner while she was sleeping, Prior to killing his mother, he went to her house twice and stole items to buy drugs. This Court rejected the trial court's finding that the homicide was cold, calculated and premeditated, stating that, "[w]hile Penn obviously decided, for some unknown reason, that he

---

[11] Dr. Sprehe said he had testified as an expert forensic psychiatrist in three or four thousand criminal cases. (R. 728)

[12] Appellee also cited Dr. Berland's testimony that he did not believe Long hit Simms to prevent her suffering. Appellee erroneously stated that Long said he hit Simns in the head and cut her throat so that she would not suffer. Long's alleged statement was that he hit her with a board so that she would not suffer when he cut her throat. (R. 343-44, 570)

should kill his mother, there is no evidence of the cold calculation prior to the murder necessary to establish this aggravating factor . . . ." 574 So.2d at 1083-84. In Long's case, although he apparently planned to pick up a prostitute and commit sexual battery, no evidence showed that he intended to kill her. After the sexual act, he killed her "for some unknown reason." This case was no more premeditated than Penn.

The sentencing judge's finding of both statutory mental mitigating factors indicates that the homicides were not CCP. The killer's state of mind is the essence of the cold, calculated and premeditated aggravating circumstance. Mason v. State, 438 So.2d 374 (Fla.), cert. denied, 465 U.S. 1051 (1983); Hill v. State, 422 So.2d 816 (Fla. 1982), cert. denied, 460 U.S. 1017 (1983). Long's psychoses and personality disorders make it highly improbable that he engaged in cold calculation.

ISSUE XI

THE TRIAL COURT ERRED BY FAILING TO CONSIDER AND FIND NONSTATUTORY MITIGATION WHICH WAS REASONABLY ESTABLISHED AND WAS NOT REBUTTED.

As Appellee noted, defense counsel shares the responsibility for identifying nonstatutory mitigation that the court should consider, The dialogue between the trial court and defense counsel shows that both knew what nonstatutory mitigation had been presented. Defense counsel asked the judge to find only the two statutory mental mitigators because he mistakenly believed that if the judge found nonstatutory mitigation, it would somehow diminish the two statutory mental mitigators. (R. 921-25) (See dialogue quoted in Brief of Appellee at 70.)

The judge knew or suspected that defense counsel was wrong because he questioned him to make sure he was not requesting any nonstatutory mitigation. Moreover, the judge must have read some of this Court's decisions setting out nonstatutory mitigation to consider. See e.g., Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). He heard Long's mother, father, ex-wife and expert witnesses testify about Long's emotionally deprived childhood, brain injuries, drug use, and attempts to educate himself and support his family. The judge must have known that extensive nonstatutory mitigation was established.

At one point, the judge commended defense counsel for his candor. (R. 280) The judge should have demonstrated equal candor by telling counsel that the mental mitigators would not be "diminished" by a finding of nonstatutory mitigation and that he was required to find and weigh established nonstatutory mitigation. Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Rogers, 511 So.2d 526. As noted by Appellee, the judge "alluded to" various nonstatutory mitigation; yet he deferred to defense counsel's ill-advised request and did not consider it.[13] He gave it no weight. Established mitigation may not be given no weight at all. Eddinas v. Oklahoma, 455 U.S. 104, 114-15 (1982); Dailey v. State, 16 F.L.W. S740, 5742 (Fla. Nov. 14, 1991).

---

[13] The cases cited by Appellee are inapplicable because in none of those cases did the trial judge expressly decline to consider and find established nonstatutory mitigation. (See Brief of Appellee at 67.)

ISSUE XII

THE TRIAL COURT SHOULD HAVE SENTENCED LONG TO LIFE IN PRISON BECAUSE IT IS UNCONSTITUTIONAL TO EXECUTE THE MENTALLY ILL.

Appellant did not "mean to" rely on Ford v. Wainwright, 477 U.S. 399 (1986), as Appellee suggests. We intentionally cited Tison v. Arizona, 481 U.S. 137, 156 (1987), and Enmund v. Florida, 458 U.S. 782, 801 (1982), for their holdings that the imposition of the death penalty requires a "highly culpable mental state," and that the crime be directly related to the defendant's "personal responsibility and moral guilt." Although Tison and Enmund dealt with defendants who did not themselves kill the victim, mentally ill offenders with disturbed thought patterns also lack the highly culpable mental state that the eighth amendment requires to justify the retributive punishment of death.

We do not, as Appellee implies, argue that Long is "insane." Mental impairment is not synonymous with insanity. See Issue V, supra. We will not repeat all of the testimony of the psychiatric experts summarized in our initial brief (Initial Brief of Appellant at 14-22) but wish to point out that (1) the trial judge found both mental mitigators established; (2) the defense experts diagnosed Long as having (a) temporal lobe epilepsy, (b) an inherited bipolar or manic-depressive psychosis and (c) brain damage, in addition to (d) an antisocial personality disorder (R. 543-44, 627-28); and (3) even the state's psychiatrist admitted that Long had a severe personality disorder, the cause of which is unknown. (R. 749-58)

Appellee's conclusory paragraph and preceding sentence denouncing mental illness as "an invisible cloak" and an "innocuous label" used *to* justify the evil and "naked wickedness" of serial rapists and killers is a blatant reference to Long's other crimes which the plea agreement precludes from consideration in this case. Furthermore, Appellee is attacking the insanity defense which is not an issue in this case. Long did not argue that he was insane.

Florida's death penalty law provides for the weighing of mental mitigation in determining the sentence. In this case, the trial judge found both statutory mental mitigators applicable to Long. Thus, Appellee's argument that Long is merely "wicked" and not mentally ill is unavailing.

ISSUE XIII

THE DEATH SENTENCE SHOULD BE REDUCED TO LIFE BECAUSE THE TRIAL COURT FOUND BOTH MENTAL MITIGATORS AND SHOULD HAVE FOUND NONSTATUTORY MITIGATION, ALL OF WHICH OUTWEIGHED THE AGGRAVATING FACTORS.

This case is different from Lucas v. State, 568 So.2d 18 (Fla. 1990), cited by Appellee. In this case, the judge already knew the nature of the nonstatutory mitigation. Thus, defense counsel did not need to tell the judge what he should consider. He did not enumerate the nonstatutory mitigation because he urged the judge to find only the two statutory mitigators. As discussed in Issue XI, supra, the trial court must have known that he was required to consider the nonstatutory mitigation and to find such mitigation as was reasonably established by the evidence. Had defense counsel urged the judge to find all of the statutory mitigating factors, even though they were not supported by the evidence, the judge surely would not have complied. For the same reason, he should have followed this Court's guidelines as to the finding of nonstatutory mitigation despite defense counsel's argument to the contrary. See Rogers, 511 So.2d 526.

Although Long's mother did not beat him, Long was emotionally deprived as a small child and suffered brain damage from various accidents, which may well have prevented his succeeding despite his handicaps. Although, as Appellee notes, Mrs. Long had a hard childhood and did not rob, kidnap or kill anyone, she raised a child who did. Even though the trial court mentioned some (but not all) of Long's problems in his order, the impact of the nonstatutory mitigation is not the same when the nonstatutory mitigation is considered only as support for the statutory mental mitigation. In all cases where the statutory mental mitigators are found, the nonstatutory mitigating circumstances have caused or affected the defendant's mental problems. Nonetheless, both this Court and the United States Supreme Court require the judge to specifically consider nonstatutory mitigation. Hitchcock; Eddings; Rosers.

Despite the plea agreement, Appellee now urges this Court to consider Long's other homicides in its proportionality review. If this were permitted by the plea agreement, Long's "bargain" would certainly be frustrated. If he had received a life recommendation and the judge had sentenced him to death, this

Court could then have affirmed, based on the other homicides. Of course, Tedder v. State, 322 So.2d 908 (Fla. 1975). precludes Appellee's argument.

We are not, as Appellee suggests, urging that the commission of other homicides is mitigating in this case. The plea agreement precludes consideration of those homicides. We urge, instead, that the Court review this case, considering only the Simms homicide, Long's mental illness, and the evidence admitted during the penalty proceeding, in comparison with cases such as Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), and Ferry v. State, 507 So.2d 1373 (Fla. 1987), in which the sentences were reduced to life because of the defendants' mental illnesses.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, an this 6th day of January, 1992.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
(813) 534-4200

A. ANNE OWENS
Assistant Public Defender
Florida Bar Number 284920
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

/aao