IN THE SUPREME COURT OF FLORIDA

REGINALD S. WHITE,

Appellant,

vs. Case No. 75,571

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

PAUL C. HELM
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 229687

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

TABLE OF CITATIONS

PRELIMINARY STATEMENT

This brief is filed on behalf of the Appellant, **REGINALD S. WHITE,** in response **to** the Brief of the **Appellee,** the State of Florida. Appellant will rely upon the arguments and authorities cited in the Initial Brief of Appellant with regard to **Issues** III, V, and VI.

References to the record on appeal are designated by "R" and **the** page number.

ARGUMENT

ISSUE I

THE TRIAL COURT **VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO PRESENT HIS DEFENSE THROUGH THE TESTIMONY OF** FAVORABLE **WITNESSES** BY **EXCLUDING TESTIMONY THAT APPELLANT WAS INTOXICATED AT THE TIME OF THE OFFENSE AND THAT THERE WAS A REASONABLE DOUBT OF HIS** ABILITY TO FORM A **SPECIFIC INTENT.**

Appellee's assertion, at page 6 of the **Brief** of the Appellee, that "it is clear that Dr. Merin's testimony was that he simply did not have an opinion one way of another," is not true. During the proffer of Dr. Merin's testimony, he plainly told the court that he had an opinion that there was a reasonable **doubt** of Appellant's ability to **farm** a specific intent at the time of the offense:

> **THE COURT:** , . . .
>
> Dr. Merin, are **you** telling the Court that within a reasonable psychological probability, based on the history that you obtained and **the** information that you **were** furnished, that Mr.

White could not form a specific intent to do anything, or you just don't know?

THE WITNESS: Yes sir, In my opinion he did know right from wrong. Further, in my opinion, there is a reasonable doubt based upon what he had told me and the types of drugs that he ingested, but also based upon the type of examination results that we obtained on that day.

(R598)(Emphasis added.)

THE COURT: Doctor, can you state, within a reasonable psychological probability, based on the information you've been furnished as to whether Mr. White, at around five or 5:30 on July 10, could form a specific intent to do anything?

THE WITNESS: No, sir, I cannot do that. The only thing I can do is to supply the Court and the jury with the understanding that there is, in my estimation, a reasonable doubt. But to say that he could or could not, I don't know.

(R599)(Emphasis added.)

BY MR. EDMUND:

...[D]o you have an opinion, to a reasonable degree of psychological certainty, as to whether or not there is a reasonable doubt that Reginald White could formulate the intent to commit the act of Premeditated First Degree Murder? Do you have such an opinion?

A. Yes, I do.

* * *

Q. What is your answer, doctor?

A. There is a reasonable doubt. That's as far as I can go with it.

(R607-608)(Emphasis added.)

Whether or not Dr. Merin's opinion that there was a reasonable doubt about Appellant's ability to form a specific intent should be

found relevant and admissible ultimately depends upon a determination of the constitutional allocation of the burden of proof in a criminal case. If Appellant was required to prove beyond a reasonable doubt that he was intoxicated to the degree that he could not form a specific intent, Dr. Merin's testimony did not satisfy that burden. However, if Appellant's only constitutional burden was ta raise a reasonable doubt about the existence vel non of the essential element of premeditation, then Dr. Merin's testimony satisfied Appellant's burden and should have been admitted for consideration by the jury.

As argued in the Initial Brief of Appellant, due process of law as guaranteed by the United States and Florida Constitutions permits the State to require the defendant to come forward with evidence of an affirmative defense, but it prohibits the State from shifting the burden of proof to the defendant with respect to an essential element of the offense; the State must prove each element of the offense beyond a reasonable doubt. Patterson v. New York, 432 U.S. 197, 204, 215, 97 S.Ct. 2319, 53 L.Ed.2d 281, 288, 295 (1977).

Thus, the proper constitutional allocation of the burden of proof may require a defendant claiming intoxication to present evidence which raises a reasonable doubt of his ability to form specific intent, but the State cannot be relieved of its burden of proving the existence of specific intent beyond a reasonable doubt. See Hall v. State, 568 So.2d 882, 885 n.6 (Fla. 1990)(allocation of

burden of proof when defendant claims insanity defense); Yohn v. State, 476 So.2d 123, 128 (Fla. 1985)(same).

In this case, Dr. Merin's testimony raised a reasonable doubt of Appellant's ability to form specific intent, satisfied Appellant's constitutional burden of proof, and should have been admitted to assist the jury in determining Appellant's guilt or innocence. "[W]here evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission." Rivera v. State, 561 So.2d 536, 539 (Fla. 1990).

With regard to the admissibility of Dr. Merin's separate opinion that Appellant was intoxicated and the opinions of Mrs. King and Mr. Taylor that he could not form specific intent, Appellant will rely upon the argument and authorities submitted in the Initial Brief of Appellant.

ISSUE II

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF APPELLANT'S STATEMENT CONCERNING HIS FEAR OF PUNISHMENT BECAUSE IT **WAS** NOT **RELEVANT TO ANY** MATERIAL **ISSUE AND THE DANGER OF UNFAIR PREJUDICE OUTWEIGHED ITS** PROBATIVE VALUE.

Appellee's procedural default argument, at pages 15 and 16 of the Brief of the Appellee, is based upon a misunderstanding of the issues presented to the court at trial in determining the admissibility of Appellant's statement. At the pretrial motion hearing Judge Lazarra denied the Miranda based motion to suppress, (R971-975,1010-1027,1066-1067) and expressly reserved ruling on the ques-

tions of relevance and whether the probative value af the statements was outweighed by the danger of unfair prejudice for determination at trial by Judge braybill. (R975,1020-1021) Counsel for both parties **requested** Judge Graybill to rule on the reserved questions, and defense counsel objected when the court admitted the statement. (R245-249,254-255,488-489) When the State seeks resolution of an issue at trial, it should not protest when the accused requests appellate **review** of the trial court's ruling.

ISSUE IV

THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BY INSTRUCTING THE JURY UPON AND FINDING THIS OFFENSE TO BE COLD, CALCULATED, AND PREMEDITATED.

Appellee's reliance upon Swafford v. State, 533 So.2d 270 (Fla. 1988), ignores **the** factual context which gave meaning to the quotation, at pages **20** and 21 of the Brief of Appellee. Swaffard planned his crime and then selected a stranger at random to kidnap, rape, and kill. Id., at 272-273. His offense epitomized the cold, calculated, **and** premeditated aggravating factor.

In contrast, **Appellant's** offense was the product of the **pas**sion and rage engendered by Ms. Scantling's rejection of their eleven-year relationship and the mental impairment and emotional derangement caused by massive ingestion of drugs. Appellant succumbed to the "passions or frailties inherent in the human condition" which necessarily mitigate his offense, Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990), and distinguish it from Swafford.

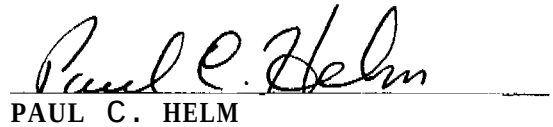
Appellee's reliance upon such "domestic" homicide cases as

Klokoc v. State, 589 So.2d 219 (Fla. 1991), at pages 21 and 22 of the Brief of Appellee, is equally misplaced. Obviously, there are domestic situations in which cold, calculated, and premeditated murders take place; for example, a wife slowly poisoning her husband to death to collect his life insurance. Buenoana v. State, 527 So.2d 194, 199 (Fla. 1988). But this is not one of those cases, and the factual circumstances of this case remove it from the category of cold and calculated.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance Sunderland, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 18th day of May, 1992.

Respectfully submitted,



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

PAUL C. HELM
Assistant Public Defender
Florida Bar Number 229687
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

PCH/ddv