IN THE SUPREME COURT OF FLORIDA

MICHAEL ALAN LAWRENCE,

Appellant,

v. CASE NO. 76,399

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT
FLA. BAR NO. 271543

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

MICHAEL ALAN **LAWRENCE,**

Appellant, :

v. : CASE NO. 76,399

STATE OF FLORIDA, :

Appellee.

REPLY BRIEF OF APPELLANT

ISSUE I

THE COURT ERRED IN ADMITTING **AS** COLLATERAL CRIMES EVIDENCE, BURGLARIES COMMITTED BY LAWRENCE, WEAPONS HE HAD STOLEN, AND HIS **USE OF** COCAINE, AND OTHER COLLATERAL CRIMES.

1. THREAT TO KILL LINDA

The State has two arguments on this issue: one, this Court's opinion in Sireci v. State, 399 So.2d 964 (Fla. 1981) controls, and two if not, the error was harmless. **As** to the first argument, Lawrence relies upon his discussion of the trial court's crucial failure to realize the distinction between the facts and Sireci and this **case as** presented in his Initial Brief.

In Sireci, the defendant wanted his brother-in-law killed because he had critical information about the murder **he had** been charged with committing. In this **case**, there was no similar link between the threat to kill Linda and her knowledge about the charged murder. All this evidence did was exhibit Lawrence as a bad character,

As the the harmlessness of the court's ruling, such error is presumed harmful, Straight v. State, 397 So.2d 903 (Fla. 1981), meaning that the State bears the burden of establishing its innocuous impact. Other than citing this courts opinion in Haliburton v. State, 561 So.2d 248 (Fla. 1990) the state only said that "a similar result is warranted sub judice." (Appellee's brief at page 28). Such a terse conclusion cannot carry the load this court has placed on the state's back when the prosecution alleges a trial court's error was harmless. Instead, in cases such as this, a detailed factual analysis is needed, and had the state done such here, it would have discovered the trial court's error was not harmless beyond a reasonable doubt. That is, the evidence of Lawrence's guilt came primarily from persons who either had consistently lied to the police (Sonya Gardner) or who knew how the system worked and were willing to use Lawrence for their benefit (Rocky Sutton). Gardner's version of the murder also had a significant weakness in that she claimed Lawrence and Pendleton were in the store about 30 minutes. That was impossible because the last purchase was made by a Terry Golson at 11:38 p.m. and the police received the missing clerk report a few minutes later at 11:42 (T 510, 511, 539).

The state also made no distinction between the harmlessness of the statement in the guilt phase of the trial and its lack of damage in the penalty phase. As to its prejudice in the latter part, the state remained silent, and

indeed it can say nothing in light of Sutton's testimony that Lawrence said he "enjoyed killing women." (T 673)

This court, in short, must reject the state's claim of harmlessness because the error is not so, and the state never made any effort to show why the error had no impact on either the jury's verdict or its recommendation.

The state's citation to Haliburton v. State, 561 So.2d 248, 251 (Fla. 1990) and Anderson v. State, 574 So.2d 87, 83 (Fla. 1991) have no effect on this case. In Haliburton, the defendant said:

> Well, If you ever want to kill someone, to kill them with a knife because a knife is more harder to trace than a gun. . . That nigger must don't know who I am, I'll kill him just like I killed that cracker." Id. at 251.[1]

Approving the trial court's admitting the statements, this court said, "these comments were relevant to the knifing at issue. They were admissible." Id. 251.

In Anderson, the court admitted hearsay that Anderson, on the day after the murder, told one Beasley that "if it ever got hot or the heat was on, or hot, that he could take out a couple of people with [the machine gun he was holding]." The court also admitted evidence from a cell-mate of Anderson that when he saw Beasley's picture on the television in connection with the murder investigation he said, "Boom, bitch, you're dead."

---

[1]Haliburton was also reported to have said that he wanted to see if had the nerve to kill someone with a knife.

Id. at 93. Those statements were admissible this court held because they showed the defendant's consciousness of guilt.

Haliburton and Anderson, like Sireci, have no relevance here because what Lawrence said about Linda needing to be killed exhibited no guilty knowledge about the charged murder. Instead, Lawrence wanted her dead because "she was a New York con artist, that she had him and all his friends fooled, even momma." (T 428) That statement had no connection to the charged crimes.

2. THE ANWEILER GUN

The state's argument on this point was that "clearly the information by Gerald Anweiler was relevant and admissible sub judice." (Appellee's brief at page 29) It was relevant because it showed that Lawrence may have stolen the gun from Anweiler's girlfriend, and it may have been the murder weapon because Tyree was killed by a .22 caliber gun.

Lawrence cited two cases in his initial brief, Huhn v. State, 511 So.2d 583 (Fla. 4th DCA 1987) and Manuel v. State, 524 So.2d 734 (Fla. 1st DCA 1988) for the principal that evidence which raises only a suspicion of guilt is irrelevant. The state made no effort to show how evidence whose relevance was qualified by "may have" and "could have" somehow rose above the level of suspicion to become admissible. Just as in the Fourth Amendment context hunches and mere suspicions do not justify detention, so here the lack of any articulable link

between the missing .22 caliber gun and the murder weapon in this case renders Anweiler's testimony irrelevant.[2]

3. THE .25 AND .32 CALIBER GUNS

The primary argument on this issue as well as that concerning the other complained of evidence (i.e. "the package," "the robbery," "Lawrence's cocaine addiction," and "jiggling old women") relies upon dicta in this court's opinion in Correll v. State, 523 So.2d 562,566 (Fla. 1988). In that case Correll had argued in a pre-trial motion, against the admissibility of certain evidence at trial, He did not, however, renew that objection at trial, and that failure, this court summarily said, precluded any consideration of that issue by this court. No rationale was provided for this result, and it tacitly ignored that ruling because it also held that the trial court had not erred in admitting the evidence.

In this case, Lawrence filed a similar motion in which he argued that the "Williams Rule" evidence he now presents as erroneously admitted should have been excluded at trial. The hearing on this motion was held on Thursday, March 29, 1990 before Judge Heflin. The trial began on the following Monday

---

[2] Swafford v. State, 533 So.2d 270 (Fla. 1988) has no relevance to this case other than providing a restatement of the law on the admissibility of evidence of other bad acts. Lawrence discussed Amoros v. State, 531 So.2d 1256 (Fla. 1988) and Shriner v. State, 386 So.2d 524 (Fla. 1980) in his Initial Brief at pages 15-16.

before the same judge, and the objected to evidence was introduced either that day or the next.

The testimony of the guns taken from Harrison's car was the first evidence admitted which Lawrence had objected to pre-trial. He renewed it at trial and briefly summarized his earlier argument (T 230). The state responded with equal brevity by merely reminding the court that "this is my Williams Rule notice." Overruling the objection, the trial judge only noted, "I just wanted to make sure that that's where we were here. Okay." (T 230). Most of the other Williams Rule evidence, which had been the part of the pretrial motions, was admitted without any further renewed objection. It is with this background in mind that Lawrence now attacks the state's reliance on Correll. The thrust of this argument is that the per se, black letter rule announced in that case, if blindly followed without reference to its underlying rationale, amounts to a denial of Lawrence's right to present a defense on appeal and it raises an irrebuttable presumption of waiver and prejudice that violates his state and federal constitutional rights to a fair trial, to present a defense, and effective assistance of counsel.

As mentioned above, Correll provided no rationale for the ruling that failing to renew a pretrial objection waived that issue for appellate review. It cited two cases for that proposition, Philips v. State, 476 So.2d 194 (Fla. 1985) and German v. State, 379 So.2d 1013 (Fla. 4th DCA 1980), but

neither of them provided the sought for rationale.[3] Indeed, one has to refer to this court's opinion in Clark v. State, 363 So.2d 331 (Fla. 1978) and Castor v. State, 365 So.2d 701 (Fla. 1978) to find any reason for requiring contemporaneous objections. In those cases, this court presented two justifications for this procedural requirement;

> 1. To allow the trial court to recognize the error and correct it.
> 2. To prepare an adequate record for an appellate court to review.

Additionally, defense counsel should renew his earlier objection at trial because the facts upon which the court based its earlier ruling may not have been presented at trial, or a long time may have elapsed between the pre-trial ruling and the trial.

It thus appears reasonable that if a defendant has met the concerns that gave rise to the contemporaneous objection rule, then the failure to renew his objection would not preclude this court from reviewing putative error.

As to the first reason, letting the trial court correct the error, the court in this case certainly was aware of the several problems with the state's case by virtue of Lawrence's pretrial motion, and the extensive hearing on it. Counsel vigorously argued against the admissibility of the evidence and did so more elaborately regarding the gun stolen from

---

[3] Indeed, none of the cases cited by Philips and German provide a rationale for this rule.

Harrison's car for example than he did when he renewed his objection at trial. The trial court in short was certainly aware of the problem. Moreover, the hearing on the pretrial motion developed the evidence adequately for this court to review. Also, what counsel offered by way of a speaking proffer was introduced or verified at trial by the various Williams Rule witnesses. The record, in short, was sufficiently developed at trial for this court to review.

Likewise the same judge who denied the motion on Thursday presided at trial the following Monday when the objectionable evidence was introduced. The issues also were the routine type courts regularly consider, and no subtle or difficult questions were presented which might call for further reflection. That is obvious here because the court was more concerned with keeping up with the state's case than with reconsidering his earlier rulings (T 230).

The Correll holding thus is a rebuttal presumption. If an appellant can show that the problems justifying the contemporaneous objection rule have been overcome then this court can review the error raised pretrial.

To rule otherwise, that the failure to renew a pretrial objection absolutely waives appellate review, thereby elevates this procedural rule to an irrebuttable presumption against the defendant. Such per se rules, however, have found increasing displeasure with the U.S. Supreme Court. Starting with Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1058, 35 L.Ed.2d 297 (1973) to Crane v. Kentucky, 476 U.S. 683, 106

S.Ct. 2142, 90 L.Ed.2d 636 (1986) through Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) the nation's High Court has consistently rejected the mechanical, per se application of legitimate state rules of procedure that prevent a defendant from fully prosecuting his defense. In the context of a court ruling refusing to allow a defendant to testify about the details of a shooting incident hypnotically refreshed, the court said:

> [R]estrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify.

Rock, at pp. 55-56,

Courts, in short, must balance the policy underlying the legitimate procedural rule against the defendant's constitutional right to present a defense. If, as Lawrence argues in this case, the rationale justifying the procedural rule has been satisfied, then the defendant's rights must prevail.

Thus requiring Lawrence to renew his pretrial objections amounted to to a useless gesture whose only value was to place a needless hoop before counsel to jump through to preserve these issues, and it exalts formality over substantial justice. This is particularly true in this case because the issues were simple, thoroughly aired at the pretrial ruling before the same judge (who gave every indication he would not have changed his

rulings), and a short time before trial. In this case, the legitimate requirement that the defendant renew his pretrial objections should give way, and especially because this is a capital case, to allow this court to review the error.

BACK TO THE GUNS

As to the merits of Lawrence's argument, the state claims that because Lawrence said that he did not know which gun he had used, it could then parade witness after witness before the jury to recount his numerous thefts of firearms of all calibers. But how he had acquired these weapons or even that he had them had no tendency to exhibit his guilty knowledge. (See Initial Brief at pages 22-23). Whatever marginal relevance this evidence had was outweighed by its prejudicial impact arising from the state's lengthy and extensive diversion from the robbery murder into Lawrence's proclivities to steal guns. Evidence of the defendant's bad character should not have been admitted.

THE ROBBERY

Appellate counsel inadvertently claimed trial counsel had objected to the state introducing evidence of a later robbery on (T 233 and 262). He did not and appellate counsel apologizes for incorrectly claiming that. But as mentioned above, the failure to renew the pretrial objection does not preclude the court in this case from considering this alleged error.

The state argues on the merits that Lawrence's cross-examination minimized any damage because "defense counsel

successfully 'brought into confusion' Ms. Crowell's testimony regarding the gun and when Lawrence said he he 'robbed' another convenience store." (Appellee's brief at page 33) The admitted error, therefore, was harmless.

First, it is evident that Crowell thought Lawrence had tried to rob the same store (T 233). Second, that defense counsel pointed out Crowell's confusion about when the attempted robbery occurred nevertheless does not eliminate the fact that the jury improperly learned about the attempt at all. Admitting this evidence was presumptively prejudicial, Straight v. State, 397 So.2d 903 (Fla. 1981), and despite the state's best efforts, it is not clear beyond all reasonable doubts that this similar fact evidence had no impact on the jury's verdict.

The state, almost in passing, also concludes that the evidence was irrelevant to show Lawrence's "planning and staking out." (Appellee's brief at page 33) If so, then such evidence needed to have those very unusual similarities to the charged crime this court has required. (See Initial Brief at page 25)

LAWRENCE'S COCAINE ADDICTION

The thrust of the state's argument on this point amounts to one of incense that Lawrence should now complain about the good mitigating evidence it presented in the guilt phase of the trial so he could use it in the penalty phase. (Appellee's brief at pages 34-35) The obvious counter to that is that if the state had not been so "thoughtful" in the guilt portion of

the trial, there may not have been any need for a penalty phase.

The state cites Craig v. State, Case No. 72,591 (Fla. September 5, 1991) to support its harmlessness argument. In that case this court said the error in introducing Craig's use of drugs was harmless "in light of other substantial evidence of guilt."

Craig has no bearing on this case because of the inherently weak evidence the stated presented through acknowledged liars and "professional" jailhouse snitches. Also, in this case unlike Craig, there was an abundance of improperly admitted Williams Rule Evidence.

JIGGLING OLD WOMEN

As to Rocky Sutton's claim that Lawrence "jiggled old women'' the state says it was harmless. But that song is wearing thin, and whether the errors were harmless in an isolated sense is not the point. The state on virtually every argument on this issue has said that Lawrence should lose because the court's repeated errors amounted individually, to harmless error. But, as pointed in Lawrence's initial brief (pages 28-29) whatever the individual damage of admitting the various Williams Rule evidence, the aggregate harm is such that this court in good conscious cannot say the court's errors were harmless beyond all reasonable doubt. This court should, therefore, remand for a new trial.

ISSUE II

THE COURT ERRED IN ADMITTING THE TESTIMONY OF THE "PROFESSIONAL" JAIL HOUSE INFORMANT, LARRY "ROCKY" SUTTON REGARDING WHAT LAWRENCE ALLEGEDLY TOLD HIM WHILE HE WAS IN THE OKALOOSA CORRECTIONAL INSTITUTION, IN **VIOLATION OF HIS FIFTH, SIXTH, AND** FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL AND EFFECTIVE REPRESENTATION **OF COUNSEL.**

The state relies upon this court's recent opinion in Maquiera v. State, Case No. 76,209 (Fla. September 5, 1991) 16 FLW S600 to refute Lawrence's argument on this point. In that case, the crucial facts were:

1. Maquiera had participated in a 1983 murder that, until 1987, not only remained unsolved but in which the defendant was not a suspect.

2. In 1987, the defendant was in jail on an unrelated charge.

3. He shared a cell with another inmate, Gonzalez whom the police had used on four prior occasions to gain information.

4. Gonzalez was fortuitously placed in the same cell with the defendant because the police had not talked with the informant about getting information from the defendant confessed.

5. Gonzalez gathered information on his own,

6. Maquiera knew that Gonzalez had worked for the police in the past as an informer.

7. He also knew that his cell mate had benefitted from his cooperation with the police.

8. With this knowledge in mind, Maquiera deliberately initiated his conversations with Gonzalez in which the defendant eventually confessed to the 1983 crimes. He did so hoping that he would derive some benefit as Gonzalez had profited.

Based on the totality of these facts, this court held that "Gonzalez was not acting at the state's behest or with the state's knowledge." The relevant facts in this case point to a different conclusion. Maquiera had knowingly and voluntarily "assumed the risk" that he would not benefit from talking with Gonzalez. In this case Lawrence never made a similar assumption.

By April **1989** the police had reopened their investigation of the murder of Paula Tyree, and in particular they had begun to focus upon Lawrence as a possible suspect (T 870). They contacted the prison to find out who his friends on the outside were, and if he had any acquaintances inside the prison (T 869, 878). Members of the institutional staff believed Lawrence was an escape risk and he was placed in **a** close confinement cell **(T 870)**. Within ten days, Larry "Rocky" Sutton was placed in the same cell (T 871). Ten days later, he went to the prison officials wanting to talk with them about what he claimed Lawrence was saying **(T 871).** Sutton had made some notes on scraps of paper, but not until he had talked with the police investigating the murder did he begin to keeping **a** log of what Lawrence was saying (T 875).[4] Even then he would not give it to the prison officials until he decided he wanted to talk with the police ***(T 882).***

---

[4]Officer Franks, the policeman **a** prison official said talked with Sutton, denied ever talking with Sutton (T 885).

This case also has factual differences with Maquiera. By the time the prison staff assigned Sutton to the same cell as Lawrence, they knew the police had reopened their investigation of the Tyree murder and were focussing upon Lawrence as a suspect (T 870). Moreover, as mentioned above, the police had contacted the prison staff specifically to find out who the defendant knew in the prison. The reason for making such a request is obvious: perhaps Lawrence had talked to other inmates about the murder. Apparently they were unsuccessful in that search because Sutton was confined with the defendant a short time after the police had told the prison that they believed he was an escape risk, which allegation the prison accepted because it placed Lawrence in a "protective custody'' cell
(T 869-870).

Lawrence, unlike Maquiera did not know Sutton had worked for the police in the past, so he logically would not have known that the informer had benefitted from such cooperation. Most significantly, Lawrence never talked with Sutton with the intention that he would pass on what the defendant said, so he (Lawrence) would benefit. He never used Sutton's status as an informer for his benefit. Unlike Maquiera's unusual naivety, there is no evidence Lawrence made the same decisions as Maquiera, His case has no controlling similarities with this one, and as argued in the Initial Brief, this court should find that what Sutton did went beyond that expected of a "listening

post."[5] He was an agent for the State because Sutton had been used before, and the police and prison officials knew that he would gather information from Lawrence. Because they acted on that knowledge by placing him in the same cell as the defendant they ratified what they knew he would do. See, Agency and Employment, Sections 50-59, 2 Fla. Jur. 2d.

As to the state's argument that Lawrence failed to renew his pre-trial objection to admitting Sutton's testimony, the defendant relies upon the same argument he made on a similar argument in the previous issue. He also adds that the hearing on the pre-trial motion to suppress Sutton's testimony was held on Friday, April 30. Moreover, there is nothing in the record to indicate the trial court would have changed his mind, Thus, objecting at trial to the admission of Sutton's testimony amounted a useless gesture,

---

[5]One becomes more than a mere listening post if he asks questions of the defendant concerning the crime, and does more than merely listening to the spontaneous comments of the accused. Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616,91 L.Ed.2d 364 (1980). In this case the copy of the notes Sutton gave to the police clearly indicate he did far more than merely listen to Lawrence's ramblings. He asked several pointed questions regarding his participation in the Tyree murder (See Supplemental Record- "Handwritten notes of Larry Allen "Rocky" Sutton).

ISSUE III

THE COURT ERRED IN FINDING LAWRENCE COMMITTED THIS MURDER TO AVOID OR PREVENT A LAWFUL ARREST.

The state has two arguments on this issue: 1) what Lawrence did after the murder, especially with wanting to dispose of the various guns he owned showed that the dominant motive for committing the murder was to avoid lawful arrest, and 2) this court's opinion in Remata v. State, 522 So.2d 825 (Fla. 1988) "is indistinguishable" from this case.

What Lawrence wanted to do with the firearms after the killing showed more his guilty knowledge of the murder than that the primary reason for killing Tyree was the desire to avoid arrest. That evidence shows that that motive arose after the killing, not before.

As to the similarity of Remata, the important facts in that case were that the trial court in that case, unlike the one here, used Remata's statements clearly evincing his intent to eliminate the witness/victim. Second, "other physical and circumstantial evidence was introduced which overwhelmingly supported this aggravating factor." Id. at 829.

In this case, the evidence hardly shows that Lawrence committed the murder to avoid lawful arrest. Specifically, he was probably in a cocaine stupor when he committed the crime. Alternatively, he said he killed the clerk because she made him mad (T 300). There is no evidence he committed this crime because he was afraid she could later identify him.

ISSUE IV

THE COURT ERRED IN FINDING LAWRENCE COMMITTED THIS MURDER IN AN ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL MANNER.

The state's primary argument on this case relies heavily upon this court's opinion in Swafford v. State, 533 So.2d 270, 277 (Fla. 1988). Lawrence distinguished Swafford in his Initial Brief (pages 39-40), but would reemphasize that in Swafford the victim was kidnapped, taken to a remote location, raped, and then shot in her torso nine times. She died, not from any of the bullet wounds, but from the loss of blood.

This case has none of the extra facts that made the murder in Swafford especially heinous, atrocious, and cruel. Tyree was not taken to a remote location. She was not raped. She was not shot so that she lingered a long time in obvious mental and physical pain before dying. Instead, she was killed quickly, and her suffering, either mental or physical, was so short as to not reflect any interest on the part of Lawrence in seeing her agony or his enjoyment in her misery. *See*, Brown v. State, 526 So.2d 903 (Fla. 1988).

As to the state's harmless error argument, see Issue VI of Lawrence's Initial Brief.

ISSUE V

THE COURT ERRED IN FINDING THAT LAWRENCE COMMITTED THIS MURDER IN A COLD, CALCULATED, AND PREMEDITATED MANNER **WITHOUT** ANY MORAL OR LEGAL JUSTIFICATION,

The state argues that this case is the "typical type'' found in several of the cases it cited. (Appellee's brief at **pp.** 45-46). The cited cases have no or very few similarities with this case, and do not have much persuasive value. They involved situations which far more clearly showed the defendant's planning or cold determination to kill than do the facts in this **case.** In Lamb **v.** State, 532 So.2d 1051 **(Fla.** 1988), for example, Lamb broke into **a** house to **steal** whatever he **could** find. Once inside he threw away the weapon he had brought with him for another, better one. He was, however, disappointed in the meager take, so he waited for the victim to return, and when he did, he **beat** him to death for being so poor. After leaving the house, he refused his companions' **pleas to call an** ambulance **for** the victim. That murder was **cold,** calculated, and premeditated, but the facts are so different from those in this case as to render that **case** of virtually no analytical value. Burr v. State, 466 So.2d 1051 (Fla, 1985) involved a convenience store killing, like this case did, and the trial court found the murder to be cold, calculated, and premeditated. This court, in a later consideration of Burr's case, however, suggested that the murder may have not been committed with the required heightened premeditation. Burr v. State, 550 So.2d 444 **(Fla. 1989).**

Thus, killings of convenience store clerks are not per-se cold, calculated, and premeditated.

Yet, the state's recitation of the facts on page 46 of its brief suggests such a conclusion. Its version of what happened certainly suggests that the robbery was cold, calculated, and premeditated, but it does not justify the determination that the murder was also cold, calculated, and premeditate, especially when Lawrence admitted killing Tyree because "she made him mad." As noted in the Initial Brief (page 43), killings committed in a moment of unchecked emotional fury generally do not warrant a finding of this aggravating factor.

As to the state's "proportionality" argument, Lawrence would first note that he never made such an argument in his Initial Brief. More significantly, several of the cases are factually more gruesome than this case, and are distinguishable on those grounds. Randolph v. State, 562 So.2d 331 (Fla. 1990); Mendyk v. State, 545 So.2d 846 (Fla. 1989); Engle v. State, 510 So.2d 881 (Fla. 1987); Swafford v. State, 533 So.2d 270 (Fla. 1988). In other cases, the murders were not found to have been committed in a cold, calculated, or premeditated fashion. Shriner v. State, 386 So.2d 525 (Fla. 1980); Hargrave v. State, 366 So.2d 1 (Fla. 1978); Carter v. State, 576 So.2d 1291 (Fla. 1989).[6] In Garcia v. State, 492 So.2d 360 (Fla.

[6]This aggravating factor was not found in Shriner and Hargrave because it had not been enacted at the time this court decided those cases.

1987), this aggravating factor applied because Garcia and his co-defendants had planned to rob a farm store for several days, and their plans included killing the two aged owners of the store. The explicit design to kill the victims, which was fully contemplated for several days, distinguishes that case from this one.

Finally Lawrence points out that the state made no effort to distinguish Hamblen v. State, 527 So.2d 800 (Fla. 1988), which he heavily relied upon in his Initial Brief. (pages 43-44). That case stands for the proposition that not every cold, calculated, and premeditated robbery necessarily means that a resulting murder was also as methodically contemplated and carried out. So, it is here, the evidence shows with equal if not greater clarity, that Lawrence wanted to rob the convenience store, and he killed the clerk only when he perceived that she had become rude with him. Such a murder was not done in a cold, calculated, and premeditated manner.

ISSUE VI

THE COURT ERRED IN NOT FINDING IN MITIGATION LAWRENCE'S UNCONTROVERTED COCAINE ADDICTION.

The state's arguments on this point are that 1) this court's opinion in Campbell v. State, 571 So.2d 415 (Fla. 1990) is not applicable retroactively to this case, and 2) the court cannot be faulted for not giving this mitigating factor as much weight as Lawrence wanted.

First, as to applicability of Campbell the state makes a squinting application of this court's opinion in Gilliam v. State, 582 So.2d 610 (Fla. 1991) which refused to apply Campbell retroactively. As the state must admit, that case had been decided a week before the court here sentenced Lawrence to death. But, the state argues, the opinion was not final until long after the defendant had been sentenced to death. True, but so what? That portion of Campbell relied upon here was not significantly changed.[7] Moreover, whether the court changed its mind later has not bearing here because when Lawrence was sentenced, the original Campbell was the law, and the trial court could not ignore it by saying, "Oh, it is not final yet." See, Caples v. Tallaferro, 146 Fla. 122, 200 So. 378 (1941).

Also, this court's opinion in Rogers v. State, 511 So.2d 526 (Fla. 1987) certainly applied, and as this court has said,

---

[7] The final opinion merely dropped one footnote and rearranged two of the others. Those changes have no impact upon this case.

Campbell merely continued the "requirements announced in Rogers.'' Santos v. State, Case No. 74,467 (Fla. September 26, 1991) 16 FLW S633.

As to the second argument, that the trial court did not give sufficient weight to Lawrence's cocaine addiction, the state has missed the point. The court's sentencing order lacked that "unmistakable clarity'' this court has demanded when a defendant is sentenced to death. Mann v. State, 420 So.2d 578 (Fla. 1982). That is, as presented in the Initial Brief, Lawrence's cocaine addiction permeated this trial, not only in the defendant's case and argument, but primarily through the state's witnesses. Yet, the court made no mention of this evidence in its sentencing order, nor did it respond to defense counsel's assertion that on the night of the murder "He didn't know what he was doing because of cocaine." (T 629) Instead, it dismissed the abundance of evidence and argument on this point by merely noting that "There are no cocaine related offenses revealed on the pre-sentence investigation.'' (T 985)

The court's ruling on that point is confusing because it seems to imply that unless Lawrence had been caught and convicted of possessing cocaine, any evidence of his use of the drug could not mitigate a death sentence. That is like saying that unless a person has been convicted of Driving While Under the Influence of Alcohol, his alcoholism has no relevance to death sentencing. That is clearly wrong, and so was the court's failure to clearly consider the defendant's cocaine use and addiction when it sentence him to death.

This court should reverse the trial court's sentence of death and remand for resentencing.

CONCLUSION

Based upon the arguments presented here and in Lawrence's Initial Brief, Michael Lawrence respectfully asks this honorable court to reverse the trial court's judgment and sentence and remand a new trial or to reverse the trial court's sentence and remand for a new sentencing hearing.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
Assistant Public Defender
Fla. Bar No. 271543
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, MICHAEL ALAN LAWRENCE, #056903, Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 31st day of October, 1991,

DAVID A. DAVIS