IN THE SUPREME COURT OF FLORIDA

GREGORY LAYMAN,

Appellant,

v.

Case No. 81,173

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

At trial police officer Diane Hanych testified to her observation of the victim's body on July 24, 1991 (Tr 383). She appeared to be dead (Tr 386). Officer Wells described taping off the crime scene (Tr 395 - 400).

Office Jack Soule explained his casual and relaxed style when conducting an interview; people can become nervous when a tape recorder is present (Tr 410 - 411). The witness described his observations at the crime scene (Tr 417 - 423). He learned that Sharon DePaula worked at the Olive Garden restaurant and was wearing a waitress uniform consistent with the employment (Tr 424). A videotape of the scene was made and introduced into evidence (Tr 428 - 429). On July 25, Soule went to the Marion County Sheriff's Office and interviewed appellant after providing Miranda warnings (Tr 438 - 448).

Layman explained that he had been together with victim Sharon DePaula but they had split up on April 27, 1991 (Tr 456 - 457). Appellant admitted being arrested for a battery to DePaula and vandalism to a vehicle belonging to Kelly Ingram in May of 1991; he was released from the county jail for this battery and criminal mischief on June 27, 1991. Layman admitted that during this time from May to June 27, he thought of different ways to kill Sharon DePaula (Tr 463). He obtained a 16 gauge shotgun from his father's closet on July 2nd and cut off a portion of the barrel and the wooden stock (Tr 464). Layman drew a picture of the shotgun (Tr 465) and explained that he test fired the weapon

on July 4th (Tr 466). The defendant expressed anger at her, he felt she had taken advantage of him and kept repeating he continued to think about killing the victim. He said he found out where she lived through an attorney's file and that he had gone to St. Petersburg several times (Tr 469 - 70). Layman provided the victim's address to Soule. He told the officer she was employed at the Olive Garden and phoned the restaurant to verify it on the phone identifying himself as Eric from Ocala (Tr 470 - 71). He had the shotgun with him when he checked the victim's residence. He went there to "try to learn about her habits", to determine her daily activities (Tr 472). Appellant said he left his house on the 24th about 9:00 a.m., went to Sharon's house in St. Petersburg, and when a truck he thought she might be driving wasn't there he drove to several locations including the Olive Garden. He phoned her place of employment and learned she was to report to work at 6:00 p.m.. He sat and watched her arrival at 5:50 p.m., using binoculars; then he left (Tr 474). He drove around arriving at the victim's house about 9:30 and parked his car a block away. He had oiled up the shotgun in preparation and used a brown or plastic bag to conceal it from passersby who might call the police. He positioned himself in the bushes on the side of the house, looked inside her house and recognized the victim's sister talking on the phone. He contemplated cutting the phone lines but didn't do it (Tr 475). When the victim pulled into the driveway, he grabbed her by the hair. He claimed she sprayed him with something like Mace

which had no effect on him and he shot her; he shot her a second time as she fell. He had loaded the gun -- the first two rounds were slugs and the last three were birdshot. He knew the slugs would cause the most damage (Tr 476). Then he left. He drove back to Marion County, stopping to phone Frank DePaula to tell him what he had done and that he would do himself (Tr 479). Layman said he was "glad the bitch is dead" and "I bent her frame" (Tr 480). Appellant told the officer he washed his clothing, had washed his hands with bleach to destroy any evidence and told them the whereabouts of the stock and barrel (Tr 481 - 82). He claimed that he had thrown the actual murder weapon over the Howard Frankland bridge (Tr 479). Appellant took the officers to his residence and pointed out where the barrel and stock of the shotgun was.

Appellant pointed out the white Chrysler he used to go to St. Petersburg when he shot DePaula (Tr 483). Appellant subsequently agreed to tell them where the remainder of the shotgun was (Tr 485); it was buried in a vacant lot (Tr 486).

Appellant thereafter phoned Soule, attempting to obtain details of the autopsy (Tr 496).

Nancy Ritchie, a co-worker and friend of the victim, testified that appellant and victim did not have a good relationship; he accused her of fooling around and was very possessive (Tr 536 - 37). On April 27th when moving some belongings in Kelly Ingram's car they saw appellant's white car (Tr 542). Layman grabbed the victim by the hair and knocked her

glasses off her face (Tr 543). Kelly Ingram's car tires were slashed and appellant was arrested on those charges (Tr 544 - 45).

Officer Allen Brooks picked up appellant after the July homicide; appellant volunteered that he would get "the big lightning bolt" for this (Tr 556).

Investigator Leo Smith added that appellant had remarked, "She had used me to get away from Frank. She'll use someone else to get away from me. And no one gets away with treating me this way." He also said, "I don't even feel bad for killing Sharon." (Tr 577)

Corrections officer Matthew Ozug testified that appellant was arrested on May 4, 1991, for criminal mischief and battery and was released on June 27, 1991 (Tr 592 - 93).

Telecommunications officer Kathy Jones who answers the 911 calls testified that a female called on July 25 with information about a murder. She also talked to a male and the exhibit 23 tape was played to the jury (Tr 599).

Crime scene technician John Schofield described his actions at the scene and items he took control of at the Medical Examiner's Officer (Tr 603 - 611).

F.D.L.E. firearms expert Joseph Hall opined that the evidence shot shell was in fact fired by the shotgun retrieved (Tr 635, 492).

John Hunt knew the victim about a month before the murder. On the night before the homicide, while they drove to her

residence, they saw another vehicle (Tr 651). It was a white late model car. The victim appeared fearful and said, "Oh my God" (Tr 655). She started crying (Tr 656). He identified a photo of DePaula (Tr 657).

Ann Sipe, an employee of the Olive Garden restaurant, confirmed that someone telephoned for Sharon on July 24 and wrote the message that Eric from Ocala called (Tr 664).

Katherine McKinney, a clerk at the Probation and Parole Office in Belleview, talked to appellant in July of 1991 and Layman told her he would kill the girl who had led to his being put on probation (Tr 671 - 72).

Detective Soule observed no scratches on the defendant (Tr 686).

Dr. Edward Corcoran, associate medical examiner, testified that the victim was 5'3" and weighed 106 pounds and the cause of death was two gunshot wounds (Tr 705).

Defense witness Robert Kopec opined that it was not possible to determine muzzle to object distances without the actual weapon (Tr 827 - 28).

The jury returned a verdict of guilty of first degree murder (Tr 910). At the penalty phase appellant decided that his counsel should not present mitigating evidence and he decided that he would testify to explain why he should be executed (Tr 928 - 963). Prior to the sentencing proceeding the trial court had Layman examined by psychologist Dr. Sidney Merin who concluded that appellant was sane, competent and manipulative.

Attached as Exhibit A to this brief is Dr. Merin's report of December 21, 1992. (R 1090 - 95). Appellant declined the court's offer to have the jury consider Dr. Merin's report (Tr 963). The jury recommended the death penalty by a vote of 10 to 2 (Tr 970, 1072). The trial court concurred finding one aggravating factor and the court listed some mitigation the jury might have considered as a result of appellant's testimony. A copy of the trial court's findings is attached as Exhibit B (R 1064 - 67).

This appeal follows.

SUMMARY OF THE ARGUMENT

I. The lower court did not err reversibly in denying requests for limiting instructions on relevant evidence as the evidence was admissible under F.S. 90.402 rather than F.S. 90.404(2). Padilla v. State, 618 So. 2d 165 (Fla. 1993).

II. The lower court did not err reversibly in allowing witness John Hunt to repeat the victim's outburst of "Oh, my God" the night before the homicide. The statement did not constitute hearsay since not offered to prove the truth of the matter asserted. The witness' description of the victim's fearful appearance was not hearsay since it was a comment on her physical demeanor. Appellant's attempt to change the basis of his objection from that urged below is impermissible. Hunt's testimony was relevant to corroborate appellant's confession regarding his trips to St. Petersburg prior to the actual murder.

II. The lower court did not fail to comply with Grossman v. State, 525 So. 2d 833 (Fla. 1988). The trial court wrote its own sentencing order and it was filed contemporaneously -- the same day that the sentence of death was orally imposed.

IV. The trial court considered all mitigating evidence presented for its consideration. Appellant cannot urge error in the failure to consider that not urged below. Lucas v. State, 568 So. 2d 18 (Fla. 1990). Hodges v. State, 595 So. 2d 929 (Fla. 1992). Additionally, what is now urged is insubstantial.

V. The trial court's rejection of potential mitigation is sufficiently clear.

VI. The trial court did not err since it was not required to follow the prospective rule of Koon v. Dugger, 619 So. 2d 246 (Fla. 1993). See Elam v. State, ___ So. 2d ___, 19 Fla. L. Weekly S 175 (1994).

VII. The instant case does not involve state-assisted suicide. By the same token, appellant may not avoid accountability for his conduct by the device of asserting the willingness to die.

VIII. The lower court was not required to review the offer of counsel since it was part of the same proceeding where appellant had waived counsel and he continued to assert his previously-expressed desires.

IX. The lower court did not err in finding the CCP aggravator for this pre-planned, stalking assassination of the victim.

X. The trial court properly mentioned lack of remorse to rebut the pretense of moral or legal justification mitigating prong of CCP.

XI. The sentence of death for the execution-slaying of Sharon DePaula is proportionate. Porter v. State, 564 So. 2d 1060 (Fla. 1990).

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED REVERSIBLY IN DENYING REQUESTS FOR LIMITING INSTRUCTIONS ON COLLATERAL CRIME EVIDENCE.

The record reflects that prior to trial the prosecutor filed notice of intent to use evidence of other crimes committed by the defendant, to wit: an attempt on April 28, 1991 to cause damage to a structure (Carmichael's Restaurant) and his battery on the victim on April 27, 1991, as well as his damage to the vehicles of Kelly Ingram and Sharon DePaula (R 843 - 846).[1]

At trial witness Officer Jack Soule testified regarding the confession (after Miranda warnings) made by appellant Layman. Layman said he had a relationship with victim Sharon DePaula between 1990 and 1991 and they had split up April 27, 1991. The defense objected when the prosecutor asked if appellant admitted having been arrested for battery or criminal mischief involving Sharon DePaula (Tr 457). The prosecutor relied on Kelley v. State, 552 So. 2d 1140 (Fla. 5th DCA 1989) and the defense complained that the state was introducing evidence of past crimes "for the purpose of evidence of past crimes, even though the State now comes up with a clever rationale for its motive" (Tr 459). The defense complained that it was a remote act, occurring three or four months prior to the homicide and the prejudicial

[1] The court excluded testimony about the restaurant incident (Tr 468).

effect outweighed the relevance (Tr 460). The court opined that these were a series of interrelated events. The defense requested a limiting instruction explaining the res gestae and the court agreed with the prosecutor they'd never understand that. (Tr 461 - 462) The witness then testified that appellant admitted he was arrested for battery on the victim and vandalism to the Kelly Ingram vehicle in May of 1991. (Tr 463) Appellant told Soule that while he was in jail from May 4 to June 27, he thought of different ways to kill Sharon De Paula (Tr 463).

Appellant admitted being angry with the victim because he felt she took advantage of him by taking his personal belongings (Tr 469). He learned where she lived and worked, traveled to St. Petersburg several times (Tr 470 - 471). Appellant admitted going to Sharon's house on July 24, at 9:00 in the morning, then went to different locations, phoned to verify her working hours, sat across the street from the Olive Garden (where she worked), watched her arrive with his binoculars and then he left. (Tr 474). He arrived at Sharon's house about 9:30 p.m., parked his car the next block over, oiled up the shotgun in preparation. Even though it was cut off he used a brown or plastic bag to cover it -- so police would not be notified. Appellant looked inside the house, saw people inside including the victim's sister, contemplated cutting the phone line but didn't do so and waited in the bushes. (Tr 475). When the victim arrived he grabbed her by the hair and he shot her; he shot her a second time when she went down. The shotgun was loaded with five

rounds, the first two were slugs to do the most damage and the last three birdshot (Tr 476). Layman telephoned the victim's estranged husband Frank De Paula and told him what he had done. He felt good after shooting her, relieved and happy (Tr 479 - 480). He stated, "I'm glad the bitch is dead" and "I bent her frame" (Tr 480). Afterwards he showed the witness where the shotgun was (Tr 485). Over the next couple of months appellant phoned the officer, wanted to know the details of the autopsy and reiterated that he was glad she was dead (Tr 496).

Nancy Ritchie testified, without objection, that the victim's relationship with appellant was not good; he was very possessive (Tr 537). The court permitted, over defense objection, the state to allow evidence regarding the course of conduct between appellant and victim (Tr 539 - 540). Ritchie testified about Layman's committing a battery on the victim (grabbing her hair and knocking her glasses off her face) (Tr 543). The tires on Kelly Ingram's car were slashed (Tr 544). Appellant was arrested on these charges. On April 27, appellant screamed, "Tell Sharon I want my stuff" (Tr 546).

Leo Smith testified that while on the ride to the jail appellant made statements to the effect that "She . . . used me to get away from Frank. She'll use someone else to get away from me. And no one gets away with treating me this way." (Tr 577)

Appellant told Katherine McKinney, a clerk at the probation and parole office in July of 1991 that when he found the girl he would kill her (Tr 672).

At penalty phase, appellant took the stand and admitted past history of violence with the victim, agreed that it was a cold and calculated killing and that there was premeditation (Tr 960). He acknowledged battering the victim and stalking her (Tr 962).

The record reflects semantic difficulties beginning with the opening statements. When the prosecutor alluded in opening statement to Layman's battery upon the victim when the latter left him, the defense objected that the state was referring to past crimes and that the battery was not similar to the murder for similar fact evidence purposes (Tr 364 - 365). The prosecutor argued -- correctly -- that the evidence of battery was intertwined with the murder pertaining to its motive and making the homicide understandable.

The confusion to the defense and trial court stems from a misconception that similar fact evidence constitutes the only type of relevant evidence permissible under Williams v. State, 110 So. 2d 654 (Fla. 1959). It does not. Similar fact evidence, as codified in F.S. 90.404(2) describes only one form of evidence permitted by the Williams-rule. As stated by Professor Ehrhardt:

> "Evidence which is admissible under this theory is frequently called 'similar fact evidence'. However, evidence of collateral crimes or acts is admissible under section 90.404(2)(a) not because it is similar to the crime or act in issue, but because it is relevant to prove a material fact or issue, in the instant case other than the defendant's propensity or bad character. Thus, it can be misleading to refer to this evidence as 'similar fact evidence' because

> the similarity of the facts involved in the collateral act or crime does not insure relevance or admissibility. Similarly, evidence of collateral crimes may be relevant and admissible even if it is not similar."
>
> (Ehrhardt, Florida Evidence, S404.9 (1993 Edition)

As this Court explained in Bryan v. State, 533 So. 2d 744, 746 (Fla. 1988):

> "Evidence of 'other crimes' is not limited to other crimes with similar facts. So-called similar fact crimes are merely a special application of the general rule that all relevant evidence is admissible unless specifically excluded by a rule of evidence. The requirement that similar fact crimes contain similar facts to the charged crime is based on the requirement to show relevancy. This does not bar the introduction of evidence of other crimes which are factually dissimilar to the charged crime if the evidence of other crimes is relevant."

See also Gould v. State, 558 So. 2d 481, 485 (Fla. 2nd DCA 1990); Calloway v. State, 520 So. 2d 665, 668 (Fla. 1st DCA 1988), rev. denied, 529 So. 2d 693 (Similar fact evidence relevant to prove a material fact other than identity need not meet the rigid similarity requirement applied when collateral crimes are used to prove identity).

Among the legitimate purposes for which Williams-rule evidence is admissible are to show the defendant's intent, motive, and when the acts are so linked that one cannot be shown without proving the other (inseparable crimes). See, e.g., Nickels v. State, 90 Fla. 659, 106 So. 479 (1925); Hall v. State, 403 So. 2d 1321, 1324 (Fla. 1981); Ruffin v. State, 397 So. 2d 277, 280 (Fla. 1981); Jackson v. State, 522 So. 2d 802, 806 (Fla.

1988); Henry v. State, 574 So. 2d 66, 70 - 71 (Fla. 1991) generally discussing the appropriateness of showing the general context in which the charged crime occurred. In the instant case, appellant's murder of his ex-girlfriend cannot be completely or intelligently explained in the absence of showing that his plan to stalk and kill her resulted from his incarceration following her charging him with assault.

And as Ehrhardt again explains at §404.17, p. 176:

> "The question may arise as to whether inseparable crime evidence is admissible under section 90.402, which generally provides that relevant evidence is admissible, or under section 90.404(2), which specifically provides for the admissibility of similar fact evidence to prove a material fact . . .
>
> * * *
>
> In addition to Wigmore's logical argument, it seems that both the language of section 90.404(2)(a) and of Williams indicates that the rule applies to evidence of discrete acts other than the actions of the defendant committing the instant crime charged. Under this view, inseparable crime evidence is admissible under section 90.402 because it is relevant rather than being admitted under 90.404(2)(a). Therefore, there is no need to comply with the ten day notice provision."

Appellee respectfully submits that Professor Ehrhardt is correct, that inseparable crime evidence is admissible under 90.402 rather than 90.404(2) and that not only is the ten day notice requirement of 90.404(2)(b) inapplicable, but also the jury instruction proviso of 90.404(2)(b)(2) is also inapplicable; that provision only applies to similar fact evidence,

inapplicable here as Layman's earlier assault on the victim is not similar to the murder. Appellee submits that this Court has previously so ruled.

In Padilla v. State, 618 So. 2d 165, 169 (Fla. 1993), a case similar to the one at bar, this Court approved the admissibility of evidence that the defendant had prior to the murder fired shots at his girlfriend's former apartment.

> [2] In his second claim, Padilla asserts that the trial court erroneously allowed the State to present evidence that Padilla fired several shots at Marisella's former apartment. We find that the evidence was admissible as "inseparable crime evidence." *See Tumulty v. State*, 489 So. 2d 150, 153 (Fla. 4th DCA), *review denied*, 496 So. 2d 144 (Fla. 1986). We also find that the evidence presented was clearly relevant to establish Padilla's mental condition during the course of the incident, which necessarily includes the initial obtaining of the firearm and then the return in less than an hour to obtain more bullets. This evidence was relevant for the State to establish Padilla's mental state in order to prove premeditation. *See Jackson v. State*, 522 So. 2d 802 (Fla.), *cert. denied*, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 153 (1988); *Gorham v. State*, 454 So. 2d 556 (Fla. 1984), *cert. denied*, 469 U.S. 1181, 105 S.Ct. 941, 83 L.Ed.2d 953 (1985).
>
> (emphasis supplied)

And, even more significantly, this Court determined that no instruction to the jury on how to consider this collateral evidence was necessary.

> Padilla's third claim is related to the second because he contends that the trial court erred in refusing to instruct the jury on how to consider this collateral evidence. We find that no instruction was necessary and that the evidence was properly admitted under section 90.402, Florida Statutes (1989).

(text at 169)
(emphasis supplied

And the United States Court of Appeals, Eleventh Circuit agrees that it is not error to fail to give the jury a limiting instruction not to use the evidence to show the defendants' bad character where the evidence of other crimes was not extrinsic evidence but rather direct evidence of the crime charge. United States v. Martin, 794 F.2d 1531, 1533 (11th Cir. 1986).

See also Tumulty v. State, 489 So. 2d 150, 153 (Fla. 4th DCA 1986):

> [3] Appellant's last two points pertain to the state's use of collateral crime evidence over objection. In support of that suggestion of error Tumulty argues that this is a homicide case and the state turned it into a drug abuse case; that the only drug haul that was relevant to this case was the fourth one, as to which Tumulty says she had no participation. She contends that the evidence relative to the first three drug smuggling transactions was collateral crime evidence, which was not relevant and thus inadmissible under section 90.402(2)(a), Florida Statutes (1983). The state's position throughout was that the above cited section of the Evidence Code did not control the admissibility of the evidence in question. On the contrary, the evidence of the first three smuggling trips and the sale and distribution of the drugs was admissible under section 90.402 simply as relevant evidence. It was relevant because it was "inextricably intertwined" in the scenario of the fourth trip to show the context of the crime. It was "inseparable crime" evidence that explains or throws light upon the crime being prosecuted. In order to present an orderly, intelligible case the state had to show the relationship between Haas and Tumulty, close personal friends and business

associates, supplier and middleman. It was necessary to show the relationship between the various pilots, Marrs, Childers and Kersting, and Parella and his participation. The motive for the killing was directly related to the "conversation" of Haas's airplane by Marrs and the urgent need for both participants to get it back in service.

Professor Ehrhardt discusses "inseparable crime" evidence and the characteristics distinguishing it from "*Williams Rule*" evidence in his work on *Florida Evidence* (2d ed. 1984):

> [T]he Florida opinions have not contained a close analysis of the reasons that inseparable crime evidence is admissible. Professor Wigmore suggests that this evidence is not admitted either because it shows the commission of other crimes or because it bears on character, but rather because it is a relevant and inseparable part of the act which is in issue. This evidence is admitted for the same reason as other evidence which is a part of the so-called "*res gestae*"; it is necessary to admit the evidence to adequately describe the deed. In addition to Wigmore's logical argument, it seems that both the language of Section 90.404(2)(a) and of *Williams indicates* that the rule applies to evidence of discrete acts other than the actions of the defendant committing the instant crime charged. Under this view, inseparable crime evidence is admissible under Section 90.402 because it is relevant rather than being admitted under 90.402(2)(a). Therefore, there is no need to comply with the ten day notice provision. The Wigmore view has been adopted by the United States Court of Appeals for the Fifth and Eleventh Circuits. [Footnotes omitted.]

Ehrhardt, §404.16 at 138. *See also Smith v. State*, 365 So. 2d 704 (Fla. 1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979); *Ashley v. State*, 265 So. 2d 685 (Fla. 1972).

Accord, Jackson v. State, 522 So. 2d 802, 805 - 806 (Fla. 1988) (Among the other purposes for which a collateral crime may be admitted under Williams is establishment of the entire context out of which the criminal conduct arose . . . Court approved the trial court's admitting into evidence testimony regarding a prior assault by Jackson on the victim McKay approximately two weeks before the murders. Such testimony supported the state's theory that Jackson's motive for killing Milton and McKay was his belief that they were stealing his drugs and taking advantage of him); Gorham v. State, 454 So. 2d 556, 558 (Fla. 1984) (relevant evidence of defendant's use of victim's credit cards not proscribed by Williams Rule).

Even if this view were to be deemed erroneous, however, the trial court's failure to instruct the jury on the limited purpose of the Williams-rule evidence is clearly harmless error under State v. Diguilio, 491 So. 2d 1129 (Fla. 1986). Surely, the jury convicted appellant of murder based on his confession to the premeditated killing and the ballistics evidence rather than the fact that he assaulted her three months earlier.[2]

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[2] Appellant's reliance on Rivers v. State, 425 So.2d 101 (Fla. 1982) is misplaced. There, the defendant charged with robbery based his defense on voluntary intoxication rendering him unable to form the specific intent to permanently deprive the victim of his property. In rebuttal, to show his ability to form the necessary criminal intent, the state called victims of two other

ISSUE II

WHETHER THE LOWER COURT ERRED REVERSIBLY IN ALLOWING HEARSAY EVIDENCE OF THE VICTIM'S FEAR THE NIGHT BEFORE THE HOMICIDE.

John Hunt testified that he had known the victim about a month prior to her murder and was dating her. On July 24, the night before the murder, he and the victim saw a vehicle in the area by her residence, a white late model car. The victim said, "Oh my God" and started crying (Tr 655 - 656) The defense objected below that it constituted hearsay for the witness to report what the victim said. The prosecutor responded that her remark of "That's him" was admissible as a spontaneous statement. See F.S. 90.801(1), (2).[3] Additionally, the prosecutor argued

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robberies occurring on the same morning and three other persons directly or indirectly connected with these two and a third robbery. A jury instruction cautioning the jury that the accused was only on trial for the crime charged and that the other crimes evidence was introduced only for a limited purpose should have been given since the jury might be confused into believing that commission of the other crimes proved the offense charged. There is no such danger sub judice that the jury would conclude that either the assault committed earlier was the homicide for which appellant was on trial or that the evidence of the assault was so prejudicial as to blind the jury from the other evidence of a premeditated murder. Although that incident served as a motive, the jury predicated its verdict on his confession, the ballistics evidence and other circumstances of Layman's stalking her.

[3] See also United States v. Moore, 791 F.2d 566, 570 - 71 (7th Cir. 1986)(the appearance behavior and condition of the declarant may establish that a startling event occurred. . . . Further, the declaration itself may establish that a startling event occurred); Garcia v. State, 492 So. 2d 360, 365 (Fla. 1986), cert. denied, 479 U.S. 1022, 93 L.Ed.2d 730 (statement by wounded victim to police officer admissible because her response was spontaneous, sprang from the stress, pain and excitement of the shootings and robberies and was not the result of any

that the victim's seeing appellant in the neighborhood supported the premeditative aspect of Layman's conduct and corroborated appellant's confession that he was there before. (Tr 652 - 53) Moreover, the prosecutor argued that the defense attacking the confession and the manner of its receipt by the police made it admissible. The court ruled it would allow the excited utterance but the contents of her comments would be hearsay and the prosecutor announced the state would not go further than "That's him". (Tr 655) The witness did not relate to the jury any comment of the victim "That's him".

Appellant cannot prevail for several reasons. First, the claim that inadmissible hearsay evidence was in fact introduced and provided to the jury is inaccurate. Although the prosecutor may very well have been attempting to elicit from witness John Hunt the content of the victim's assertion (That's him), witness Hunt did not do so. Hunt testified that Ms. DePaula was in fear when they saw a white late model car and she said "Oh, my God". (Tr 655) The "Oh, my God" statement does not constitute hearsay for it is not offered to prove the truth of the statement asserted.[4] That the victim was in fear and was crying was an observation on physical demeanor not a hearsay comment.

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premeditated design); State v. Jano, 524 So. 2d 660 (Fla. 1988).

[4] Unless of course, Ms. DePaula was identifying the white car with the Deity, which no one is urging.

Appellant seems to be arguing now on appeal that Hunt's testimony was not relevant, an argument that cannot be urged ab initio in this Court since not presented below. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So. 2d 902 (Fla. 1990).

Secondly, even if preserved, the contention is meritless as the Hunt testimony regarding seeing the white vehicle in the area of 70th Avenue and 13th Street North, the night before the homicide (Tr 651 - 652) confirms and corroborates appellant's confession to Detective Soule that he had gone several times to St. Petersburg, knew the victim's address, 7201 - 13th Street North (Tr 470), that he checked out the victim's residence to learn her habits (Tr 472). Such corroboration is appropriate considering trial defense counsel's attempt to establish on cross examination that the police were not providing an accurate picture regarding the confession (Tr 499 - 533).[5]

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[5] The defense in cross examining Officer Soule inquired about the failure to tape record or videotape the confession (Tr 519 - 521), the failure to have appellant write out his confession (Tr 521); defense counsel asked if the officer sought to "benefit" from not taping the interview (Tr 524). He asked if appellant were misstating the facts in order to obtain the death penalty (Tr 531). And in closing argument the defense urged that the state had concealed evidence (Tr 862), that Soule didn't "care what's the truth in this case" (Tr 863), that officer Brooks unlike Officer Soule "doesn't have any interest in this case" (Tr 877) and, "He's not going to lie to you about it" (Tr 877), that unlike Soule, Officer Smith was an expert who taped suspects' conversations. (Tr 878) He argued that a tape "would have revealed what was said" (Tr 880) and that this was really an unplanned death. (Tr 881).

Appellant relies on a number of decisions such as Hunt v. State, 429 So. 2d 811 (Fla. 2d DCA 1983). In Hunt, the Court recognized three exceptions to the general rule that a murder victim's statement to a third person that defendant intended to kill her are usually inadmissible hearsay: where the defendant claimed self defense, the victim's suicide, or that the victim accidentally killed herself. Since the defendant claimed he accidentally shot the victim, none of the three exceptions were deemed applicable, and the victim's statements of fear of the defendant remained inadmissible. Hunt may be of questionable precedential value after Peterka v. State, ___ 19 Fla. Law Weekly S 232 (Fla. 1994) (victim's state of mind was a material issue in this case where Paterka asserted that he accidentally shot the victim).

Appellant correctly points out that he did not urge as his defense below either that it was self-defense or the victim committed suicide or that DePaula accidentally shot herself; but he did argue that the degree of homicide was something less than a premeditated, preplanned killing. Contrary to appellant's assertions here, Hunt's testimony regarding DePaula's spontaneous statements were not submitted to show an irrelevant matter of her state of mind but rather as some evidence of appellant's presence in the area of her residence the day before the murder which supports the state's theory of the premeditated nature of the killing and that aspect of his confession to Detective Soule that he repeatedly went to St. Petersburg to determine her habits.

Appellant argues that Hunt's testimony of seeing a "white late model car" (Tr 655) insufficiently connected Layman to this encounter since he was not shown a photo of appellant's car and asked to identify it. Of course, the defense could have cross-examined on the point or shown a photo to the witness if that were deemed important, but instead elected no cross-examination (Tr 657). In any event, Detective Soule had testified that appellant admitted showing the officer the "white Chrysler . . . he used to go to St. Pete." (Tr 483) and the victim's friend Nancy Ritchie referred to appellant's "white car" (Tr 542, 546). The prosecutor permissibly could argue the totality of the evidence presented. Any complaint Layman may now urge that the prosecutor was inaccurate below was not accompanied by any contemporaneous objection meriting subsequent review by this Court (Tr 839). Lindsey v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 241 (Fla. 1994).[6]

Finally, assuming (only arguendo, of course) that the Court were to find error in the trial court's ruling, it is clearly harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.

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[6] Appellant's reliance on Kennedy v. State, 385 So. 2d 1020 (Fla. 5th DCA 1980) and Fleming v. State, 457 So. 2d 499 (Fla. 2nd DCA 1984) is inapposite. In Kennedy, the only purpose advanced for the introduction of evidence that the victim feared his wife was the victim's state of mind. In Fleming the state impermissibly introduced hearsay evidence of the victim's state of mind purporting to explain the reasons for her visit to the defendant husband; her state of mind in making the visit was irrelevant when the determinative issue was the identity of her killer.

2d 1129 (Fla. 1986). In Correll v. State, 523 So. 2d 562 (Fla. 1988), the state elicited from witness Valentine that the victim had displayed fear of the defendant and this Court held:

> [2, 3] Susan Correll's statements, as related by Valentine, were hearsay. In the absence of an applicable exception, hearsay evidence is inadmissible. §90.801, Fla. Stat. (1985). It is well settled that the state-of-mind exception to the hearsay rule allows the admission of extra-judicial statements only if the declarant's state of mind is at issue in a particular case or to prove or explain the declarant's subsequent conduct. §90.803(3)(a), Fla. State. (1985). Because Susan Correll's state of mind was not at issue and her statements could not be used to prove Correll's state of mind, the testimony was inadmissible. *Hunt v. State*, 429 So. 2d 811 (Fla. 2d CA 1983); *Bailey v. State*, 419 So. 2d 721 (Fla. 1st DCA 1982); *Kennedy v. State*, 385 So. 2 1020 (Fla. 5th DCA 1980). However, in view of the other evidence against Correll, we find that the admission of such testimony was harmless error. *See Palmes v. State*, 397 So. 2d 648 (Fla.), *cert. denied*, 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981).
>
> (text at 565 - 566)

See also, Downs v. State, 574 So. 2d 1095, 1098 - 99 (Fla. 1991) (victim's statement of fear of defendant constituted harmless error); Roman v. State, 475 So. 2d 1228 (Fla. 1985); Clemente v. State, 593 So. 2d 616 (Fla. 3d DCA 1992). Trial defense counsel did argue in closing argument that the state had failed to establish premeditation (Tr 857 - 858), in between charges that the state had "edited out the evidence" (Tr 858) and that the state's medical examiner was "willing to say whatever the state wants him to say" (Tr 869), and that the state had

deliberately destroyed evidence (Tr 876 - 879). Quite apart from appellant's confession to Officer Soule that he stalked and killed Sharon DePaula after readying his sawed off shotgun and hiding in the bushes for hours outside her home, the state elicited the testimony of expert Joseph Hall that the shells were fired from appellant's shotgun (Tr 635), appellant's admission to Katherine McKinney in July of 1991 that "he was going to kill" the girl responsible for his problem on probation (Tr 671 - 672). Appellant also took the stand at penalty phase and admitted having battered and stalked the victim and premeditatedly killed her (Tr 960 - 61).

In conclusion, appellant's contention that Hunt's recitation of DePaula's "Oh, my God" utterance was unduly prejudicial is meritless. Even if the Court were to conclude that DePaula insufficiently identified the presence of Layman or his automobile, her excited utterance added nothing that unfairly prejudiced the accused especially in light of his admissions to perpetrating the crime.

Should this Court determine that the trial court's ruling merited a retrial, the state would introduce appellant's admissions on the stand at retrial. Pendleton v. State, 348 So. 2d 1206 (Fla. 4th DCA 1977) (trial court did not err in permitting portions of defendant's testimony at first trial to be used against him at second trial); Edmonds v. United States, 273 F.2d 108 (D.C. Cir. 1959); United States v. Hughes, 411 F.2d 461 (2nd Cir. 1969); Harrison v. United States, 392 U.S. 219, 20 L.Ed.2d 1047 (1968).

No remand is necessary. As observed by Justice Shaw in State v. Rucker, 613 So. 2d 460 (Fla. 1993):

> "Were we to remand for resentencing, the result would be mere legal churning."
>
> (text at 462)

ISSUE III

WHETHER THE TRIAL JUDGE FAILED TO COMPLY WITH GROSSMAN V. STATE, 525 SO. 2D 833 (FLA. 1988) AND ITS PROGENY.

Appellant argues that the lower court failed to comply with such cases as Van Royal v. State, 497 So. 2d 625 (Fla. 1986), Grossman v. State, 525 So. 2d 833 (Fla. 1988) and subsequent decisions. Appellee disagrees.

In Van Royal, supra, this Court overturned a death sentence imposed by the trial court where (1) the judge had orally imposed a sentence more than a month after the jury recommended life sentences, (2) the findings were not made for an additional six months until after the appellate record had been certified to this Court and the lower court had lost jurisdiction. The Van Royal court observed:

> "We appreciate that the press of trial judge duties is such that written sentencing orders are often entered into the record after oral sentence has been pronounced. Provided this is done on a timely basis before the trial court loses jurisdiction, we see no problem."
>
> (emphasis supplied)
> (text at 628)

In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), this court criticized the trial judge's delegating to the state attorney the responsibility to identify and explain the appropriate aggravating and mitigating factors. There is no Patterson error sub judice. While the trial judge initially had suggested that the prosecutor draft a proposed order for review by both the defense and the court, when the prosecutor balked

suggesting it would be "inappropriate for the state to draft it" (Tr 976), the Court changed course:

> "The Court: I'm going to do it. I've got a doctor's appointment at quarter to one, but I'll get it out today."
>
> (Tr 976)

In Stewart v. State, 549 So. 2d 171 (Fla. 1989), the Court remanded for the entry of a written sentencing order when the court in following the jury's recommendation dictated orally the findings supporting a death sentence but failed to submit written findings.

In Christopher v. State, 583 So. 2d 642 (Fla. 1991), the trial court failed to make written findings until two weeks after he sentenced the defendant to death. The court again expressed the concern that "The preparation of written findings after the fact runs the risk that the 'sentence was not the result of a weighing process or the reasoned judgment of the sentencing process that the statute and due process mandate" 583 So. 2d at 647.[7]

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[7] Appellant also cites two cases decided by this Court after the trial court's December 1992 imposition of the death sentence sub judice. Spencer v. State, 615 So. 2d 688 (Fla. 1993), involved ex parte discussions between the trial judge and prosecutor not present in the instant case; the trial judge cannot be criticized for having failed to anticipate this Court's subsequently-announced explanation of Grossman. Hernandez v. State, 621 So. 2d 1353 (Fla. 1993) was a case where the trial judge failed to provide any reasons -- oral or written -- until twelve days after oral pronouncement of sentence. The failure to file contemporaneous written reasons resulted in vacation of the death sentence.

Appellee submits that in the instant case there has been satisfactory compliance with the contemporaneous filing requirement by the trial judge's filing the written sentencing findings on the same day as the oral imposition of sentence, December 23, 1992 (R 1062). There is not present here the danger articulated in this court's prior decisions that a trial judge's delayed statement of reasons will not accurately reflect a reasoned judgment; that is especially true here where the defense offered no mitigation and all involved (prosecution, defendant and trial judge) agreed that the CCP aggravator is present.

Appellee accepts appellant's invitation to consider the comparability of sentencing guidelines jurisprudence.[8]

In the sentencing guidelines context this Court has concluded that it is proper for the trial court to file its written statement of reasons for departure, on the same day as sentencing such actions are contemporaneous. See State v. Lyles, 576 So. 2d 706, 708, 709 (Fla. 1991):

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[8] At first blush, it might seem odd to merge the twin giants of Florida's criminal justice jurisprudence -- capital punishment and sentencing guidelines. It can be argued that each advance separate goals: sentencing guidelines result in a reduced period of incarceration and a prompter return to society whereas the death penalty imposition seeks a permanent removal of the culprit from society. On the other hand, both systems seek to support the general view that it is desirable to alleviate the ever-present problem of prison overpopulation: guidelines' doctrine by promoting early release; capital punishment by curing recidivism by ultimate removal of those who cannot abide by the most serious of society's laws.

> "We find that when express oral findings of fact and articulated reasons for the departure are made from the bench and then reduced to writing without substantive change on the same date, the written reasons for the departure sentence are contemporaneous, in accordance with Ree. To adopt a contrary view would be placing form over substance. The ministerial act of filing the written reasons with the clerk on the next business day does not, in our view, prejudice the defendant in any respect.
>
> * * *
>
> . . . It is important that these written reasons are entered by the trial judge on the same date as the sentencing. These written reasons should, if at all possible, be filed on the same date; however, a filing on the next business day does not require a new sentencing proceeding."

Appellee submits that if, for sentencing guidelines purposes, the filing of written reasons for departure on the following day constitutes a contemporaneous filing, how can it be urged that filing the written findings in a capital case on the same day as oral pronouncement of sentence is not contemporaneous?

ISSUE IV

WHETHER THE LOWER COURT ERRED IN FAILING TO CONSIDER AND WEIGH ALL AVAILABLE MITIGATING EVIDENCE.

Appellant did not present to the judge and jury any mitigating evidence. In Lucas v. State, 568 So. 2d 18 (Fla. 1990), this Court declared:

> "Because nonstatutory mitigating evidence is so individualized, the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish. This is not too much to ask if the court is to perform the meaningful analysis required in considering all the applicable and mitigating circumstances."

(text at 24)

And, in Hodges v. State, 595 So. 2d 929, 934 - 935[9] the Court reiterated:

> "It is also obvious that the judge considered the nonstatutory mitigating evidence that Hodges presented. Hodges complains that the judge did not specifically address his childhood, educational background, close family relationships and employment history, but Hodges did not point out to the judge the nonstatutory mitigators he felt had been established. Lucas v. State, 568 So. 2d 18 (Fla. 1990) directs that defendants share the burden of identifying nonstatutory mitigators, and we will not fault the trial court for not guessing which mitigators Hodges would argue on appeal. There is no

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[9] Hodges was vacated on other grounds. Hodges v. Florida, ___ U.S. ___, 121 L.Ed.2d 6 (1992) and affirmed on remand. Hodges v. State, 619 So. 2d 272 (Fla. 1993), cert. denied, ___ U.S. ___, 126 L.Ed.2d 460 (1993).

> merit to Hodges' claim that the court refused to consider the evidence presented in mitigation."

It would be a strange Kafkaesque jurisprudence that would punish defendants like Lucas and Hodges by not considering desired mitigation urged in the appellate court when they presumably desire to live, but would find reversible error in the trial court's failure to consider evidence which the defendant refused to have considered (Tr 963) simply because the defendant assertedly is not upset about death being imposed.

But even if this Court should conclude that the trial court should have addressed Dr. Merin's comments regarding personality disorder, affirmance is still required. Dr. Merin's report states (R 1093 - 94):

> "A review was made of the various criteria for competency. Mr. Layman met all of the criteria for competency. Consequently, there were no suggestions he was psychotic, notwithstanding the concepts of reincarnation, gender changes, and other fanciful concepts.
>
> It is this examiner's opinion Mr. Layman has a character disorder which can be described as reflecting a Mixed Personality Disorder with paranoid, schizotypal and anti-social characteristics. These features in no way suggest psychosis. Reference is made to the description of these diagnostic formulations in the Diagnostic and Statistical Manual III-R. A Personality Disorder is described as reflecting an inflexible and maladaptive form of behavior often recognizable by adolescence, and continuing throughout most of adult life. A Mixed Personality Disorder would include a wide variety of characteristics associated with such maladaptive behavior. Prominent in this man's interview were paranoidal personality

> traits often reflected in a tendency to interpret the actions of others as being deliberately demeaning or threatening. In addition, it included the expectation he would be exploited or harmed by others. He can bear a grudge and can be unforgiving, often projecting responsibility for his behavior onto others. He would be quick to anger, and can question without justification, the fidelity of others.
>
> With regard to the schizotypal characteristics noted, those features must be differentiated from schizophrenia, the latter reflecting psychotic thinking. With schizotypal personalities, there is a pervasive pattern in the manner an individual relates. It is reflected in peculiarities of ideas. These individuals often have odd beliefs or magical thoughts, superstitions, belief in clairvoyance, telepathy, or in sensing the presence of a force or person not actually present. This personality disorder is also often reflected in odd or eccentric behavior or appearance, but is not of psychotic proportions.

In the instant case, the trial court complied with the provisions of Pettit v. State, 591 So. 2d 618 (Fla. 1992), by considering that which was presented to him by Layman. Layman testified that his premeditated killing of Sharon DePaula was cold and calculated, that he had a belief in reincarnation wherein he and Sharon would be reunited, and that he loved her (Tr 960). All of this was considered in the sentencing judge's order ("the jury might have considered as a mitigating factor that the Defendant Gregory Scott Layman was deeply in love with the victim which clouded his judgment to such an extent that he did not act rational. Another possible mitigating factor was the defendant's belief in reincarnation believing that he would join the victim in another life in the future") (R 1067).

While Dr. Merin noted that appellant exhibited a Mixed Personality Disorder "with paranoid, schizotypal and antisocial characteristics," there is little in such description of a truly mitigating nature. His paranoidal traits include interpreting the actions of others as threatening -- since the prosecutor was attempting to obtain a guilty verdict, his attitude was not entirely unexpected. That appellant "can bear a grudge and can be unforgiving" or project responsibility for his conduct on others (R 1094) does not seem to be reflective of any mitigating quality. In regard to the schizotypal characteristics (as distinguished from schizophrenia), that Layman may have odd beliefs or peculiar ideas again that does not have relevance to a determination whether death or life imprisonment is the appropriate sanction. Does a belief in reincarnation suggest that a defendant's culpability is reduced? Do those defendants without a similar belief more readily deserve death? Dr. Merin opined that Layman was "manipulative" and "determined to prove the state wrong." Is being manipulative a mitigating characteristic? Appellee submits not. His bravado and effort to "prove the state wrong" merely demonstrates yet again an unwillingness to accept full accountability for his conduct and an absence of remorse that might provide some quality of decency deserving of a less severe sanction.[10] Even in Farr v. State,

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[10] The Merin report does not diagnose Layman as having antisocial personality disorder. Rather, it describes him as reflecting a "Mixed Personality Disorder" (R 1093) which according to Diagnostic and Statistical Manual of Mental Disorders, DSM-III-R,

621 So. 2d 1368 (Fla. 1993), relied on by appellant, this Court -- explained that mitigation presented in the record should be considered "to the extent it is believable and uncontroverted". Id. at 1369. Dr. Merin has not found the presence of mitigating factors; rather his evaluation explored "his expressed motives for making this request" (to impose the death penalty) (R 1090). One of these motives was to punish the state to support Layman's view that he should have been convicted only of second degree murder. Since the evidence demonstrates clearly a premeditated murder -- appellant does not even challenge the evidentiary sufficiency -- appellant's asserted views and beliefs along with Dr. Merin's label attached for different reasons than suggesting mitigation do not compel the conclusion that there is uncontroverted evidence of mitigation.

Finally, even if the trial court committed error in failing to anticipate that appellant would urge on appeal that which he had repudiated at trial, i.e., consideration of Dr. Merin's report as containing mitigating evidence, any error is harmless. Wickham v. State, 593 So. 2d 191 (Fla. 1992). This is so especially considering the weak nature of alleged personality disorders as mitigation.

301.90 Personality Disorder Not Otherwise Specified is exemplified by having the features of more than one specific disorder but does not meet the full criteria for any one.

As noted by Justice Thomas, concurring in Graham v. Collins, 506 U.S. ___, 122 L.Ed.2d 260, 291 (1993):

> Every month, defendants who claim a special victimization file with this Court petitions for certiorari that ask us to declare that some new class of evidence has mitigating relevance "beyond the scope" of the State's sentencing criteria. It may be evidence of voluntary intoxication or of drug use. Or even -- astonishingly -- evidence that the defendant suffers from chronic "antisocial personality disorder" -- that is, that he is a sociopath. See Pet for Cert in Demouchette v. Collins, OT 1992, No. 92-5914, p 4, cert denied, 505 US ___, 120 L Ed 2d 952, 113 S Ct 27 (1992). We cannot carry on such a business, which makes a mockery of the concerns about racial discrimination that inspired our decision in Furman.
>
> (emphasis supplied)

See also Harris v. Pulley, 885 F.2d 1354, 1381 - 1384 (9th Cir. 1988), wherein the court explained that a personality disorder such as antisocial personality was to be distinguished from a mental disorder such as psychosis or neurosis:

> "A personality disorder is not analogous to 'the incurable and dangerous mental illness' of a person diagnosed as suffering from paranoid schizophrenia and hallucinations."
>
> (text at 1382)

And:

> "This interaction between general social attitudes and what seems appropriate for medical diagnosis is suggestive that what is classified as a mental disorder by the American Psychiatric Association is not necessarily a condition that a state is constitutionally required to take into account in assessing punishment. In the case of the condition described as an antisocial personality there is a substantial tension

between the implications of its being seen as a "can't help" characteristic and what are the frequent accompaniments of this condition. The disorder, the American Psychiatric Association observes, often leads to "many years of institutionalization, more commonly penal than medical." DSM-III, p. 318. In adulthood those with this condition are marked by a "failure to accept social norms with respect to lawful behavior." Id.

[26] *Zant* suggested that "mental illness" might actually militate in favor of a penalty less than death. The "mental disorder" of such antisocial personality is not "mental illness" in the sense used by *Zant*. For the ordinary citizen it would, to say the least, be paradoxical that a person who was likely not to accept social norms with respect to lawful behavior should be treated more kindly than the person who was law-abiding. The paradox is all the stronger when it is the view of the American Psychiatric Association that persons with this condition are capable of understanding the consequences of their actions and are willing to perform or not to perform particular volitional acts. We may go further and say that it is difficult to suppose that there are any persons who commit the kind of vicious crime for which the death penalty is now imposed in this country who do not possess one or more of the personality disorders or one or more of the neuroses recognized as mental disorders by the American Psychiatric Association. To hold that each of these conditions must be a mitigating factor when the death penalty is considered would be to undermine the death penalty under the guise of acknowledging that what the American Psychiatric Association finds to be a mental disorder must be treated as a factor that calls for less severe punishment than death. We cannot say that the evolving standards of decency that have characterized interpretation of the eighth amendment require a state to conform its scheme of capital punishment to such a norm."

(text at 1383)
(emphasis supplied)

In conclusion it should be noted that Layman's "mixed personality disorder" -- the term used by Dr. Merin -- is apparently a catch-all phrase intended to embrace a number of traits that do not fit the generally accepted categories of personality disorders. As explained in Kaplan's and Sadock, Comprehensive Textbook of Psychiatry, Vol. 2, 5th edition:

> Table 27.1-16
>
> Diagnostic Criteria for Personality Disorder Not Otherwise Specified
>
> "Disorders of personality functioning that are not classifiable as a specific personality disorder. An example is features of more than one specific personality disorder that do not meet the full criteria for any one, yet cause significant impairment in social or occupational functioning, or subjective distress. In DSM-III this was called mixed personality disorder.
>
> (page 1387)

Thus, a convicted murderer may be fascinated by torture (meeting one of the criteria for sadistic personality disorder), or may become sulky or irritable when asked to do something (meeting one of the criteria for passive-aggressive personality disorder), he may exhibit a lack of generosity in giving time, money or gifts when no personal gain is likely to result (meeting one of the criteria for obsessive-compulsive personality disorder), engages in a pattern of antisocial acts leading to arrests (meeting one of the criteria for anti-social personality disorder), is interpersonally exploitative (meeting one of the criteria for narcissistic personality disorder), and is overly

concerned with physical attractiveness (meeting one of the criteria for histrionic personality disorder) and chooses solitary activity (meeting one of the criteria for schizoid personality disorder) and yet no sensible juror or sentencing judge (and hopefully appellate tribunal) would seriously conclude that any of the described qualities is meaningfully mitigating even if the definition of mixed personality disorder is satisfied.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN FAILING TO MAKE CLEAR, INDEPENDENT FINDINGS AS TO MITIGATING CIRCUMSTANCES.

The trial court's sentencing order recites, in pertinent part:

> "f) The jury was instructed on those factors they could consider in mitigation of the crime. Although no evidence concerning mitigating factors was presented by the Defendant, Gregory Scott Layman, the jury might have considered as a mitigating factor the fact that the Defendant, Gregory Scott Layman, was deeply in love with the victim which clouded his judgment to such an extent that he did not act rational. Another possible mitigating factor was the Defendant's belief in reincarnation believing that he would join the victim in another life in the future. However, the aggravating factors of that the Defendant, Gregory Scott Layman, acted in a cold, calculated and premeditated manner without any pretense of moral or legal justification so far outweighed the mitigating factors to require the Court to follow the juries recommendation and impose the death penalty."

(R 1066 - 67)

In Nibert v. State, 574 So. 2d 1059 (Fla. 1990) the defendant "presented a large quantum of uncontroverted mitigating evidence" (text at 1062) including physical and psychological abuse which the trial court improperly dismissed because of Nibert's age. A mental health expert had testified as part of the defense case opining that Nibert was under the influence of extreme mental or emotional disturbance and that his capacity to control his behavior was substantially impaired. In the instant case the defense did not urge any mitigation. See Lucas v.

State, 568 So. 2d 18, 24 (Fla. 1990) (Because nonstatutory mitigating evidence is so individualized the defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish. This is not too much to ask if the court is to perform the meaningful analysis required in considering all the applicable aggravating and mitigating circumstances.)

Although Layman was not actively desirous of seeking life imprisonment in lieu of the death penalty, the trial court went out of its way to list potential mitigating evidence the jury might have considered prior to its returning a ten to two death recommendation. The court concluded that none of it compared in weight to the aggravating factor of homicide committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. F.S. 921.141(5)(i). As in Hamblen v. State, 527 So. 2d 800 (Fla. 1988) and Pettit v. State, 591 So. 2d 618 (Fla. 1992), the sentencing judge considered possible mitigation even though not urged (possible emotional disturbance in Hamblen, Huntington's chorea in Pettit, and desire for reincarnation with the victim in this case). The trial court's rejection of potential mitigation in the weighing process is sufficiently clear.

ISSUE VI

WHETHER THE LOWER COURT ERRED IN FAILING TO REQUIRE COUNSEL TO STATE ON THE RECORD WHETHER THERE WAS ANY MITIGATING EVIDENCE.

On March 25, 1993, three months after the trial court imposed a sentence of death in the instant case this Honorable Court denied post-conviction relief to a prisoner in Koon v. Dugger, 619 So. 2d 246 (Fla. 1993). In that opinion the Court stated:

> [5] Although we find that no error occurred here, we are concerned with the problems inherent in a trial record that does not adequately reflect a defendant's waiver of his right to present any mitigating evidence. Accordingly, we establish the following prospective rule to be applied in such a situation. When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.
>
> (text at 250)
> (emphasis supplied)

In the instant case the record adequately reflects counsel's representing to the court that his client wanted to have a penalty phase, would like to present evidence of aggravating rather than mitigating circumstances and that he had instructed counsel not to present evidence of mitigation. Dr. Merin had evaluated appellant and found him competent. (Tr 929 - 930)

Appellant then confirmed counsel's representations; he was thirty-seven years old and had been told he had a 121 I.Q. (Tr 935 - 36). He had been researching and understood the role of the jury and judge in the penalty phase (Tr 939 - 940). Appellant insisted that no mitigating evidence be presented (R 945). Layman mentioned that he wanted to tell the jury about his battery on the victim, his prior history of violence with her; he said he had four prior felony convictions and he did not want to urge the mitigator of no significant prior history of violence. The court announced it would give some mitigating instructions over Layman's objection and did so (Tr 951, 966). The court asked attorney Horn to stay and answer questions the defendant might have in presenting his case and that was agreeable to both Horn and Layman (Tr 955). The jury was informed that appellant was seeking the death penalty against the advice of his counsel (Tr 957). Appellant testified (Tr 960 - 63).

The trial court did not err based on the law applicable at the time. See Hamblen v. State, 527 So. 2d 800 (Fla. 1988), Pettit v. State, 591 So. 2d 618 (Fla. 1992), Henry v. State, 586 So. 2d 1033 (Fla. 1991). Appellant contends that the state should not be assisted by this Court's declaration of the prospective nature of its ruling since the original opinion was published in June of 1992. But the case was not final until time for rehearing expired. Indeed in Lovette v. State, ___ So. 2d - __, 19 Fla. Law Weekly S 85 (February 10, 1994), this Honorable Court announced a new requirement that if the state sought to

elicit facts about the crime from confidential expert appointed to assist the defense not only must the state show a waiver of the attorney-client privilege but "must also show that the defendant received a valid Miranda warning." 19 Fla. Law Weekly S at 86. However, on March 31, 1994, the Court withdrew its prior opinion in Lovette and substituted another reported at 19 Fla. Law Weekly S 164, omitting the requirement of proof of Miranda warnings. As in Lovette, the trial court was not required to comply with the newly announced Koon procedures until that decision was final. See also Elam v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 175 (1994) (reiterating that Koon rule applies prospectively only).

ISSUE VII

WHETHER EXECUTION IN THIS CASE CONSTITUTES STATE-ASSISTED SUICIDE.

Counsel for appellant advises that he will first address "the big picture" -- cases wherein a defendant requests death and waives presentation of mitigating evidence and then focus on the circumstances of this case.

A. Appellant's review of the case law leads him to suggest that Hamblen v. State, 527 So. 2d 800 (Fla. 1988) and its progeny should be overturned. Appellee suggests that Hamblen be retained.[11] In Hamblen, supra, this Court opined:

> "While we commend Hamblen's appellate counsel for a thorough airing of the question presented by this issue, we decline to accept his logic and conclusions. We find no error in the trial judge's handling of this case. Hamblen had a constitutional right to represent himself, and he was clearly competent to do so. To permit counsel to take a position contrary to his wishes through the vehicle of guardian ad litem would violate the dictates of *Faretta*. In the field of criminal law, there is no doubt that 'death is different," but, in the final analysis, all competent defendants have a right to control their own destinies. This does not mean that courts of this state can administer the death penalty by default. The rights, responsibilities and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence.

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[11] To the extent that the prospective rule announced in Koon v. Dugger, 619 So. 2d 246 (Fla. 1993) is deemed part of the Hamblen progeny, appellee would join the request to overturn it and interposes no objection.

> A defendant cannot be executed unless his guilt and the propriety of his sentence have been established according to law.
>
> (text at 804)

As in Hamblen, supra, the trial court articulated possible mitigating factors the jury may have considered resulting from the evidence presented. See also Pettit v. State, 591 So. 2d 618 (Fla. 1992) (trial judge considered the testimony of the effect of Huntington's chorea).

Layman contends that Klokoc demonstrates that Hamblen is unworkable. In Klokoc the trial court appointed special counsel to represent the public interest in bringing forth mitigating factors when the defendant refused to allow his counsel to actively participate and refused to allow the presentation of family member mitigation evidence; that a different procedure was utilized in Klokoc than in Hamblen, Pettit or the instant case does not mean that only Klokoc is workable. This Court was able to fulfill its appellate responsibility not only in Klokoc but also in Hamblen, and in Pettit and in this case.

This Court has rejected the argument that Hamblen is inconsistent with Klokoc and must be overturned. Farr v. State, 621 So. 2d 1368 (Fla. 1993); Durocher v. State, 604 So. 2d 810 (Fla. 1992).

B. The instant case --

It should first be pointed out that the state is not imposing the death penalty to assist Mr. Layman in suicide. The death penalty is being imposed because a judge and jury have

concurrently agreed that aggravating outweigh mitigating evidence and that death is the appropriate sanction for the execution-slaying of Sharon DePaula.[12]

Appellant argues, apparently to support his view that the state only wants to assist in Layman's suicide, that the prosecutor originally deferred to the wishes of the victim's family regarding a life sentence. After the guilty verdict the prosecutor informed the court that:

> " . . . two of the members of the victim's family are in law enforcement and have quite a bit of experience and knowledge of cases in the Florida Supreme Court and death penalty-type situations. And they've expressed to us that rather than risk the Florida Supreme Court finding the aggravating factors were not sufficient, they would prefer to be safer and to therefor forego the death penalty in this case for a guaranteed life sentence with the minimum mandatory."

(Tr 919 - 920)

While the prosecutor acknowledged there was but one aggravating factor and there was a chance this Court could remand (Tr 920), ultimately the prosecutor represented that he was pursuing the death penalty in good faith citing Porter v. State, 564 So. 2d 1060 (Fla. 1990) (Tr 923)[13] The prosecutor then

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[12] Whether Mr. Layman agrees with the state that death is appropriate is irrelevant to the state. If there is less suffering involved by Layman's concurrence with the sentence imposed that may be an *additional perk* but is *not* dispositive.

[13] It would be understandable for law enforcement relatives of victims to be concerned about the direction of the Court's decisions. See Street v. State, ___ So. 2d ___, 19 Fla. Law

opined that there was a strong likelihood this case would be upheld "but the makeup of the Court has somewhat changed and we don't know." (Tr 933)

Appellant in his testimony before the jury informed them that he had a past history of violence with the victim Sharon DePaula "that it was a cold and calculated killing and that there was premeditation" (Tr 960). He acknowledged further "The record shows I stalked her. I hunted her down. I confronted her. And I made her suffer when she died." (Tr 962)

Appellant's footnote references to Pridgen v. State, 531 So. 2d 951 (Fla. 1988) and Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990) are inapposite. In Pridgen the record reflected reasonable grounds to believe the defendant was not mentally competent to continue to stand trial during the penalty phase and the lower court erred in declining to stay the proceedings for him to be examined. In Nowitzke the trial court also erred in failing to conduct a competency hearing. In contrast, Layman was examined by Dr. Merin on December 21, 1992 who found appellant competent and manipulative. Dr. Merin noted Layman's anger with the state for allegedly "fabricating evidence" and convicting him of first degree murder. His primary motive to punish the state and create

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Weekly S 159 (Fla. 1994); Burns v. State, 609 So. 2d 600 (Fla. 1992); Rivera v. State, 545 So. 2d 864 (Fla. 1989); Brown v. State, 526 So. 2d 903 (Fla. 1988) (defenseless police officer shot and HAC ruled inapplicable); cf. Huff v. State, 495 So. 2d 145 (Fla. 1986) (HAC found where non-policeman victim shot in the head when aware he was about to be murdered).

a guilt in the prosecutors predominated over the "secondary but less insistent motive" to be reincarnated with the victim (R 1091). His attention-getting behavior merits no further relief.[14]

[14] Unlike Mr. Klokoc and Mr. Pettit, appellant, as of this writing had not sent any motions to this Court requesting dismissal of his appeal.

ISSUE VIII

WHETHER THE LOWER COURT ERRED IN ALLEGEDLY FAILING TO RENEW THE OFFER OF COUNSEL AT SENTENCING.

At the penalty phase on December 23, 1992, the court conducted an inquiry with Mr. Layman who stated that he desired the death penalty, that it was fine with him for counsel to step aside, that Layman did not want mitigating circumstances put on; he did not want counsel to represent him. Layman was thirty-seven years old, can read and write and was told he had a high I.Q. (121). He felt he could represent himself (Tr 934 - 937). Layman understood the jury made a recommendation as to penalty and that the judge imposed sentence (Tr 939 - 940). He stated he wanted no mitigating circumstances presented (Tr 945). After Layman testified (Tr 959 - 963) and after the jury returned with its recommendation (Tr 970), the court asked if anybody had anything to say why sentence should not be imposed. The defendant answered, "No, but I request to be executed" (Tr 971). The court added:

> "Mr. Horn, anything you wish to say on his behalf?
>
> Mr. Horn: Well, Your Honor, I think under the case law, specifically Hamlin, there are a number of factors the Court's relegated to a determination on the record. I know we're precluded from statutory mitigating circumstances, but I would just ask the Court to comply with Hamlin and take the role that Hamlin advises the Court."
>
> (Tr 971 - 972)

After a short colloquy with the defendant regarding taking the victim's life, the court opined that it justified the death penalty. (Tr 972 - 973)

Appellant argues that the court erred in failing to renew the offer of counsel following the jury's death recommendation. The court did not err since the sentencing was a continuation of the penalty proceeding before the jury. Since there was no subsequent stage there was no reason for the court to repeat the earlier colloquy. Moreover, when the court inquired whether there was any reason not to impose sentence, the defendant simply reiterated his belief in the appropriateness of the death penalty and attorney Horn was permitted to comment that the court should follow the procedures in Hamblen, supra. Since there is no indication that appellant's desires had changed or would change, a remand now is completely unnecessary.[15]

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[15] Appellant cites Spencer v. State, 615 So. 2d 688 (Fla. 1993) a decision announced three months after the lower court's imposition of a sentence of death. Obviously, Spencer is a case for prospective application. Furthermore, the instant case does not involve a situation as in Spencer wherein the prosecutor and judge drafted a sentencing order without notice to the defense. Here, the trial court informed the prosecutor to furnish both the defendant and defense counsel with any proposed draft of an order (Tr 976). In fact, the trial judge drafted his own order, without participation by counsel.

ISSUE IX

WHETHER THE LOWER COURT ERRED IN FINDING THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR.

The trial court's sentencing order recites:

> "4. The crime for which the Defendant, Gregory Scott Layman, is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification as follows:
>
> (a) The Defendant spent many days in thinking about and planning the victims murder.
>
> (b) The Defendant on one occasion had battered the victim for which he spent time in jail. During his incarceration the Defendant formulated a plan to kill the victim. Following his release from jail he indicated to a friend he was going to kill the victim.
>
> (c) As a part of his plan to murder the victim, he obtained a shotgun which he altered in order to make it a more deadly weapon using ammunition designed to kill large animals. He tested the weapon in order to make sure it was operable to murder the victim. Prior to the commission of the murder he searched for and located the victim in Pinellas County. He made several trips from Marion County to St. Petersburg during which time he followed the victim from her place of employment to her home in order to learn her daily routine. On the night of her death he hid for several hours behind the shrubbery adjacent to the victim's house. Upon her arrival to her home he came from behind the bushes and fired the shotgun twice causing great bodily injury to the victim which resulted in her death. Following the shooting the victim, the Defendant exalted in the victim's death even considering firing a third shot into her back.
>
> (d) Not only did the Defendant fail to show any remorse for the victim's murder, he

> seemed delighted he had murdered her. The murder was without any pretense of moral or legal justification.
>
> (e) The Defendant testified before the jury during the penalty phase that he desired the death penalty. Prior to the Defendant taking the stand and testifying it was determined by Dr. Sid Merin, Psychologist, that the Defendant, Gregory Scott Layman, was competent to make the decision to testify. Because the Defendant was acting against the advise of his attorney, Charles Horn, the Defendant's attorney requested the Court to allow him to withdraw from the representation of the Defendant, Gregory Scott Layman and the Court granted the request."

(R 1065 - 66)

Appellant argues that his stalking and heightened premeditated murder of Sharon DePaula cannot qualify for a "CCP" finding because it was not sufficiently "cold", citing Douglas v. State, 575 So. 2d 165 (Fla. 1991); Santos v. State, 591 So. 2d 160, 162 - 63 (Fla. 1991); Richardson v. State, 604 So. 2d 1107 (Fla. 1992); Maulden v. State, 617 So. 2d 298 (Fla. 1993) and Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993).

Douglas involved an emotional triangle between defendant, the victim and victim's wife, the latter of whom Douglas befriended shortly before the murder and a jury life recommendation.

In Santos, the Court noted that:

> "We acknowledge that the evidence shows that Santos acquired a gun in advance and had made death threats -- facts that sometimes may support the state's argument for cold, calculated premeditation.

(text at 162)

Citing Douglas, the court reasoned that that murder "was not 'cold' even though it may have appeared to be calculated. There was no deliberate reflection, see Rogers, only mad acts prompted by wild emotion." 591 So. 2d at 163 (emphasis supplied).

Santos was similar to Douglas and had unrebutted expert testimony that the domestic dispute severely deranged him. Santos was found by the unrebutted testimony of experts to be under extreme emotional distress at the time of the murders, had an impaired capacity to conform his conduct to the requirements of law and an impaired capacity to appreciate the criminality of his conduct.

Unlike Douglas the instant case does not involve a love triangle (or a jury override) and did involve a plan performed through cool and calm reflection; unlike Santos the instant case contained no expert testimony opining about a deranged state or finding the presence of statutory mental mitigators. The evidence reflects a well-conceived plan to obtain an easily-concealed weapon, over a period of time that exceeded weeks not hours, lying in wait in the bushes outside her home and a calm execution and professed satisfaction that "the bitch" was dead.

While Richardson, supra, also involved the killing of a girlfriend over a dispute -- unlike the case sub judice -- "the element of coldness, i.e., calm and cool reflection, is not present here." 604 So. 2d at 1109. Maulden as in the earlier cases involved murders "that were not the product of a deliberate plan formed through calm and cool reflection," only "mad acts

prompted by wild emotion." 617 So. 2d at 303. In Cannady, supra, the Court found "no evidence in this record that Cannady had been contemplating the murder of Georgia Cannady. There was no evidence of any threats against her and no showing of any prior intent to kill her." 620 So. 2d at 170. Similarly with respect to the other victim Boisvert "there was no deliberate plan formed through calm and cool reflection only mad acts prompted by wild emotion." Cannady was also an alcoholic suffering from brain atrophy.

To the extent that appellant is urging a per se rule that anytime a girlfriend is killed by a boyfriend (or vice versa) that CCP cannot be applicable no matter how extensive the planning and "heightened" premeditation and no matter the absence of any mental or emotional impairment the Court should reject the invitation to declare a per se rule. Each case must be decided on its own merits and where as here the CCP factor is established the trial court's finding should not be disturbed. See Phillips v. State, 476 So. 2d 194 (Fla. 1985).[16]

See Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990) (This is not a case involving a sudden fit of rage. Porter previously had threatened to kill Williams and her daughter. He watched

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[16] Appellant mentions the report of psychologist Dr. Merin (R 1090 - 95). Dr. Merin noted appellant's desire to "punish the state" and "create a sense of guilt in the prosecutors" (R 1091). Dr. Merin opined that Layman was not psychotic but sane, competent and manipulative (R 1094).

Williams' house for two days just before the murders. Apparently he stole a gun from a friend just to kill Williams. Then he told another friend that she would be reading about him in the newspaper. While Porter's motivation may have been grounded in passion, it is clear that he contemplated the murder well in advance).

ISSUE X

WHETHER THE LOWER COURT ERRED IN CONSIDERING LACK OF REMORSE.

The trial court's order in support of the death sentence recites in pertinent part:

> "4. The crime for which the Defendant, Gregory Scott Layman, is to be sentenced was committed in a cold calculated and premeditated manner without any pretense of moral or legal justification as follows:
>
> * * *
>
> (d) Not only did the Defendant fail to show any remorse for the victim's murder, he seemed delighted he had murdered her. The murder was without any pretense of moral or legal justification."

(R 1065 - 1066)

The sentencing order also reflects consideration as a possible mitigating factor that appellant loved the victim to an extent that he did not act rational and the possible mitigating factor of his belief in reincarnation to join the victim in future life. (R 1067)

Appellant complains that the trial court improperly utilized lack of remorse as an aggravating factor. Appellee disagrees. The problem is that the "CCP" aggravator contains within its own terms an inherent mitigator exception to wit: pretense of moral or legal justification. The trial court was merely rebutting that aspect of the factor to explain why the "CCP" finding was appropriate . Had the trial court not made any reference to it, appellate counsel would probably be urging error in the court's

failure to credit Layman's testimony and to equate the proposed desire to join Sharon DePaula in the next life with remorse.[17]

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[17] Appellant cites Trawick v. State, 473 So. 2d 1235, 1240 (Fla. 1985), but the Court noted in that case that there the trial court had not used lack of remorse as "evidence of some valid aggravating circumstance." And in Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983), the Court was critical of the mistake present there, "of inferring lack of remorse from the excercise of constitutional rights." Here, in contrast, lack of remorse was not used as a separate aggravating factor but to explain the inapplicability of the mitigating prong of pretense or moral or legal justification. And lack of remorse was not inferred but supported by the evidence.

ISSUE XI

WHETHER THE SENTENCE OF DEATH IS DISPROPORTIONATE.

If appellant is complaining that the sentence of death is disproportionate because only a single aggravator was found, this Court has approved death sentences with a single aggravator. Duncan v. State, 619 So. 2d 279 (Fla. 1993); Arango v. State, 411 So. 2d 172 (Fla. 1982); Armstrong v. State, 399 So. 2d 953 (Fla. 1991); Leduc v. State, 365 So. 2d 149 (Fla. 1978); Douglas v. State, 328 So. 2d 18 (Fla. 1976); Gardner v. State, 313 So. 2d 675 (Fla. 1975); Cardona v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 301 (Fla. 1994).

If appellant is complaining that the death penalty is disproportionate because Layman has expressed a desire to be executed, this Court has affirmed a number of decisions involving similar sentiments by the defendant. See Hamblen v. State, 527 So. 2d 800 (Fla. 1988); Pettit v. State, 591 So. 2d 618 (Fla. 1992); Durocher v. State, 604 So. 2d 810 (Fla. 1992); Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993).

If appellant is complaining that death is disproportionate for someone who plans and premeditates a murder over a lengthy period of time, he is mistaken. Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990) (defendant watched victim's house for two days before murder . . . contemplated murder well in advance); Turner v. State, 530 So. 2d 45 (Fla. 1987).

Appellant argues that he has no prior violent felony convictions (he apparently had four felonies involving a prison escape, two auto thefts and a burglary -- Tr 949) and that therefore the presence of only the "CCP" factor does not warrant death. This Court has consistently held that the "CCP" aggravating factor is more serious than most of the others enumerated in the statute. Maxwell v. State, 603 So. 2d 490, 493 (Fla. 1992) (By comparison the present case involves only two aggravating factors. These do not include the more serious factors of heinous, atrocious or cruel or cold, calculated premeditation) In footnote 4 of the Maxwell decision this Court decreed:

> "By any standards the factors of heinous, atrocious or cruel, and cold, calculated premeditation are of the most serious order."

Appellee will not gainsay this considered view of six members of the court.

It is true as appellant notes that there have been a number of cases in which the death penalty has been deemed disproportionate but in those cases there has usually been uncontroverted and substantial evidence of mental or emotional trauma not present in the instant case. Songer v. State, 544 So. 2d 1010 (Fla. 1989) (one weak aggravator [none if Chief Justice Ehrlich's concurring view were correct] and ten mitigating factors); DeAngelo v. State, 616 So. 2d 440 (Fla. 1993) (bilateral brain damage, hallucinations, psychotic disorders and mental illness); Klokoc v. State, 589 So. 2d 219 (Fla. 1919)

(bipolar affective disorder, manic type with paranoid features and family history of suicide and alcoholism); White v. State, 616 So. 2d 21 (Fla. 1993) (trial judge erred in finding CCP, crime committed while high on cocaine, extensive mental mitigation supported by expert testimony and found by the sentencing judge); Irizarry v. State, 496 So. 2d 822 (Fla. 1986) (override of jury life recommendation supported by testimony of psychologist of extreme emotional disturbance and impairment of capacity to appreciate the criminality of his conduct); Santos v. State, 591 So. 2d 160 (Fla. 1991) (proportionality not reached, trial court erred in rejecting without explanation unrebutted testimony of defense psychological experts). These cases cannot be equated with the instant case where there is no testimony by a mental health expert describing the existence of substantial mental health statutory and nonstatutory mitigation. Layman alludes to the December 21, 1992 report of psychologist Dr. Merin (R 1090 - 95) who describes appellant as "sane, competent and manipulative" who wishes to "express his sense of righteousness indignation, reveal his bravado and point out to the world he would be willing to die for a cause." (R 1094). It was not "psychotic thinking". (R 1094) That appellant now hopes to create guilt in the prosecutors hardly places Layman in the category of those cases cited above demonstrating serious mental problems. And it would be bizarre for the Court to conclude that the instant case is comparable to decided cases containing extensive psychological testimony when there is not supporting

testimony for the claim. If allowed, any defendant could avoid a death sentence simply by urging its imposition as to him.

The instant case rather than being a wild frenzied act directed at his victim was the result of a cunning, lengthy, prearranged plan. See Turner v. State, 530 So. 2d 45 (Fla. 1987); Porter v. State, 564 So. 2d 1060 (Fla. 1990).

Appellant's claim that the death sentence is disproportionate must be rejected.[18]

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[18] Appellant relies on the dissenting opinion of (former) Justice Barkett in Porter v. State, 564 So. 2d 1060, 1065 (Fla. 1990). Appellee agrees with the view expressed therein that "I do not suggest that there is an unrequited love exception to the death penalty." In any event there was more to justify a life imprisonment conclusion in Porter than in the instant case; Porter had been drinking heavily to the point of drunkenness in the late night hours prior to the murder and shortly after the murder he purchased more liquor and beer. 546 So. 2d at 1065. Appellant Layman, unlike Porter, cannot attempt to diminish his culpability in the cloak of "alcohol clouded my judgment" especially since his planned execution covered a prolonged time period.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 24TH day of June, 1994.

OF COUNSEL FOR APPELLEE.