IN THE SUPREME COURT OF FLORIDA

GREGORY SCOTT LAYMAN, :

Appellant, :

vs. : Case No. 81,173

STATE OF FLORIDA, :

Appellee. :

:

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Appellant, GREGORY SCOTT LAYMAN, was the defendant in the trial court and will be referred to in this brief as appellant or by name. Appellee, the State of Florida, was the prosecution and will be referred to as the state. Record references are as follows: "R" for the record on appeal; "T" for the transcripts of the trial and penalty proceedings; and "SR" for the supplemental record. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

A. Trial

Gregory Layman was charged by indictment returned August 21, 1991 with first degree murder in the death of his estranged girlfriend Sharon DePaula (R11). The case proceeded to trial on December 15-18, 1992 before Circuit Judge Robert Beach and a jury, and appellant was found guilty as charged (R1063,T917).

B. Penalty Phase and Sentencing

Immediately after the jury's verdict was returned, the state announced that, after consultation with members of the victim's family, it would forego seeking the death penalty and would accept a sentence of life imprisonment with the twenty-five year minimum mandatory (T919-20). When the judge asked what was the state's position, the prosecutor said:

> The State will abide by the wishes of the family, also realizing that with one aggravating factor that we would be arguing to the jury and the recent trend of the -- not so

> recent trend of the Florida Supreme Court, that there is a great chance that this would be sent back should the jury recommend death and this Court impose that. Therefore, the family would prefer that we go with the life sentence.

(T90)

However, appellant did not concur. Against the advice of his attorney, he told Judge Beach that he wanted the death penalty hearing to proceed:

> MR. LAYMAN [appellant]: That's what they all want. That's -- you Honor, I was at the scene that night. They know about it, Charlie --
>
> MR. HORN [defense counsel]: Go ahead.
>
> MR. LAYMAN: They know exactly, especially this man right here. What difference is it going [to] make? I shot Sharon DePaula. I did not -- I did not sit in that bush contemplating that she would die. I did not do that. I confronted her with a gun. I felt that she would probably have a gun with her because I had heard that she had a gun permit.
>
> The way that it happened is I ended up shooting her and I feel that a life should be taken for a life. As the pastor said, he who sheds blood should have his own blood shed.[1] I've stated that from the minute that I was picked up from the police and that's what I want and I still want it. They know why. They don't want me to have the death penalty. That's all I have to say.

(T923-24)

Judge Beach ordered a competency evaluation, and suggested to both counsel that they look into "whether he has an absolute right

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[1] This appears to be a reference to comments made during voir dire by a minister who became foreperson of the jury (T338-39, R1063).

to a penalty phase even though the State's not seeking it" (T921, 924).

Appellant was examined by Dr. Sidney Merin on December 21, 1992 (R1070,1090-95). Dr. Merin concluded that appellant was competent and not psychotic, but that he suffers from a mixed personality disorder with paranoid, schizotypal, and antisocial characteristics (R1070,1093). "His motive [for insisting on a death sentence, R1090] is to put blood on the hands of the state attorney who prosecuted him claiming prosecutorial misconduct. He is going to make them guilty themselves and not him. Also, an additional motive, which is more fantasy than psychosis since he loved Sharon so much, is that he wants to be with her again and proposes to die one way or another by state attorney or by his own hand on February 14, 1997" (R1070).[2]

The proceedings resumed on December 23, 1992, with the state once again seeking the death penalty. The prosecutor stated that he was going forward in good faith, in reliance on the Supreme Court's proportionality decision in Porter v. State, 564 So. 2d 1060 (Fla. 1990), and added:

> . . . [W]e acquiesced to the victim's family. We have proceeded as this being a death penalty case from the beginning. We are ready to go forward with the penalty phase. The Defendant Friday rejected the offer from the victims, if you will, through the State, so we're ready to proceed. We'll give him his penalty phase.

(T932-34)

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[2] Dr. Merin's findings are set forth in more detail in the Statement of Facts, Part B.

Defense counsel put on the record that he had advised appellant of the state's offer. Appellant had rejected it, said that he wanted to present evidence of aggravating circumstances, and instructed counsel not to present any evidence of mitigating circumstances (T929-30). Counsel stated that he faced the dilemma of "assisting my client in a proceeding that is contrary to his best interest," and asked the court to inquire of appellant regarding his decision (T930). The court conducted an inquiry, and appellant reaffirmed that he wanted the death penalty (T934-40). The court concluded that he was competent to make that decision and to represent himself (T940). The court relieved defense counsel of his representation of appellant, but instructed him to remain as standby counsel (T940-41,955,957).

The state put on no additional evidence, but relied on the evidence introduced in the guilt phase to support the "cold, calculated, and premeditated" aggravating factor (T928,958-59).[3] Appellant took the stand and asked the jury to recommend death (T960-63).[4] Both the prosecutor and appellant waived closing argument

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[3] CCP was the only aggravating factor on which the jury was instructed (T965). Over appellant's objection (T944-46,951-52), the court instructed the jury on five statutory mitigating factors and gave the "catch-all" instruction on nonstatutory mitigating factors (T966). However, no evidence of any mitigating factors was presented. The court instructed the jury (over objection by appellant through standby counsel) that appellant's expressed desire for the death penalty was not to be taken as a release of its responsibility to make a fully considered recommendation based on all the evidence in the case (T946-48,965).

[4] Appellant's statement to the jury is set forth in the Statement of the Facts, Part C.

(T963-64). The jury recommended the death penalty by a vote of 10 - 2 (T970, R1072).

Immediately after receiving the jury's recommendation, the trial judge proceeded to sentencing (T971). Appellant repeated his request to be executed (T971). Standby counsel told the court:

> . . . I think under the case law, specifically [Hamblen v. State, 527 So. 2d 800 (Fla. 1988)], there are a number of factors the Court's relegated [sic] to a determination on the record. I know we're precluded for statutory mitigating circumstances, but I would just ask the Court to comply with Hamblen and take the role that Hamblen advises the Court.

(T971-72).

Judge Beach then engaged in the following dialogue with appellant:

> THE COURT: All right. Before I impose sentence, I have a question to ask. It's really bothered me and I just wonder by what authority do you have playing God with this woman's life like that?
>
> MR. LAYMAN: I didn't play God. It didn't happen like that.
>
> THE COURT: You took her life.
>
> MR. LAYMAN: I took her life and I'm giving up my life for her.
>
> THE COURT: She had no choice in the matter.
>
> MR. LAYMAN: I know. I know. You people can all hate me, but you don't hate me as much as I hate myself. I took her life. I have to live with that until the day I die. I'm here giving up my life. I didn't play God with her, it just happened that day. I did not execute her. I did not execute her as she was lying on the ground. I did not execute her. I did not play God.

THE COURT: In my mind you did.

MR. LAYMAN: Well, that's in your mind. In my mind, I know, and in Sharon's mind, it's different. Sharon knows what happened that day and I know what happened.

THE COURT: I'm satisfied it's a coldly, calculated murder, planned some time ahead, for reasons I don't understand.

MR. LAYMAN: Murder is hard to understand.

THE COURT: You took a life. I'm sure she enjoyed life as much as any of us in this courtroom.

MR. LAYMAN: I'm sure she did.

THE COURT. And it was your decision to take that away from her, and I feel that in this case it does justify the death penalty.

MR. LAYMAN: Thank you. I'd like to be executed on a certain day.

THE COURT: Well, I have no authority to do that. So it's the sentence of this Court that you be transported immediately to the Florida State Prison, placed in death row to be held until such time as the Governor issues a death warrant for your death, at which time you will be placed in the electric chair with a sufficient amount of electricity coursed through your body to render you dead.

MR. LAYMAN: Thank you.

(T972-74).

In pronouncing the sentence of death, the trial court made no findings at all regarding mitigating circumstances. After discharging the jury, advising appellant of his right to appeal, and appointing the Public Defender for that purpose, the court asked if there was anything further. The prosecutor replied:

> Yes, your Honor. Is the Court going to reduce his reasons to writing as written reasons?
>
> THE COURT: You prepare the order. Let me see it with a copy to Mr. Layman and a copy to Mr. Horn [standby counsel].
>
> MR. MARTIN [prosecutor]: Judge, it's -- my reading of the case law says that it has to be contemporaneous with sentencing and that it would be inappropriate for the State to draft it.
>
> 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.

(T975-76)

A written sentencing order was filed by Judge Beach later that afternoon (R1064-67). The judge found a single aggravating factor in support of the death sentence: that the homicide was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (R1065-66). Regarding mitigating circumstances, the order states only that although no evidence was presented by appellant:

> . . . 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 judgement 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.

(R1067)

STATEMENT OF THE FACTS

A. Trial

The following is a summary of the evidence introduced in the guilt phase of the trial:

On the night of July 24, 1991, police officers were dispatched to a residence at 7201 13th Street North in St. Petersburg, after neighbors reported hearing gunshots and screams (T381-82,397,412). The dead body of a female, later identified as Sharon DePaula, was lying on her left side in the grass near the driveway (T383-86,391, 398-99,507). A white penlight was in her left hand (T384-85). She was fully clothed, wearing a waitress uniform from the Olive Garden restaurant, where she was employed (T424). In the vicinity of the body were a purse, a pair of eyeglasses, a pin or badge, a waitress book from the Olive Garden, and a container of Mace (T389,423-27). A brown plastic garbage bag was lying between the shrubs (T419-20, 427-28). Ms. DePaula's blue Renault was parked in the driveway (T434-35).

Additional items, including a nozzle cap from a can of Mace, a spent shotgun shell, and some loose change, were found in the grass near the driveway by a crime scene technician who canvassed the scene on July 26, 1991 (T603-07,614-16).

The lead investigator was St. Petersburg homicide detective Jack Soule. He interviewed Sharon DePaula's estranged husband Frank. Frank had received a phone call from appellant, saying that he had shot Sharon and was going to "do" himself (T436,479,514-18). The St. Petersburg investigators telephoned appellant's residence

in Marion County (T436-37). They also called the Marion County Sheriff's Office, requesting that they bring him in for questioning, and also asking for a tape of a phone call they had received from appellant and his mother in the early morning of July 25 (T437,496-97,594-99).

Detective Soule, along with Detective Krause, traveled to Marion County on July 25 to interview appellant (T437-41). In accordance with his usual practice, Soule chose not to tape record the interview (T442-43,519-27,531-32).

After being advised of his rights (T443-48), appellant told Detective Soule that his relationship with Sharon began in 1990 and ended in April, 1991 (T456-57). On May 4, 1991 appellant was arrested for battery of Sharon and vandalism of a vehicle belonging to Kelly Ingram (T457,463).[5] While he was in jail, he was thinking of ways he could kill Sharon (T463,469). He was angry at her and felt she had taken advantage of him by taking some of his personal belongings (T469). He was released from jail on June 27 (T463).[6]

In early July, appellant obtained a 16 gauge shotgun from his father's closet (T464). He cut off a portion of the barrel and the stock, and test fired it (T464-65,492;R1029). He found out where Sharon lived through an attorney's file, and he had heard that she

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[5] This portion of Soule's testimony regarding his interview with appellant was introduced over defense Williams Rule objection (T457-62).

[6] The state later introduced Marion County jail records, over renewed defense objection, showing that appellant was arrested on 5/4/91, charged with battery and criminal mischief, and was released with adjudication withheld on 6/27/91 (T588-93;R1034-35).

was working at the Olive Garden (T469-70). He made several trips to St. Petersburg, and on one occasion went by Sharon's house with the shotgun in his possession (T470-73). On the day of the shooting, July 24, appellant left his house at 9:00 a.m. and drove to St. Petersburg (T474). He drove by Sharon's house to see if a truck he thought she might be driving was there. It wasn't (R474). He then went to a Waffle House across from the Olive Garden, where he sat and watched the restaurant. He went to a nearby bowling alley, had a couple of beers, and slept in his car for about an hour (T474). Sometime during the day, he telephoned the Olive Garden (identifying himself as Eric from Ocala) to find out what time Sharon would be working that day (R470-71,474, see T660-64, R1033). He was told that she was to report at 6:00 p.m. (T474).

Appellant then sat in the Hickory Smoke House Restaurant, which was also across the street from the Olive Garden. Watching with binoculars, he saw Sharon arrive at about 5:50 p.m. (T474). Appellant went to another bowling alley and a mall, and rode around by the dog track. At the bowling alley he oiled the shotgun, which he then concealed in a brown plastic bag (T474-75). The gun was loaded with five rounds; the first two were slugs and the last three were birdshot (T476). At around 9:30 p.m., he arrived at Sharon's house, and parked his car on the next block over (T475). He got into the bushes. He could see people inside the house, including Sharon's sister who was talking on the phone. He contemplated cutting the phone lines, but did not do so (T475).

When Sharon pulled into the driveway, appellant approached the front of her car. Sharon got out, and he grabbed her by the hair and pulled her toward the back of the car. She sprayed him in the face with something he thought was Mace, but it had no effect on him (T476). He shot her, and as she was going down he shot her again (T476). Sharon said something to the effect of "Why are you doing this to me?" (T476) As appellant ran back to his car it crossed his mind to go back and shoot her one more time, but instead he got in his car and left. (T477)

Detective Soule testified that appellant told him that on the way back to Marion County he threw the shotgun over the Howard Frankland Bridge (T478-79, see T577). He stopped near New Port Richey and telephoned Frank DePaula, telling him he had shot Sharon and was going to do himself (T479,517-18).

According to Detective Soule, appellant made statements to him, "I'm glad the bitch is dead" and "I bent her frame" (T480-81). During the interview appellant also said that he wanted the death penalty (T529-30).

When Soule asked appellant where the stock and barrel of the shotgun were, he said they were still on or near his property. He took the officers to the location, where the stock and barrel were recovered (T481-84). He consented to a search of his white Chrysler. A pair of binoculars and a pair of wire cutters were found in the car (T483,485,490). He was asked if he would be willing to take a chemical test to determine if he had recently fired a shotgun. Appellant said he would be glad to, but informed them that he

had washed his hands with bleach when he returned home from St. Petersburg (T482). [A gunshot residue test was done anyway, but it yielded no results (T482,505)]. The investigators asked if they could have the clothing he had worn. He said that they could, but that the clothing has been washed (T481).

The investigators continued to question appellant about the location of the shotgun itself, because they did not believe he had thrown it off the bridge. He took them to a vacant lot about a quarter of a mile from his residence and showed them where it was buried (T485-86,489-92).

Marion County sheriff's deputy Allen Brooks testified that he picked up appellant at his mother's house at about 5:30 a.m. on July 25, to transport him to the Sheriff's Office (T553-55). Appellant was standing outside with his mother. He was holding a bag containing some underwear, toiletries and books (T554). He was unkempt and appeared tired (T557,560). In Brooks' vehicle, appellant said "I guess they'll give me the big lightning bolt for this one" and "I wonder if they'd make me a cook in prison" (T556,566). These remarks were unsolicited, and Brooks did not respond to them (T555-56). Appellant also said that he'd been having trouble eating and sleeping, and had not slept in about three months (T566).

Investigator Leo Smith of the Marion County Sheriff's Office testified that appellant made several comments to him or in his presence, either at his residence (after his interview with Detective Soule) or during transport (T576-78). According to Smith, appellant said "I don't even feel bad for killing Sharon" and "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" (T577). Appellant may have asked Smith if he was going to get the electric chair (T583-85). Smith described appellant's attitude as unbelievably cooperative; he was friendly and talkative and he provided as much information as he possibly could (T586-87).

Nancy Ritchie was a friend of Sharon DePaula's; they had worked together as waitresses at Carmichael's Restaurant in Ocala in 1990 and 1991 (T533-35,547-48,551). Sharon had been involved in a relationship with appellant for about eight months, and they were sharing an apartment (T534,547). In March, 1991, Nancy moved in with them and contributed to the rent (T535-36). According to her, Sharon was unhappy and her relationship with appellant was not very good. There were arguments, which were loud on appellant's side. He was very possessive, and accused Sharon of cheating on him (T536-37, 551). Sharon decided to move out. On April 27, 1991 several of their friends came over to help Sharon and Nancy move (T537-38). They had a U-Haul, two cars, and a van; and were planning to put all their things in storage and stay in a motel (T538). After one load of belongings had been moved, and as they were returning to the apartment complex, they saw appellant's car (T539-42). [Defense counsel again objected to the collateral crime evidence, arguing that the prejudice outweighed its probative value, and unsuccessfully requested a limiting instruction (T539-42)]. Appellant, who was standing outside, got into his car and started coming towards them. Sharon got out of the car she was in

and started to go over to talk to appellant. Her friends, who were in the van, did not think that was a very good idea, so they pulled her into the van (T543). As they tried to take off, appellant grabbed Sharon through the window by her hair, knocking her glasses off (T543). While the van was moving, Nancy pounded on appellant's arm and grabbed him by the hair, eventually breaking his hold on Sharon (T543).

They drove to the Jiffy King store and called the Sheriff's Department (T543-44). While they were waiting there, appellant drove up, opened the door, screamed "Tell Sharon I want my stuff", and left (T546). Sharon was hiding in the bathroom (T546).

When they returned to the apartment complex with the Sheriff's department, they found that Kelly Ingram's car had two tires slashed, and Sharon's car had its tires and seats slashed, the wires cut up, and sand inside the engine and the interior (T544).

Katherine McKinney, a clerk for the Probation and Parole Office, used to work with appellant at a Waffle House restaurant five or six years earlier (T669-70,673-74). She considered him a nice, happy-go-lucky person (T675-77). During that period of time, he was in a motorcycle accident (T677).

In early July of 1991, appellant came into the probation office for intake, and he and Ms. McKinney had a conversation. He told her that the reason he had been placed on probation "was something about a girl and his car", and that when he found her, he was going to kill her (T671-72). He said this in a conversational tone of voice, and Ms. McKinney did not take him seriously (T672,675-

77). For that reason, she did not report it to her superiors until she was questioned after Sharon DePaula's death (T677-78).

John Hunt was dating Sharon DePaula at the time of her death. The previous night, as he was driving her back to her residence, they encountered another vehicle (R651-52). Over defense objection (T652-56), Hunt testified that it was a white, late model car. When Sharon saw it, she was in fear; she said "Oh my God" and she started crying (T655-56).

Associate Medical Examiner Edward Corcoran performed an autopsy on Sharon DePaula on July 26, 1991. The cause of her death was two gunshot wounds, each of which independently would have been fatal (T703-05,720-21). The shot which entered her left upper arm and went into her chest probably occurred first. The shot which entered at the base of the neck and severed the aorta probably occurred second (T704-07,721). The victim would have been conscious for only a few seconds after the second shot, and death would have occurred within a few minutes at the maximum (T721). In Dr. Corcoran's opinion, the shooter would have been in front of the victim and slightly off to the left when the first shot was fired. The second shot was fired at a downward angle. Dr. Corcoran could not tell the exact positions; only that the shooter would have been relatively above the victim (T706-07). One bullet exited her body on the right side of the chest, while the other bullet did not exit and was recovered at the autopsy (T704,708-09). Six pieces of wadding were found in the left chest cavity (T709).

Over defense objection (T711-20), Dr. Corcoran expressed the opinion that the distance from which the shots were fired was slightly beyond contact range and out to approximately six to eight inches (T720). On voir dire examination by defense counsel, Dr. Corcoran acknowledged that he did not test fire the shotgun, nor has he ever performed that type of testing (T717-19,732). He stated that it is sometimes, but not always, necessary to test fire the actual gun, with the same or similar ammunition, in order to reach an expert conclusion as to firing distance (T717). According to Dr. Corcoran, a medical examiner can form some judgment as to firing distance based on abrasions, tattooing, soot, or other residue on the victim's body or clothing, and that was the basis of his opinion in this case (T710-20,732).

FDLE firearms examiner Joseph Hall tested certain items of evidence. He concluded that the spent shotgun shell recovered at the crime scene was fired from the 16-gauge bolt action sawed-off shotgun recovered in Marion County (T634-35). The slug and wadding taken from the body of Sharon DePaula at the autopsy were consistent in weight and/or size with 16 gauge, but contained no individual details from which it could be determined whether or not they were fired from that specific weapon (T636).

According to Hall, it is impossible to give a valid opinion on the distance from which a gunshot was fired without test firing the weapon with the same or similar ammunition (T640,643-45,648-50). Hall was not asked to do that in this case (T644-45,649,692-94).

The sole defense witness was Robert Kopec, an independent consultant specializing in microanalysis, serology, and crime scene analysis (T810-13). Before becoming self-employed, Kopec had over twenty years experience with various law enforcement agencies (T811-12). His field of expertise includes the determination of gunshot residue and muzzle-to-object distance (T813,818). The trial judge declared Kopec an expert witness (T814). However, after an objection by the state and a proffer (T749-807), the judge [relying on Huff v. State, 495 So. 2d 145 (Fla. 1986)] excluded those portions of Kopec's testimony concerning a number of tests and procedures which in his opinion could or should have been performed in the investigation (T749-54.773-74,801,804-06). The judge allowed Kopec to testify before the jury that it is impossible for anyone to reach an objective scientific opinion as to the firing distance between a gun and the victim without test firing the actual weapon with the same ammunition, or at least the same type of ammunition (T776-77,801,806,821-22,827). Such testing is absolutely necessary; otherwise it is just a "rough guess" (T776-77, 822,827).

B. Penalty Phase - Dr. Merin's Psychological Evaluation

After the prosecutor told the judge that the state would accept a sentence of life imprisonment, appellant insisted on going forward with the death penalty proceedings (T919-24). The judge ordered a competency evaluation (T921,924). Appellant was examined by Dr. Sidney Merin, a clinical psychologist, who submitted a

report (R1070,1090-95;T931). In the penalty phase, the report was marked as an exhibit and made a part of the record (T931). The judge asked appellant (who was now representing himself) if he wanted Dr. Merin's evaluation to be provided to the jury. He initially said he did, but later changed his mind, and the jury did not see it (T943-44,963).

In his interview with Dr. Merin, appellant referred to his crime as second degree murder instead of Murder I (R1090). "He strongly disputed, with expletives, the State's version, considering its presentation as being a lie" (R1090). He insisted that the state had fabricated and changed evidence (R1091).

> With the State, in his view, having presented false evidence, he thus finds no reason to continue living. He would reject living his life out in prison.
>
> Mr. Layman's primary motive for insisting on the death penalty is his intent to punish the State for conducting it's prosecution in an allegedly unjust and untruthful manner. Thus, he reasoned if the State's position is to be believed, then the death penalty appears as the only logical remedy. It would be his intent to insist on the death penalty which may then prompt the State into realizing its error. To insist upon the "extreme" penalty would be in keeping then with his perception of the State's "extreme" position in presenting its findings and coloring those findings in a manner which would guarantee a conviction of Murder I. He pointedly noted he had learned the family of the victim and the State were not in fact seeking the death penalty. Thus, for him to insist on the death penalty, would be consistent with the nature and intensity of the State's trial arguments despite the fact the State would not seek that penalty.
>
> To further support his argument, Mr. Layman reasoned further the State had not sought the

> death penalty, "because they don't want my blood on their hands." He would therefore, hopefully, create a sense of guilt in the prosecutors, thus punishing them for their allegedly false evidence. He would punish the State by sacrificing himself. Indeed, he noted it would be worth it to him to die, in order to assure the State would be punished for it's inaccurate prosecution. Mr. Layman insisted, "they want my blood washed off their hands," by not moving for the death penalty. He noted, "I'll die for this," and thus, he would make his point, hoping to create guilt in the prosecutors as noted above.

(R1091)

Dr. Merin reported that as a "secondary, less insistent" motive appellant:

> went off into philosophizing that by dying, he would again be with Sharon, the victim. He verbalized a variety of thoughts and dreams which could be described as eccentric and unusual. He made frequent references to his belief in concepts of reincarnation wherein he and Sharon had lived earlier lives and will do so again. He considers, whether he receives the death penalty or not, he will die on February 14, 1997. He computed arithmetically and astrologically, certain statistics and coincidences of dates and events which tie him closely to Sharon. He views Sharon as being his "soul mate." He would now ask the court to have him executed on the above date. Should the State not execute him as he would request, he would then commit suicide on that date.
>
> The subject's thinking includes concepts of astrology, and rebirth all supporting his belief he and Sharon will again live together. His fantasies suggest he will be the female partner and Sharon the male.

(R1091-92)

Appellant told Dr. Merin that his concepts emerged from age 13. He perceives coincidences as having a special meaning for him.

He is aware that his beliefs "sound crazy, but it's not if you believe in reincarnation" (R1092). Appellant insisted to Merin that he is neither insane nor incompetent (R1092):

> He stated, "I just want to prove, before I die, that these people (the State prosecutors) perverted the system." In an expression of altruism, he would like for his actions to be instrumental in saving others from similarly alleged State prosecutorial misconduct. His bravado is designed to enhance his self concept and hopefully to reflect the full justification of his position.
>
> It was this examiner's observation Mr. Layman enjoyed the pulpit-like opportunity to assert his feelings and his beliefs. He expressed himself dramatically and insistently. Despite his contention he and Sharon are "soul mates," he spontaneously would fall into verbalizing many of the conflicts he had with her, while at the same time insisting he remains in love with her. He does not wish to identify that relationship as suggesting a love-hate phenomenon, although he allows that some "hate" on his part may be in fact directed toward her.

(R1092)

Appellant's description or perception of his crime (which, according to Dr. Merin, "suggested some selective recall of his motives and what had actually transpired") was that "his first shot at Sharon was defensive, while his second shot arose out of anger engendered by his thoughts of all of the negative things she allegedly had done to him." At the time of the first shot he was "blinded and infuriated by the mace in his eyes," although he claimed to have a clear memory of what had occurred (R1093). At the conclusion of the interview, appellant told Dr. Merin that he had just learned "of an alleged Supreme Court ruling whereby the

death penalty in a First Degree Murder conviction must be applied should the defendant insist upon it" (R1093).

Dr. Merin was of the opinion that appellant met the criteria for competency, and was not psychotic (R1093). He concluded, instead, that appellant suffers from a Mixed Personality Disorder with paranoid, schizotypal, and antisocial characteristics (R1093). Citing to the Diagnostic and Statistical Manual III-R, Dr. Merin wrote:

> 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.

(R1093-94)

Dr. Merin noted that the schizotypal features were not observed during his earlier evaluation of appellant in January, 1992. Appellant's only reference at that time "was associated with internal 'voices' which even then were not considered psychotic" (R1094).

In conclusion, Dr. Merin wrote:

> It is this examiner's opinion Mr. Layman's primary motive in insisting on the death penalty is to punish the State even at the expense of losing his own life. The latter prospect then becomes supported and sought out as an acceptable alternative since he, in some magical way, would be reincarnated with Sharon. In view of his insistence upon dying on February 14, 1997, this man could very easily make it a point to commit suicide at that time. Any prospective change in his insistence upon dying may be associated with his assurance he had been vindicated, the prosecutors found to be in error, and the State experiencing the discomfort of guilt in his belief it had wronged him.
>
> Mr. Layman is sane, competent and manipulative. He is determined to prove the State wrong, punish the State and ask for a sentence consistent with the State's trial arguments and the findings of the jury. By insisting upon the death penalty he can express his sense of righteousness indignation, reveal his bravado, and point out to the world he would be willing to die for a cause. Certainly it constitutes questionable judgement but not judgement determined by psychotic thinking. Only this "last hurrah" will give his life and his behavior purpose or meaning.

(R1094)

C. Penalty Phase -- Appellant's Statement to the Jury

The state introduced no additional evidence in the penalty phase (T958-59). Appellant, representing himself, announced that

he wanted to enter aggravating circumstances (T959). He then took the stand and made the following statement to the jury:

> At this time I wish that you would consider giving me the death penalty. I feel that the record will show that there is a past history of violence between me and Sharon. The record would also show, and you have shown, that I have been found guilty of this offense. Also that it was a cold and calculated killing and that there was premeditation that it was a heinous crime to the fact that one of the bullets almost tore her arm right off her body. And the second bullet would be shown by the record that I was supposed to have stood over her with the barrel six inches from her and shot her in the back of the neck. And I feel that I should die for that.
>
> And there are reasons that I want that, and those reasons are -- the reasons why I want to die are I do love Sharon. I've always loved Sharon, from the minute I saw Sharon, and I feel that if I die -- I have beliefs that there is reincarnation in this world and if there are reincarnations there are past lives. And I feel that me and Sharon have been together before and we will be again. And my feelings are that she is -- as wild as this sounds -- I believe at the moment she died she was reincarnated into another body and that today she is alive in another person. And if I die at a certain time that I wish to die, I have a chance to be back with Sharon. And I feel that from our past experiences that this has happened to us before and that I know that I drove Sharon away from me and she did not -- she did not want to leave until two days before. I don't care what she told Nancy Ritchie. From what she told me, she did not want to leave until I gave her -- insulted her more than you could ever insult a woman. And two days later she left me.
>
> And I also feel that supposedly -- the record shows that Sharon saw me the day before she died, that she took -- in fact, when she called the Probation and Parole, it took her three phone calls before she admitted she had seen me in her neighborhood. The first phone calls were due to the fact she wanted the restitution money I owed her for destroying her car. It took three phone calls before she

came forward and said that she had seen me in her neighborhood. And to me, that's telling me she didn't want me in trouble, she just wanted maybe to get the money and maybe get away.

She had the chance to get away while I was still locked up in jail. From what her husband told me, she was planning on leaving two weeks before I was released from jail, but for some reason she stayed in town. She knew that I knew where she was living. She knew that I had her phone number. She knew I had been in the area. I just don't understand why she stayed. She knew. She knew. And I feel that somehow she knew the destiny of this and I know the destiny of it. And for me, if you don't sentence me to death, I will die eventually on this certain day that I have the choice. And all I want to do is be back with Sharon. And I feel this is the way that we can be back together. I feel that we've been together before and we'll be together again.

And the record shows that it was prior history between us, prior violence. I battered her. The record shows I stalked her. I hunted her down. I confronted her. And I made her suffer when she died. And to me, that's all three aggravating circumstances to give me the death penalty. And that's what I wish you people would give me. I wanted that from the very beginning. I turned myself in. I could have -- if I would have kept my mouth shut I would not -- I gave all the evidence. I called the police. I turned myself in. It's not that -- it didn't happen the way they said it happened, but that's beside the point. You believed the evidence that was presented.

All I can say is that I don't want to go on living. I feel that's my choice to make and I wish you people would do that for me. That's it.

(T960-63).

SUMMARY OF THE ARGUMENT

Appellant's conviction of first degree murder should be reversed because of the trial court's repeated refusal to instruct the jury on the limited purpose for which it could consider the collateral crime evidence [Issue I, see Fla. Stat. § 90.404(2)(b)2; Rivers v. State, 425 So. 2d 101 (Fla. 1st DCA 1982)], and because of the erroneous admission of irrelevant and prejudicial hearsay evidence showing the victim's fear of appellant [Issue II, see e.g. Selver v. State, 568 So. 2d 1331, 1334 (Fla. 4th DCA 1990)].

Appellant's death sentence should be reduced to life imprisonment without possibility of parole for twenty-five years because of the numerous errors which pervaded the penalty and sentencing proceedings. These include the trial court's imposition of a death sentence without prior or contemporaneous written findings [Issue III, see Grossman v. State, 525 So. 2d 833, 841 (Fla. 1988); Christopher v. State, 583 So. 2d 642, 646-47 (Fla. 1991)]; the court's failure to consider and weigh mitigating evidence, specifically the information contained in Dr. Merin's psychological evaluation [Issue IV, see Farr v. State, 621 So. 2d 1368 (Fla. 1993)]; his failure to make clear findings as to mitigating circumstances [Issue V, see Mann v. State, 420 So. 2d 578, 581 (Fla. 1982)]; his acceptance of appellant's waiver of mitigating evidence without requiring counsel to state on the record what mitigating evidence was available to be presented [Issue VI, see Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993)]; and his failure to renew the offer of

counsel before the final sentencing proceeding [Issue VIII; see Traylor v. State, 596 So. 2d 957, 968 (Fla. 1992)].

Where no valid aggravating factors exist, the death penalty cannot lawfully be imposed. Banda v. State, 536 So. 2d 221, 225 (Fla. 1988). Here, the only aggravator which was argued by the state or found by the trial court was CCP ("cold, calculated, and premeditated"). However, because the homicide arose from a turbulent domestic relationship, and was the culmination of appellant's obsessive and delusional rage, it cannot be characterized as "cold" within the meaning of the aggravating factor. [See Douglas v. State, 575 So. 2d 165 (Fla. 1991); Santos v.State, 591 So. 2d 160, 162-63 (Fla. 1991); Maulden v. State, 617 So. 2d 298, 302-03 (Fla. 1993)]. The trial court found in mitigation that appellant was so deeply in love with the victim that it "clouded his judgment to such an extent that he did not act rational", and that he believed he would rejoin the victim in another life in the future. The "coldness" element of the CCP aggravator was not proved beyond a reasonable doubt. Douglas; Santos; Maulden. In the absence of any valid aggravators, appellant's sentence must be reduced to life imprisonment [Issue IX].

The trial court, in finding the CCP aggravator, improperly considered appellant's (supposed) failure to show remorse [Issue X, see e.g. Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983)].

Even if this Court were to conclude that CCP was properly found, the death sentence is still disproportionate. See Klokoc v. State, 589 So. 2d 219, 222 (Fla. 1991). Under Florida law, the

death penalty may be imposed only in the most aggravated and least mitigated cases of first degree murder. Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). This Court has rarely affirmed death sentences supported by only one valid aggravating factor, and then only when there was very little or nothing in mitigation. Songer v. State, 544 So. 2d 1010 (Fla. 1989); DeAngelo v. State, 616 So. 2d 440, 443-44 (Fla. 1993). The homicide in the instant case occurred as a result of appellant's obsessive love-hate relationship with the victim, who had been his live-in girlfriend and whom he considered his soul mate. Appellant had no prior or concurrent convictions of violent felonies. The trial court found two mitigating circumstances: (1) that appellant was so deeply in love with the victim that it clouded his judgment to such an extent that he acted irrationally, and (2) that he believed he would rejoin the victim in another life in the future. Dr. Merin's psychological evaluation contains additional information which the trial court should have weighed in mitigation. See Farr. According to Dr. Merin, Appellant has a mixed personality disorder, with paranoid, schizotypal, and antisocial features. This is a serious psychiatric condition which constitutes valid mitigation [see Eddings v. Oklahoma, 455 U.S. 104 (1982); Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993)], especially since there appears to be a nexus between appellant's obsessive and paranoid thought processes which culminated in this crime, and the traits described by Merin as characteristic of this disorder.

At the conclusion of the guilt phase of this trial, the state unilaterally agreed to a sentence of life imprisonment, with the concurrence of the victim's family. The prosecutor noted that, since she was arguing only the one aggravating factor, there was a "great chance" that a death sentence would not be upheld on appeal. When appellant insisted on going forward with the death penalty proceedings, the state decided to let him have his penalty phase. The state represented that it was proceeding in good faith, from a proportionality standpoint, in reliance on Porter v. State, 564 So. 2d 1060 (Fla. 1990). Undersigned counsel does not contend that the state proceeded in bad faith, but the cases are completely distinguishable for proportionality purposes, since in Porter (1) the defendant murdered two victims; (2) there were three valid aggravating circumstances; and (3) the trial court found no mitigating circumstances. Turner v. State, 530 So. 2d 45, 50-51 (Fla. 1987), relied on for proportionality comparison in Porter, also involved in a double murder, and four aggravating factors were found by the trial court and upheld on appeal.

In the instant case, there is at most only one aggravating factor, CCP, and -- assuming arguendo that it is upheld -- its weight should be diminished by the fact that the premeditation was fueled by passionate obsession. Cf. Santos; Douglas; Irizarry v. State, 496 So. 2d 822, 825 (Fla. 1986). While this Court's ability to conduct proportionality review is hampered by appellant's refusal to present mitigating evidence (contrast Klokoc, where the mitigating evidence which ultimately resulted in a proportionality

reversal was presented by independent counsel, notwithstanding Klokoc's refusal to cooperate), there is more than enough mitigation on this record for this Court to determine that the death sentence is disproportionate (Issue XI].

Finally, under the unusual circumstances of this case, execution of the death sentence would amount to state-assisted suicide, and would violate the standards of reliability required by the Eighth and Fourteenth Amendments [Issue VII]. This Court should recede from the majority position in Hamblen v. State, 527 So. 2d 800 (Fla. 1988), and establish a procedure, when a defendant requests a death sentence, for the appointment of independent counsel to present the evidence and argument in mitigation.

Moreover, even the majority in Hamblen made it clear that it will not administer death by default; and that this state's death penalty is not a vehicle for a suicidal defendant to achieve his end. Under the circumstances here -- where the state was unilaterally willing to forego the death penalty, and the proceedings continued only because of appellant's insistence; where his insistence on dying was based on delusional, mystical, and suicidal ideation; and where he has been diagnosed as suffering from a mixed personality disorder with paranoid and schizotypal (as well as antisocial) features -- appellant's "request for the death penalty and refusal to present mitigating evidence amounts to nothing more than a request for state-assisted suicide." Farr v. State, 621 So. 2d at 1371 (Barkett, J., specially concurring).

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN TWICE DENYING APPELLANT'S REQUESTS TO GIVE THE JURY A LIMITING INSTRUCTION ON COLLATERAL CRIME EVIDENCE AT THE TIME IT WAS INTRODUCED, AND IN LATER DENYING HIS REQUEST FOR A LIMITING INSTRUCTION AT THE CLOSE OF THE EVIDENCE.

When evidence of collateral crimes is introduced, Florida's Evidence Code §90.404(2)(b)2 provides:

> When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited propose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

See e.g., Hodges v. State, 403 So. 2d 1375, 1377 (Fla. 5th DCA 1981) (when collateral crime evidence "is offered for one proper purpose there is danger of the jury improperly considering it for an improper purpose," so a cautionary or limiting instruction should be given).

Florida's standard jury instructions for criminal trials include the following "Williams Rule" instruction:

> (Note to Judge: To be given at the time the evidence is admitted, if requested).
>
> The evidence you are about to receive concerning evidence of other crimes allegedly committed by the defendant will be considered by you for the limited purpose of proving [motive] [opportunity] [intent] [preparation] [plan] [knowledge] [identity] [the absence of

> mistake or accident] on the part of the defendant and you shall consider it only as it relates to those issues.
>
> However, the defendant is not on trial for a crime that is not included in the [information] [indictment].
>
> (Note to Judge: To be given after the close of evidence, if applicable).
>
> The evidence which has been admitted to show similar crimes, wrongs, or acts allegedly committed by the defendant will be considered by you only as that evidence relates to proof of [motive] [opportunity] [intent] [preparation] [plan] [knowledge] [identity] [the absence of mistake or accident] on the part of the defendant.

A trial court's failure to give a limiting instruction on evidence of other crimes at the time the evidence was introduced, if such an instruction was requested by the defense, is reversible error. Rivers v. State, 425 So. 2d 101 (Fla. 1st DCA 1982), rev.-den., 436 So. 2d 100 (Fla. 1983). It is also reversible error when the trial court fails at the close of the evidence to instruct the jury on the limited purpose of the collateral crime evidence. Lowe v. State, 500 So. 2d 578 (Fla. 4th DCA 1986). In Rivers, the judge's refusal to give the limiting instruction when requested during the course of the trial was held to require reversal, even though (unlike the instant case) the second half of the Williams Rule instruction was given at the close of the evidence.

In contrast to Rivers, in Milton v. State, 438 So. 2d 935 (Fla. 3d DCA 1983), it was held that in the absence of a request by defense counsel, the trial court was not obligated to give a limiting instruction at the time the evidence was admitted. The appel-

late court further held that, because the trial court did give the standard limiting instruction required by §90.404(2)(b)2 at the close of the evidence, there was no likelihood that the jury misunderstood the limited purpose for which the collateral crime evidence was admitted.

In the instant case, the trial judge had three opportunities to give the statutorily mandated instructions, but failed to do so on each occasion. Prior to trial, the state filed its notice of intent to use evidence of other crimes; specifically appellant's battery of Sharon DePaula, and his vandalism of two cars belonging to Sharon and Kelly Ingram (R845). At trial, defense counsel objected to the admission of the testimony of Detective Jack Soule and eyewitness (to the collateral crimes) Nancy Ritchie regarding the prior criminal acts, on the ground that its prejudicial effect outweighed its probative value (T457-62,539-42). The judge agreed with the state that the evidence was relevant to motive and intent, and also expressed the view that it was not Williams Rule evidence (T458-59,540-41,745). When his objections were overruled and the evidence was admitted, defense counsel on each occasion requested a jury instruction on the limited purpose for which the collateral crime evidence was to be considered, so that it would not be misused merely to show bad character (T460-62,542).[7] Each time, the

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[7] Defense counsel's requests were sufficiently specific to preserve the issue for review. See Rivers v. State, 425 So. 2d at 104-05) (defense counsel's statement "I would move . . . for a limited instruction based upon evidence of a collateral offense for which the defendant is not on trial" held to be specific enough to preserve the issue). See, generally, Castor v. State, 365 So. 2d 701 (Fla. 1978).

judge refused to give a limiting instruction (T461-62,542). Then, during the charge conference, defense counsel requested the standard Williams Rule limiting instruction (T745).[8] The judge said "I don't consider it Williams Rule evidence, but if you both agree, that instruction can go in" (T745). The prosecutor, however, did not agree (T745); and as a result, even though defense counsel repeated his request, the instruction was not given (see T745,898-914).

The trial court's refusal to give the mandatory Williams Rule instruction can only be explained by his misapprehension that the testimony in question was something other than Williams Rule evidence (T458-59,540-41,745). He commented, for example, "I don't see that as Williams Rule, though, I see that as evidence of motive and opportunity and why he did it. I don't see that as Williams Rule" (T458). Also, "I'm not putting on Williams Rule. It's showing the course of conduct toward this woman, and this was a dangerous and serious act of violence" (T540-41).

Contrary to the trial judge's view, evidence of earlier crimes committed against the same victim introduced to show the defendant's motive or intent is classic Williams Rule evidence. See e.g., Craig v. State, 510 So. 2d 857, 863 (Fla. 1987). Section

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[8] The standard Williams Rule instruction is unnumbered, and is listed after 3.07 (instruction upon discharge of the jury). While defense counsel appears to have cited an incorrect number (3.03d), he specifically asked for the Williams Rule instruction, and it is clear that the judge and the prosecutor were well aware of which instruction was being requested (T475). See Rivers, 425 So. 2d at 104.

90.404(2)(a) of the Evidence Code (which codifies the Williams Rule) reads:

> (2) **Other crimes, wrongs, or acts.--**
>
> (a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Subsections (b)1 and (b)2 of the same statute require the state to give prior notice of its intent to introduce evidence of other crimes, and require the judge to instruct the jury on the limited purpose for which the evidence was received.

The earlier criminal acts which occurred on April 27, 1991 in Ocala were plainly not part of the "res gestae" of a homicide which took place three months later and over a hundred miles away. See e.g., Washington v. State, 118 So. 2d 650, 653 (Fla. 2d DCA 1960) ("statements or acts which are disconnected in point of time or otherwise with a main litigated fact are not admissible as part of the res gestae"). The collateral crimes may have been relevant to show a motive for the charged offense, but they were not "inseparable" from it. The distinction between "Williams Rule evidence" and "inseparable crime evidence" is discussed in Ehrhardt's Florida Evidence (2d Ed. 1984), §404.16 at 138 (quoted in Tumulty v. State, 489 So. 2d 150, 153 (Fla. 4th DCA 1986):

> [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 commis-

> sion 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 [Williams] 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).

See Selver v. State, 568 So. 2d 1331, 1332-33 (Fla. 4th DCA 1990). See also Smith v. State, 365 So. 2d 704, 706-07 (Fla. 1978) (evidence of second murder properly admitted "as part of a single transaction which spanned the night of, and included [the charged] murder"); Ashley v. State, 265 So. 2d 685, 693 (Fla. 1972) (charged homicide and collateral homicides occurred on the same night during "one prolonged criminal episode"; the same car and the same ice pick were used in both sets of crimes, and the victim of the second murder was one of the perpetrators of the first murder).[9]

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[9] An issue regarding limiting instructions was also raised in Ashley, 265 So. 2d at 694. This Court wrote:

> Appellant complains that no cautionary instruction was given by the trial judge before receiving the evidence of these other crimes. It was incumbent upon appellant to request such a charge, but he did not do so until most of the evidence had been admitted. When he did request a cautionary charge, the court gave it. We do not find a situation here which would warrant the conclusion that fundamental error was committed because the trial court did not, of its own motion, give
>
> (continued...)

In the instant case, the collateral crime evidence involved discrete acts other than the actions of the defendant in committing the crime charged. The events were widely separated in time and location, and were in no way part of a single "res gestae." The trial judge, therefore, was wrong in his belief that the evidence was not "Williams Rule"; a belief which caused him to err three times in refusing defense counsel's requests that he instruct the jury on the limited purposes for which it could consider the evidence of the other crimes.

The admission of improper collateral crime evidence is presumptively harmful, "because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Peek v. State, 488 So. 2d 52, 56 (Fla. 1986); see Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990). Evidence of other crimes, as the trial court in this case was well aware, is by its very nature prejudicial (see T540). Nevertheless, it may be admissible if relevant, but the jury must be cautioned as to its proper use in order to avoid the very danger emphasized in Peek. See Hodges v. State, supra, 403 So. 2d at 1377 (reason for the limiting instruction on Williams Rule evidence is

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[9](...continued)
the cautionary instruction before the reception of the evidence in question. Had he been requested to give the instruction and refused to do so, the appellant might have cause for complaint. A party may not complain on appeal about a failure to give an instruction unless an objection has been made to such failure.

to prevent the jury "from improperly considering it for an improper purpose"). In the absence of any limiting instruction, either at the time the evidence was admitted or at the close of all the evidence (despite defense counsel's three requests for such an instruction), the state cannot show beyond a reasonable doubt that the jury did not consider the Williams Rule evidence as proof of appellant's bad character and propensity for violence, or that it did not contribute to its guilt or penalty phase verdicts. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Appellant's conviction and death sentence must be reversed for a new trial. Rivers v. State, supra; Lowe v. State, supra.

ISSUE II

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE HEARSAY SHOWING THE VICTIM'S STATE OF MIND (i.e. HER FEAR OF APPELLANT) ON THE NIGHT BEFORE THE HOMICIDE.

Statements purportedly made by a murder victim to a third party, prior to the homicide, which express fear of the defendant or a concern that the defendant might intend to kill the victim are generally inadmissible hearsay. Selver v. State, 568 So. 2d 1331, 1334 (Fla. 4th DCA 1990); see also Correll v. State, 523 So. 2d 562, 565 (Fla. 1988); Hunt v. State, 429 So. 2d 811 (Fla. 2d DCA 1983); Kennedy v. State, 385 So. 2d 1020 (Fla. 5th DCA 1980). "[A] homicide victim's state of mind prior to the fatal incident generally is neither at issue nor probative of any material issue raised in a murder prosecution." Fleming v. State, 457 So. 2d 499,

501 (Fla. 2d DCA 1984); Kelley v. State, 543 So. 2d 286, 288 (Fla. 1st DCA 1989). "Moreover, even if the victim's state of mind is relevant under the particular facts of the case, the prejudice inherent in developing such evidence frequently outweighs the need for its introduction." Fleming, 457 So. 2d at 501.

> Indeed, a homicide victim's purported statements to a third party have been deemed admissible only in three general categories in which the need for the statements appears to overcome the possible prejudice. These categories are: (1) the defendant claims self defense, which can be rebutted by the victim's statements that he feared the defendant; (2) the defendant claims the victim committed suicide, which can be rebutted by statements of the victim that are inconsistent with suicide; and (3) the defendant claims the victim's death was accidental, which can be rebutted by the victim's statements that he feared whatever the instrument of death proved to be. However, if the evidence is highly prejudicial, it will be excluded even if it has a high degree of relevance. Kennedy v. State, 385 So. 2d 1020, 1021 (Fla. 5th DCA 1980), citing United States v. Brown, 490 F.2d 758, 767 (D.C.Cir. 1973); Ehrhardt, § 803.3a, at pp. 476-477, f.n. 3.

Kingery v. State, 523 So. 2d 1199, 1202 (Fla. 1st DCA 1988).

See Kelley, 543 So. 2d at 288; Fleming, 457 So. 2d at 501; Hunt, 429 So. 2d at 813; Kennedy, 385 So. 2d at 1021; United States v. Brown, 490 F.2d 758, 767 (D.C. Cir. 1973).

In the instant case, there was no claim of self-defense, suicide, or accident. Rather, defense counsel sought to persuade the jury that the state failed to prove beyond a reasonable doubt that the killing was premeditated (see T857-84). The victim's state of mind, therefore, was not at issue. Moreover, her statements to a third party could not properly be used to prove appellant's motive

or his state of mind. Correll, 523 So. 2d at 565; Bailey v. State, 419 So. 2d 721 (Fla. 1st DCA 1982); Van Zant v. State, 372 So. 2d 502, 504 (Fla. 1st DCA 1980); see Kelley, 543 So. 2d at 288; Fleming, 457 So. 2d at 502; Hunt, 429 So. 2d at 813. Here, the prosecution called John Hunt, who was dating the victim, Sharon DePaula. On the night before Sharon was killed, Hunt was driving her back to her residence when they encountered another vehicle. The prosecutor asked "And what did Sharon do or say when you encountered that vehicle?" (T652) Defense counsel objected to the hearsay, and the prosecutor replied:

> Spontaneous statement. She just said, that's him, like that, and they got very freaked out or scared and didn't -- I'm not getting into any other things she said. But it's about classic spontaneous as it gets.
>
> THE COURT: I can't hear you too well because they're talking right into my ear.
>
> MS. ANDRINGA [prosecutor]: It's a classic spontaneous statement where when she see the vehicle she says, that's him. That's all she says. That's him. I'm not going into anything after that. It would be hearsay.
>
> THE COURT: What's the relevancy of it?
>
> MS. ANDRINGA: This is the night before the murder. She sees him in the neighborhood. This goes all to the premeditation and corroborates his own confession that he was there before.
>
> THE COURT: Is he going to be able to point out the Defendant?
>
> MS. ANDRINGA: No, just the car.
>
> THE COURT: If we can't tie him into it --
>
> MS. ANDRINGA: She says, that's him.

THE COURT: Yeah, but we don't know who she says that's him about.

MS. ANDRINGA: She goes on to explain to him who that's him is.

MR. HORN [defense counsel]: That's hearsay.

THE COURT: Yeah, it is.

MS. ANDRINGA: But that's him is not.

THE COURT: That's him is not. It's an explanation but it's not relevant until you tie it in to him.

(T652-53)

The prosecutor said she could tie it in through appellant's confession [apparently referring to Detective Soule's testimony that appellant told him he had gone to St. Petersburg on July 23 and arrived back in Ocala in the early morning hours of the 24th; then drove back to St. Pete at about 9:00 a.m. on the 24th (T472-74)], and that she was seeking to introduce Hunt's testimony in order to corroborate the confession (T653-54). The trial court pointed out that defense counsel had attacked Detective Soule's testimony regarding the confession as being inaccurate or unreliable. Defense counsel replied "I've been basically saying that there were certain aspects of it that were exaggerated to try to prove a case of premeditation" (T654).

THE COURT: I think when you attack the confession it puts the whole confession in issue. I don't think it puts one or two things at issue.

MR. HORN [defense counsel]: It's still hearsay, your Honor, and it's damaging for the truth of the matter asserted.

MS. ANDRINGA [prosecutor]: It's just, that's him. And she is afraid of him.

MR. HORN: Victim fear is not permissible. It's not permissible under the case law. I could attempt to secure that case law for you. Victim fear is not admissible.

MS. ANDRINGA: The fear goes on to that's him and her identification in corroborating his confession.

THE COURT: I think that's him comes in under an excitable utterance. I think you have to tie it in with this fellow and I think when she starts talking, that's hearsay.

MS. ANDRINGA: I won't get in any further than that's him.

THE COURT: All right.

(T654-55).

John Hunt then testified before the jury as follows:

Q. [by Ms. Andringa]: Now, Mr. Hunt, did you and Ms. DePaula see a vehicle in the area of 70th Avenue and 13th Street North by her residence?

A. Yes, we did.

Q. And can you describe the color and type of vehicle that you saw?

A. It was a white late model car.

Q. And the white late model car, when you saw that, did Ms. DePaula say anything to you?

A. Yes. She was in fear.

Q. And did she say anything?

A. She said, oh my God.

Q. And what did she do? What was her demeanor after she saw the car? [10]

. . .

Q. What was her demeanor after she saw that car, not what she said after she saw the car other than, oh my God. But what was her demeanor? How did she act?

A. She started crying.

(T655-56)

The prosecutor then showed Hunt an autopsy photograph of the victim, which he identified as Sharon DePaula (T656-57; R1036).

Significantly, in light of the prosecutor's asserted rationale for admissibility, Hunt never testified that Sharon said "That's him" (T651-52,655-57). The trial court had earlier expressed the view that Hunt's testimony was not relevant unless it could be tied in to appellant (T653). The prosecutor had acknowledged that Hunt would not be able to point out appellant, but only the car (T653). Yet his testimony was merely that it was "a white late model car" (T655). There are probably tens of thousands of white late model cars in Pinellas County at any given time. Hunt was not shown a photograph of appellant's white Chrysler and asked whether that was the car he saw, or whether it was even similar. In short, there was absolutely nothing to connect appellant to the encounter described by Hunt, other than the prejudicial and improper inference that, because Sharon DePaula was in fear when she saw the car, it must have been appellant's car. And, as defense counsel cor-

[10] At this point, defense counsel asked to approach the bench, and complained that the prosecutor had gone into the victim's fear "right after she said she wasn't going to do it" (T656).

rectly pointed out, the victim's fear of the defendant is inadmissible. Selver.

The prosecutor's asserted basis for admissibility -- that Sharon's statement "That's him" was a spontaneous and excited utterance and was relevant to corroborate appellant's confession by showing that he was in the neighborhood -- is vitiated by the fact that Hunt never testified that she made any such statement. Instead, the prosecutor, after repeatedly assuring the court that she would go no further than "That's him" (T652,655), showed only that Sharon was in fear, said "Oh my God", and began to cry when she saw a white late model car (T655-56). There was no evidence that the car was appellant's; there was not even any evidence (as opposed to an impermissible inference drawn from her expression of fear) that Sharon thought the car was appellant's. Hunt's testimony served no proper purpose, but it was used by the state for two improper purposes: to show the victim's state of mind (i.e. fear of appellant) [see Selver], and to show appellant's state of mind (i.e., intent to kill)[see Bailey]. In his closing argument to the jury, the prosecutor said:

> So now what? We go to St. Pete, not once, not twice, but several times. Why? To find out her habits, when does she go to work, when does she get home? You heard the testimony of John Hunt. They came home the night of July 23rd, late at night, and Sharon DePaula saw that white Chrysler.[11] Oh my God.. He was

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[11] The prosecutor inaccurately characterized Hunt's testimony as "Sharon DePaula saw that white Chrysler." In fact, all Hunt was able to say is that they saw a white late model car. The quantum leap between the testimony and the inference is the result of (continued...)

> there watching her. He could have stopped there but he didn't. He drove all the way back to Ocala two, two and a half hours away thinking about killing Sharon DePaula. He could have stayed in Ocala, but no, he turned right around back and in the morning hours of July 24th, 1991, he returned to St. Petersburg. And during that two, two and a half hour drive what was he thinking about? Killing Sharon DePaula.

(T839)

Because Hunt's testimony had no legitimate probative value, and because it prejudiced appellant by showing the victim's fear of him and by enabling the prosecution to bolster its argument as to premeditation, the trial court reversibly erred in admitting it. See e.g., Kennedy, 385 So. 2d at 1021-22; Fleming, 457 So. 2d at 501-02. Appellant's conviction and death sentence must be reversed for a new trial.

ISSUE III

BECAUSE THE TRIAL JUDGE FAILED TO COMPLY WITH THE PROVISION OF FLORIDA'S DEATH PENALTY STATUTE REQUIRING PRIOR OR CONTEMPORANEOUS WRITTEN FINDINGS, THIS COURT MUST REMAND FOR A SENTENCE OF LIFE IMPRISONMENT.

Florida's death penalty statute requires the trial court to provide written findings in support of its imposition of a death sentence. Fla. Stat. §921.141(3). In Grossman v. State, 525 So. 2d 833, 841 (Fla. 1988), this Court adopted a rule that "all written orders imposing a death sentence be prepared prior to the oral

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[11](...continued)
impermissible consideration of the victim's fear. She was afraid when she saw the car, ergo it must have been appellant's car.

pronouncement of sentence for filing concurrent with the pronouncement." [The rule announced in Grossman became effective thirty days after that decision became final; June 24, 1988. The sentencing proceeding in the instant case took place on December 23, 1992; four and one half years after the rule went into effect].

The reasoning behind the Grossman rule was expressed by Justice Ehrlich in his concurring opinion in Van Royal v. State, 497 So. 2d 625, 630 (Fla. 1986), and quoted in the unanimous opinion of this Court in Patterson v. State, 513 So. 2d 1257, 1261 (Fla. 1987):

> [T]he trial court's written findings with respect to aggravating and mitigating circumstances must at least be coincident with the imposition of the death penalty. It is inconceivable. . .that any meaningful weighing process can take place otherwise.

In Stewart v. State, 549 So. 2d 171, 176-77 (Fla. 1989) - a case where the sentencing proceeding took place prior to Grossman - the trial court failed to provide written findings, but did make detailed oral findings which he dictated into the record at the time he pronounced the death sentence. This Court said:

> Prior to, or contemporaneously with, orally pronouncing a death sentence, courts now are required to prepare a written order which must be filed concurrent with the pronouncement. Grossman, 525 So. 2d at 841. Should a trial court fail to provide timely written findings in a sentencing proceeding taking place after our decision in Grossman, we are compelled to remand for imposition of a life sentence. Because Stewart's sentencing occurred prior to Grossman and because the trial court followed the jury recommendation of death and dictated its findings into the record, we remand for written findings. Cave v. State, 445 So. 2d 341 (Fla. 1984).

In subsequent cases where the sentencing proceedings took place after the Grossman rule became effective -- Christopher v. State, 583 So. 2d 642, 646-47 (Fla. 1991) (written findings issued two weeks after oral pronouncement of death sentence) and Hernandez v. State, 621 So. 2d 1353, 1357 (Fla. 1993) (written findings made twelve days after oral pronouncement of sentence) -- this Court vacated the death sentences and remanded for imposition of sentences of life imprisonment. In Christopher, the Court said:

> Our holding in this respect is more than a mere technicality. The statute itself requires the imposition of a life sentence if the written findings are not made. § 921.141-(3), Fla. Stat. (1989). We have consistently emphasized the necessity that the weighing of aggravating and mitigating circumstances take place at sentencing. Patterson v. State, 513 So.2d 1257 (Fla. 1987); Muehleman v. State, 503 So.2d 310 (Fla.), cert.denied, 484 U.S. 882, 108 S.Ct. 39, 98 L.Ed.2d 170 (1987). 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." Van Royal v. State, 497 So.2d 625, 630 (Fla. 1986) (Ehrlich, J., concurring).

See also the opinion of the Court in Van Royal, 497 So. 2d at 628, stating that the trial court's "written findings of fact as to aggravating and mitigating circumstances constitutes an integral part of the court's decision; they do not merely serve to memorialize it."

Similarly, in Hernandez this Court stated that the reason for the statutory requirement

> . . . is to ensure that each death sentence handed down in Florida results from a thought-

> ful, deliberate, and knowledgeable weighing by the trial judge of all aggravating and mitigating circumstances surrounding both the criminal and the crime, as dictated by the United States Supreme Court and our own state constitution.

The purpose for requiring the written order to be prepared prior to the oral pronouncement of sentence "is to implement the intent of the Legislature -- to ensure that written reasons are not merely an after-the-fact rationalization for a hasty, visceral, or mistakenly reasoned initial decision imposing death." Hernandez v. State, 621 So. 2d at 1353.

The responsibility to identify and explain in writing the applicable aggravating and mitigating circumstances is placed squarely on the trial judge, and cannot be delegated to the state attorney. Patterson v. State, 513 So. 2d 1257, 1261-63 (Fla. 1987).[12]

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[12] In the pre-Grossman case of Nibert v. State, 508 So. 2d 1, 3-4 (Fla. 1987), it was held that reversal was not required where the judge had orally "made the findings and conducted the weighing process necessary to satisfy the [statutory] requirements" and had then instructed the state attorney to reduce his findings to writing. On the other hand, in Patterson (also a pre-Grossman decision) the error was found to be reversible where:

> This record, contrary to Nibert, does not demonstrate that the judge articulated specific aggravating and mitigating circumstances. On the contrary, the trial judge's action in delegating to the state attorney the responsibility to identify and explain the appropriate aggravating and mitigating factors raises a serious question concerning the weighing process that must be conducted before imposing a death penalty. It is insufficient to state generally that the aggravating circumstances that occurred in the course of the trial outweigh the mitigating circumstances that
> (continued...)

The proper procedure for capital sentencing in Florida was outlined in Spencer v. State, 615 So. 2d 688, 690-91 (Fla. 1993):

> First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order. Such a process was clearly not followed during these proceedings.

In the instant case, the trial judge proceeded to sentencing immediately upon receiving the jury's recommendation (T970-73). The judge initiated a dialogue with appellant by inquiring "Before I impose sentence, I have a question to ask. It's really bothered me and I just wonder by what authority do you have playing God with this woman's life like that?" (T972). Appellant took issue with the judge's characterization of the crime; he insisted that he did not execute the victim and he did not play God. The judge replied:

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[12](...continued)
were presented to the jury. It is our view that the judge must specifically identify and explain the applicable aggravating and mitigating circumstances).

In my mind you did.

MR. LAYMAN: Well, that's in your mind. In my mind, I know, and in Sharon's mind, it's different. Sharon knows what happened that day and I know what happened.

THE COURT: I'm satisfied it's a coldly, calculated murder, planned some time ahead, for reasons I don't understand.

MR. LAYMAN: Murder is hard to understand.

THE COURT: You took a life. I'm sure she enjoyed life as much as any of us in this courtroom.

MR. LAYMAN: I'm sure she did.

THE COURT: And it was your decision to take that away from her, and I feel that in this case does justify the death penalty.

MR. LAYMAN: Thank you. I'd like to be executed on a certain day.

THE COURT: Well, I have no authority to do that. ---

(T972-73)

The judge then formally pronounced the sentence of death without making any findings regarding mitigating circumstances (T973). After discharging the jury, advising appellant of his right to appeal, and appointing the Public Defender for that purpose, the court asked if there was anything further. The prosecutor replied:

Yes, your Honor. Is the Court going to reduce his reasons to writing as written reasons?

THE COURT: You prepare the order. Let me see it with a copy to Mr. Layman and a copy to Mr. Horn.

MR. MARTIN [prosecutor]: Judge, it's -- my reading of the case law says that it has to be contemporaneous with sentencing and that it

would be inappropriate for the State to draft it.

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.[13]

(T975-76)

It is apparent, therefore, that at the time he sentenced appellant to death, the trial judge had not complied with the statutory requirements or the Grossman rule. Not only did he fail to recess the proceeding to consider the appropriate sentence [see Spencer], and not only did he fail to prepare written findings prior to or contemporaneously with the oral pronouncement [see Grossman; Stewart; Christopher; Hernandez], his after-the-fact attempt to delegate this critical task to the assistant state attorney reveals that at the time he imposed the sentence, he had not even determined what mitigating circumstances applied. See Patterson, 513 So. 2d at 1261-63. Therefore, he could not have meaningfully weighed the mitigating factors against the sole aggravating factor he found.[14] Patterson, at 1261; Van Royal, 497 So.

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[13] A written sentencing order was filed by Judge Beach later that afternoon, in which he found the "CCP" aggravating factor (R1065-66). The sentencing order does not clearly state what mitigating factors Judge Beach found, but indicates as "possible" mitigating circumstances which the jury "might have considered" (1) the fact that appellant was deeply in love with the victim" which clouded his judgment to such an extent that he did not act rational" and (2) appellant's belief in reincarnation and that he would join the victim in another life in the future (R1067).

[14] While the trial judge made no express reference to aggravating circumstances when he orally pronounced the death sentence, it appears from his dialogue with appellant that he concluded that the "CCP" factor applied. ("I'm satisfied it's a coldly calculated murder, planned some time ahead, for reasons I (continued...)

2d at 630 (Ehrlich, J., concurring) (trial court's written findings must at least be coincident with the imposition of the death sentence; "It is inconceivable . . . that any meaningful weighing process can take place otherwise").

Although the judge (having been correctly advised by the prosecutor) prepared a written sentencing order a few hours after the fact -- rather than two weeks or twelve days as in Christopher and Hernandez -- the purpose of the statutory requirement and the Grossman rule was violated just the same. See Grossman (all written orders imposing a death sentence must "be prepared prior to the oral pronouncement of sentence" for filing concurrent with the pronouncement); Christopher (emphasizing the necessity that weighing of aggravating and mitigating circumstances take place at sentencing; preparation of written findings after the fact runs the risk that death sentence was not the result of reasoned judgment and the weighing process mandated by statute and due process); Hernandez (purpose of requiring written findings is to ensure that each death sentence results from "thoughtful, deliberate, and knowledgeable weighing by the trial judge of all aggravating and mitigating circumstances"; purpose of contemporaneity requirement "is to ensure that the written reasons are not merely an after-the-fact rational-

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[14](...continued)
don't understand", T973). The judge told appellant that the crime warranted the death penalty ("You took a life. I'm sure she enjoyed life as much as any of us in this courtroom. . . . And it was your decision to take that away from her, and I feel that in this case it does justify the death penalty", T.973), but said nothing to indicate that he considered or weighed any mitigating circumstances.

ization for a hasty, visceral, or mistakenly reasoned initial decision imposing death").

In this case, the fact that the judge imposed the death sentence immediately upon receiving the jury's recommendation, after initiating an impromptu debate with appellant as to "what authority do you have playing God with this woman's life like that?", further suggests a hasty or visceral decision, with the reasons to be determined later. In fact, until he was disabused of the idea, the judge was perfectly willing to let the prosecutor articulate the reasons and decide what if any mitigating circumstances applied. The fact that the judge -- after he made his decision and sentenced appellant to death -- was then persuaded to prepare the order himself does not cure the Grossman error. The procedure mandated by the statute and due process, i.e., the identification and careful weighing of the mitigating circumstances against the aggravating circumstances, was not followed by the trial judge in making his decision; but only in justifying it after the fact.

The state will probably argue that a written sentencing order prepared later the same day is close enough. Since the death penalty decisions of this Court provide no support for such an assertion, the state may try to draw an analogy to sentencing guidelines departure cases such as Ree v. State, 565 So. 2d 1329 (Fla. 1990) and State v. Lyles, 576 So. 2d 706 (Fla. 1991). The situations, however, are not analogous. First of all, capital sentencing (unlike non-capital sentencing under the guidelines) is subject to the Eighth Amendment requirement of heightened reliability. See e.g.

Caldwell v. Mississippi, 472 U.S. 320, 329-30 (1985); Sumner v. Shuman, 483 U.S. 66, 72 (1987). This requirement cannot be satisfied by an after-the-fact justification. Secondly, a valid death sentence requires more than one or several affirmative reasons (i.e., aggravating circumstances); it also requires a finding, after a careful weighing process, that the aggravating circumstances outweigh the mitigating circumstances present in the case.[15] A guidelines departure, in contrast, requires only that the trial judge provide one or more valid reasons. In non-capital sentencing, neither the Eighth Amendment nor the sentencing guidelines themselves require consideration or weighing of mitigating factors against the reasons given for the departure.

Moreover, even under the rules governing guidelines departures, the sentencing order in the instant case would still be untimely and insufficient. In Ree, this Court adopted a rule, to be applied prospectively, that the written reasons for a guidelines departure must be issued at the time of sentencing. When the prosecution seeks a departure sentence, the judge has three options:

> First, if the trial judge finds that departure is not warranted, he or she then may immediately impose sentence within the guidelines'

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[15] This is especially true where, as in the instant case, only one aggravating factor was found by the trial judge, since under Florida law the death penalty is reserved for "only the most aggravated and unmitigated of most serious crimes", and this Court has rarely affirmed death sentences supported by only a single aggravator (and then only when there was very little or nothing in mitigation). See e.g. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988); Songer v. State, 544 So. 2d 1010 (Fla. 1989); White v. State, 616 So. 2d 21, 26 (Fla. 1993); DeAngelo v. State, 616 So. 2d 440, 443-44 (Fla. 1993).

> recommendation, or may delay sentencing if necessary. Second, after hearing argument and receiving any proper evidence or statements, the trial court can impose a departure sentence by writing out its findings at the time sentence is imposed, while still on the bench. Third, if further reflection is required to determine the propriety or extent of departure, the trial court may separate the sentencing hearing from the actual imposition of sentence. In this event, actual sentencing need not occur until a date after the sentencing hearing.
>
> We realize this procedure will involve some inconvenience for judges. However, a departure sentence is an extraordinary punishment that requires serious and thoughtful attention by the trial court.

565 So. 2d at 1332.

The procedure outlined in Ree (which does not allow for a trial judge to impose a departure sentence from the bench and determine the reasons later) is somewhat similar to the capital sentencing procedure outlined in Spencer, 615 So. 2d at 691. If a departure sentence is considered an extraordinary punishment requiring serious and thoughtful attention by the trial court, then this is even more true of the ultimate penalty of death. The United States Supreme Court has recognized that imposition of death by public authority is "profoundly different from all other penalties", and requires stronger substantive and procedural safeguards than any form of non-capital sentencing. See e.g. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

In State v. Lyles, 576 So. 2d at 707-09, this Court addressed the validity of a departure sentence where the reasons were orally pronounced at the time the sentence was imposed, and were reduced

to writing later the same day. After noting that the reason for the holding in Ree was to ensure that the defendant's decision whether to appeal the departure sentence would not have to be made without benefit of the written reasons[16] the Court said:

> 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 are contemporaneous in accordance with Ree.

576 So. 2d at 708.

See also Troutman v. State, __So. 2d __ (Fla. 1993) [18 FLW S 580] (applying Ree and Lyles to imposing adult sanctions on juvenile defendants).

In the instant case, as in Patterson v. State, 513 So. 2d at 1261-63, the trial judge did not make the required findings orally at the time he pronounced the death sentence. If he had made sufficient findings from the bench and then reduced them to writing without substantive change on the same date, then (assuming arguendo that the sentencing guidelines rules applied as well to capital sentencing) the requirements of Ree and Lyles would have been met. However, that is not what happened here. Judge Beach made no oral findings whatsoever regarding mitigating factors, and gave no

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[16] Contrast the purpose of the Grossman rule, which is to ensure that no death sentence is imposed without meaningful weighing of the aggravating and mitigating circumstances, and to prevent after-the-fact rationalization for a hasty, emotional, or mistakenly reasoned decision. Christopher; Hernandez. In the death penalty context, "[i]t is inconceivable that any meaningful weighing process can take place" unless the written findings are at least coincident with the imposition of the death sentence. Patterson; Van Royal (Ehrlich, J., concurring).

indication that he had weighed any mitigating factors against the CCP aggravator. He merely told appellant that he felt that the killing was coldly calculated and planned some time ahead, and that his decision to take the victim's life justified the death penalty. After pronouncing the death sentence, the judge instructed the prosecutor to prepare the written order. Presumably, this would include deciding which mitigating factors did or did not apply, and how much weight to give them, since the judge had not stated his own findings on these matters. The only thing which had been determined at that point was the result. The after-the-fact sentencing order which the judge later produced bore no resemblance to his oral pronouncement. Therefore, since he did not make sufficient oral findings at the time of sentencing, which were then reduced to writing without substantive change, the procedure in this case did not even satisfy Ree and Lyles, much less Grossman, Christopher, and Hernandez. Appellant's death sentence must be vacated, and the case remanded with directions to impose a sentence of life imprisonment.[17]

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[17] In the event that this Court reverses appellant's conviction for a new trial for the reasons argued in Issues I and II, it should be with directions that the maximum sentence in the event of a guilty verdict of first degree murder shall be life imprisonment. Otherwise, appellant would be penalized for successfully appealing his conviction, in violation of North Carolina v. Pearce, 395 U.S. 711 (1988). See also Wright v. State, 586 So. 2d 1024, 1032 (Fla. 1991), which addresses the situation where a new guilt-phase trial is ordered for a defendant whose jury recommended life imprisonment:

> To rule otherwise would force death-sentenced prisoners to risk giving up the life recommendation by arguing for a new trial, and (continued...)

ISSUE IV

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

This Court has repeatedly held that in capital sentencing the trial judge must "expressly find, consider, and weigh in its written sentencing order all mitigating evidence. . . , both statutory and nonstatutory, apparent anywhere on the record. . . ." Ellis v. State, 622 So. 2d 991, 1001 (Fla. 1993) (emphasis in opinion), citing Rogers v. State, 511 So. 2d 526 (Fla. 1987); Campbell v. State, 571 So. 2d 415 (Fla. 1990); and Santos v. State, 591 So. 2d 160 (Fla. 1991). See also Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990); Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Maxwell v. State, 603 So. 2d 490 (Fla. 1992). "[This] requirement applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence." Farr v. State, 621 So. 2d 1368 (Fla. 1993). In Pettit v. State, 591 So. 2d 618, 620 (Fla. 1992), this Court said:

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[17](...continued)
would place capital appellants in the anomalous position of having to choose between arguing guilt phase or penalty phase issues on appeal, even if they reasonably believe that the trial court committed reversible errors in each phase. Putting capital appellants in the position of having to make this "Hobson's choice" would be fundamentally unfair and inconsistent with the Florida Constitution . . . .

> We considered a similar situation in Hamblen v. State, 527 So. 2d 800 (Fla. 1988), and resolved the issue of whether a convicted murderer could waive the presentation of mitigating evidence. Over the thought-provoking argument of two dissenters we held that he could, but emphasized that the trial judge must carefully analyze the possible statutory and nonstatutory mitigating factors against the aggravators to assure that death is appropriate.

In Hamblen v. State, 527 So. 2d 800, 804 (Fla. 1988), in concluding that a competent defendant could waive the presentation of mitigating evidence,[18] this Court cautioned:

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

In Farr v. State, 621 So. 2d at 1369-70, the trial court in his sentencing order considered in mitigation only Farr's apparent intoxication at the time of the murder (which he erroneously found not to be of mitigating value), but ignored other mitigating evidence contained in a psychiatrist's competency evaluation and in

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[18] In Issue VII of this brief, undersigned counsel urges this Court to recede from its holding in Hamblen, on the ground that it makes meaningful proportionality review impossible. As the Hamblen dissenters advocated, when a defendant demands or requests to be put to death, independent public counsel should be appointed to present the available mitigating evidence, "to satisfy society's need for a reliable and proportionate sentence without infringing upon the defendant's right of self-representation." Hamblen, 527 So. 2d at 809 (Barkett, J., joined by Ehrlich, J., dissenting). This procedure has already been used successfully in Klokoc v. State, 589 So. 2d 219 (Fla. 1991), and in Pope v. State, (case no. 81,797, pending on appeal).

the PSI. Notwithstanding Farr's waiver of a penalty jury and his request that he be sentenced to death, this Court vacated the death sentence and remanded with directions that the trial court "conduct a new penalty phase hearing in which it weighs all available mitigating evidence against the aggravating factors." Justice Harding, concurring, pointed out:

> The sentencing order does not reflect consideration of any mitigation. It is clearly the responsibility of the trial judge to affirmatively show that all possible mitigation has been considered and it is error to fail to do so. In this case it is difficult to rule that the trial judge erred when he considered and did only and exactly what the defendant requested him to do. Yet, we have no alternative under our responsibility to review the record of each case to insure that the propriety of the sentence has been established according to law.

621 So. 2d at 1371 (emphasis in opinion).

In the instant case, the state announced its willingness to accept a sentence of life imprisonment, but appellant insisted on going forward with the death penalty proceedings. Representing himself, he waived presentation of any mitigating evidence and asked the jury to recommend a death sentence. The attorney who had represented appellant at trial was allowed to withdraw. Although he remained as "standby" counsel, he presented no evidence, nor did he inform the court what mitigating evidence was available. See Koon v. State, 619 So. 2d 246, 250 (Fla. 1993), discussed in Issue VI, infra. Therefore, the only information before the trial court -- aside from the testimony of the state's witnesses in the guilt

phase[19] -- which could potentially establish mitigating circumstances was the psychological evaluation done by Dr. Sidney Merin (R1090-95). Dr. Merin, it should be noted, was not a defense expert; the examination was ordered by the trial court (over appellant's mild objection) to determine whether appellant was competent to represent himself as he saw fit in the penalty proceedings (T921-24; R1090). Dr. Merin's report was marked as an exhibit and made a part of the record, but (at appellant's request) it was not presented to the jury (T931,943-44,963).

When he pronounced the death sentence, the trial judge made no oral findings regarding mitigating circumstances (T972-74). It is clear that, at that time, he had not made any written findings either, since he attempted to delegate that task to the prosecutor (T975-76), see Issue III, supra. When, later that afternoon, he finally did issue a written sentencing order, the only mention made of mitigating circumstances is:

> Although no evidence concerning mitigating factors was presented by the Defendant . . . , the jury might have considered as a mitigating factor the fact that Defendant, Gregory Scott Layman, was deeply in love with the victim which clouded his judgement 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.

(R1067)

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[19] The only defense witness in either phase of the trial was an independent crime scene analyst, and most of his proffered testimony was excluded (T749-829).

The trial judge states earlier in the sentencing order that Dr. Sid Merin had determined that appellant was competent to make the decision to testify that he desired the death penalty (R1066). However, none of the information contained in Dr. Merin's report is found, weighed, considered, or even discussed as mitigating circumstances. From the wording of the judge's belated sentencing order -- speculating on what the jury might have found, rather than setting forth with unmistakable clarity the independent findings of the court[20] -- it appears that the judge considered only the mitigation which was in evidence before the jury. The "possible" mitigating factors mentioned in the order, however, are only the tip of the iceberg when considered alongside Dr. Merin's psychological evaluation. The information contained in his report -- had it been analyzed and weighed by the trial judge -- might well have persuaded him to find one or both of the statutory "mental mitigating circumstances."[21] On the other hand, even if the judge had determined that appellant's mental state did not reach the level of "extreme" emotional disturbance or "substantial" impairment, he would still be required to consider Dr. Merin's unrefuted findings concerning appellant's mental and emotional disturbance as a non-

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[20] This alone amounts to reversible error. Mann v. State, 420 So. 2d 578, 581 (Fla. 1982); Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990). See Issue V.

[21] Fla. Stat. § 921.141(b) ("The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance") and (f) ("The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired").

statutory mitigating circumstance. See Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990).

In his report, Dr. Merin concluded that appellant, while not psychotic, suffers from a Mixed Personality Disorder with paranoid, schizotypal, and antisocial characteristics (R1093).[22] Citing the DSM-III,[23]he wrote:

> 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.

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[22] Dr. Merin's findings are summarized in detail in the Statement of the Facts, p. 17-22.

[23] The American Psychiatric Association's Diagnostic and Statistical Manual (3d Ed.).

(R1093-94).

The "extreme mental or emotional disturbance" mitigating factor is defined in State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973) as "less than insanity, but more than the emotions of an average man, however inflamed." Appellant's emotional state, as a result of his personality disorder and the break-up of his relationship with Sharon, was clearly more disturbed than what an average man would have experienced in the same situation. Therefore, if the trial judge had considered Dr. Merin's report in mitigation, it would have supported a finding of this statutory mitigating circumstance. Moreover, the fact that a defendant suffers from a personality disorder has been recognized as a valid nonstatutory mitigating factor. See Eddings v. Oklahoma, 455 U.S. 104 (1982) (antisocial personality disorder); Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993) (borderline personality disorder).

Contrary to popular misconception, a diagnosis of personality disorder is not just psychiatric shorthand for a "bad" or "mean" person. The Comprehensive Textbook of Psychiatry (4th Ed., 1985) [Chapter 21, Personality Disorders (Clinical Overview)], at p. 958, notes "four characteristics that all personality disorders share: (1) an inflexible and maladaptive response to stress; (2) a disability in working and loving that is generally more serious and always more pervasive than is found in neurosis; (3) elicitation by interpersonal conflict, and (4) a peculiar capacity to 'get under the skin' of others." "In any scheme that tries to classify persons in terms of relative mental health, those with personality

disorder would fall toward the bottom." Individuals with personality disorders "exhibit the repetitious, self-detrimental responses . . . often associated with persons who are fatigued, brain damaged, under severe stress, immature, or otherwise regressed. The causes of specific personality disorders have not been conclusively determined, but "genetic, constitutional, environmental, cultural, and maturational factors" all appear to play a part. Comprehensive Textbook of Psychiatry, p. 961. According to the DSM-III, the manifestations of personality disorders "are generally recognizable by adolescence or earlier and continue throughout most of adult life, though they often become less obvious in middle or old age." Id. at 958.

Among the enumerated characteristics of individuals with personality disorders, two which seem particularly descriptive of appellant, and his relationship with Sharon,[24] are the inability to control or modulate anger or other strong emotions, and the "[m]erging of personal boundaries." Id., at 958-59.

In failing to consider and weigh in mitigation the evidence of appellant's mental and emotional disturbance contained in Dr. Merin's evaluation, the trial judge violated the constitutional principle of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982). See Farr; Cheshire; Campbell;

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[24] Personality disorders, according to the authors, "almost always occur within an interpersonal context", and it would be difficult to imagine such a person "becoming symptomatic on a desert island. A personality disorder must been seen as a way of making a painful truce with people one can neither live with nor live without."

Nibert. The death sentence imposed in this case lacks the heightened degree of reliability required by the Eighth and Fourteenth Amendments [see Lockett, 438 U.S. at 604; Sumner v. Shuman, 483 U.S. 66, 72 (1987)], and cannot constitutionally be carried out.

ISSUE V

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

In the trial court's belated sentencing order, the only mention made of mitigating circumstances is:

> Although no evidence concerning mitigating factors was presented by the Defendant . . . , 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 judgement 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.

(R1067).

Under Florida's capital sentencing scheme, after the jury has returned its penalty recommendation, it then becomes the responsibility of the trial judge to independently weigh the evidence of aggravating and mitigating circumstances "in order to arrive at a reasoned judgment as to the appropriate sentence to impose." Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981); see Ross v. State, 386 So. 2d 1191, 1197 (Fla. 1980). The judge's findings as to aggravating and mitigating circumstances must be of "unmistak-

able clarity" so that this Court "can properly review them and not speculate as to what he found." Mann v. State, 420 So. 2d 578, 581 (Fla. 1982); Morgan v. State, 453 So. 2d 394, 397 (Fla. 1984); Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990).

Here, instead of clearly stating what he found in mitigation, the judge merely speculated about what the jury might have found. While it is true that Hamblen v. State, 527 So. 2d 800, 804 (Fla. 1988), and Pettit v. State, 591 So. 2d 618, 620 (Fla. 1992) direct the trial judge to "carefully analyze the possible statutory and nonstatutory mitigating factors against the aggravators to assure that death is appropriate", that does not suggest that he can simply identify mitigators as "possible" and stop there. See Nibert v. State, 574 So. 2d 1059, 1061-62 (Fla. 1990). Rather, he must determine whether a reasonable quantum of competent, uncontroverted evidence of a particular mitigating circumstance has been presented, and -- if so -- he must find that the mitigating circumstance has been proved. Nibert; Maxwell v. State, 603 So. 2d 490 (Fla. 1992).

In the instant case, perhaps it could be inferred that the judge must have found the nonstatutory mitigating circumstances which he mentioned, because he goes on to state that "the aggravating factors [sic] 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" (R1067). See Parker v.

Dugger, 498 U.S. 308, 318 (1991). However -- and especially in view of the many other constitutional and procedural deficiencies which infected the sentencing proceedings in this case -- this Court and counsel should not have to use deductive reasoning to sort out the judge's findings. They should have been of unmistakable clarity [Mann; Lucas], and they should have been made prior to the decision to impose the death sentence [Grossman; Christopher].

ISSUE VI

THE TRIAL COURT ERRED IN ALLOWING APPELLANT TO WAIVE HIS RIGHT TO COUNSEL AND HIS RIGHT TO PRESENT MITIGATING EVIDENCE, WITHOUT REQUIRING COUNSEL TO STATE ON THE RECORD WHETHER THERE WAS MITIGATING EVIDENCE WHICH COULD BE PRESENTED, AND WHAT THAT EVIDENCE WOULD BE.

In Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993), this Court adopted a rule to be applied in the situation where a capital defendant waives his right to present mitigating evidence:

> 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, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

The procedure outlined in Koon was not followed in the instant case. At the beginning of the penalty proceeding, defense counsel

stated that he had advised appellant of the state's willingness to accept a sentence of life imprisonment, and that appellant had rejected it. Appellant told counsel that he wished to present evidence of aggravating circumstances, and instructed him not to present any evidence of mitigating circumstances (T929-30). Defense counsel stated that he faced the dilemma of "assisting my client in a proceeding that is contrary to his best interest", and asked the court to inquire of appellant regarding his decision (T930). The court conducted an inquiry, and appellant reaffirmed that he wanted to be sentenced to death (T834-40). The court concluded that appellant was competent to make that decision and to represent himself (T940). The court relieved defense counsel of his representation of appellant, but instructed him to remain as standby counsel (T940-41,955,957).

At no time did defense counsel specify on the record what the mitigating evidence would have been. The penalty jury and the trial judge (as well as this Court, on proportionality review) had virtually no information about appellant's life history. There are indications, however, in the pre-trial and guilt-phase proceedings that defense counsel was actively investigating and developing mitigating evidence. In a hearing held on November 22, 1991, before Judge Luce (who was not involved in the subsequent trial and penalty proceedings), defense counsel, in requesting the appointment of a neuropsychologist and neurologist to examine appellant, represented that "[t]here's been four blunt trauma head injuries to the defendant over time which I have some background and run down

those reports" (SR1216).[25] At the same hearing, the prosecutor represented that appellant had attempted suicide in the county jail at least once (SR 1214). He did not know if there was more than one suicide attempt (SR1214).

Because the procedure outlined in Koon was not followed, there is no way to tell what mitigating evidence was available that was not presented, and no way for this Court to meaningfully fulfill its obligation to ensure that the death sentence is appropriate. We do not know whether there were psychiatric or psychological experts who would have testified that appellant acted under the influence of extreme mental or emotional disturbance.[26] We do not know whether his behavior was affected by organic brain damage.[27]

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[25] There was testimony at trial from the probation office clerk, Katherine McKinney, that during the period of time five or six years earlier when she worked with appellant at the Waffle House, he had been in a motorcycle accident (T669-70,673-74,677).

[26] Dr. Merin, in his competency evaluation, did not address the question of whether appellant's personality disorder met the criteria for the statutory "mental mitigating circumstances", nor did he express an opinion regarding nonstatutory mitigation. Defense counsel, upon being relieved of his representation of appellant at the beginning of the penalty phase, did not indicate whether he was prepared to present any psychiatric or psychological expert testimony to establish mitigating circumstances.

[27] According to the authors of the chapter on Personality Disorders in the Comprehensive Textbook of Psychiatry (4th Ed, 1985), such individuals "exhibit the repetitious, self-detrimental responses . . . often associated with persons who are fatigued, brain damaged, under severe stress, immature, or otherwise regressed." If, as defense counsel mentioned in the pre-trial hearing before Judge Luce, appellant had suffered from blunt trauma head injuries, the strong possibility of brain damage cannot be discounted. Yet defense counsel, upon being relieved of representation, did not indicate whether appellant had been examined for brain damage, or whether he was prepared to present any testimony on that subject.

We do not know whether he was physically or emotionally abused during childhood and adolescence, or whether he had a personal or family history of drug or alcohol abuse. We do not know whether he has a good employment, educational, or military record, or whether he is a good prospect for rehabilitation and productive adjustment if sentenced to life imprisonment. Under these circumstances, the Eighth Amendment's requirement of reliability in capital sentencing[28] was not satisfied.

The state may contend that there was no need to comply with the requirements of Koon because the rule in that case was intended to be applied prospectively. 619 So. 2d at 250. However, the sentencing proceeding in this case took place on December 23, 1992. The Koon opinion was originally issued on June 4, 1992, and was published in Florida Law Weekly [17 FLW S 337]. The defendant, Koon, moved for rehearing, and his motion was denied in light of the revised opinion issued on March 25, 1993 [18 FLW S 202].[29] The only change in the section of the opinion dealing with the waiver of mitigating evidence is that the earlier opinion contained a string citation including the Hamblen, Pettit, and Henry cases,[30]

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[28] See e.g. Lockett v. Ohio, 438 U.S. 586, 604 (1978), Zant v. Stephens, 462 U.S. 862, 884-85 (1983); Caldwell v. Mississippi, 472 U.S. 320, 329-30 (1985); Sumner v. Shuman, 483 U.S. 66, 72 (1987).

[29] After the revised opinion was issued, another motion for rehearing was denied on June 9, 1993.

[30] 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).

while the revised opinion deleted the citation to Henry.[31] The text of the revised opinion, as to this issue, was identical to the opinion issued June 4, 1992.

The penalty proceeding in the instant case took place more than six months after the original Koon opinion, but before the revised opinion. For several reasons, undersigned counsel urges this Court that Koon should not be deemed inapplicable. First, the procedure outlined in Koon was published in Florida Law Weekly and available to the bench and bar in June 1992. Second, the revised opinion issued in March, 1993 was unchanged as to this issue (except for the aforementioned citation).[32] Third, and most important, the absence of a record as to what mitigating evidence defense counsel was prepared to present makes it impossible for this Court to ensure the proportionality or the reliability of the death sentence. The Eighth Amendment requires reliability in capi-

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[31] The apparent reason for the elimination of the Henry cite is because, in the interim, the United States Supreme Court vacated the judgment in that case on grounds unrelated to the waiver of mitigation issue. Henry v. Florida, ___US___, ___S. Ct.___, 120 L. Ed. 2d 893 (June 29, 1992) [remanding for reconsideration in light of Espinosa v. Florida, 505 US ___, 112 S. Ct. ___ 120 L. Ed. 2d 854 (1992), and Sochor v. Florida, 504 US ___, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992)].

[32] Unlike Grossman v. State, 525 So. 2d 833, 841 (Fla. 1988) (requiring reversal for sentence of life imprisonment when trial judge fails to make written findings prior to or contemporaneously with pronouncement of death sentence), which expressly states that its prospective rule is to become "effective thirty days after this decision becomes final", Koon simply states (in both the June 4, 1992 and March 25, 1993 opinions) that "we establish the following prospective rule to be applied in such a situation" [i.e., when the defendant waives the presentation of mitigating evidence]. Since no effective date is specified, and since the two opinions are identical on this point, undersigned counsel submits that there is no good reason not to apply Koon to the instant case.

tal sentencing; the result cannot constitutionally turn on whether the Koon procedures became effective with the original June 1992 opinion or the revised March 1993 opinion. Rather, the question is whether the procedures used in the instant case, when appellant waived the presentation of mitigating circumstances, were sufficient to enable the trial court and this Court to determine whether death or life imprisonment is the appropriate sentence. The answer -- whether or not Koon is considered to have been in effect -- is that the procedures used here were not sufficient.

Fourth, this Court has recognized the inequity of prospective rulemaking on appeal:

> Any rule of law that substantially affects the life, liberty, or property of criminal defendants must be applied in a fair and evenhanded manner. Art. I, §§ 9, 16, Fla. Const. "[T]he integrity of judicial review requires that we apply [rule changes] to all similar cases pending on direct review." [citation omitted] Moreover, "selective application of new rules violates the principle of treating similarly situated defendants the same," because selective application causes "'actual inequity'" when the Court "'chooses which of many similarly situated defendants should be the chance beneficiary' of a new rule." [citation omitted] Thus, we hold that any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending or not yet final.

Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992).

See e.g. Fink v. Holt, 609 So. 2d 1333, 1337 (Fla. 4th DCA 1992); Stone v. State, 616 So. 2d 1041, 1042 (Fla. 4th DCA 1993).

The procedures set forth in Koon -- or some reasonable facsimile thereof -- must be followed in order to ensure the reliability and proportionality of a death sentence. The fortuitous circumstance of whether the penalty proceeding took place after the original Koon opinion as opposed to the revised Koon opinion cannot be controlling.

ISSUE VII

UNDER THE CIRCUMSTANCES OF THIS CASE, EXECUTION OF THE DEATH SENTENCE WOULD AMOUNT TO STATE-ASSISTED SUICIDE, AND WOULD VIOLATE THE STANDARDS OF RELIABILITY REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. Introduction

In presenting this issue, undersigned counsel will first address the big picture -- the recurring problem that arises whenever this Court reviews a capital case where the defendant has requested a death sentence and waived the presentation of mitigating evidence. He will then focus on the unusual circumstances specific to this penalty proceeding -- a case of attempted state-assisted suicide in its purest form.

B. The Legislature's Intent that the Death Penalty be Reserved for Only the Most Aggravated and Unmitigated Cases of First Degree Murder Cannot be Given Effect Without an Adversary Penalty Proceeding. This Court Should Recede from Hamblen v. State, 527 So. 2d 800 (Fla. 1988) and its Progeny, and Should Establish a Procedure, When the Defendant Requests a Death Sentence, for the Appointment of Independent Counsel to Present the Case in Mitigation.

The legislature intended that the death penalty be reserved for only the most aggravated and least mitigated of first degree murders. State v. Dixon, 283 So. 2d 1, 7-8 (Fla. 1973); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988); Songer v. State, 544 So. 2d 1010 (Fla. 1989). As this Court observed in Fitzpatrick:

> In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), Justice Stewart began his concurring opinion with an instructive admonition:
>
> > The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embod ied in our concept of humanity.
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> 408 U.S. at 306, 92 S.Ct. at 2760 (Stewart, J., concurring)(quoted in Hamblen v. State, 527 So. 2d 800 (Fla. 1988)(Barkett, J., dissenting)).
>
> It is with this background that we must examine the proportionality and appropriateness of each sentence of death issued in this state. A high degree of certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty is administered evenhandedly.

Even while holding that a competent defendant may waive the presentation of mitigating evidence, this Court has made it clear that Florida's death penalty law may not be used as a vehicle for a defendant to commit state-assisted suicide. See Hamblen v. State, 527 So. 2d 800 (Fla. 1988); Klokoc v. State, 589 So. 2d 219 (Fla. 1991); Pettit v. State, 591 So. 2d 618, 620 (Fla. 1992); Farr v. State, 621 So. 2d 1368 (Fla.1993). However, in its 5-2 decision in Hamblen this Court declined to adopt a procedure to provide for an adversary penalty proceeding even where the defendant demands or requests a death sentence, through the appointment of independent counsel to present the case in mitigation. The Hamblen majority agreed that the fact that a competent defendant has the right to control his own destiny:

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

527 So. 2d at 804.

However, the majority went on to hold that, since the trial judge "carefully analyzed the possible statutory and nonstatutory mitigating evidence":

> . . . there was no error in not appointing counsel against Hamblen's wishes to seek out and to present mitigating evidence and to argue against the death sentence. The trial judge adequately fulfilled that function on his own, thereby protecting society's inter-

> ests in seeing that the death penalty was not imposed improperly.

527 So. 2d at 804.

See also Pettit v. State, 591 So. 2d at 620.

In the instant case, the trial court did not adequately fulfill that function on his own. See Issues III, IV, V, and VI. Moreover, the instant case demonstrates that, as a practical matter, the trial judge cannot adequately fulfill that function on his own. This Court has emphatically required an adversary appeal -- whether the defendant wants one or not -- in order to ensure the reliability and proportionality of every death sentence imposed in this state. Klokoc, 589 So. 2d at 221-22; Pettit, 591 So. 2d at 620 n.2; Hamblen, 527 So. 2d at 802 and n.2. But requiring an adversary appeal without an adversary penalty phase is like trying to build a pyramid from the top down. This Court cannot meaningfully review mitigating evidence which was never presented. A comparison of the instant case with Klokoc demonstrates that the Hamblen theory is unworkable.

In Klokoc, the defendant refused to cooperate with defense counsel or allow him to present mitigating evidence. As a result, counsel moved to withdraw. That motion was denied, but the trial court appointed special counsel "to represent the public interest in bringing forth mitigating factors to be considered by the court in the sentencing proceeding." 589 So. 2d at 220.

The state presented its penalty phase case and rested:

> Special counsel then presented mitigating evidence, consisting of . . . first, . . . Klokoc's sister, who described Klokoc's past

> and the circumstances surrounding his mental apprehension; second . . . a forensic pathologist who testified that [the victim, Klokoc's daughter] died instantly; and third . . . a mental health professional, who, although he found Klokoc competent, explained Klokoc's mental problems, particularly his bipolar affective disorder.

589 So. 2d at 220.

The trial court imposed a death sentence, finding that the one aggravating circumstance ("cold, calculated, and premeditated") outweighed the mitigating circumstances which had been presented. The public defender was appointed to represent Klokoc on direct appeal.

> At Klokoc's insistence, the public defender moved to dismiss the appeal, stating: "Appellant, Victor G. Klokoc, after discussing the appeal with appellate counsel, wants to dismiss the appeal of the death sentence and be executed, and in that regard has signed a notice of voluntary dismissal." The motion also stated: "It will be appellant's position on appeal, if forced to submit an initial brief, that the death penalty should be imposed."

589 So. 2d at 221.

This Court denied the motion, and in so doing stated:

> . . . counsel for appellant is hereby advised that <u>in order for the appellant to receive a meaningful appeal, the Court must have the benefit of an adversary proceeding with diligent appellate advocacy addressed to both the judgment and the sentence</u>.
>
> Accordingly, counsel for appellant is directed to proceed to prosecute the appeal in a genuinely adversary manner, providing diligent advocacy of appellant's interests. The foregoing rulings are made without prejudice to the right of appellant to request leave to file a <u>pro se</u> supplemental brief setting both his personal positions and interests in the subject matter of this appeal.

Obeying this Court's order, Klokoc's appellate counsel then filed a brief arguing that the death sentence was (1) unsupported by any valid aggravating factor; (2) proportionally unwarranted; and (3) invalid on several constitutional grounds. In its decision, this Court rejected the constitutional claims and held that the evidence was sufficient to support the trial court's finding of the CCP aggravating circumstance. However, the Court agreed with appellate counsel's contention:

> . . . that Klokoc's death sentence should be reduced to life because of the mitigating circumstances in this cause. While this record reflects that this murder occurred when Klokoc was not in a heightened rage, it is unrefuted in this record that he was under extreme emotional distress. The record also establishes that he suffers from bipolar affective disorder, manic type with paranoid features, and that his family has a history of suicide, emotional disturbance, and alcoholism. Further, he had no record of prior criminal activity. In State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), we held that "[r]eview by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case." In applying that principle to the instant case, we find that the one statutory aggravating factor does not outweigh the unrefuted mitigating factors when comparing this cause to other death penalty decisions. [Citations omitted]. This finding requires us to reduce Klokoc's sentence to life imprisonment without the possibility of parole for twenty-five years.

589 So. 2d at 222.

Thus, in Klokoc, the trial judge chose to appoint independent counsel to present the case in mitigation, even though under

Hamblen he was not required to do so.[33] Because this procedure was used, the mitigating circumstances which existed were in evidence before the trial court, and were on the record before this Court. This Court was able to fulfill its responsibility to determine whether the death sentence was proportionate, and concluded that it was not.

If the judge in Klokoc had not appointed special counsel, the outcome would almost certainly have been different, because the mitigating circumstances -- while they still existed -- would not have been in evidence or on the appellate record. Any attempt to conduct proportionality review would have been futile, because only the aggravating side of the equation would have been before the Court. The result, of necessity, would have been either an unjustified affirmance or (much less likely) a speculative reversal.

C. The Instant Case: Attempted State-Assisted Suicide by Means of the Death Penalty.

The instant case shares a number of similarities with Klokoc. In both cases, only one aggravating factor (CCP) was found by the trial court. Both homicides arose from turbulent domestic relationships.[34] Klokoc, although neither insane nor incompetent to

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[33] Another capital case, currently pending review in this Court, in which the trial judge appointed independent counsel to present the mitigating evidence and argue against a death sentence is Horace Pope v. State, case no. 81,797.

[34] The victim in the instant case was appellant's former live-in girlfriend, with whom he believed he had a mystic bond; that they had been together in past lives, and would be together -- switching gender roles -- in future incarnations (T960-62;R1091-
(continued...)

stand trial, suffers from a bipolar affective disorder, manic type with paranoid features. Appellant, although neither insane nor incompetent, suffers from a mixed personality disorder with paranoid, schizotypal, and antisocial characteristics (R1093).

The instant case, much more plainly than the previously reported decisions in which capital defendants have requested death sentences or waived mitigation,[35] amounts to attempted state-assisted suicide. This is something which even the Hamblen majority did not countenance. In the other cases, the defendant, in asking to be sentenced to death, was simply voicing his concurrence to what the prosecution was actively pursuing anyway. Here, in contrast, the state announced that, in deference to the wishes of the victim's family, it would not seek a death sentence. The prosecutor also stated that, with only the one aggravating factor arguably applicable, even if the jury were to recommend death and the trial court impose it, there was a "great chance" that the death sentence would not be upheld on appeal (T920). It was appellant who insisted on going forward with the death penalty proceedings. Dr. Merin, while finding him competent, noted appellant's reasons for requesting a death sentence: (1) He wanted to punish the state for its "misconduct" in presenting fabricated evi-

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[34](...continued)
92). In Klokoc the defendant killed his nineteen year old daughter in order to spite his estranged wife.

[35] In addition to Hamblen, Klokoc, Pettit, and Farr, see e.g. Henry v. State, 613 So. 2d 429 (Fla. 1992); Clark v. State, 613 So. 2d 412 (Fla. 1992); Durocher v. State, 604 So. 2d 810 (Fla. 1992); Anderson v. State, 574 So. 2d 87 (Fla. 1991); and Krawczuk v. State, ___ So. 2d. ___ (Fla. 1994) (decided March 17, 1994).

dence, which resulted in his conviction of first degree murder for what (in appellant's view) was actually second degree murder. He reasoned that the prosecutors "don't want my blood on their hands." He would make them feel guilty for what they had done. "By insisting upon the death penalty he can express his sense of righteousness [sic] indignation, reveal his bravado, and point out to the world he would be willing to die for a cause" (R1090-91,1094).[36] (2) He wanted to be put to death on a specific date -- February 14, 1997 -- which he had computed arithmetically and astrologically.[37] "Should the state not execute him as he would request, he would then commit suicide on that date."[38] It was necessary for him to die on that day in order that he be reunited with Sharon in their next lives, with him as female partner and Sharon as the male (R1091-92; see T960-62). Dr. Merin observed that individuals with appellant's type of personality disorder "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" (R1094).

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[36] See Pridgen v. State, 531 So. 2d 951, 953 (Fla. 1988) (defendant, asking for a death sentence, "made a rambling statement in which he seemed to protest his innocence even though he said it was his purpose that the jury find him guilty").

[37] See Nowitzke v. State, 572 So. 2d 1346, 1349 (Fla. 1990)(defendant rejected plea offer because of his belief that he would be "spiritually released" on July 4, 1989, and therefore could not be executed; date was arrived at because it was Independence Day and because of the number of letters in his three names).

[38] Dr. Merin also cautioned that appellant's suicidal impulse was genuine; "In view of his insistence upon dying on February 14, 1997, this man could very easily make it a point to commit suicide at that time" (R1094).

D. Conclusion

An adversary appeal without an adversary penalty phase is form without substance. This Court cannot properly fulfill its obligation to conduct proportionality review of every death sentence imposed in this state unless there is a meaningful evidentiary record; one which reflects the mitigating circumstances that exist as well as the aggravating factors. The Hamblen theory -- that the trial judge on his own can analyze the "possible" mitigating factors without hearing any evidence -- is unworkable and should be scrapped. The suggestion of the dissenters in Hamblen, that independent counsel be appointed to present the available mitigating evidence, has been used effectively in Klokoc and Pope, and should now be adopted as a rule by this Court.

In any event, whether this Court recedes from Hamblen or continues to adhere to it, under the unusual circumstances of this case -- where the state was unilaterally willing to forego the death penalty, and the proceedings continued only because of appellant's insistence; where his insistence on dying was based on delusional, mystical, and suicidal ideation; and where he has been diagnosed as suffering from a mixed personality disorder with paranoid and schizotypal (as well as antisocial) features -- appellant's "request for the death penalty and refusal to present mitigating evidence amounts to nothing more than a request for state-assisted suicide." Farr v. State, 621 So. 2d at 1371 (Barkett, J., specially concurring). The Eighth Amendment requirements of

reliability and individualized consideration in capital sentencing[39] were patently not met under these circumstances, and appellant's death sentence cannot constitutionally be carried out.

ISSUE VIII

THE TRIAL COURT ERRED IN FAILING TO RENEW THE OFFER OF COUNSEL BEFORE THE FINAL SENTENCING PROCEEDING.

Florida's capital sentencing system consists, at the trial level, of three separate stages:

> The requirements of due process of law apply to all three phases of a capital case in the trial court: 1) The trial in which the guilt or innocence of the defendant is determined; 2) the penalty phase before the jury; and 3) the final sentencing process by the judge.

Engle v. State, 438 So. 2d 803, 813 (Fla. 1983).

See also Spencer v. State, 615 So. 2d 688, 690-91 (Fla. 1993).

Upon being charged with a crime, a defendant:

> . . . is entitled to decide at each crucial stage of the proceedings whether he or she requires the assistance of counsel. At the commencement of each such stage, an unrepresented defendant must be informed of the right to counsel and the consequences of waiver. Any waiver of this right must be knowing, intelligent, and voluntary, and courts generally will indulge every reasonable presumption against waiver of this fundamental right. Where the right to counsel has been properly waived, the State may proceed with the stage in issue; but the waiver applies only to the present stage and must be renewed at each subsequent crucial stage where the defendant is unrepresented.

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[39] See Lockett v. Ohio, 438 U.S. 586, 604-05 (1978); Caldwell v. Mississippi, 472 U.S. 320, 329-30 (1985); Sumner v. Shuman, 483 U.S. 66, 72 (1987).

Traylor v. State, 596 So. 2d 957, 968 (Fla. 1992) [footnote omitted].

Accordingly, Fla.R.Cr.P 3.111(d)(5) provides:

> If a waiver is accepted at any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel.

See, generally, Pall v. State, __ So. 2d __ (Fla. 2d DCA 1994) [19 FLW D 450, 451].

Failure to renew the offer of counsel prior to sentencing requires reversal for resentencing. Billions v. State, 399 So. 2d 1086 (Fla. 1st DCA 1981); Baranko v. State, 406 So. 2d 1271 (Fla. 1st DCA 1981); Tucker v. State, 440 So. 2d 60, 61 (Fla. 1st DCA 1983); Smith v. State, 444 So. 2d 542, 547 (Fla. 1st DCA 1984).

In Grossman v. State, 525 So. 2d 833, 841 (Fla. 1988), this Court emphatically reiterated that written findings as to the aggravating and mitigating circumstances must be prepared by the trial court prior to the oral pronouncement of a death sentence. See Issue III. Grossman was further explained in Spencer, 615 So. 2d at 690-91:

> We contemplated that the following procedure be used in sentencing phase proceedings. First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, it appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the

> judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order. Such a process was clearly not followed during these proceedings.

In the instant case, the judge telescoped the separate stages of capital sentencing into a single proceeding. This may well have contributed to his error in failing to prepare prior or contemporaneous written findings as required by Grossman. See Issue III. In addition, however, he failed to renew the offer of counsel before the third stage: the final sentencing process by the judge. See Engle. After the jury returned its penalty recommendation, the judge immediately proceeded with the imposition of sentence (T970-73). After initiating a brief debate with appellant about the nature and circumstances of the crime by asking "[B]y what authority do you have playing God with this woman's life like that?", the judge pronounced the sentence of death (T972-73). In addition to all of the other procedural and substantive errors which pervaded the penalty and sentencing proceedings in this case, the court's failure to renew the offer of counsel violated appellant's right -- guaranteed by the federal and state Constitutions and effectuated by Rule 3.111(d)(5) -- to the assistance of counsel at every critical stage of the proceedings. Traylor; see Faretta v. California, 422 U.S. 806 (1975). For this reason, along with the other reasons, appellant's death sentence must be reversed.

ISSUE IX

THE TRIAL COURT ERRED IN FINDING THE "COLD, CALCULATED, AND PREMEDITATED" AGGRAVATING FACTOR; AND SINCE NO VALID AGGRAVATING FACTORS REMAIN, APPELLANT MUST BE RESENTENCED TO LIFE IMPRISONMENT.

Where no valid aggravating factors exist, the death penalty cannot lawfully be imposed. Banda v. State, 536 So. 2d 221, 225 (Fla. 1988); Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992). In the instant case, the only aggravating factor found by the trial judge was CCP (homicide committed in a cold, calculated, and premeditated manner)(R1065-66). Because the killing arose from a turbulent domestic relationship, and was the culmination of appellant's obsessive and delusional rage, it cannot be characterized as "cold" within the meaning of this aggravating factor. See Douglas v. State, 575 So. 2d 165 (Fla. 1991); Santos v. State, 591 So. 2d 160, 162-63 (Fla. 1991); Richardson v. State, supra, 604 So. 2d at 1109; Maulden v. State, 617 So. 2d 298, 302-03 (Fla. 1993); Cannady v. State, 620 So. 2d 165, 170 (Fla. 1983).

In Maulden, this Court discussed the facts which persuaded it to reject findings of CCP in Santos and Douglas. In the former case:

> Santos killed his ex-girlfriend, Irma, and their daughter. Two days before the murder, Santos had gone to Irma's home and threatened to kill her. Later, Santos acquired a gun. On the day of the murder Santos traveled by taxi to Irma's parents' home, where she was staying. Santos saw Irma and her child walking down the street and proceeded toward them. When Irma saw Santos coming, she attempted to flee. Santos, however, gave chase, caught

> her, spun her around, and shot Irma and her daughter, killing them both.
>
> This Court reversed the finding that Santos had acted in a cold, calculated, and premeditated manner. While we acknowledged that the evidence showed that Santos had acquired a gun in advance and had made death threats, we stated that "the fact that the present killing arose from a domestic dispute tends to negate cold, calculated premeditation."

617 So. 2d at 302 (citations omitted).

Similarly, in the latter case, this Court "rejected a finding of cold, calculated premeditation in a domestic setting", where Douglas had "obtained a rifle, tracked down his ex-girlfriend, torturously abused her by forcing her to have sex with her newlywed husband, and then murdered the husband while the woman watched." The entire episode lasted some four hours.

> In another context, these facts might have led to a finding of cold, calculated premeditation. In a domestic setting, however, where the circumstances evidenced heated passion and violent emotions arising from hatred and jealousy associated with the relationships between the parties, we could not characterize the murder as cold even though it may have appeared to be calculated.

617 So. 2d at 302-03.

In the instant case, the trial judge found (or at least recognized that the jury might have found)[40]

in mitigation that appellant was so deeply in love with the victim that it "clouded his judgment to such an extent that he did not act rational", and that he believed he would join the victim in another life in the future (R1067). The case is complicated by appellant's

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[40] See Issue V.

refusal to allow the presentation of mitigating evidence or the rebuttal of aggravating evidence. However, Dr. Merin's report also reveals the obsessive nature of appellant's relationship with Sharon: "Despite his contention that he and Sharon are 'soul mates', he spontaneously would fall into verbalizing many of the conflicts he had with her, while at the same time insisting he remains in love with her. He does not wish to identify that relationship as suggesting a love-hate phenomenon, although he allows that some 'hate' on his part may be in fact directed toward her" (R1092). As previously discussed, appellant believed that he and Sharon had lived earlier lives together, and would continue to live together in future lives, provided he could die on February 14, 1997 (R1091-92). Dr. Merin also noted a number of characteristics associated with appellant's personality disorder:

> 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.

(R1093-94).

Other characteristics which often accompany this disorder include "odd beliefs or magical thoughts, superstitions, belief in clairvoyance, telepathy, or in sensing the presence of a force or person not actually present" (R1094).

Under the totality of the circumstances, it cannot be said that the "coldness" element of the CCP aggravator was proved beyond a reasonable doubt. Santos; Douglas. Appellant's sentence must be reduced to life imprisonment without possibility of parole for twenty-five years. Richardson.

ISSUE X

THE TRIAL COURT ERRED IN CONSIDERING LACK OF REMORSE TO SUPPORT HIS FINDING OF THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR.

This Court has repeatedly held that "it is error to consider lack of remorse for any purpose in capital sentencing." Trawick v. State, 473 So. 2d 1235, 1240 (Fla. 1985). Specifically:

> . . . [L]ack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor.

Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983); Patterson v. State, 513 So. 2d 1257, 1263 (Fla. 1987); Robinson v. State, 520 So. 2d 1, 6 (Fla. 1988).

See also Derrick v. State, 581 So. 2d 31, 36 (Fla. 1991); Hill v. State, 549 So. 2d 179, 184 (Fla. 1989).

In the instant case, as part of his finding of the "cold, calculated, and premeditated" aggravating factor, the trial judge stated "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"

(R1066).[41] This improper consideration cannot be deemed "harmless", since it went to the only aggravating factor even arguably applicable in this case.

ISSUE XI

THE DEATH SENTENCE IS DISPROPORTIONATE.

Because the only aggravating factor found by the trial judge -- "cold, calculated, and premeditated" -- is negated by the fact that the homicide resulted from passionate obsession in the context of a domestic relationship, no valid aggravators remain and the death sentence cannot stand. Banda; Richardson. Even if this Court were to conclude that CCP was properly found, however, the death sentence is still disproportionate. See Klokoc v. State, supra, 589 So. 2d at 222. Under Florida law, the death penalty may be imposed only in the most aggravated and least mitigated cases of first degree murder. Dixon; Fitzpatrick; Songer v. State, 544 So. 2d 1010 (Fla. 1988); DeAngelo v. State, 616 So. 2d 440, 443 (Fla. 1993). This Court has rarely affirmed death sentences supported by only one valid aggravating factor, and then only when there was

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[41] The trial court also found that appellant was so deeply in love with the victim that it clouded his judgment to the point of irrationality (R1067). Seen in this context, his apparent "delight" at having murdered a woman he thought of as his soul mate is much more indicative of mental or emotional disturbance than cold-blooded lack of remorse. Moreover, appellant's statements to the judge and to the jury during the penalty proceeding suggest that he felt so much remorse for what he had done that he had lost the will to live (T937-38,960-63).

very little or nothing in mitigation. Songer, at 1011; DeAngelo, at 443-44; White v. State, 616 So. 2d 21, 26 (Fla. 1993).[42]

The homicide in the instant case occurred as a result of appellant's obsessive love-hate relationship with the victim, who had been his live-in girlfriend and whom he considered his soul mate. Appellant had no prior or concurrent convictions of violent felonies.[43] The trial court found (or at least recognized that the

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[42] Counsel is aware of only six cases -- and only one in the last twelve years -- where this Court has affirmed a death sentence based only on a single valid 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. 1981); LeDuc v. State, 365 So. 2d 149 (Fla. 1978); Douglas v. State, 328 So. 2d 18 (Fla. 1976); and Gardner v. State, 313 So. 2d 675 (Fla. 1975). None of these defendants has been executed and only Duncan and Armstrong remain on death row. Douglas' death sentence was reversed on appeal after resentencing. Douglas v. State, 575 So 2d 165 (Fla. 1991). Four of these cases -- Arango, LeDuc, Douglas, and Gardner -- involved torture-murders. In four -- Armstrong, LeDuc, Douglas, and Gardner -- no mitigating circumstances were found. In Duncan, the defendant had previously been convicted of an unrelated second degree murder; the victim was a fellow prison inmate.

[43] In her dissenting opinion in Porter v. State, 564 So. 2d 1060, 1065 (Fla. 1990), Justice Barkett, joined by Justice Kogan, pointed out that in the vast majority of domestic homicides:

> . . . this Court has found cause to reverse the death sentence, regardless of the number of aggravating circumstances found, the brutality involved, the level of premeditation, or the jury recommendation. See Blakely v. State, 561 So.2d 560 (Fla. 1990) (death penalty disproportional despite finding of heinous, atrocious, or cruel, and cold, calculated, and premeditated); Armoros v. State, 531 So.2d 1256, 1261 (Fla. 1988); Garron v. State, 528 So.2d 353, 361 (Fla. 1988); Fead v. State, 512 So.2d 176, 179 (Fla. 1987); receded from on other grounds, Pentecost v. State, 545 So.2d 861, 863 n.3 (Fla. 1989); Irizarry v. State, 496 So.2d 822, 825-26 (Fla. 1986); Wilson v. State, 493 So.2d 1019, 1023 (Fla. 1986); Ross (continued...)

jury could have found) two mitigating circumstances: (1) that appellant was so deeply in love with the victim that it clouded his judgment to such an extent that he acted irrationally; and (2) that appellant believed that he would rejoin the victim in another life in the future (R1067). Dr. Merin's psychological evaluation contains additional information which the trial court should have weighed in mitigation. Farr; Cheshire; Campbell; Nibert; Ellis [See Issue IV]. According to Merin, appellant has a mixed personality disorder, with paranoid, schizotypal, and antisocial features (R1093-94). This is a serious psychiatric condition and

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[43](...continued)
v. State, 474 So.2d 1170, 1174 (Fla. 1985); Herzog v. State, 439 So.2d 1372, 1381 (Fla. 1983); Blair v. State, 406 So.2d 1103, 1109 (Fla. 1981); Phippen v. State, 389 So.2d 991 (Fla. 1980); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Chambers v. State, 339 So.2d 204 (Fla. 1976); Halliwell v. State, 323 So.2d 557 (Fla. 1975); Tedder v. State, 322 So.2d 908 (Fla. 1975); cf. Hamilton v. State, 547 So.2d 630 (Fla. 1989) (aggravating circumstances and judgment of guilt reversed, remanded for new trial). The Court has even reversed death sentences where, as in Porter's case, the defendant murdered two people during the same violent outburst. See Garron; Wilson; Phippen; cf. Hamilton.

Justice Barkett continued, "Generally, when we have affirmed death sentences in analogous situations, we have noted that the defendants had prior, unrelated convictions of violent felonies" [citing Hudson v. State, 538 So. 2d 829 (Fla. 1989); Lemon v. State, 456 So. 2d 885 (Fla. 1984); Williams v. State, 437 So. 2d 133 (Fla. 1983); King v. State, 436 So. 2d 50 (Fla. 1983)]. See also Duncan v. State, 619 So. 2d 279 (Fla. 1973).

constitutes valid mitigation,[44] especially since there appears to be a nexus between appellant's obsessive and paranoid thought processes which culminated in this crime, and the traits described by Dr. Merin as characteristic of individuals with appellant's type of disorder (R1093-94).

At the conclusion of the guilt phase of this trial, the state unilaterally agreed to a sentence of life imprisonment, with the concurrence of the victim's family. The prosecutor noted that, since she was arguing only the one aggravating factor, there was a "great chance" that a death sentence would not be upheld (T919-20).

When appellant insisted on going forward with the death penalty proceedings, and after Dr. Merin found him competent to represent himself and waive the presentation of mitigating evidence, the other prosecutor said:

> We are ready to go forward with the penalty phase. The Defendant Friday rejected the offer from the victims, if you will, through the State, so we're ready to proceed. We'll give him his penalty phase.

(R934)

The prosecutor asserted that he was proceeding in good faith, from a proportionality standpoint, based on the precedent of Porter v. State, 564 So. 2d 1060 (Fla. 1990):

> The facts are very similar to this one. A defendant killed his lover and the aggravating

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[44] See Eddings v. Oklahoma, 455 U.S. 104 (1982) (antisocial personality disorder); Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993) (borderline personality disorder). See also The Comprehensive Textbook of Psychiatry (4th Ed. 1985), p. 958 ("In any scheme that tries to classify persons in terms of relative mental health, those with personality disorder would fall toward the bottom").

> factor was the cold, calculated manner in which it was done. The facts are very similar to the case we have here, and the Supreme Court upheld the death penalty in that particular case.

(T932-33).

Undersigned counsel does not contend that the state proceeded in bad faith. However, while there are some superficial similarities between Porter (a 5-2 decision on the proportionality question) and the instant case, the critical dissimilarities include: (1) Porter murdered two victims; (2) there were three valid aggravating circumstances;[45] and (3) the trial court found no mitigating circumstances. Moreover, unlike the instant case, there is no indication in Porter that the trial court failed to consider and weigh all of the mitigation which was apparent anywhere in the record. The case cited in Porter to show that the result was not disproportionate to other death penalty cases decided by this Court is Turner v. State, 530 So. 2d 45,50-51 (Fla. 1987). Turner, another 5-2 decision, also involved a double murder, and four aggravating factors were found by the trial court and upheld on appeal. In addition to CCP, the murder of the defendant's wife's roommate was especially heinous, atrocious, or cruel, and was committed during a burglary. The defendant's prior conviction of the

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[45] In addition to the "cold, calculated, and premeditated" aggravator, the trial court found that Porter had previously been convicted of a violent felony (the contemporaneous second murder and aggravated assault), and that the capital felonies were committed during a burglary. A fourth aggravating factor, "especially heinous, atrocious, or cruel", was found by the trial court but disapproved on appeal. No mitigating factors were found. 564 So. 2d at 1062, n.2.

(contemporaneous) murder of his wife was the fourth valid aggravator.

In the instant case, there is at most only one aggravating factor, CCP, and -- assuming arguendo that it is upheld -- its weight should be diminished by the fact that the premeditation was fueled by passionate obsession. Cf. Santos; Douglas; Irizarry v. State, 496 So. 2d 822, 825 (Fla. 1986). While this Court's ability to conduct proportionality review is hampered by appellant's refusal to present mitigating evidence (contrast Klokoc, where the mitigating evidence which ultimately resulted in a proportionality reversal was presented by independent counsel, notwithstanding Klokoc's refusal to cooperate), there is enough mitigation on this record for the Court to determine that the death sentence is disproportionate. Appellant's sentence should be reduced to life imprisonment without possibility of parole for twenty-five years.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, undersigned counsel respectfully requests that this Court grant the following relief:

> Reverse appellant's conviction and remand for a new trial [Issues 1 and 2]
>
> Reverse the death sentence and remand for a sentence of life imprisonment without possibility of parole for twenty-five years [Issues 3,4,5,6,7,8,9,10, and 11, independently and cumulatively].
>
> Reverse the death sentence and remand for a new penalty proceeding before a newly impaneled jury, with the appointment of independent counsel to present the evidence and argument in mitigation [Issue 7, alternative relief].
>
> Reverse the death sentence and remand for resentencing [Issues 4,5,6,8, and 10, alternative relief].

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 21st day of March, 1994.

Respectfully submitted,

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