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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The state's brief will be referred to herein as "SB". Other references are as denoted in appellant's initial brief.

This reply brief is directed to Issues I, III, VI, VII, IX, X and XI. Appellant will rely on his initial brief as to the remaining issues.

STATEMENT OF THE FACTS

As has been its routine practice[1], the state has provided a condensed version of appellant's statement of the facts. The state has not indicated any disagreement with anything appellant said, and virtually every piece of evidence mentioned in the state's statement was set forth in appellant's. Evidently, appellant's ten-page summary of the trial evidence was more complete or more detailed than the state would have preferred. Nevertheless, the technique used by the state is unauthorized by the rules.

Fla. R. App. P. 9.210(c) provides that, in an answer brief, the statement of the case and of the facts "shall be omitted unless there are areas of disagreement, which should be clearly specified." See Dania Jai-Alai Palace, Inc. v. Sykes, 450 So. 2d 1114, 1122 (Fla. 1984); Trolinger v. State, 296 So. 2d 87, 88 (Fla. 2d DCA 1974); Overfelt v. State, 434 So. 2d 945, 949 (Fla. 4th DCA 1983). As the First District Court of Appeal has observed:

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[1] See, for example, the state's answer brief and the appellant's reply brief in Hallman v. State, 560 So. 2d 223 (Fla. 1990) (case no. 70,761).

> This simple, concise statement plainly means that the appellee's answer brief shall not contain a reiteration of the statement of the case and of the facts stated in appellant's brief, but shall only state wherein appellee disagrees with appellant's statement and supplement that statement to the extent necessary to correct any material misstatements and omissions in appellant's statement. The appellee's answer brief filed in this case contains almost a verbatim copy of the statement of case and facts found in appellant's brief. At no point does appellee clearly specify any areas of disagreement with appellant's statement. Were it not for the dismissal of this appeal for lack of jurisdiction, we would have stricken appellee's brief for noncompliance with the rules.

Metropolitan Life and Travelers Ins. Co. v. Antonucci, 469 So. 2d 952, 954 (Fla. 1st DCA 1985).

The court noted that Rule 9.210(c) is not complied with in a substantial number of cases, and that the appellate caseload does not afford judges time "to search through an appellee's 'restatement' of the case to determine if areas of disagreement exist. 469 So. 2d at 954.

The state's technique, as often employed in capital appeals, is not to provide additional facts deemed relevant to the appeal, or to call attention to areas of disagreement, but rather to omit facts which its opponent deems relevant. This practice is unauthorized, unnecessary, and potentially misleading, and it should be stopped.

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.

The state -- defending what nobody has challenged -- submits that Professor Ehrhardt is correct in saying that the substantive and procedural limitations which apply to Williams Rule evidence (governed by Fla. Stat. §90.404) do not apply to "inseparable crime evidence" (which is admissible under § 90.402). Appellant does not disagree with Ehrhardt's analysis; in fact he relied on it in his initial brief (p. 34-35). The question is not whether there is such a thing as "inseparable crime evidence", but rather whether the evidence in the instant case falls into that category, and it plainly does not. According to Ehrhardt,[2] inseparable crime 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." Conversely, Williams Rule evidence "applies to evidence of discrete acts other than the actions of the defendant in committing the instant crime charged".

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[2] Ehrhardt, Florida Evidence (2d Ed. 1984), § 404.16, at 138, quoted in Tumulty v. State, 489 So. 2d. 150, 153 (Fla. 4th DCA 1989).

The collateral crime evidence in the instant case involved appellant's battery of his estranged girlfriend Sharon DePaula, and his vandalism of two cars belonging to Sharon and Kelly Ingram. These acts occurred in Ocala on April 27, 1991. While in jail on these charges, according to the state's evidence, appellant began ruminating on ways that he could kill Sharon. He was angry at her and felt she had taken advantage of him by taking some of his personal belongings (T463,469). Appellant was released from jail on June 27. The charged homicide of Sharon DePaula occurred in St. Petersburg on July 24. The earlier criminal acts may have been relevant to motive or intent, but they were not part of the "res gestae" of a homicide which took place three months later and over a hundred miles away.

The state incorrectly asserts that Padilla v. State, 618 So. 2d 165, 169 (Fla. 1993) is "a case similar to the one at bar" (SB15). To the contrary, Padilla involved a single sequence of events which all took place in a single evening, within a time frame of about an hour. 618 So. 2d at 166 and 169. On these facts, this Court said:

> . . . Padilla asserts that the trial court erroneously allowed the State to present evidence that Padilla fired several shots at Marisella's former apartment. We find that the evidence was admissible as "inseparable crime evidence." See Tumulty v. State, 489 So.2d 150, 153 (Fla. 4th DCA), review denied, 496 So.2d 144 (Fla. 1986). We also find that the evidence presented was clearly relevant to establish Padilla's mental condition during the course of this incident, which necessarily includes the initial obtaining of the firearm and then the return in less than an hour to obtain more bullets.

618 So. 2d at 169.

The "other crimes" evidence in the instant case has no resemblance to the single continuous transaction involved in Padilla.[3] Instead, it is similar to the kind of evidence which was introduced (and properly instructed on) in Lindsey v. State, __ So. 2d __ (Fla. 1994) [19 FLW S 241]. Lindsey was charged with the murder of his sometime live-in girlfriend (who had decided to leave him) and

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[3] Griffin v. State, __So. 2d __ (Fla. 1994)[19 FLW S 365] is also distinguishable, as it involved a continuous, inextricably intertwined sequence of events. For example, one of the charges against Griffin was grand theft of an automobile. He conceded that his possession of the vehicle was admissible, but objected to the owner's testimony about finding the car keys missing from his motel room dresser (because the testimony suggested that the room had been burglarized). This Court found the evidence to be an inseparable part of the charged offense. "The manner in which the car keys were taken was inextricably intertwined with the theft of the automobile, one of the charges before the jury" 19 FLW S 366. Similarly, Griffin conceded that his possession of the murder weapon was relevant and admissible. [In addition to charges including murder and attempted murder, Griffin was charged with possession of a firearm by a convicted felon]. However, he objected to evidence that he had stolen the gun in a home invasion robbery which occurred the night before the murder. This Court disagreed, saying the "testimony was necessary to identify the gun and to show that the gun was stolen from the possession of its rightful owner. Nicholas Tarallo's testimony identified the individual who stole the gun as Griffin, thereby establishing possession. The evidence was essential to show Griffin possessed the murder weapon" 19 FLW at S 366.

The collateral crime evidence in the instant case is much more like that in Craig v. State, 510 So. 2d 857, 863 (Fla. 1987) and Lindsey v. State, supra, in which an earlier, separate and distinct crime against the same person who was later murdered may have played a part in the motive for the murder. This is Williams Rule evidence, which is admissible only for a limited purpose [Craig]; and an instruction on the limited use of such evidence is appropriate [Lindsey]. Note also that (unlike the situation in Griffin) "evidence of motive is not necessary to a conviction" of first degree murder; rather it is admissible to "help the jury understand the other evidence presented." Craig, 510 So. 2d at 863. Where another crime -- committed three months earlier and a hundred miles away -- is introduced by the state to support its theory of motive and intent, it is classic Williams Rule evidence, and the statutorily mandated limiting instruction must be given.

her brother. The previous month, Lindsey -- upset after having seen his girlfriend and her sister talking with two men -- assaulted the women by driving his car onto the sidewalk to within a few feet of them. On appeal, this Court found that Lindsey's challenge to the admissibility of evidence of the earlier incident was not preserved for review:

> The state proffered the sister's testimony and argued that evidence of other wrongs was admissible to prove motive, intent, and identity among other things. Lindsey argued that the prejudicial effect of the testimony outweighed its relevance. The court, however, found the testimony relevant and material and decided to admit it and instructed the jury on the limited use of such evidence. When the sister testified (some three witnesses after the proffer), Lindsey did not object specifically to her testimony about the car incident. As we have held before: "The contemporaneous objection rule applies to evidence about other crimes, and, even if 'a prior motion in limine has been denied, the failure to object at the time collateral crime evidence is introduced waives the issue for appellate review." [Citations omitted]. Because Lindsey failed to object to this testimony when given, and on the ground now argued, he failed to preserve this issue for review.* [* Had a proper objection been made, we would find that the trial judge did not abuse his discretion in allowing this evidence for its limited purpose].

19 F.L.W. at S 241.

A trial judge is required by statute to instruct the jury on the limited purpose for which it may consider evidence of other crimes. Fla. Stat. §90.404(2)(b)2. This provision mandates that, if the defendant so requests, the court shall give the limiting instruction at the time the evidence is introduced, and again at the close of the evidence. Failure to do so is prejudicial and

reversible error. Rivers v. State, 425 So. 2d 101 (Fla. 1st DCA 1982), rev. den., 436 So. 2d 100 (Fla. 1983); Lowe v. State, 500 So. 2d 578 (Fla. 4th DCA 1986). Here, defense counsel twice requested limiting instructions at the time the evidence was admitted, so that it would not be misused merely to show bad character (T460-62,542). Twice the judge refused. Then at the close of the evidence, defense counsel requested the standard Williams Rule limiting instruction. This time the judge said he would give the instruction if both sides agreed. The prosecutor, however, did not agree, and as a result, even though defense counsel repeated his request, no limiting instruction was ever given, at any stage of the proceeding.

The protective procedures codified in §90.404(2)(b)2 were circumvented, and the jury was never cautioned not to consider the earlier crimes as evidence of appellant's bad character or propensity for violence. See 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 limiting instruction should be given). Nevertheless, the state -- having succeeded at the trial level in blocking the instruction -- now makes its customary "harmless error" argument. However, under the standard of State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), the question is not whether (absent the error) there was sufficient evidence on which the jury could have based its guilty verdict. Rather, the question is whether the error could have contributed to the verdict; and the

burden of showing beyond a reasonable doubt that it did not is on the state. 491 So. 2d at 1139. Here, the state merely opines that "surely" the jury convicted appellant based on his confession[4] and the ballistics evidence "rather than the fact that he assaulted [Ms. De Paula] three months earlier" (SB18). However, the reason why the admission of improper collateral crime evidence is presumptively harmful error is because of the danger that a jury will consider "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). When evidence of the collateral crime is relevant to prove a material fact (and hence admissible under the Williams Rule), the defendant is entitled by law to a limiting instruction to prevent its use to show bad character or propensity. Here, appellant was deprived of this crucial protection when the evidence was introduced because of the judge's misunderstanding of the law. When -- at the close of the evidence -- the judge might have partially ameliorated his error when he offered to give the standard Williams Rule instruction requested by the defense if the state agreed, the state refused to agree (T745), and the instruction was never given. Obviously, the prosecutor must have felt that the collateral crime evidence would carry more impact with the jury without a limiting instruction, and the state should not now

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[4] As the state correctly points out in Issue II of its brief, a major focus of the defense at trial was to challenge the credibility of Detective Soule's version of the confession, which he chose neither to tape record nor videotape (SB21) (see R 499-504,517-32,858-59,876-83).

be heard to speculate otherwise. See Gunn v. State, 78 Fla. 599, 83 So. 511, 512 (1919).

In addition to its failure to prove beyond a reasonable doubt that the court's refusal to give a limiting instruction had no effect on the jury's guilt phase verdict, the state cannot show (indeed, has not even attempted to show) that the error could not have contributed to the jury's recommendation that appellant be sentenced to death. The jury was instructed on only one aggravating factor (CCP), and -- as the trial court recognized in his belated sentencing order -- the jury could have found in mitigation that appellant was so deeply in love with the victim that it clouded his judgment to the extent that he acted irrationally.[5] The evidence of the earlier crimes was admissible only for the purpose of showing motive or intent, and thus it was also relevant to CCP. If the jury had been instructed when the evidence was introduced or at the close of the evidence to consider it only for that purpose, and not for bad character or propensity to violence, there would have been no problem. In the absence of such an instruction, however, the jury may well have been influenced in its penalty deliberations by the improper considerations. See Castro v. State, 547 So. 2d 111, 116 (Fla. 1989). This is especially true "in light of the fact that a Williams rule error is presumed to infect the entire proceeding with unfair prejudice". Castro 547 So. 2d at 115 and 116.

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[5] The court also stated that the jury could have found in mitigation that appellant believed he would rejoin the victim in another life in the future.

Appellant's conviction and death sentence should 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.

The state's reliance on the sentencing guidelines is misplaced, because (even assuming arguendo that the contemporaneity requirement applies identically in the very different contexts of capital sentencing and the non-capital guidelines)[6] the trial court's after-the-fact sentencing order in the instant case plainly fails to satisfy even the requirements of the guidelines decision quoted by the state. State v. Lyles, 576 So. 2d 706 (Fla. 1991) (SB29-30). Lyles holds that "when express oral findings of fact are made from the bench and then reduced to writing without substantive change on the same date", the written reasons are contem-

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[6] The two situations, however, are not analogous. First, capital sentencing (unlike non-capital sentencing under the guidelines) is subject to the Eighth Amendment requirement of heightened reliability, which cannot be satisfied by an after-the fact justification. Second, a valid death sentence requires something more than 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. (Obviously, this cannot be done if -- as here -- the death sentence is pronounced before the judge has determined what the mitigating circumstances are). 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.

poraneous. 576 So. 2d at 708. Here, in stark contrast, the judge initiated an impromptu dialogue with appellant as to what authority he thought he had playing God with the victim's life; then sentenced him to death without making express oral findings as to the aggravating or mitigating factors; then (when asked by the prosecutor if he was going to prepare a written order) attempted to delegate this responsibility to the assistant state attorney; and only then -- upon being advised that delegation would be inappropriate -- prepared a written order later that afternoon. Unlike the procedure approved for guidelines sentencing in Lyles, the judge did not "reduce to writing" his previously announced oral findings. To the contrary, it is evident that the judge -- at the time he sentenced appellant to death -- had not weighed the mitigating factors against the sole aggravating circumstance, and had not even decided which mitigating factors applied. The record establishes that, after the death sentence was imposed, the judge was ready to let the assistant state attorney decide which if any mitigators to find and "weigh." As stated 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.

The sentencing in the instant case did not even satisfy the more lenient sentencing guidelines rules established in Ree and

Lyles[7], much less the procedure required for capital sentencing. See e.g., Van Royal; Patterson; Grossman; Stewart; Christopher; Hernandez; Spencer.[8] A 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." Van Royal, 497 So. 2d at 628. The preparation of written findings after the fact runs the risk that the sentence was not the result of the reasoned weighing process mandated by Florida's statute and by due process. Christopher, 583 So. 2d at 647.

Appellant's death sentence must be reduced to life imprisonment. Grossman; Christopher; Hernandez.

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.

Because the procedure required by Koon v. Dugger, 619 So. 2d 246 (Fla. 1983) was not followed in this case, this Court cannot meaningfully fulfill its obligation to determine whether the death

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[7] Ree v. State, 565 So. 2d 1329 (Fla. 1990); State v. Lyles, 576 So. 2d 706 (Fla. 1991).

[8] Van Royal, supra; Patterson, supra; Grossman v. State, 525 So. 2d 833 (Fla. 1988); Stewart v. State, 549 So. 2d 1717 (Fla. 1988); Christopher v. State, 583 So. 2d 642 (Fla. 1991); Hernandez v. State, 621 So. 2d 1353 (Fla. 1993); Spencer v. State, 615 So. 2d 688 (Fla. 1993).

sentence is appropriate, or whether appellant's waiver of mitigating evidence was knowing and voluntary. The trial court did not know, and this Court does 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. We do not know whether his behavior was affected by organic brain damage. We do not know whether he was physically or emotionally abused during childhood and adolescence; whether he had a personal or family history of drug or alcohol abuse; 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. Nor do we know whether counsel conducted a constitutionally adequate investigation as to the existence of potential mitigating evidence. See e.g. Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993) (defense counsel's failure to investigate mitigating evidence comprised prejudicially deficient performance, despite defendant's avowed intention to waive its presentation, because waiver "was not knowing, voluntary, and intelligent" in the absence of investigation); Blanco v. Singletary, 943 F. 2d 1477, 1502 (11th Cir. 1991).

The state's only response is to argue that the trial court did not need to comply with Koon. Even though the requirements of that decision were announced in this Court's opinion issued June 4, 1992 (over six months prior to appellant's trial and penalty phase), and even though the revised opinion issued on March 25, 1993 did not change those procedures in any way, the state contends that "the

trial court did not err based on the law applicable at the time" (SB43). In support of its position that the judge need not follow the procedures outlined in Koon until the motion for rehearing was disposed of, the state relies improvidently on a case in which a procedural requirement announced in an original opinion was changed in a subsequent revised opinion. Lovette v. State, __So. 2d__ (Fla. 1994) [19 FLW S 85 and 19 FLW S 164] (SB43-44). In the original opinion in Lovette, this Court held

> that the state cannot elicit specific facts about a crime learned by a confidential expert through an examination of a defendant unless that defendant waives the attorney/client privilege by calling the expert to testify and opens the inquiry to collateral issues. If such occurs, the state must also show that the defendant received a valid Miranda warning.

19 FLW at S 86.

In the revised opinion, the first sentence in the above quotation was retained, but the second sentence, containing the requirement of a Miranda warning, was eliminated.

If the state's reasoning ("as in Lovette, the trial court was not required to comply with the newly announced Koon procedures until that decision was final" (SB44)), were correct, it would mean that trial judges were free to ignore Lovette in its entirety -- including the unchanged main holding prohibiting the state, in the absence of a waiver, from eliciting facts about the crime from the defense's confidential expert -- throughout the period of time when the motion for rehearing was pending. Plainly that is not the law. See Reed v. State, 565 So. 2d 708, 709 (Fla. 1st DCA 1990) ("We recognize that a motion for rehearing of Pope is pending before our

Supreme Court. The state contends that application of the Pope rule would be improper before a decision is made on the motion for rehearing but cites [no] authority, nor have we found a case to support that contention. Additionally, the Pope rule, as established by the supreme court, has already been applied. (Citations omitted)").

A situation nearly identical to the one at issue here was addressed by an Illinois appellate court in People v. Brooks, 527 So. 2d 436 (Ill. App. 1 Dist. 1988). There the state contended that People v. Zehr was inapplicable:

> . . . because while the voir dire examination in this case was conducted on July 31, 1984, the decision in Zehr did not become effective until September 28, 1984, upon modification on a denial of a petition for rehearing. The State essentially argues that the trial court was not required to apply the law as set forth in Zehr at the time of defendant's trial because a petition for rehearing had been filed, and the opinion was subsequently modified on September 28, 1984. As a result, the modified opinion of the court as set forth in Zehr superseded and vacated the rule of law concerning voir dire set forth in the opinion issued by the court on July 31, 1984. We find no merit in the State's argument.

The court explained:

> In the present case, the opinion in Zehr was filed on March 23, 1984. The opinion was later modified upon the denial of a petition for rehearing and refiled on September 28, 1983. While a modification of an opinion following a rehearing does supersede and vacate the earlier opinion [citation omitted], this did not occur here. Rather, the petition for rehearing was denied, and the modification concerned a matter completely unrelated to the voir dire issue originally addressed by the supreme court in the July 31, 1984, Zehr opinion. Therefore, the modification of the

> unrelated issue did not supersede and vacate that portion of Zehr dealing with voir dire. As a result, the law as set forth in Zehr on July 31 was clearly applicable to the voir dire proceeding in defendant's case.

527 NE 2d at 438-39.

Similarly, the motion for rehearing in Koon was denied [18 FLW at S 201] and the modification (which consisted of adding a discussion of the intervening decision in Espinosa v. Florida[9] and the jury instruction on the HAC aggravating factor) was completely unrelated to the procedures to be followed when a death-seeking defendant waives his right to present mitigating evidence.

See also Padovano, Florida Appellate Practice §14.7 ("The decision of an appellate court is the actual disposition of the case, whereas an appellate opinion is a written explanation, given in some instances to explain the disposition"). In Koon, the decision was unchanged, and the legal basis of the decision was unchanged. The only difference between the opinion issued in June 1992, and the opinion as revised on denial of rehearing in March 1993, was the addition of some additional explanation concerning an unrelated issue.[10]

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[9] 505 US. ___, 112 S. Ct. ___, 120 L. Ed. 2d 854 (1992).

[10] For another example, in Taylor v. State, __So. 2d __ (Fla. 1994)[19 FLW S 250 and 343], this Court addressed four issues in the body of the opinion and summarily disposed of six other issues as "without merit" in a footnote. In the footnote, one of the rejected issues was described as a claim that the death penalty statute conflicts with the Rules of Civil Procedure. On denial of rehearing, a revised opinion was issued which correctly describes the issue as a claimed conflict with the Rules of Criminal Procedure. Is it the state's contention that Taylor had no precedential value as to any issue until the typo was fixed?

The state's implicit contention that trial judges need not follow applicable appellate decisions until after any motion for rehearing has been disposed of would merely encourage the filing of dilatory motions for rehearing; would put newly released appellate decisions in a state of suspended animation, thereby creating pervasive uncertainty as to the law; and would lead to disparate results for similarly situated parties.[11]

Finally, Elam v. State, __So. 2d __ (Fla. 1994)[19 FLW S 175] relied on by the state (SB44) and Durocher v. State, 604 So. 2d 810 (Fla. 1992) (cited in Elam) do not support the state's position, since the penalty trials in those cases took place before the original Koon decision was issued on June 4, 1992.

Because of the trial court's failure to comply with Koon, and for the many other reasons discussed in appellant's initial, reply, and supplemental briefs, the death sentence imposed in this case is improper under state law, and fails to meet the standards of reliability required by the Eighth and Fourteenth Amendments to the U.S. Constitutions.

ISSUE X

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

The state, still looking for a way to backdoor lack of remorse into capital sentencing, argues that the trial judge properly con-

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[11] See Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992).

sidered it as rebuttal to the "pretense of moral or legal justification"[12] exception to the CCP aggravator (SB57). However, as this Court recognized in Dragovich v. State, 492 So. 2d 350, 355 (Fla. 1986):

> Whatever doctrinal distinctions may abstractly be devised distinguishing between the state establishing an aggravating factor and rebutting a mitigating factor, the result of such evidence being employed will be the same: improper considerations will enter into the weighing process. The state may not do indirectly that which we have held they may not do directly.[13]

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[12] A claim which nobody ever made, though the state speculates that undersigned counsel "probably" would have made such an argument on appeal were it not for the judge's reference to lack or remorse (SB57-58).

[13] In addition, how does lack or remorse rebut a pretense of justification? If anything, the two go hand in hand. Murderers -- from John Wilkes Booth to the Hamas terrorist bombers -- who act out of a genuine, but misguided or pathological belief in the rightness of their cause tend to be the most remorseless killers of all, often claiming "credit" for their acts.

ISSUES VII, IX, AND XI

[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.

[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.

[XI] THE DEATH SENTENCE IS DISPROPORTIONATE.

Undersigned counsel's reply on these points is brief and interrelated. To avoid repetition, they are addressed together.

The state -- setting up a straw man -- suggests that appellant is arguing for a per se rule that the killing of one's girlfriend (or spouse or "significant other") can never support a finding of CCP (SB55). To the contrary, appellant seeks no per se rule, but is simply asking the Court (as the state says should be done, SB55) to decide this case on its own merits.

Here, the only aggravating factor relied on by the state -- CCP -- was negated, or at least substantially diminished, by the trial court's finding 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" (R1067). Appellant's irrational behavior and thought processes are also vividly described in Dr. Merin's evaluation (a report which was prepared for the court, rather than for the defense). Granted, there was evidence that the

killing was "calculated." But because it occurred in the context of a domestic relationship, and because it was the product of obsessive and delusional rage, it cannot be characterized as "cold" within the meaning of the aggravating factor. Douglas; Santos; Maulden.[14]

On the proportionality question (which only comes into play if this Court upholds the CCP finding)[15], the state tries to distinguish several cases by saying they "cannot be equated with the instant case where there is no testimony by a mental health expert describing the existence of substantial mental health statutory and nonstatutory mitigation" (SB61) (Emphasis in state's brief). And why is that? Is it because no statutory or nonstatutory mitigation exists? Or is it because, as a result of appellant's death wish -- coupled with the trial court's failure to appoint independent counsel to present the case in mitigation [see Klokoc],[16] and his failure even to require a proffer of what mitigating evidence was available to be presented [see Koon[17] and Issue VI] -- we simply do not know how strong the mitigating evidence was. This illus-

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[14] 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).

[15] If CCP is stricken, then no valid aggravating factors exist, and 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).

[16] Klokoc v. State, 589 So. 2d 219 (Fla. 1991).

[17] Koon v. Dugger, 619 So. 2d 246 (Fla. 1993).

trates the futility of Hamblen[18] line of cases. When there has been no adversary penalty hearing below, the requirement of an adversary appeal is illusory, because this Court does not have all the information it needs to conduct meaningful proportionality review. The undersigned again urges this Court to recede from Hamblen, and adopt the "independent counsel" procedure advocated by the dissenters in Hamblen and successfully implemented by the trial court in Klokoc.

Nevertheless, despite the problems inherent in proportionality review in Hamblen-type cases, undersigned counsel submits that, in this particular case, the trial court's findings in mitigation and the corroborative information in Dr. Merin's report are more than enough to overcome the one possible aggravating factor (especially in light of the domestic context of the crime, and the absence of any prior or concurrent convictions of violent felonies). Appellant's death sentence should be reduced to life imprisonment.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests the relief outlined on page 96 of the initial brief.

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[18] Hamblen v. State, 527 So. 2d 800 (Fla. 1988).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 27th day of July, 1994.

Respectfully submitted,

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