IN THE SUPREME COURT OF FLORIDA

GREGORY SCOTT LAYMAN,

Appellant,

v. Case No. 81,173

STATE OF FLORIDA,

Appellee.

SUPPLEMENTAL BRIEF OF THE APPELLEE

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ARGUMENT

ISSUE XII

WHETHER THE SENTENCE OF DEATH MEETS THE REQUIREMENTS OF FLORIDA'S DEATH PENALTY LAW OR THE EIGHTH AMENDMENT STANDARDS OF RELIABILITY.

Appellant, via supplemental brief, now relies on Jackson v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 215 (Fla. 1994), wherein this Court held that a challenge to the instruction on the CCP aggravator had been properly preserved at the trial court level by request for an expanded instruction and had been urged on direct appeal and the given instruction was unconstitutionally vague.[1] The Jackson Court added that as distinguished from the jury instruction issue the challenge to the aggravating factor itself was rejected, citing Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992), cert. denied, 113 S.Ct. 2377, 124 L.Ed.2d 282 (1993)

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[1] Layman belatedly relied on Jackson v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 215 (Fla. 1994); he could have argued in his initial brief that the CCP instruction was unconstitutional, as earlier defendants have done -- see, e.g., Hodges v. State, 595 So. 2d 929 (Fla. 1992). And Jackson, supra, decided after submission of appellant's brief, lends no support to him since Layman did not object to the given instruction (Tr 964 - 969) and Jackson requires the interposition of objection to the instruction at trial to preserve the issue for appellate review. See also Walls v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 377 (Fla. 1994) (To preserve the error for appellate review, it is necessary both to make a specific objection and to raise the issue on appeal).

Even if preserved for appeal, Walls would require affirmance since the instant case involves greater heightened premeditation with Layman's lengthy planning and stalking of his ex-girlfriend than was presented in Walls, which a unanimous court found the CCP factor to be present "under any definition."

and Klokoc v. State, 589 So. 2d 219 (Fla. 1991). See slip opinion at 5.

The CCP statutory aggravating factor is not unconstitutionally vague; this Court has clarified and explained the heightened premeditation which distinguishes F.S. 921.141 (5)(i) from the premeditation element of first degree murder. In Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), this Court explained:

> [18] We also find that the murder was not cold, calculated and premeditated, because the state has failed to prove beyond a reasonable doubt that Rogers' actions were accomplished in a "calculated" manner. In reaching this conclusion, we note that our obligation in interpreting statutory language such as that used in the capital sentencing statute, is to give ordinary words their plain and ordinary meaning. *See Tatzel v. State*, 356 So. 2d 787, 789 (Fla. 1978). Webster's Third International Dictionary at 315 (1981) defines the word "calculate" as "[t]o plan the nature of beforehand: think out . . . to design, prepare or adapt by forethought or careful plan." There is an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery. While there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation." Since we conclude that "calculation" consists of a careful plan or prearranged design, we recede from our holding in *Herring v. State*, 446 So. 2d 1049, 1057 (Fla.), *cert. denied* , 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984), to the extent it dealt with this question.

See also Walls v. State, ___ So. 2d ___, 19 Fla. Law Weekly S 377 (Fla. 1994) wherein this Court described four

characteristics of the CCP factor: first, the killing is the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage; second, the murder is the product of a careful plan or prearranged design to commit murder, third, there must be heightened premeditation, and finally, the murder must have no pretense of moral or legal justification. And see Walton v. Arizona, 497 U.S. 639, 111 L.Ed.2d 511, 528 (1990) (If the Arizona Supreme Court has narrowed the definition of the "especially heinous, cruel or depraved" aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition. It is irrelevant that the statute itself may not narrow the construction of the factor).

Apparently recognizing that he failed to object to the instruction below so as to benefit from appellate consideration under Jackson, supra, and Walls, supra, Layman urges that he be entitled to relief under the fundamental error doctrine. Mordenti v. State, 630 So. 2d 1080 (Fla. 1994).

Fundamental error is one "basic to the judicial decision under review and equivalent to a denial of due process." State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993). This Court has also cautioned that "the Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly." Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970). If a vague jury instruction on the "CCP" or "HAC" were to constitute fundamental error, this Court would not have affirmed

the several decisions where it found erroneous instructions condemned by Espinosa v. Florida, 505 U.S. ___, 120 L.Ed.2d 854 (1992), rather than finding the error harmless or the claim procedurally barred. See, e.g., Happ v. State, 618 So. 2d 205 (Fla. 1993); Ponticelli v. State, 618 So. 2d 154 (Fla. 1993); Davis v. State, 620 So. 2d 152 (Fla. 1993); Slawson v. State, 619 So. 2d 255 (Fla. 1993); Thompson v. State, 619 So. 2d 261 (Fla. 1993); Espinosa v. State, 626 So. 2d 165 (Fla. 1993); Hodges v. State, 619 So. 2d 272 (Fla. 1993).

As appellee has previously noted, the instant case presents even a clearer depiction of a cold, calculated and premeditated assassination than did the facts presented in Wall, supra, where this Court unanimously affirmed. There the defendant killed two people during the course of a burglary. This Court found sufficient that "at the point where Walls left Alger's body, he obviously had formed a 'prearranged design' to kill Peterson" (slip opinion at 11). That can be contrasted with the extraordinary time and preparation of Mr. Layman to kill his victim (thinking about the murder while incarcerated in jail, sawing off the shotgun and test firing it, then stalking her prior to the actual shooting.)

Finally, appellant makes an actual innocence of the death penalty argument, citing Sawyer v. Whitley, 505 U.S. ___, 120 L.Ed.2d 269 (1992) to avoid his procedural default. In Sawyer, the Court explained that a habeas prisoner must show by clear and convincing evidence that but for a constitutional error no

reasonable juror would have found petitioner eligible for the death penalty under the applicable state law. Appellant fails to satisfy this test because under any definition the judge and jury would have found this homicide to be cold, calculating and premeditated. Only if the evidence could not have satisfied this aggravating factor would the argument have any appeal that in the absence of CCP Layman might be ineligible for the death penalty.

CONCLUSION

Based on the foregoing argument and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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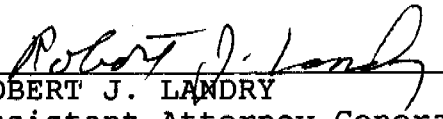

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Steven L. Bolotin, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 9TH day of September, 1994.

OF COUNSEL FOR APPELLEE.