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

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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APPELLANT'S DEATH SENTENCE DOES NOT MEET THE REQUIREMENTS OF FLORIDA'S DEATH PENALTY LAW, OR THE EIGHTH AMENDMENT'S STANDARDS OF RELIABILITY, WHERE THE JURY WAS GIVEN AN UNCONSTITUTIONALLY VAGUE INSTRUCTION ON THE ONLY AGGRAVATING CIRCUMSTANCE WHICH WAS ARGUABLY APPLICABLE.

The state's reliance on Walls v. State, ___ So. 2d ___ (Fla. 1994) [19 FLW S 377] is misplaced. In Walls, this Court found the erroneous jury instruction on CCP to be harmless error because under the facts of that case the state had demonstrated beyond a reasonable doubt that "all four elements of [the CCP] aggravator would exist under any definition" 19 FLW at S 379 [citing State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986)]. In the instant case, in contrast, a properly instructed jury might well have found that the "coldness" element of CCP was not proven beyond a reasonable doubt. In fact, the trial judge expressly stated in his belated sentencing order that "the jury might have considered as a mitigating factor 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" (R1067). An irrational killing fueled by obsessive and delusional love is not "cold" within the meaning of this aggravating factor, even where the other elements of calculation, premeditation, and no pretense of justification are present. See e.g. 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). Had the jury been given a constitutionally adequate instruction, it may well have determined that CCP was not proven, and therefore no valid aggravating factor existed. In that event, the jury could not legally have returned anything other than a life recommendation.[1]

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[1] The state argues:

> If a vague jury instruction on . . . "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).

(State's supplemental brief p. 3-4).

The state's argument completely ignores the central fact on which appellant's claim of fundamental error is based; here the jury was given an unconstitutionally vague instruction on the only aggravating circumstance which was arguably applicable. Appellant's very eligibility for a death sentence depended on a jury instruction which this Court has recognized is highly susceptible to misinterpretation and likely to cause CCP to be applied in an arbitrary manner. Jackson v. State, ___ So. 2d ___ (Fla. 1994) [19 FLW S 215]. In each of the decisions cited by the state there were other valid aggravating factors, so the principle of Sawyer v. Whitley, 505 U.S. ___, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992) does not apply to those cases. In the instant case, the constitutional error directly impacted appellant's eligibility for the death penalty, and the Sawyer principle does apply. Appellant's death sentence does not satisfy the Eighth Amendment's standard of reliability, and it cannot constitutionally be carried out.

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 15th day of September, 1994.

Respectfully submitted,

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