IN THE SUPREME COURT OF FLORIDA

JOHN AUSTIN LANDRY, :

Appellant, :

vs. : Case No. 81,270

STATE OF FLORIDA, :

Appellee. :

_____ :

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Appellee noted that David Sorton and Rick Young testified that John Landry told them he had worked for the victim. In the initial brief, Appellant noted that Rick testified that John said he had worked for the victim and that his safe contained $500,000. (T. 820) Landry testified, however, that he did not know Ed or Dawn Downs and had never worked for them. (T. 1840) The victim's wife, Dawn Downs, testified that she had never met any of the defendants before (T. 1893), despite the fact that she and her husband were "very, very, very very close," "joined at the hip," and he did everything for her. She did not work away from the home. (T. 2113)

ISSUE I

THE TRIAL COURT ERRED BY DENYING LANDRY'S DEMAND FOR SPEEDY TRIAL.

Contrary to Appellee's assertion, John Landry was arrested on May 3, 1992, the day after the offense, and not on May 21st. (R. 2) Counsel was appointed to represent Landry on May 5, 1992, two days after his arrest. (R. 178) As indicated by Appellee, counsel filed the Demand for Speedy Trial on May 22, 1992. (R. 12)

As Appellee noted, no discovery was done.[1] Defense counsel represented, however, that the case was not complicated and he did not think he could get any more information from discovery than he already had. (R. 184) Thus, he did not request discovery. He

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[1] A defendant is not required to participate in reciprocal discovery. See Fla. R. Crim. P. 3.220 ("If a defendant should elect to avail himself of the discovery process. . ."). Depositions are not required. In fact, in federal court and many states they are not permitted without court order.

spent a number of hours with Landry, and talked to his family and counsel for the three codefendants. (R. 184-90) He had talked to the prosecutor because he twice made offers which the State turned down. Because Landry would be going to trial anyway, he wanted to make the State prove its case as soon as possible. (R. 250)

Under oath, John Landry testified that he had discussed the case with his lawyer, understood that he was entitled to discovery and depositions, but preferred to invoke his right to a speedy trial on demand. (R. 241-46) Because Landry never requested or received discovery, he gave up his right to discovery in exchange for a speedy trial. He received neither.

Appellee correctly notes that "death is different," inferring that a defendant in a capital case is not entitled to forego discovery and demand a speedy trial. If the this Court agrees with Appellee's sentiment, a defendant in a capital case will never be entitled to a speedy trial upon demand, despite the language of the statute. Certainly, a person accused of first-degree murder is entitled to make the State prove his guilt as soon as possible.

A demand for speedy trial is a pleading that the accused "is prepared or will be prepared for trial within five days." Fla. R. Crim. P. 3.191(g). Thus, had the demand been honored, defense counsel would have had five more days to be prepared for trial. Because the judge is required to set the case within **sixty** days, Fla. R. Crim. P. 3.191(b), he could have scheduled the trial at the end of the sixty days to give the State time to prepare its case. If the judge was really worried about counsel providing ineffective assistance, this would have resolved that dilemma too. The trial

was already scheduled for July. (R. 247-49) Had the judge granted Landry's demand and scheduled the trial sixty days later, it would have been in July, the month in which it was already docketed.

Appellee correctly notes that, in a capital case, counsel must also prepare for penalty phase. In this case, counsel represented that he had talked extensively with Landry, and had spoken with his family. Defense counsel presented no expert testimony at penalty phase and the record contains no indication that Landry was ever evaluated by a mental health expert, although the trial was not held for six months. At penalty phase, Landry's mother and step-father testified about his background. His mother said John was bright and a good candidate for rehabilitation. (T. 2114-26) Landry and/or his mother could have told counsel everything presented in mitigation in a very short time. If this was not sufficient investigation, then defense counsel was ineffective despite the court's denial of his speedy trial demand.

Based on defense counsel's affidavit in support of his motion for attorney fees, submitted after the trial, Appellee alleges that Landry spent only six hours on the case, and had not even talked to Landry's family, when he filed the motion for discharge. (Brief of Appellee, p.11) This affidavit was not before the trial judge when he made his ruling and cannot now be considered as "evidence in hindsight." Second, the affidavit, filed many months later, may not accurately reflect everything defense counsel had done. Many attorneys do not keep a record of every phone call or contact made in a case. Third, in filing a demand for speedy trial, counsel must represent only that he will be prepared for trial within five

days. Counsel's affidavit in support of his motion for attorney fees shows a fifty minute telephone conference with Landry and his mother within the five day period. (R. 648)

The five days would appear to be intended to correlate with the five days in which the court must hold a calendar call on the demand. In this case, the hearing was not held until thirty days later. At the hearing, counsel represented that he had talked to Landry, his family, and the attorneys for the codefendants.[2] He had not requested discovery and did not intend to do so, had no motions outstanding, and had scheduled no depositions. He said he was ready for trial. Objectively, which is the only basis on which the judge can determine whether the demand is bona fide, Landry was entitled to the speedy trial demanded. See e.g., State v. Reaves, 609 So. 2d 701, 705 (Fla. 4th DCA 1992).

Appellee has attempted to equate the trial court's duty to determine whether a demand for a speedy trial is bona fide with "second-guessing tactical decisions," thus arguing that the judge is required to "second-guess" counsel's tactical decisions. This is not true. The rule's requirement that the judge determine whether the speedy trial demand is bona fide is an **objective**, rather than a subjective requirement. State v. Reaves, 609 So. 2d 701, 705 (Fla. 4th DCA 1992); State v. Kaufman, 421 So. 2d 776, 77

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[2] Even if defense counsel agreed to delay the hearing for thirty days after he filed his demand, he cannot be penalized by any advantage he had from the additional time. Defense counsel was not responsible for holding the hearing in five days, and the prosecutor could have scheduled it sooner had she so chosen. She also benefitted by having additional time to accumulate discovery and to prepare her argument against the defense motion.

(Fla. 5th DCA 1982). Once the judge determines that the demand is bona fide, he may not proceed to second-guess defense counsel's strategic decisions; this is not an objective means of determining whether a speedy trial demand is bona fide.

> [T]he test to determine preparedness for trial must be primarily objective. The old adage that actions speak louder than words is quite appropriately applied here. When the record shows continuing investigation and on-going preparation, it speaks more eloquently than any subjective opinion testimony to the contrary. The filing of a demand for discovery (to which a prosecutor has fifteen days to respond) and the scheduling of discovery depositions is the antithesis of current preparedness for trial.

Kaufman, 421 So. 2d at 777-78; see e.g., Hood v. State, 466 So. 2d 1232 (Fla. 2d DCA 1985) (demand for discovery filed after speedy trial demand); Jones v. State, 449 So. 2d 253 (Fla.), cert. denied, 469 U.S. 893 (1984) (defendant filed 17 pro se motions and requested discovery during two weeks preceding demand); State ex rel. Furland v. Conkling, 405 So. 2d 773 (Fla. 5th DCA 1981) (notice of deposition filed same day as demand, with deposition set for 11 days later); State ex rel. Ranalli v. Johnson, 277 So. 2d 24 (Fla. 1973) (motion to dismiss, filed two weeks after demand, alleged information too vague to prepare defense); Turner v. State ex rel. Pellerin, 272 So. 2d 129 (Fla. 1973) (motion to compel discovery and take depositions filed two days after demand).

In Heiney v. State, 620 So. 2d 171 (Fla. 1993), cited by Appellee for the proposition that even tactical decisions are subject to review as to ineffective assistance (brief of Appellee, p.10), this Court held that Heiney's lawyer did not make decisions regarding the presentation of mitigation for tactical reasons. He

did not know what mitigation existed because he did not attempt to develop a case. The Court cited Stevens v. State, 552 So. 2d 1082, 1083 (Fla. 1989), in which defense counsel failed to investigate the defendant's background, presented no mitigation, and made no arguments on the defendant's behalf to the judge, thus essentially abandoning the representation of his client during sentencing. Heiney, 620 So. 2d at 174. In Heiney and Stevens, this Court held that counsel's decisions did not result from reasoned professional judgment. Moreover, both were jury overrides in which the judge was provided with no mitigation on which to base a life sentence.

The instant case is far different. Defense counsel had spoken to Landry and his family and thus may have already arranged all the mitigation he presented at penalty phase. He ultimately presented mitigation and argued to the judge and jury for a life sentence. He could have presented exactly the same mitigation if the judge had granted his demand for speedy trial and held the trial sooner.

Appellee cited several federal cases to support the argument that even tactical decisions are subject to review when counsel fails to investigate. (Brief of Appellee, p.10.) Although technically true, "if the decision was tactical, that decision is afforded a 'strong presumption of correctness.'" Blanco v. Singletary, 943 F.2d 1477, 1500 (11th Cir. 1991); see also Baxter v. Thomas, 45 F.2d 1501 (11th Cir. 1995) (quoting from Blanco).

In Blanco, cited by Appellee, counsel failed to pursue mental health mitigating evidence including evidence of the defendant's impoverished childhood, epileptic seizures and organic brain damage. In the instant case, Landry or his mother would certainly

have informed counsel immediately had Landry had shown signs of mental or physical illness. Unlike some defendants, Landry had not been on his own for years, or drifted from place to place. He was young and lived at home, at least most of the time. Who would be in a better position to know about possible mitigation his mother?

In Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986), also cited by Appellee, defense counsel failed to investigate a possible alibi witness. Where deficiencies in counsel's performance are severe and **not a product of strategic judgment**, counsel may be ineffective. In this case, however, counsel was aware of all material witnesses (i.e., Dawn Downs, caretakers, codefendants, medical examiner) from the beginning. Although the ballistics evidence was crucial to the State's case, expert Terry LaVoy's testimony was inconclusive as to whether Landry fired any of the bullets. Had the judge allowed the speedy trial demand, perhaps LaVoy would have been available to testify in person at trial rather than by perpetuated deposition.

In Foster v. Dugger, 823 F.2d 402 (11th Cir. 1987), cert. denied, 487 U.S. 124 (1988), defense counsel formulated his trial strategy after frequent conversations with his client concerning the defense options. The Foster court noted that the corollary of the test in Strickland v. Washington, 466 U.S. 668, 691 (1984), is whether counsel's pretrial investigation is reasonable, "applying a heavy measure of deference to counsel's judgments." 823 F.2d at 405 (citing Strickland.) Although a strategic decision cannot be reasonable when the attorney has not investigated and evaluated the options and made a reasonable choice between them, see Horton v.

Zant, 941 F.2d 1449, 1462 (11th Cir. 1991), cert. denied, 112 S.Ct. 1516, 117 L.Ed. 2d 652 (1992), such was not the case here. Landry told his attorney what happened at the scene. Defense counsel spoke with counsel for the codefendants and, presumably, learned their versions of the facts. He also spoke with the prosecutor who declined to enter into a plea agreement with Landry. He spent considerable time discussing alternatives with Landry, who decided on a speedy trial rather than a lengthy investigation into the details of what they already knew. Landry was satisfied with counsel's investigation, and wanted a speedy trial.[3] (R. 241-46)

Despite the continued denials of his motions for discharge, Landry's counsel never requested discovery. As Appellee noted, defense counsel attended 31 depositions and participated in most. These depositions were not scheduled by defense counsel, however, but by counsel for a codefendant, and were held the week before trial, and several months after the judge denied Landry's demand for a speedy trial.[4] The judge ruled that counsel's participation in the codefendant's depositions was not discovery, and denied the State's demand for reciprocal discovery. (R. 359, 378, 388, 740-44)

Once the court denied Landry's demand for speedy trial and motions for discharge, defense counsel was not required to sit on his hands and do nothing further lest he waive his client's speedy

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[3] See Landry's testimony at pp. 24-26 of initial brief.

[4] The depositions were taken in late October, four months after the demand was denied, and after three motions for discharge and a writ of prohibition were denied. (T. 817-1472) Trial was about to begin. By then, it was clear that Landry was not going to get the speedy trial he demanded.

trial rights. Cf. State v. Embry, 322 So. 2d 515 (Fla. 1975) (filing of motion to suppress did not negate demand); Obanion v. State, 496 So. 2d 977, 981 (Fla. 3d DCA 1986) (adding witness and moving to suppress did not show defendant not ready for trial). When trial was imminent, and the petition for writ of prohibition denied, defense counsel probably decided that his time could best be used by participating in the codefendant's scheduled depositions. Appellee specified nothing defense counsel learned at the depositions which made a material difference at trial.

Defense counsel was not using the demand for a speedy trial as a gimmick to get a discharge,[5] but as legitimate trial strategy to enhance Landry's chances of a good result. The longer they waited for trial, the more time the codefendants had to practice their testimony so that it would be consistent and sound convincing at trial. Landry, only 21 at the time, probably saw no purpose in sitting in jail for months while the State prepared a case against him. He had a defense prepared and hoped for an early acquittal, or at least conviction of a lesser offense.

Appellee has enumerated many things defense counsel should have done to prepare for trial. (Brief of Appellee, p.11.) Appellee alleges that counsel could not have obtained school or prison records, or determined whether a mental health evaluation was necessary. Although Landry was in jail and on probation, there was

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[5] Had the judge granted Landry's demand for speedy trial, there was no reason that the trial could not have taken place within sixty days; thus, no reason for a technical discharge. Certainly, the State could get its lab results back and prepare for trial in two months time.

no evidence he had been in prison. No evidence shows that counsel ever got any jail records or had a mental health evaluation, nor did he obtain discovery or lab results. If counsel's failure to perform these tasks shows that he had not diligently investigated his case, and would have been ineffective had the demand been granted, then counsel was ineffective, despite the court's failure to allow Landry a speedy trial.

Three of the four cases cited by Appellee (brief of Appellee, p.11), were also cited by Appellant in the initial brief, and are cited above, to show why the defendants therein (unlike Landry) were not prepared for trial under an objective test. See Jones, 449 So. 2d 253 (defendant filed 17 motions and requested discovery during two weeks preceding demand for speedy trial); Ranalli, 277 So. 2d 24 (motion to dismiss filed two weeks after demand alleged information too vague to prepare defense); Kaufman, 421 So. 2d 776 (ongoing investigation, including demand for discovery and scheduling of depositions, is antithesis of being prepared for trial). In the fourth case, State ex rel. Hanks v. Goodman, 253 So. 2d 129 (Fla. 1971), this Court answered a certified question concerning when the 60-day period commenced under the then new rule 3.191, and discussed other requirements under the new rules.

Appellee incorrectly alleged that, as in Kaufman, "Landry was still scheduling depositions after making the demand for speedy trial." (Brief of Appellee, p.12.) As discussed above, defense counsel never scheduled any depositions. The ones he participated in, scheduled by counsel for a codefendant, were taken months after the judge denied the demand for speedy trial; and after the judge

denied three motions for discharge, and the Second DCA denied the petition for writ of prohibition, without prejudice. Counsel's belated participation in a codefendant's depositions is clearly distinguishable from Kaufman and other cases cited by Appellee, in which discovery or depositions were in progress or scheduled, at the time of or within two weeks of the demand for speedy trial.

Appellee also incorrectly argues that counsel wanted to depose the State Attorney on the circumstances of the plea negotiation. (Brief of Appellee, p.12.) Although the prosecutor accused defense counsel of wanting to obtain information concerning the plea agreements despite his professed readiness for trial, counsel clarified that he was not asking for information about the plea agreements, which are public record, but wanted the prosecutor available as a possible defense witness at trial to impeach the codefendants' testimony concerning what they were promised. (R. 716-17) He never even mentioned wanting to depose the prosecutor. Moreover, this hearing was held September 30, 1992, long after the demand and several motions for discharge had been denied.

Because the trial court erroneously denied Landry his right to a speedy trial on demand, his conviction and sentence must be vacated and he must be acquitted of the burglary and homicide.

ISSUE II

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTIONS TO DISCHARGE BECAUSE HIS RIGHT TO SPEEDY TRIAL UPON DEMAND WAS VIOLATED.

Appellee argues that, when Landry filed a petition for writ of prohibition in the Second DCA, speedy trial was automatically tolled, despite the fact that the prosecutor believed that a court order was necessary. (R. 280) Although defense counsel said he had at first erroneously believed the tolling was automatic (R. 264), he was apparently convinced to the contrary by the prosecutor. The judge also thought an order was necessary because, over defense objection that speedy trial had already run, he agreed to grant the State's motion to toll speedy trial during the pendency of the writ at an October 5, 1992, hearing. (R. 699-703) He did not enter his order until October 14, 1992, however, and, as Appellee admits, did not make it retroactive. (R. 288)

To support the argument that speedy trial was automatically tolled, Appellee cites a 1973 case, Esperti v. State, 276 So. 2d 58 (Fla. 2d DCA 1973). This case was decided under section 915.01 of the Florida Statutes which was repealed in 1971 by c. 71-1(B), § 7, Laws of Florida. See § 915, Fla. Stat. (1993) (historical note). That statute has been superseded by the current Florida Rule of Criminal Procedure 3.191. All other cases found by undersigned counsel indicate that, under the speedy trial rule, the court must grant an extension of time to toll the speedy trial period during the pendency of an extraordinary writ. (See cases cited infra.).

Moreover, although Esperti appears to hold, as Appellee

argues, that the tolling of speedy trial is automatic, in State v. Jenkins, 389 So. 2d 971, 973 (Fla. 1980), this Court noted that the Second DCA, in Esperti, held that "extensions are to be granted, not presumed, and that the court order, not the circumstances, tolls the speedy trial rule." The Jenkins Court also held that the portion of former section 924.071(2), Florida Statutes, which provided for automatic stay during the pendency of an interlocutory appeal, was superseded by the provisions of the speedy trial rule which did not exist when section 924.071 was adopted.

In Williams v. State, 350 So. 2d 81 (Fla. 1977), the trial court granted the State's motion for an order staying the speedy trial time pending an interlocutory appeal (certiorari). 350 So. 2d at 82. This Court noted that "the district court quite correctly observed that the State availed itself of [Rule 3.191(d)(2)] when it moved for a stay, and that, by its terms, the order stayed the proceedings only until completion of the proceeding.

In Tucker v. State, 357 So. 2d 719 (Fla. 1978), this Court held that application to the trial court for an extension of the speedy trial period is necessary during an interlocutory appeal. In a footnote, the Court rejected

> the notion that criminal defendants are to be penalized for moving to dismiss an indictment, and certainly not where the motion is sufficiently well-taken to elicit a favorable ruling from the trial court. The position urged by the state (and mentioned suggestively by the Second District) would place an accused on the horns of a dilemma by requiring him to jeopardized his speedy trial rights in order to challenge the state's right to prosecute. The right to test the legality of the state's procedure and the right to a speedy trial are independently guaranteed, and we cannot accept a construction of our rules that would force a defendant to risk one to obtain the other.

357 So. 2d at 721 n.7. Similarly, a defendant has the right to petition for writ of certiorari to challenge the state's right to prosecute after the defendant's speedy trial rights have been denied, and should not be required to forfeit that right or submit to further delay of the trial, without a court order tolling the speedy trial time. In this case, the Second DCA requested a response to the petition, and later denied it without prejudice to raise the issue again in this appeal. Thus, it was not frivolous.

In Hochstrasser v. Demers, 491 So. 2d 1245 (Fla. 2d DCA 1986), the State filed a petition for writ of certiorari and the defense later filed a petition for writ of prohibition. The court noted that the reference to appeals in Rule 3.191(g), requiring that the defendant be brought to trial within ninety days after an appeal, did not encompass petitions for extraordinary writs. 491 So. 2d at 1245 (citing State v. Barreiro, 460 So. 2d 945 (Fla. 3d DCA 1984); State v. Dante, 467 So. 2d 744 (Fla. 3d DCA (1985) (court granted state's motion to toll speedy trial during pendency of writ of prohibition)). The Hochstrasser Court stated that, "to toll the speedy trial time pending a petition for certiorari, an order of extension must be obtained from the trial court pursuant to Florida Rule of Criminal Procedure 3.191(d)(2)." 491 So. 2d at 1246. There is no reason why a writ of prohibition, also an extraordinary writ, should be any different.

In any event, if the state and this Court construe the trial court's June 25, 1992, denial of the defense demand for speedy trial as a finding that the demand was invalid, it would appear that the trial judge should have commenced the running of the

ninety day period under Rule 3.191(j)(4) on June 25, 1992, when he entered a written order denying the demand for speedy trial. (R. 91-92) Rule 3.191(j)(4) requires that, when a demand for speedy trial is invalid, "the pending motion for discharge shall be denied, provided, however, that trial shall be scheduled and commence within 90 days." The committee note to this section under the 1980 amendments states that, if the court finds that the demand was invalid, "the court must deny the motion and schedule trial within 90 days." Although no motion for discharge was pending, the court found the demand invalid and denied it on June 25, 1992.

At the hearing on the defense motion for discharge filed July 17, 1992, the judge did not reconsidered whether Landry was ready for trial. Instead, the judge held in his July 21, 1992, order that, because he had previously ruled that the defense was not ready for trial, the time periods had not run. (R. 107) Thus, he actually made his determination of invalidity on June 25, 1992, which should have started the ninety day period under the rule.

Ninety days from June 25, 1992, expired on September 23, 1992, well before trial commenced on November 3, 1992, and before the Petition for Writ of Prohibition was filed in the Second District Court. If the ninety days had expired, the tolling issue is mooted because, as defense counsel argued at the October 5, 1992, hearing, the speedy trial period had already expired.

Appellee correctly notes, as did Appellant in the initial brief, that several district courts have held that the 15-day window applies when the court orders that a case be tried within ninety days following denial of a motion for discharge pursuant to

subsection (j). Naturally, the district courts want to proceed cautiously and prevent speedy trial discharges when possible and, thus, have interpreted the rules to this end. This Court has not yet considered this issue and we contend that a reading of the rule shows that the 15-day window is not applicable in such a case.

Quoting from State v. Veliz, 524 So. 2d 1157 (Fla. 3d DCA 1988), Appellee notes that, "[a]cross the 3.191 board, the sole remedy available when any 'prescribed time period' has run is a motion to discharge," and that the ten day grace period applies "on its face and without limitation to all of the speedy trial requirements set forth in various subsections of the speedy trial rule." (Brief of Appellee, p.18) Why, then, is 3.191(j) the only section that omits mention of the grace period? Because the provision referring to the 15-day window was omitted from Rule 3.191(j), we must presume that the legislature did not intend it to apply to that provision.

Rule 3.191(j) states that once the court determines that discharge is inappropriate for reasons set forth in (2), (3) or (4) of that subsection, the pending motion for discharge shall be denied; the trial, however, "shall be **scheduled and commenced** within 90 days of a written or recorded order of denial." There is no mention of the "remedies set forth in subsection (p)," which includes the 15-day window. Had the legislature intended the 15-day window to apply, the subsection would have provided, like all of the other subsections, that, if the defendant was not brought to trial within 90 days, he would be entitled to "the appropriate remedy as set forth in subdivision (p)."

The intent of subsection (p) was to provide the state an additional 15 days as a "safety valve" to give the state a chance to remedy a mistake. Once the judge has denied a motion for discharge and given the state 90 days in which to try the case, the state should not then be given another 15 days. For the above reasons and those in Issue I, acquittal is required.

ISSUE III

THE TRIAL COURT ERRED BY GRANTING THE STATE'S MOTIONS IN LIMINE TO EXCLUDE DEFENSE EVIDENCE SUGGESTING THAT THE VICTIM'S WIFE, DAWN DOWNS, MAY HAVE BEEN INVOLVED IN THE CRIME.

Cases cited by Appellee, such as Crump v. State, 622 So. 2d 963 (Fla. 1993), are distinguishable because, unlike the instant case, the excluded evidence was hearsay. In Hitchcock v. State, 413 So. 2d 741 (Fla.), cert. denied, 459 U.S. 960 (1982), the Court found character evidence suggesting that the defendant's brother might have committed the crime too remote to be relevant. In the instant case, the evidence was not remote, and was not character evidence. It was not, as alleged by Appellee (brief of Appellee, p.21), an attempt to paint Ed and Dawn downs in a bad light. Instead, the evidence showed a clear motive and opportunity for Dawn to arrange the murder of her husband. Although perhaps no one excluded piece of evidence would sufficiently implicate her, the combination did so.

Appellee argues that most of this information was submitted to the jury. (Brief of Appellee, p.22.) Although some of it was, the crucial facts were omitted. Without knowing about the existence of

the drug indictment and forfeiture action, the jury would not be about to see the pattern implicating Dawn in the murder. Although the jury heard that the defendants were looking for marijuana at the Downs estate, and that Brock once looked for marijuana there, they had no reason to believe that Ed Downs was aware of any marijuana growing on his property. Without this information, the jury would have no reason to believe Landry's testimony that Rick Young knew where to find the house key and was waiting for a signal from the lady in the house who wanted him to kill her husband and make it look like a robbery; or that, despite Rick's offer to give him some of the money, John refused and left. (T. 1827)

Although Dawn Downs said that she did not know about the drug indictment until a month after the murder, this testimony was merely self-serving. She also testified that she and Downs were so close they were joined at the hip. (T. 2113) The judge excluded evidence that Ed Downs had been indicted for smuggling marijuana about a month prior to the homicide. (T. 570-79) Because he had already been indicted, there was a good chance that both he and Dawn, who was joined at the hip, were aware of the indictment. The fact that the forfeiture proceedings were still in progress at the time of the trial, and that Dawn had five lawyers, although not all of them were working on the forfeiture action (R. 570-78), in no way undermines the theory that Dawn had her husband killed to avoid losing all the money and estate in a forfeiture action. (Brief of Appellee, p.23.) Certainly, Dawn would not have known that the government could continue the forfeiture action even though they could not convict Downs. Common sense would suggest otherwise, and

Dawn was in no position to consult a lawyer as to the consequences if Downs died prior to conviction.

Although many of John Brock's actions do not show that he was involved with Dawn, the fact that he helped her move furniture at some time after the homicide (T. 567, 1285), suggests more than a professional relationship. One does not normally call a law enforcement officer to help move furniture. Moreover, that she offered him a $500 campaign contribution, and that he declined to take it (T. 570-78), suggests that Brock thought they had something to hide. Why else would he had refused the contribution?

Although Appellee argues that Landry's testimony concerning the party at which Dawn may have hired Young to murder her husband was self-serving (Brief of Appellee, p.26), it was no more self-serving than Dawn's testimony that she was not at any such party, did not know about the drug indictment, and never hired anyone to kill her husband. Certainly, the codefendants, especially Rick Young, would not admit they met Dawn Downs at the party.

Although the evidence that Dawn was also Ed Downs' step-daughter would not be material alone, it adds to Dawn's motive to kill her husband. It suggests that she may have married a father-figure for his money, rather than for love, and did not want to lose the money. Moreover, the State introduced a myriad of self-serving testimony concerning the idyllic relationship Dawn had with her husband. (T. 493-98, 553-56) Without knowing the background of the marriage, the jury would be less inclined to believe Landry's defense that she hired Young to kill her husband to keep the government from taking his estate.

Appellee argues finally that the judge went overboard in allowing the defense to later establish a foundation for the excluded evidence. Although he continually told the defense that they could do so, he precluded them from doing so by excluding the evidence they needed to provide a foundation. They could not connect the independent events without being permitted to cross-examine state witnesses such as the caretakers to elicit the necessary connecting testimony. Contrary to Appellee's assertion,[6] that the caretakers were paid in case does support the theory that Dawn was behind the murder because it suggests that the caretakers were paid with drug money. That the trial court refused to allow their proffers concerning this and the type of work Downs did, to try to establish a nexus to the excluded evidence, denied Landry a fair trial. A fair trial is never harmless. Moreover, the evidence of Landry's guilt, based primarily on the testimony of codefendants with motives to lie to protect themselves, was not overwhelming.

ISSUE IV

THE TRIAL COURT ERRED BY DISALLOWING CODEFENDANT RICK YOUNG'S TESTIMONY CONCERNING HIS UNDERSTANDING OF HIS SENTENCE UNDER THE PLEA AGREEMENT.

Appellee argues that this issue was not preserved because the defense failed to proffer the testimony. In this case, however, no matter what response Young gave, his answer would have been relevant and the jury was entitled to hear it. Where the propriety of excluding evidence can be determined from the record, the denial of

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[6] Brief of Appellee, p. 29.

a proffer is not reversible error. Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987).

This case is distinguishable from Lucas v. State, 568 So. 2d 18, 22 (Fla. 1990), because Lucas involved the exclusion of hearsay. Moreover, this Court noted that even if the witness had been permitted to answer the question, her response would have been cumulative. 568 So. 2d at 22 n4. In this case, the evidence was not hearsay because it was not offered for the truth of the matter, but instead to show how much time Young believed he would serve, which was crucial to his motivation to testify for the State. It was not cumulative because only the prosecutor knew what she promised Young, and she could not be called as a witness. (See discussion of motion to disqualify state attorney in Appellant's initial brief.)

ISSUE V

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE TAPED STATEMENTS OF TWO CODEFENDANTS, AND OTHER HEARSAY EVIDENCE, TO BOLSTER THE CODEFENDANTS' TRIAL TESTIMONY.

As noted by Appellee (brief of Appellee, p. 41), the codefendants could not change their stories from those given in their original taped statements, pursuant to their plea agreements. Rick Young so testified. (T. 895) This clearly shows that the boys did not make up the stories after their plea agreements, but before. Thus, their statements were given before, not after, their motive to fabricate, and served only to bolster their trial testimony.

Defense counsel pointed out that, at their depositions a week before trial, they gave somewhat different versions of the crime.

He tried to impeach their testimony by reference to the depositions given a week before trial. (T. 738, 740, 755, 763-64, 771, 907, 914, 960, 962, 987-91) This suggests that they forgot part of their original versions by the time they gave their depositions. Before trial, however, the prosecutor apparently reviewed their original statements with them. Young admitted that he went over his testimony with the prosecutor before trial. (R. 905) By reviewing their original taped statements, Young and Sorton were able to conform their trial testimony to their taped statements.

Obviously, therefore, we disagree with Appellee's statement that the inference at trial was that the motive to lie was developed at the time of the plea agreement. (Brief of Appellee, p. 46). Moreover, Sorton and Young may have concocted their stories after rather than before their arrests. Young, who gave his version first, may have communicated it to Sorton prior to Sorton's statement a day later. Even if their stories were not concocted, the taped statements were inadmissible because they were not made after the motive to fabricate, and for other reasons cited herein.

In Alvin v. State, 548 So. 2d 1112, 1114 (Fla. 1989), cited by Appellee, the Court agreed that portions of a taped statement consistent with the witness' trial testimony were admissible because, unlike this case, the defense had argued that the witness fabricated his story after state gave him immunity in exchange for his testimony. The Alvin Court also held, however, that the witness' taped statement contained information not elicited from him in court, particularly concerning the defendant's reason for starting to shoot. The trial judge expressed regret that he had

not listened to the tape before trial to edit out the statements that went beyond the witness' trial testimony. Although this Court found error, it did not reverse because other evidence made the additional statements from the tape cumulative. Id., see also Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992).

In this case, the tapes contained a myriad of information outside the scope of the codefendants' trial testimony, which was not cumulative. Much of it was irrelevant and prejudicial. Some examples were cited in Appellant's original brief at pages 68-69. Much of the taped statements, during which Brock employed various strategies to induce the codefendants to talk, was clearly irrelevant. David Sorton cried for nearly fifteen minutes. (See S2 -- tapes) Brock told him he could see that what happened bothered him a lot and suggested that it would help to get it off his chest. When Sorton finally started responding (T. 1186-88), Brock took a fourteen minute recess so that Sorton could compose himself. (T. 1190-91) All of this was prejudicial.

Appellee argues that any questionable hearsay was deleted from the tapes. (Brief of Appellee, p. 46) In fact, however, it was all hearsay. Because they are generally hearsay, prior consistent statements are inadmissible as substantive evidence unless they qualify under an exception to the hearsay rule. Rodriguez, 609 So. 2d at 500. As discussed above, the exception which would have allowed such evidence (prior consistent statement used to rebut an express or implied charge of improper influence, motive or recent fabrication, under section 90.801(2)(b), Florida Statutes (1993), was inapplicable in this case.

Finally, Appellee argues that Detective Brock was available for cross-examination as to what Franklin Delph, the juvenile who did not testify, said. (Brief of Appellee, p. 48) Brock referred to Delph's statement, which the jury did not hear, in the taped statements. To the contrary, Brock could not have been cross-examined about Delph's statement because it would have been inadmissible hearsay. Thus, the jury must have assumed that Landry's counsel did not call Delph to testify because he would have implicated Landry. The record does not indicate who Delph did not testify, although it may have been to avoid self-incrimination.

ISSUE VI

THE TRIAL COURT ERRED BY ALLOWING CHRIS HOWELL'S HEARSAY TESTIMONY.

Appellee argues that this issue was not preserved because defense counsel failed to renew his objection to the testimony at the time the witness testified. In fact, defense counsel objected to Howell's testimony various times throughout the testimony. For example, when the prosecutor asked Howell whether Sorton and Landry told him they got a ride from Danny Reynolds, defense counsel objected because the question called for hearsay. His objection was overruled. (T. 1038). Defense counsel's objection was again overruled when Howell was asked what the boys talked about in the room, which also called for hearsay. (T. 1041) Once the judge had ruled in limine that the testimony was admissible, and was overruling counsel's objections, it was futile for counsel to continue objecting to each question asked.

Counsel is not required to continue to object when it is obvious that objecting would be futile. Thomas v. State, 599 So. 2d 158 (Fla. 1st DCA 1992). Citing this Court, the Thomas court observed that, "[t]he courts of this state have recognized that there is no need to make further obviously vain and futile objections once an issue has been clearly ruled on by the trial judge." 599 So. 2d at 160 n.1 (citing Mercer v. State, 40 Fla. 216, 24 So. 154, 159-60 (1989); Webb v. Priest, 413 So. 2d 43 (Fla. 3d DCA 1982) (party not required to renew his objection each time in what would have been an obviously futile gesture).

Accordingly, this issue is preserved for appellate review.

ISSUE VII

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE PERPETUATED DEPOSITION TESTIMONY OF BALLISTICS EXPERT TERRY LaVoy, INSTEAD OF REQUIRING LIVE TESTIMONY.

As noted by Appellee,[7] the prosecutor argued to the court that she could not have called LaVoy to testify prior to Friday of the first week because it was not until Thursday that the exhibits were picked up by the lab analyst, and none of the other witnesses knew about the exhibits. Appellee continued, paraphrasing her argument, that, "[s]ince it wasn't until Thursday that the exhibits had been picked up in order to show them to the jury and make any sense with regard to the exhibits in the case, that she could not present LaVoy's testimony. (T. 1442)." Undersigned counsel attempted to

[7] Brief of Appellee, p.59.

organize the above sentence, and those preceding it, so as to understand the prosecutor's argument, but was unable to do so.

It is not clear what exhibits the prosecutor is talking about. Were they the guns and ammunition LaVoy examined, or exhibits for the other witnesses to examine? Why were they at the lab? If she was referring to the guns and ammunition, they were apparently available on Monday when LaVoy's deposition was perpetuated.

The prosecutor also argued that she tried to get LaVoy to testify on Friday, but he had to testify in another first-degree murder case in Hernando County. Didn't she ask LaVoy in advance whether he had other commitments that week? Moreover, she told the judge that, when she talked to LaVoy on Thursday, he was in the midst of perpetuating testimony for the Hernando County judge. If he intended to testify there on Friday, why was he perpetuating testimony on Thursday? Did the prosecutor suggest that he let Hernando County use his perpetuated testimony so that he could testify in Glades County on Friday?

During the prosecutor's earlier argument, quoted by Appellee at page 68 of its Answer Brief, the prosecutor said she brought the lab analyst on Thursday to identify the items that were picked up at the house. She then said she arranged to have the evidence on Friday morning to put Mr. LaVoy on the stand. Thus, it seems that the exhibits she was waiting for were the ones that LaVoy examined during the Monday deposition, and maybe some others. If so, why couldn't she have had LaVoy testify on Thursday, prior to the lab analyst, and identify the exhibits during his testimony? On the other hand, if LaVoy was perpetuating testimony in Hernando County

on Thursday, perhaps he could not have come on that day either. It sounds as though the prosecutor had not even attempted to find out whether LaVoy would be available during the first week of trial.

Why did it take until Thursday for the lab analyst to pick up the exhibits anyway? The prosecutor had six months to prepare for trial, over defense counsel's speedy trial objections. She knew the trial was about to start. If they were the same exhibits the prosecutor had available for LaVoy to examine during his deposition earlier in the week, why were they not available on Wednesday or Thursday. None of this argument makes any sense.

The prosecutor's argument that she had to introduce other evidence prior to LaVoy's testimony is also specious. She needed only the testimony of Dawn Downs to prepare the jury for the ballistics testimony. Had LaVoy testified on Friday, the jury would not have heard the codefendants' testimony.

Citing no record page reference, Appellee stated that the prosecutor represented that LaVoy was available to testify at trial on the original trial date, and that it was the defense petition for writ of prohibition that caused the conflict. Even if this were true (we do not know, of course), Landry cannot be punished for exercising his legal right to file a petition for writ of prohibition. Cf., State v. Eubanks, 630 So. 2d 200, 201 n.1 (Fla. 4th DCA 1993) (defendant had option of filing petition for writ of prohibition challenging court's denial of motion for discharge). Moreover, had the judge correctly allowed Landry's demand for a speedy trial, perhaps LaVoy would have been available to testify in person at the earlier trial.

Appellee argues that Landry's lack of knowledge as to what the state's witnesses would testify to at trial, which he might use to cross-examine LaVoy, was due to defense counsel's decision not to engage in discovery. We disagree. Discovery would not have enlightened the defense as to what the prosecutor planned to ask the witnesses at trial. The fact that defense counsel participated in a number of depositions arranged by counsel for a codefendant would not have made him privy to these witnesses' trial testimony, unless counsel just happened to asked all the right questions.

We might agree with Appellee that this error was harmless, but for the fact that it was the single most crucial testimony of the trial. Moreover, LaVoy's testimony was confusing in part, and inconclusive. LaVoy identified a Winchester "pump" rifle which the prosecutor argued was the gun Landry used to fire one shot that hit the victim. LaVoy said he had test-fired the gun twice. (R. 1478-80, 1958-59) During the deposition, however, LaVoy found no spring in its magazine. He admitted that one could not load, reload and fire the rifle without a spring to push the cartridges into the chamber. (T. 1579-80) LaVoy could not explain how he test-fired the Winchester .22 without a spring. (T. 1582) There was no explanation as to how the spring could have disappeared between LaVoy's test-firing and the deposition.

Codefendant David Sorton testified earlier that he recognized the gun they borrowed from Landry's mother, allegedly the Winchester pump carried by Landry, because he cleaned it two years earlier. He said the spring was missing at that time. (T. 674-77) If LaVoy examined the same gun, and the spring was missing, then he

could not have test-fired the gun as he claimed to have done.

LaVoy found that the .22 long rifle caliber cartridge taken from the victim's body was consistent with being fired from the .22 Winchester pump rifle, but could not positively identify it as having come from that rifle to the exclusion of all others. (T. 1508-12) Although the copper bullet was in a package labeled "gray metal bullet," like the other two packages which actually contained gray metal bullets, only the base portion of the copper bullet was gray. (T. 1555-56) Additionally, a revolver was found under the foot of the Downs' bed, which apparently belonged to the Downs. (T. 650(24)) Had LaVoy testified in person, perhaps some of these problems could have been cleared up.

Appellee argues that this error was harmless because codefendants Sorton and Young testified that Landry went into the victim's bedroom with a gun and participated in the shooting of the victim. Because neither Sorton or Young were in the bedroom, according to their self-serving testimony, they could not possibly have known what happened or who fired the shots. Appellee's statement that Landry said the victim grabbed for his gun, that he shot the gun, and that it jammed, is based on a combination of hearsay testimony. Rick Young, testifying in exchange for a seventeen year sentence, said that codefendant Delph, a juvenile who did not testify, told him John fired a shot and his gun jammed. (T. 864-66) Chris Howell, a friend of the codefendants, testified that, either David Sorton or John Landry told him the victim grabbed Franklin's gun and Franklin fired the first shot. He thought both the husband and wife were shot, and that John's gun jammed "or something." (T.

1049-50) Howell admitted he had no independent recollection of who said what, but went over his deposition testimony the day before he testified. He was "doing drugs" when he gave the deposition and at the time of the homicide. (T. 1066-68) Thus, many questions were left unanswered after the trial. The ballistics evidence was the most crucial evidence in the case and should not have been presented on videotape. The case should be reversed for retrial.

ISSUE VIII

THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTION FOR JUDGEMENT OF ACQUITTAL AS TO PREMEDITATED MURDER.

Although, as noted by Appellee, Landry and Delph allegedly went into the victim's bedroom armed (brief of Appellee, p. 64), Appellee fails to mention Young's testimony that Delph and Landry planned to take duct tape to tape up the victims, and to scare them with guns so they would open the safe. (T. 816) Duct tape and a ski mask were found in Sorton's car. (T. 1309-12) This indicates that Landry intended only to rob the victims.

Appellee's assertions that "Franklin said" John fired first and his gun jammed, and that "John said" the man jumped up and grabbed his gun (brief of Appellee, p. 65), are misleading. Franklin did not testify and John testified that he abandoned the burglary. The statements cited by Appellee are from the testimony of codefendant Young, who testified pursuant to a plea agreement.

As Appellee admits, ballistics expert Terry LaVoy testified only that one of the bullets removed from the body was merely **consistent with** having been fired from the Winchester pump rifle,

allegedly carried by Landry. Appellee's conclusion, therefore, that "the evidence shows that at least one of the bullets found in the victim's body came from John Landry's gun," is unfounded.

As Appellee argues, the jury apparently rejected Landry's defense. (Brief of Appellee, p.66.) Nevertheless, the State is required to prove Landry committed premeditated murder. Landry has not obligation to prove anything.

ISSUE IX

THE APPELLANT'S SENTENCE FOR PREMEDITATED MURDER MUST BE VACATED BECAUSE THAT CONVICTION WAS MERGED INTO THE FELONY MURDER CONVICTION.

Appellee agrees that the convictions must be merged.

ISSUE X

LANDRY'S SENTENCE MUST BE REDUCED TO LIFE BECAUSE THE TRIAL COURT DID NOT FILE A WRITTEN SENTENCING ORDER.

Although the judge purported to give reasons for sentencing Landry to death, his reasons did not comply with the requirements of Florida's death penalty statute and this Court's case law, because he did not specify which aggravating and mitigating factors he found. § 921.141, Fla. Stat. (1993). He said only that he considered the [unspecified] aggravating and mitigating factors and the jury recommendation, and found that the aggravators outweighed the mitigators. He said the State rebutted the "no significant criminal history" mitigator, which defense counsel never argued, and said Landry was 21 years old and not a minor. (R. 802-04)

In addition, the judge orally found numerous nonstatutory aggravating factors. He said the crime was particularly heinous, even though the jury was not instructed on HAC and the crime clearly did not fit under this Court's definition of that factor because the victim was shot and died almost immediately. See e.g., Wickham v. State, 593 So. 2d 191, 193 (Fla. 1991).

The judge found that the defendants were armed and "evidently" prepared for loss of life, and that nothing would cause a homeowner more concern for his safety than a burglary and shooting in one's own bedroom. He said that Landry destroyed a home and family and showed no remorse; that the jury rejected Landry's version of the events; that Landry's version was contradicted by a corrections officer who overheard him make an admission in jail (a fact not in evidence); that Dawn Downs heard Landry's name in her bedroom; that the codefendants testified against him; that Ed Downs apparently gave a lot of himself to others; that Landry took more than a person's life -- he took a husband and father and grandfather; that Dawn was almost killed too and her security impacted; that Ed Downs was "everything" to her; that she no longer slept with a husband, but with a gun;[8] that Landry was the ringleader and masterminded the burglary; and that he shot and killed Downs with "fatal wounds through the heart."[9] (R. 799-802)

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[8] Dawn testified earlier that they had a lot of guns. Her husband, Ed, had given her hunting guns as well as the handgun by her bed. Ed had taught her to use guns. (T. 570-71)

[9] As noted above, this was not established. Franklin Delph apparently fired at least two of the fatal wounds.

This Court has held repeatedly that lack of remorse cannot be considered as an aggravating factor nor be used to rebut the mitigation. See Nowitzki v. State, 572 So. 2d 1346, 1356 n.7 (Fla. 1990); Hill v. State, 549 So. 2d 179 (Fla.1989); Trawick v. State, 473 So. 2d 1235 (Fla. 1985), cert. denied, 476 U.S. 1143 (1986). The rest of the judge's reasoning was of an emotional rambling nature, sounding more like a sermon than legal reasoning. These reasons are obviously not what was contemplated by the legislature when it enacted Florida's death penalty statute, or by this Court in its interpretations thereof. Accordingly, Appellee's argument that the judge's oral findings should be considered in lieu of a written sentencing order is completely spurious.

In Layman v. State, 20 Fla. L. Weekly S141 (Fla. Mar. 23, 1995), this Court reconfirmed its prior holdings that the trial judge must "set forth in writing its findings upon which the [death] sentence is based . . . ." Id.; § 921.141(3), Fla. Stat. (1993). Moreover, the written order must be prepared prior to the oral pronouncement of sentence and filed concurrent therewith. In Layman, the judge imposed a death sentence without clearly discussing the aggravating and mitigating factors, and issued a written order several hours later. This Court vacated the death sentence and remanded for imposition of a life sentence.

In the instant case, the judge never made any oral or written findings as to aggravating and mitigating factors, and to this day has never made nor filed a written sentencing order. His rambling comments show clearly that he did not weigh any aggravators and mitigators, as required by Florida law. If this case is not

dismissed on speedy trial grounds, and a new trial is not ordered, this Court must clearly vacated the death sentence and remand for the imposition of a life sentence.

ISSUE XI

THE APPELLANT'S SENTENCE MUST BE REDUCED TO LIFE BECAUSE IT IS DISPROPORTIONATE.

A number of cases cited by Appellee to support proportionality compare the number of aggravating circumstances against the number of mitigating circumstances. The weighing process is not a matter of counting aggravators and mitigators. Moreover, the trial judge never found any aggravators or mitigators in this case, and issued no written order; thus, this case cannot be compared to others in which the trial judge's properly employed the weighing process.

Appellee's assertions that Landry was "the shooter" and that he was the moving force behind the crime were not proven by the evidence. In fact, the only proven shooter was Franklin Delph. That the other defendants entered into plea agreements in exchange for their lenient sentences does not justify the disparity in sentencing. According to defense counsel, the State rejected two proposed plea agreements with Landry (R. 250), presumably because two of the other boys, who were arrested first, had already agreed to testify against Landry. Delph, who fired at least two of the three shots, was a juvenile.

The death sentence must be vacated and the sentence reduced to life not only because the judge made no written findings (see Issue X, supra), but also because the penalty is disproportionate.

ISSUE XII

THE APPELLANT MUST BE RESENTENCED FOR BURGLARY WITHIN THE SENTENCING GUIDELINES BECAUSE THE TRIAL COURT DID NOT FILE CONTEMPORANEOUS WRITTEN REASONS FOR DEPARTURE.

Despite Appellee's argument that the valid departure reason was printed on the scoresheet "at the time of sentencing," the departure reasons on the scoresheet do not qualify as written reasons because the judge did not sign the scoresheet. See Morris v. State, 640 So. 2d 213 (Fla. Aug. 3, 1994) (scoresheet not signed by judge did not constitute written departure order). Moreover, we do not know when the departure reasons were printed on the scoresheet, or by whom.

Even if the judge had signed the scoresheet, it would not constitute a valid departure order because it was not filed until five days after the sentencing. (R. 633) See Ree v. State, 565 So. 2d 1329, 1331 (Fla. 1990) (judge may not depart from the guidelines without filing a contemporaneous written order citing reasons for his departure); see also State v. Lyle, 576 So. 2d 706 (Fla. 1991).

Because the judge failed to provide contemporaneous written departure reasons, if Landry is not discharged and a new trial ordered, the life sentence for burglary must be vacated, and the case reversed and remanded for resentencing within the guidelines for the burglary. See Owens v. State, 598 So. 2d 64 (Fla. 1992); Faulk v. State, 626 So. 2d 1063 (Fla. 2d DCA 1993).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 10th day of May, 1995.

Respectfully submitted,

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