IN THE SUPREME COURT OF FLORIDA

STEVEN M. EVANS,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC95-993
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

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PRELIMINARY STATEMENT

Evans relies on the argument and authority set forth in the Initial Brief of Appellant in reference to the following points on appeal:

POINT IV:

THE TRIAL COURT IMPROPERLY BALANCED THE AGGRAVATING FACTORS AGAINST THE MITIGATING FACTORS.

POINT V:

UNDER FLORIDA LAW, THE DEATH PENALTY IS DISPROPORTIONATE TO THE FACTS OF THIS CASE.

POINT VI:

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL

AFTER A STATE WITNESS REFERRED TO APPELLANT'S PRIOR CRIMINAL RECORD.

POINT VII:

THE INTRODUCTION OF IRRELEVANT AND PREJUDICIAL EVIDENCE WHICH THE STATE COULD NOT TIE TO THE CRIME DENIED STEVEN EVANS HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

POINT VIII:

STEVEN EVANS DEATH SENTENCE WHICH IS GROUNDED ON A SPLIT JURY VOTE OF (11-1) IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

POINT I

IN REPLY AND IN SUPPORT THAT THE TRIAL COURT ERRED IN FINDING EVANS TO BE COMPETENT TO STAND TRIAL.

On the eve of trial, Dr. Gutman specifically urged the court to find Evans incompetent to proceed because Evans could not aid in his own defense. According to Gutman, Evans was in a "disassembling mode",[1] he could not adequately help and aid in his own defense. (T VI 116) Evans required further help by a psychiatrist to bring out information about his illness and his paranoia and fully apprise him of all the details of a criminal defense of not guilty by reason of insanity. (T VI 115) Dr. Gutman concluded that Evans is not competent to stand trial because he is delusional about wanting to be non-delusional. (T VI 116)

The state argues that the trial court did not abuse its discretion in rejecting Dr. Gutman's opinion and finding Evans competent for trial because Dr. Gutman replied upon "matters which preceded the trial by a significant period of time, and were of no relevance to Evans' mental state at the time his trial began." (Answer Brief page 13) This is not persuasive. To the contrary, the opinions formed by mental health experts primarily rely upon the known **history** of the

[1] A form of paranoid schizophrenia where the individual wants so hard to look like he is sane. (VIp115)

defendant combined with the current behavior of the defendant.

At the competency hearing , the mental health experts informed the court that either Evans suffer from a bipolar disorder and that there is a strong possibility of mental illness; or that Evans suffers from a psychotic disorder not otherwise specified (a "catch all" diagnosis[2]) ; or that Evans was "dissembler" which is a rare form of paranoid schizophrenia. A review of the record establishes that Dr. Gutman explained to the trial court that because of Evans' mental illness he could not assist in his defense. Neither the state or other mental health experts could establish on this record that Evans had the ability to assist in his defense; or in the alternative, what factual basis have they relied upon that Evans had to ability to assist in his defense but chose not to assist in his defense.

Competency includes the ability to relate to and assist counsel in the preparation of the defense. Based upon this record, Evans was not capable in assisting counsel because of his mental illness. The trial court abused its discretion in finding Evans competent to proceed. See Lane vs. State, 388 So.2d 1022 (Fla. 1980); Manso v. State, 704 So.2d 516 (Fla. 1997)

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[2] Amended Sentencing Order (R2330)

POINT II

IN REPLY AND IN SUPPORT THAT THE TRIAL COURT ERRED IN FINDING THAT THE MURDERS WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OR MORAL OR LEGAL JUSTIFICATION WHERE THE FINDING IS UNSUPPORTED BY THE EVIDENCE.

The state initially relied upon the following cases in support of the agravating factor that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP): Trepal v. State, 621 So.2d 1321 (Fla. 1993); Jones v. State, 612 So.2d 1370 (Fla. 1992); Cruse v. State, 588 So.2d 983 (Fla. 1991); Dougan v. State, 595 So.2d 1 (Fla. 1992). These cases predate Jackson v. State, 648 So.2d 85 (Fla. 1994), and are factually distinguishable.

In Trepal the murder was planned in advance with the use of poison; in Jones[3],prior to the murder, as the victims slept, Jones discussed killing the victims for the purpose of obtaining the pickup for about a half hour and then got the gun; in Cruse, the advanced procurement of the weapon and ammunition was more than a month before the murder; in Dougan, there was a plan to indiscriminately kill white people and thus start a revolution and racial war.

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[3] 569 So.2d 1234 (1990)

The state then argues that Eutzy v. State, 458 So.2d 755 (Fla. 1984), Knight v. State, 746 So.2d 423 (Fla. 1998) and Zakrzewski v. State, 717 So.2d 488 (Fla. 1998) is support for the trial court's finding of CCP. These cases are also distinguishable. Eutzy was a purely circumstantial evidence case where the jury convicted Eutzy of first-degree premeditated murder, and Eutzy raised no objection to the sufficiency of the evidence. As a result, this Court could find no reasonable hypothesis inconsistent with the heightened premeditation required for this factor. In Knight, the murder involved an extensive plan to kidnap and then murder bank employees. In Zakrzewski, the murder was committed after Zakrzewski spent all day preparing for the murder.

The record in this case is absolutely devoid of **any** evidence that Steven M. Evans planned and calculated the killing of Kenneth Lewis well in advance of the shooting.[4] The totality of the evidence indicates that the shooting was quickly accomplished in seconds and was probably the product of rage or passion. The **apparent** motive (although the State's theory is lacking in this regard) was anger and rage.

The State failed to meet its burden of proving this circumstance beyond a

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[4] In fact, the State failed to prove an advanced "plan" of **any** duration, much less a plan of **lengthy** duration.

reasonable doubt. The State failed to show **any** evidence of a calculated plan. The State clearly failed to prove that the killing was the product of cool and calm reflection. The shooting was accomplished in a matter of seconds, not minutes. Finally, there was at least a **pretense** of moral or legal justification. At the very least, he acted in an emotional frenzy, panic, or fit of rage when he became angry that Kenneth Lewis had betrayed him and the gang. Accordingly, this aggravating circumstance should be struck, the death sentence vacated and the matter remanded for resentencing.

POINT III

IN REPLY AND IN SUPPORT THAT THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCE OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER.

The victim in this case was beaten by gang members as punishment for leaving them behind in Sanford. To be sure, the beating of gang members that broke the rules was a routine matter and did not involve torture[5]. The state tries to tie together the punishment of Lewis by the gang earlier in the evening with the ultimate shooting to make the case that Lewis suffered a torturous death. This conclusion is not supported by the evidence.

Florida law reserves this particular aggravating factor for killings where the victim was tortured, e.g., Douglas v. State, 575 So.2d 165 (Fla. 1991), or forced to contemplate the certainty of their own death,[6] e.g., Sochor v. State, 619 So.2d 285 (Fla. 1983). There must be "such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is

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[5] According to Webster's New Collegiate Dictionary Torture is defined as "the infliction of intense pain (as from burning, crushing or wounding) to punish, coerce, or afford sadistic pleasure.

[6] The trial court's conclusion that Kenneth Lewis knew he was about to die is not supported by the evidence. In reality, the entire event took place in seconds. Less than a minute, and it was over.

unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). The factor applies to torturous murders, "as exemplified either by the desire to inflict a high degree of pain or the utter indifference to or enjoyment of the suffering of another." Cheshire v. State, 568 So.2d 908 (Fla. 1990). Furthermore, the defendant must have intended to cause the victim "extreme pain or prolonged suffering." Elam v. State, 636 So.2d 1312 (Fla. 1994).

Moreover, the HAC aggravator focuses on the means and manner in which the death is inflicted and the immediate circumstance surronding the death. Brown v. State, 721 So.2d 274 (Fla. 1998) The case of Green v. State, 641 So.2d 391 (Fla. 1994) is indistinguishable from the instant case. In Green this court held that

> This aggravating factor is reserved for "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The additional acts accompanying Flynn's death--Flynn knew Green had a gun, his hands were tied behind his back, and he was driven a short distance to the orange grove--do not turn this shooting death into the " 'especially' heinous" type of crime for which this aggravator is reserved. See Tedder v. State, 322 So.2d 908, 910 (Fla.1975).

Green at 396.

The trial court focused inappropriately on the fact that Kenneth Lewis was in terror at the time his wounds were inflicted. For example, there was no evidence

presented as to what room Lewis was in when Evans prepared the homemade silencer. Therefore, it is abundantly clear from the record that the trial court was absolutely wrong in writing, "He had watched his executioner prepare the means of his death." There was no evidence that Lewis knew he was to be shot, therefore, the trial court reliance on the terror Lewis was suffering "during the long walk" prior to his death was speculation and misplaced. In Lewis v. State, 398 So.2d 432, 438 (Fla. 1981), this Court announced the principle that "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious, or cruel." In the realm of first-degree murders, Kenneth Lewis' shooting was "ordinary." Even viewing the seriously flawed and contradictory evidence in the light most favorable to the State, Steven Evans shot Kenneth Lewis in a fit of anger and rage.

During the gang beating of Lewis, no one in the group taunted Lewis that they had intended to kill him. By all accounts Lewis was beaten by the gang members as punishment for betraying the gang. When Lewis manifested the intent to kill Lewis, the shooting of Kenneth Lewis occurred minutes later. Likely, less than five minutes. Although Evans clearly intended to kill Kenneth Lewis, the manner of the killing was one where he did not intend for Lewis to suffer. The record of this case does not prove the existence of the aggravating circumstance

beyond a reasonable doubt.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, appellant respectfully requests this Honorable Court to vacate his convictions and remand for a new trial as to Points I, VI and VII. As for Points II, III, IV, V and VIII vacate Steven Evans's death sentence and remand for the imposition of a sentence of life in prison without possibility of parole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Steven Evans, #330290, Florida State Prison, P.O. Box 181, Starke, FL 32091, this 6th day of October, 2000.

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GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced CG Times, 14pt.

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GEORGE D. E. BURDEN
ASSISTANT PUBLIC DEFENDER