IN THE SUPREME COURT OF FLORIDA

MICHAEL LEE LOCKHART, :

Appellant, :

vs. : Case No. 82,096

STATE OF FLORIDA, :

Appellee. :

_____ :

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ANDREA NORGARD
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 661066

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

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PRELIMINARY STATEMENT

The State will be referred to as the "State" or "Appellee." In addition to the arguments contained herein, Appellant will rely on his initial brief.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN ACCEPTING APPELLANT'S PLEA OF GUILTY IN THE INSTANT CASE.

The State incorrectly asserts that Krawczuk v. State, 19 Fla. L. Weekly S134 (Fla. March 17, 1994) is controlling in this case on the question of whether or not the trial court should have inquired of Appellant regarding mental disturbances when engaging in a plea colloquy with him. As noted in the Krawczuk opinion, the plea colloquy was extensive. Krawczuk was thoroughly questioned about taking his medication (Elavil), its side effects, a prior psychiatric evaluation, and the fact he had no prior suicide attempts. In Appellant's case, the court failed to make the extensive inquiry made in Krawczuk.

Appellant is not now claiming that more psychiatric evaluations should have been done. There is no way to know if evaluations were needed. And why is this so? Very simply, because the trial court failed to inquire. The judge failed to conduct the type of in depth plea colloquy necessary in a capital case; and, therefore, the plea is defective.

The remaining materials cited by the State as supported for their assertion that no inquiry was necessary were not available to the trial court at the time of the plea. Quite possibly, they were never reviewed by the judge. They can not be used after the fact to validate the defective plea.

There is no foundation, legal or otherwise, to require Appellant to advise the court as to what he will do if he is granted the right to withdraw the plea prior to litigating this Issue. The State's assertion otherwise is nonsense.

ISSUE II

WHETHER APPELLANT'S WAVIER OF COUNSEL WAS SUFFICIENT UNDER FARETTA V. CALIFORNIA.

Respondent cites to the Eleventh Circuit case of Stano v. Dugger, 921 F.2d 1125 (11th Cir. 1991), quoting United States v. Fout, 890 F.2d 408, 409-10 (11th Cir. 1989) as a benchmark for what factors the trial court should consider in determining whether a criminal defendant should be permitted to proceed pro se. Stano sets forth eight criteria to be considered in determining whether a defendant should be permitted to represent himself. The record in this case fails to show that any inquiry was made into five of the eight areas outlined.

As its second factor, Stano requires investigation into the extent to which the defendant had contact with lawyers prior to the pending trial. No questions were asked of Appellant regarding his prior contact with attorneys.

Appellant had been represented by counsel in this case for only six weeks (R6,8,48-54) at the entry of the plea and contact was limited. During the intervening period between the plea and penalty phase, counsel was forbidden to investigate and contact was minimal (R151). The record does not reflect Appellant's other experience with other attorneys. Although he had been through prior trials, the record does not indicate the extent of his contact with those lawyers or even if he was represented.

Factor three requires the defendant to be informed of the possible defenses he has available to him. In a penalty phase, counsel submits this would be a thorough explanation of the right to present evidence of statutory and nonstatutory mitigating factors. The record, especially that cited to by the State on pages 16 and 17 of their brief, fails to contain any dialogue wherein it was explained to Appellant prior to his choosing to proceed pro se that mitigation was explained to him.

Factor four to be considered under Stano is information relating to the defendant's knowledge of the rules of procedure, evidence, and courtroom decorum. The record reflects one question was asked by the court regarding procedure -- whether Appellant knew what would happen if an objection was sustained (R177). Appellant was asked no other questions regarding procedure or the Florida Evidence Code.[1] Surely the investigation under Stano anticipates

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[1] For comparative purposes counsel would note that the Florida Rules of Criminal Procedure consists of 28 (numbers I through XVIII) separate rules, or which there are a total of 118 (3.010 through 3.989) subsections and The Florida Evidence Code (continued...)

more than one question regarding procedure when the stakes are literally life or death. There was also no inquiry by the Court of Appellant regarding his knowledge of any particular local rules, such as standing versus sitting when addressing the bench, back-striking on voir dire, or on courtroom decorum.

Factor five, likewise, the record does not reflect any questioning by the court of Appellant's experience in criminal trials, Factor five. Although the court knew Appellant had two prior homicide convictions, this alone is no guarantee that Appellant was highly experienced. The court did not know, for example, if Appellant had been present during the prior proceedings, if he had ever been consulted by counsel concerning strategic matters, or if he had previously had counsel.

Factor seven takes into consideration whether the waiver of counsel is the result of mistreatment or coercion. No questions were asked on this issue. Prior court hearings and arguments from counsel certainly provide a basis for Appellant to have felt mistreated or coerced, although not in a physical sense. At the first court hearing on October 26, the public defender represented to the court that he was unprepared for trial and could not be ready by the previously set December 4 trial date (R107-08).

Defense counsel and the State Attorney engaged in an exchange of insulting personal remarks culminating in the use of profanity and demands made by each for apologies (R111-21). Both were chas-

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[1](...continued)
consists of 9 separate main sections (90.101 and 90.95) with 82 total subsections.

tised by the court. Immediately after this exchange, Appellant pled.

Appellant may have felt there was no reason to proceed with counsel given counsel's statements that he would be ineffective anyway. Thus, Appellant's request to proceed pro se has present in it an element of mental coercion that was not the relinquishment of able, prepared assistance of counsel, but rather a throwing in of the towel.

Thus, under the criteria submitted by Respondent, the record reflects that the hearing conducted failed to adequately comport with the principals of Faretta. In addition to failing to meet the degree of thoroughness envisioned under Stano, Appellant asserts the other claims raised in Issue II in his Initial Brief.

ISSUE III

THE TRIAL COURT ERRED IN RESTRICTING APPELLANT'S VOIR DIRE EXAMINATION AND IN DENYING APPELLANT'S CAUSE CHALLENGE TO JURORS LEE AND GILLMAN.

A. Restriction of Voir Dire

In addressing the restriction of Appellant's ability to question the venire regarding their religious beliefs, the State has presented case authority to support her position in a misleading fashion. Her brief contains the following cite on page 23: Davis v. Minnesota, 8 Fla. L. Weekly, Fed. S156 (May 23, 1994), cert. denied (Ginsberg, J. concurring), quoting State v. Davis, 504 N.W. 2d 767, 771 (Minn. 1993). The citation is credited with a quota-

tion purporting to be the holding of the case that by the U.S. Supreme Court inquiry into religious beliefs and affiliations of the venire is improper. However, the case and quote do not arise from a case reviewed by the Court, but rather from the denial of a petition for a writ of certiorari. The proper order of citation is to begin with the state citation and indicate that certiorari was denied, thus making clear that the content is not a binding opinion of the Court. Hence, proper order of citation would be Davis v. Minnesota, 504 N.W.2d 767 (Minn. 1993), cert.denied, 128 L. Ed. 2d 679, ___S.Ct.___ (May 23, 1994). (See, A Uniform System of Citation, Rules 10.7 and 10.7.1, Thirteenth Edition, 1985).

Justice Ginsberg wrote a paragraph concurring in the denial of certiorari. Contained in that paragraph is a quote from the Supreme Court of Minnesota which is cited by the State. Also appearing in the denial is a dissent by Justices Thomas and Scalia. The dissent argues for certiorari. The dissent notes that a black Jehovah's witness was excluded from a criminal trial and the prosecutor's reason for excusal was found to be race-neutral because he did so due to the juror's religious denomination. The dissent urged the reversal of the case, finding that such a strike would fall within the ambit of Batson v. Kentucky, 476 U.S. 79, 97, 90 L. Ed. 2d 69, 106 S. Ct. 1112 (1986) and the Equal Protection Clause as an unconstitutional classification based upon religion. Justice Ginsberg "concurrence" was only to point out a perceived incomplete quoting by the dissenters of the Minnesota state court opinion. It is not an expression of opinion by Justice Ginsburg, nor even an

adaptation by her of the State court opinion, It was merely a clarification. It was not, by any stretch of the imagination, an affirmation of the principal espoused in that opinion and should not be represented by the State as such. The denial of the writ of certiorari is not a reported decision or opinion of the court, hence is of no authority. It is misleading to represent it as authority of any type from the United States Supreme Court.

This Court very recently looked with inquiry into the impact religious beliefs have on the ability to sit as a juror in a capital trial. In Castro v. State, 19 Fla. L. Weekly S435 (Sept 8, 1994), this court upheld a Witherspoon challenge on a juror who first indicated he could not vote for death because of his religious beliefs, but could set those aside although he felt bound by a "higher law." The trial court in this case precluded Appellant from being able to develop a basis for either peremptory or cause challenges by foreclosing to him the ability to voir dire on such concepts as belief in Christ, a higher law, and how those beliefs would impact upon their decision.

B. Restriction of Voir Dire

As a point of clarification, Appellant does not assert he should be excused from a procedural bar solely due to his proceeding pro se, but rather the bar should not be enforced because the trial court actively misled and grossly misstated the law to a pro se defendant who relied upon that misstatement to his detriment.

Secondly, Appellee's claim that Appellant was aware he could backstrike is not apparent. The trial court never instructed him on that and never questioned him about his knowledge of this procedure.

Contrary to the case of Penn v. State, 574 So. 2d 1079 (Fla. 1991), Appellant contends that jurors Lee and Gillman were not ultimately demonstrated to be competent. A reasonable doubt, at minimum, continued to exist regarding their ability to serve. Neither Lee or Gilham could pass the requirement of Singer v. State, 109 So. 2d 7 (Fla. 1959), accord Bryant v. State, 601 So. 2d 529, 532 (Fla. 1992).

ISSUE IV

WHETHER THE TRIAL COURT'S STATEMENTS CONSTITUTED PROPER DENIGRATION OF THE JUROR'S SENTENCING RESPONSIBILITIES IN A CAPITAL PROCEEDING REQUIRING REVERSAL FOR A NEW TRIAL.

The State claims that the statement made by the trial court to the venire which gave rise to Appellant's claim of a violation of Caldwell v. Mississippi, 472 U.S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985) comports with the standard jury instructions upheld by this Court in Sochor v. State, 619 So. 2d 285 (Fla. 1993). A review of those instructions belies this assertion. The comments by the trial court in this case fall far short of the standard instruction's explanation to the jury of their role in the capital sentencing proceeding. For example, the standard instructions inform the jury it returns an "advisory sentence" not that they

will "at most to recommend the death penalty" (R239). The term "advisory sentence" far better communicates the seriousness of the situation and the weight of this recommendation. The standard instruction also contains the following paragraph:

> The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should careful weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

This statement clearly informs the jury of its own moral duty when rendering their advisory sentence. The trial court's instruction to the jury did not comport with the standard instructions. Thus, the comments of the trial court do not fall within the approved range of Sochor and of those cases cited by Appellee on page 28 of the Brief of the Appellee.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN ADMITTING PHOTOGRAPH OF THE MURDER OF WINDY GALLAGHER AND ADMITTING DETECTIVE WILBUR'S TESTIMONY WITH REGARD TO THE MURDER OF OFFICER HALSEY. (AS STATED BY APPELLEE).

It is Appellant's position that photographs of Windy Gallagher should not have been admitted into evidence during the penalty phase of this case. The Appellee asserts that these photos were admissible to establish the aggravating factor of cold, calculated, and premeditated. Appellant contends, the photos were not relevant

to this aggravator and, even if they had minimal relevancy, their prejudicial impact was far outweighed by their probative value.

The cases of State v. Wright, 265 So. 2d 361 (Fla. 1972); Henninger v. State, 251 So. 2d 862 (Fla. 1971); Meeks v. State, 339 So. 2d 186 (Fla. 1976); and Henderson v. State, 463 So. 2d 196 (Fla. 1985) are cited and quoted by the State to support their position; however, these cases deal with the presentation of photos of the actual victim to which the trial pertains, not, as here, photos of collateral offenses. Appellant did not contend that photos of Jennifer Colhouer should be excluded.

Duncan v. State, 619 So. 2d 279 (Fla. 1993) makes it clear that the admittance of gruesome photos is prohibited where prejudicial impact outweighs probative value. In Duncan's case the photo was allegedly used by the prosecution to rebut a mental mitigator. Thus, even though there may be limited relevance to photos of collateral crimes, there are very clearly limits on their admissibility.

The case of Rhodes v. State, 547 So. 2d 1201, 1204-05 (Fla. 1989) cautions that not only must the issue of probative value versus prejudicial effect be addressed, but that "the line must be drawn when [evidence of circumstances of the prior offense] is not relevant, [or] gives rise to a violation of a defendant's confrontation rights. . . ."

It is Appellant's contention, which is more fully addressed in Issue V, that Wilbur's testimony and the photos deprived Appellant

of his ability to meaningfully exercise his constitutional protected right of confrontation.

The State also cites to Slawson v. State, 619 So. 2d 255 (Fla.), cert.denied, ___U.S.___, 114 S. Ct. 2765 (1994) as further reason for admission of the photos and testimony. In Slawson this court was concerned with the appropriateness of whether the facts surrounding a prior felony could be considered in determining the weight which was to be given to an aggravating factor. The relationship between the prior felonies and the charge pending sentences in Slawson is far different from Appellant's case.

In Slawson all the offenses, both the murder subject to the appeal and those used as priors, were part of the same episode which involved the killing of an entire family. Because those murders were tried together and factually connected, it can be presumed that the evidence did not consist solely of hearsay, as in this case. Neither did the prior felonies constitute collateral offenses in the same fashion as Appellant's. Slawson's guilt or innocence as to those crimes was in the hands of the same jury; and the prosecutor was required to present evidence of guilt on those charges, thereby guaranteeing Slawson the ability to confront and cross-examine witnesses. This is far different from the situation facing Appellant. In Slawson, all 11 the homicides were tried together, so the underlying facts of those prior capital felonies were already part of the record. Slawson did not address the use of photos or testimony of unrelated prior felonies and is, therefore, inapplicable to the issue in this case.

While this Court did permit the use of photos of a prior felony and testimony regarding a prior felony in Wyatt v. State, 19 Fla. L. Weekly S351 (Fla. 1994), Wyatt does not provide for the blanket admission of such photos and testimony. The opinion merely holds that the admission in that case was not an abuse of discretion. Nothing in that opinion provides a detailed factual account of how many photos were used, whether they were relied upon by the State in an improper fashion, or whether the hearsay testimony was reliable or rebuttable. In fact, trial counsel did not object on hearsay grounds in Wyatt. Appellant maintains his position that in his case, the admission of the photos and Wilbur's testimony did constitute an abuse of discretion and should have been excluded.

ISSUE VII

WHETHER THE COURT IMPROPERLY RESTRICTED APPELLANT'S PRESENTATION OF MITIGATING EVIDENCE.

Appellee asserts that the instant issue is governed by Hamblen v. State, 527 So. 2d 800 (Fla. 1985), and that to have allowed defense counsel to investigate this case would violate Hamblen. Appellee is incorrect in asserting that the claim raised by Petitioner in this Issue is the same as that in Hamblen.

Hamblen, after psychiatric evaluations found him to be competent and sane at the time of the offense, moved to dismiss counsel and to plead guilty. The court "determined Hamblen met the criteria that enabled him to exercise his right of self-representation, but ordered two assistant public defenders to be in the

courtroom as emergency back-up counsel." Hamblen, 527 at 801. Conversely, at the time that the trial court signed an order precluding defense counsel from investigating mitigation in this case, Appellant had not been discharged of his counsel. The court had not allowed counsel to withdraw (R135). No Faretta inquiry was held; thus, Appellant had not been found to meet the criteria for self-representation and counsel was still responsible for his case. The facts of this case are completely opposite to those of Hamblen.

There could be no violation of Faretta in the manner which the Appellant claims because there had been no Faretta inquiry. There had been no determination made by the court that Appellant would represent himself; therefore, counsel was charged with that responsibility.

It is clearly the attorney who directs the case. It is the attorney who has the decision making authority in a case. In Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991), cert.denied, ___U.S.___, 112 S. Ct. 2282, 119 L. Ed. 2d 207, and cert.denied, ___U.S.___, 112 S. Ct. 2290, 119 L. Ed. 2d 213 (1992), counsel did not investigate mitigation prior to the rendition of the guilt phase verdict. Blanco then stated he wished to present no witnesses and counsel took no action. In finding counsel ineffective, the court found that Blanco did not control the issue and counsel should not follow blindly such commands.

Thus, as long as defense counsel represented M. Lockhart he had a duty to investigate in order to comply with Blanco's requirement that counsel "must first evaluate potential avenues and advise

the client of those offering potential merit." Blanco, at 1502. If the client refuses to accede to his attorney's duty to investigate, counsel may not abdicate the decision making process to the client, but must move to withdraw. At that juncture, the court must engage in a Faretta inquiry. Koon v. Dugger, at 250-251. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L. Ed. 2d 562 (1975).

Mr. Lockhart had clearly requested self-representation. Thus, the trial court had no choice but to engage in a full Faretta inquiry. The court could not refuse to engage in Faretta and require counsel to remain, while at the same time forcing abdication of all decision-making authority by counsel in favor of the client. The trial court should not be able to circumvent the requirements of Faretta by forcing counsel to stay or a case while stripping him of his ability to represent his client or exercise his independent judgment in that representation.

Appellee next claims that Koon v. Dugger, 619 So. 2d 246 (Fla. 1993) does not affect Appellant. While the procedure adopted in Koon requires that counsel must investigate and present to the court possible mitigation and then orders the defendant to confirm in open court the wish to waive presentation is prospective, the principle underlying Koon is not new. Counsel must endeavor to effectively represent his client. Effective representation requires the attorney to investigate mitigation in a capital case. Heiney v. State, 620 So. 2d 171 (Fla. 1993) makes it clear that this requirement exists. This Court in Heiney found that defense

counsel's failure to investigate Heiney's background constituted ineffective assistance of counsel. The fact that Heiney acted as co-counsel did not release the attorney from this obligation. Heiney's conviction occurred in 1978 -- some five years after the retrial of Koon in 1982 which formed the basis of Koon v. Dugger, 619 So. 2d 246, 248-49 (Fla. 1993) and eleven years before Appellant's 1989 trial. Thus, as long as he was charged with the responsibility of representing Appellant, counsel was required to prepare the case. The trial court may not impede the effective performance of this duty.

ISSUE VIII

WHETHER THE TRIAL COURT ADEQUATELY RENEWED THE OFFER OF COUNSEL TO APPELLANT BEFORE THE FINAL SENTENCING HEARING.

As a point of clarification and correction, Appellant notes that he does not concede that a Faretta inquiry was conducted prior to his plea as stated on page 43 of Appellee's brief. No inquiry was held until the start of the penalty phase (R126-92, 143-51,167-78).

Appellee cites Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992) to support her contention that a full Faretta inquiry did not have to be renewed at each critical stage. Waterhouse does not support this conclusion. In Waterhouse the defendant demanded the right to make his own closing argument in penalty phase. Waterman had expressed dissatisfaction with counsel and, in fact, previously

had several attorneys withdraw. Waterhouse then changed his mind and wanted counsel to do closing argument. Counsel refused, due to ethical considerations, to make the argument Waterhouse wanted. Waterhouse then claimed that if his right to self-representation had been asserted, a Faretta inquiry should have been held. Waterhouse addresses the need for a final hearing, where none was formally done, but where the record was replete with instances amounting to an adequate inquiry. Waterhouse does not address the need for the renewal of the inquiry at subsequent stages once self-representation has been previously chosen. Waterhouse addresses solely the question of whether, in that case, the record demonstrated that the requirements of Faretta were met before Waterhouse gave his own closing argument in penalty phase. Waterhouse addresses the adequacy of the inquiry, not the necessity of subsequent inquiry.

This Court should continue to follow the District Courts and its own prior rulings in recognizing the need for renewal of a Faretta inquiry at each critical stage.

ISSUE X

WHETHER THE TRIAL COURT ERRED IN FINDING THE INSTANT HOMICIDE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED FASHION.

Respondent presents on page 50 an alleged "factual" scenario of what events led up to the death of Jennifer Colhouer. These "facts" were the theory of the sequence of events offered by the

State as to what occurred in the home; however, there is no evidence to support the hypothesis as fact. For example, nothing in the record established Appellant went to the home when he "knew" Jennifer Colhouer would be alone. There was no evidence, such as blood spatters or signs of a scuffle, to indicate that Jennifer was "pricked, prodded or teased" upstairs.

Appellant will continue to rely on the arguments advanced in his initial brief on this issue.

ISSUE XI

THE TRIAL COURT IMPROPERLY REVIEWED AND CONSIDERED INFORMATION NOT CONTAINED IN THE RECORD PRIOR TO SENTENCING APPELLANT.

Appellant contends that the trial court erred in reviewing newspaper articles which were the product of interviews with Appellant conducted after the penalty phase. The articles were not presented to the jury. Appellant had presented no explanation for his conduct to the jury. The trial court found that from the articles an "explanation can only be gleaned," but this did not mitigate Appellant's sentence.

The State cites to Hendrix v. State, 19 Fla. L. Weekly S227 (Fla. April 21, 1994) and argues that under Hendrix, the trial court's conduct in this case does not constitute error. This reasoning is misplaced.

In Hendrix, the trial judge, Judge Lockett, had been consulted by an attorney representing a potential codefendant about that person's grand jury testimony in this case. At the time, Judge

Lockett was in private practice. The trial court had also considered associating Lockett on Hendrix's case, but he was not appointed due to his judicial candidacy.

Ultimately, Hendrix's case was assigned to Judge Lockett. Hendrix moved to recuse Judge Lockett, arguing that Lockett had violated Gardner v. State, 430 U.S. 349, 51 L. Ed. 2d 393, 97 S. Ct. 1197 (A977) by having extra information he knew about from his only consultation on the co-defendant's case while in private practice. The information which was claimed to constitute a Gardner violation was the potential codefendant's grand jury testimony. However, this grand jury testimony was later given to the court by the defense attorney.

In Hendrix, the defendant certainly had an opportunity to deny or explain the complained of information. It did not arise in an extra judicial fashion. In fact, the potential codefendant testified at trial. Presumably, the testimony of this witness was also before this Court as part of the record.

Gardner violations arise when there is no opportunity to rebut or explain and the reviewing abilities of the higher court are impaired. In Hendrix, neither prong was satisfied. There was no impairment of this Court's reviewing ability -- the complained of testimony was a part of the record. Neither was there a problem with Hendrix's ability to deny or explain the allegations contained in the complained of information. The source of the information became a witness at trial, subject to cross-examination and impeachment.

However, as argued in his Initial Brief, Appellant falls under both the disabilities Gardner protects against. The proper analysis is not a comparison of sentences, as the State asserts; but instead, the determination of whether the factual basis exists to support a claim. Appellant has satisfied the requirements of Gardner whereas Hendrix did not.

The trial court did consider Appellants' statements and the content of the interviews. He found them to have no mitigating value. The rejection of mitigation is more similar to the affirmance of aggravation. Because the defendant is entitled to have many wide ranging aspects of himself and his life considered in mitigation, it is quite probable that the trial judge was wrong to reject the information in the articles. However, without knowing and reviewing those articles, it is impossible to evaluate that decision.

Thus, Appellant falls within the parameters of Gardner, and the remedies mandated by Gardner must be afforded to Appellant.

ISSUE XII

WHETHER THIS COURT SHOULD RECEDE FROM HAMBLEN V. STATE, AND ITS PROGENY. (AS STATED BY APPELLEE).

Appellant's counsel must disagree with the Appellee's assertion that no reasons were given as to why this Court should recede from Hamblen v. State, 527 So. 2d 800 (Fla. 1988). Counsel submits that the Initial Brief provided numerous reasons, but will accept the Appellee's invitation to provide another.

Counsel can be no more eloquent than the Honorable Justice Kogan was in illuminating the need for thoroughness and full adversarial review in capital cases. Justice Kogan's concurring opinion in Johnson v. State, 19 Fla. L. Weekly S 337, 339 (Fla. May 19, 1994) observed that:

> Capital punishment, however, poses a special problem because of its uniquely irrevocable character. I certainly understand that emotions run high when any of us are confronted with the senseless murder of one of our fellow human beings. It is entirely understandable that much sentiment exists to return to the Mosaic code of "an eye for an eye." As a society, however, we must resist the temptation to abandon the basic principles of American law, among these being the right to due process and the right to respond when the State presents condemnatory evidence against us. Criminal law must never become to any degree as ruthless as the criminal it prosecutes.

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 95 of the Initial Brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 21 day of October, 1994.

Respectfully submitted,

Andrea Norgard

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 534-4200

ANDREA NORGARD
Assistant Public Defender
Florida Bar Number 661066
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

AN/ddv