IN THE SUPREME COURT OF FLORIDA

DEAN KILGORE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 83,684

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

PAUL C. HELM
Assistant Public Defender
FLORIDA BAR NUMBER 229687

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(813) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This brief is filed on behalf of the appellant, Dean Kilgore, in reply to the brief of appellee, the State of Florida. Appellant will rely upon his arguments in his initial brief for Issues V and VI.

References to the record on appeal are designated by "R" for the record proper and "T" for the trial transcript.

ARGUMENT

ISSUE I

APPELLANT'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN THE COURT DENIED HIS REQUESTED INSTRUCTION ON HEAT OF PASSION AND THE STATE MISLED BOTH THE COURT AND THE JURY ABOUT THE LAW APPLICABLE TO APPELLANT'S THEORY OF DEFENSE.

Appellee concedes, "Certainly the law recognizes that a person's mind may be so clouded by passion as to defeat the person's ability to premeditate a murder." Brief of Appellee, p. 8. Appellee also concedes this Court ruled that the trial court has discretion to give a special instruction on a heat of passion killing in Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993). Brief of Appellee, p. 6. While this Court found no abuse of discretion in refusing the instruction under the facts and circumstances of Kramer,[1] that does not foreclose a finding that the trial court abused its discretion in refusing the instruction in this case.

When defense counsel requested a special instruction that an intentional unlawful killing is not premeditated murder when committed while the defendant was in the heat of passion brought on by sudden provocation, the prosecutor responded:

> Your Honor, I would be opposed to that. The standard jury instruction on excusable homicide, the long form, one of the paragraphs on that reads when the killing occurs by accident or misfortune in the heat of passion upon any sudden and sufficient provocation. I

---

[1] In Kramer, this Court held the proper defense in the context of that case was voluntary intoxication. Id., at 277.

> think that the weight of the standard jury instruction has been codified. It covers the situation that Mr. Alcott. [sic] He's certainly free to argue to the Jury. But I think it's got to be argued under the excusable homicide language that has been adopted by the Supreme Court. And I would oppose the giving of the special instruction that he has drafted. [Emphasis added.]

(T 1227-28) The court responded, "I agree with Mr. Wallace [the prosecutor]." (T 1228)

During closing argument, the prosecutor took advantage of the denial of the requested instruction by insisting that heat of passion applied solely to excusable homicide and was not a defense unless the killing occurred by accident and misfortune:

> The Court will then tell you that there's another type of homicide which is not criminal. It's what's called excusable homicide. And the reason that we need to talk about that just briefly is because throughout the Jury selection in this case, and I anticipate even perhaps when the defense has a chance to address you after I sit down, they want to talk about heat of passion. They want to talk about this being a crime of passion and saying because of that it can't be First Degree Murder.
>
> . . . [T]he Court will tell you that the killing of a human being is excusable and lawful under the following circumstances. And there are three circumstances. Any one of those three meet the test of excusable homicide. But the way each one of those three begins is identical. The Court will read to you. He'll say when the killing is committed by accident and misfortune. Accident and misfortune. Each one of these three ways he's going to talk about starts out by accident and misfortune. And you got to remember that, because the only way a homicide is excusable is by accident and misfortune under one of three scenarios. [Emphasis added.]

(T 1326-27)

> The second, and again you have to remember it's by accident and misfortune. The second way the Court will tell you is, and here's the only place -- the only place in the jury instructions you are going to hear the word passion. It says if it's done by accident and misfortune in the heat of passion upon sudden provocation and upon sufficient provocation.
>
> Now, I -- I thought long and hard and I struggled very, a long time with that trying to figure out a scenario that we maybe could imagine that would come under that particular law. Because it's got to be by accident and misfortune. Something that's intentional is not accidental. So it's got to be done by accident. But it's got to be in a situation where the heat of passion is there upon sudden and sufficient provocation. [Emphasis added.]

(T 1329)

The prosecutor provided an absurd example of someone whose child is killed in a car accident hitting and pushing the drunken driver of the other car until he stumbles into the roadway and is hit by an oncoming car. (T 1329-30) He then gave an example of a person coming home to find his spouse being unfaithful, becoming enraged, and shooting them, explaining that such a killing would not be excusable despite the heat of passion because it was not accidental. (T 1331) The prosecutor neglected to explain that this Court has held that the heat of passion killing described in his second example was not premeditated murder but voluntary manslaughter. Febre v. State, 158 Fla. 853, 30 So. 2d 367, 369 (1947); Collins v. State, 88 Fla. 578, 102 So. 880, 882 (1925).

The prosecutor then turned to the facts of this case:

> Now, I don't stand up here and contest that there's some passion involved in this case. I'll be one of the first to admit that that's the reason this crime happened is

> because of passion. Passion is simply being a very strong emotion that one person has towards another person. There is passion all over this case. But it doesn't come within excusable homicide heat of passion. It doesn't come close to it. [Emphasis added.]

(T 1331-32) He further argued:

> Now, the defense has tried to convince you that this is a heat of passion case. Legally the only thing they could stand up here and ask you to do if you want to argue heat of passion is to say this is excusable and Mr. Kilgore is excused by the law for taking Mr. Jackson's life because the heat of passion was such that there was sufficient provocation, sufficient -- provocation, and it was excusable because it was an accident and misfortune. And I don't think they've even done that. I don't think in good faith you're going to hear them stand up here and say that the heat of passion completely excuses his criminal conduct. What I think they've argued to you is that well, look at the passion and knock it down from First Degree to Second Degree. But that's not where heat of passion comes in. Heat of passion says it's excusable if it fits that very limited scenario. Which it doesn't. [Emphasis added.]

(T 1333-34)

These passages from the prosecutor's arguments to the court and the jury establish that he sought to convince both that heat of passion has no bearing on the law of homicide unless the killing was accidental and qualified as excusable homicide. But Florida law recognizes two separate heat of passion defenses, distinguished primarily by whether the killing was accidental or intentional. As explained in Rodriguez v. State, 443 So. 2d 286, 289 n. 5 (Fla. 3d DCA 1983), "If an accidental death occurs 'in the heat of passion,' the killing in most circumstances is excusable homicide. § 782.03 Fla. Stat. (1981)."

But when the heat of passion killing is intentional, a different rule applies:

> Among the intentional killings recognized at common law as voluntary manslaughter were those committed (1) in the heat of passion, Forehand v. State, 126 Fla. 464, 470, 171 So. 241, 243 (1936) (a heat of passion killing is one arising from adequate provocation, that is, provocation "calculated to excite such anger as might obscure the reason or dominate the volition of an ordinary man"); Disney v. State, 72 Fla. 492, 502, 73 So. 598, 601 (1916) (when the mind operates in the heat of passion, "pre-meditation [sic] is supposed to be impossible, and depravity which characterizes murder in the second degree absent")[.]

Rodriguez, at 289.

Common law voluntary heat of passion manslaughter did not disappear when the law of homicide was codified:

> In 1868, the Florida Legislature codified the law of homicide. . . . Voluntary heat of passion killing was listed as third-degree manslaughter. . . . In 1892, the Legislature revised the homicide statute. . . . Manslaughter was defined exactly the way it is today in Section 782.07 . . . . Degrees of manslaughter were eliminated. . . . Other classic common-law manslaughters (. . . heat of passion killings . . .) were no longer specifically listed but became subsumed within the general definition. The present manslaughter statute continues this structure.

Id., at 290 n. 8.

Thus, an intentional heat of passion killing committed upon adequate provocation is manslaughter and not first-degree murder. In Febre, 30 So. 2d 367, the defendant came home to find his wife, from whom he was separated, emerging from the bedroom with a nude man. He shot the man, then struggled with him, resulting in the man's death from a skull fracture. This Court reversed Febre's

first-degree murder conviction, holding that he acted in the heat of passion upon adequate provocation and was therefore guilty of manslaughter. Id., at 369. The provocation in Febre was both immediate and very strong. There are few incidents more likely to engender a passionate, violent rage than to discover one's spouse in a compromising position with another person.

However, when the provocation was less strong or less immediate than in Febre, both this Court and the Third District have ruled that an intentional heat of passion killing may also constitute second-degree murder. See Forehand v. State, 126 Fla. 464, 171 So. 241, 243-44 (1936) (defendant shot and killed deputy who was struggling with defendant's brother in an altercation outside a bar); Tien Wang v. State, 426 So. 2d 1004, 1007 (Fla. 3d DCA) (defendant abducted his estranged wife then stabbed and killed her stepfather when he came to rescue her and rejected defendant's pleas to leave her with him), rev. denied, 434 So. 2d 889 (Fla. 1983).

Thus, when the defendant raises a heat of passion defense in a first-degree murder case, there are three possible verdicts if the jury believes all or part of the defense: First, if the jury finds sufficient provocation and that the homicide was accidental, the defendant is not guilty because the homicide is excusable. Second, if the jury finds sufficient provocation and that the homicide was intentional, the defendant is guilty of manslaughter. Third, if the jury finds enough provocation to rule out premeditation, but not enough to rule out malice, and the homicide was

intentional, the defendant is guilty of second-degree murder. The prosecutor's argument was misleading[2] because it totally omitted the second and third possible verdicts and restricted the jury's consideration of Kilgore's defense to an all or nothing proposition -- he was either not guilty because the homicide was excusable, or he was guilty of first-degree murder.

Appellee mistakenly asserts that there was no evidence to support a defense that the homicide was intentional but not premeditated because of heat of passion. Brief of Appellee, p. 8. The prosecutor conceded that the homicide was the result of passion.[3] (T 1331-32) While it is true that Kilgore asserted that he did not intend to kill Jackson and that the fatal stab wound was accidental, (T 1156-62, 1172-73, 1176-77, 1181, 1190, 1193) he admitted that he took the knife and paint thinner to Jackson's cell intending to humiliate him by cutting him and pouring the paint thinner on him. (T 1179, 1184-85) Thus, the jury could have inferred that the homicide was intentional from Kilgore's admission that he intended to cut Jackson. See Taylor v. State, 444 So. 2d

---

[2] It is immaterial to appellant's argument whether the prosecutor knew the law and intended to mislead the court and jury. Appellant assumes that he most likely did not, and that he mistakenly relied upon the standard jury instructions. The affect upon the jury's perception of appellant's defense was the same.

[3] Kilgore's passion was initially provoked by Jackson's unfaithfulness and manipulation of Kilgore's emotions in the course of their homosexual relationship. (T 1165, 1168-69, 1193) It was further provoked by a confrontation at the prison hobby shop a day or two before the homicide. (T 898-99, 920-21) It was inflamed by their angry and violent confrontation outside Jackson's cell which resulted in the fatal stabbing. (T 850, 853-60, 863-67, 913, 917-19, 924, 1066-67, 1254-55)

931, 934 n. 3 (Fla. 1983), in which this Court found, "Since there was evidence the defendant intended to shoot the victim with a shotgun, the intent to kill could have been inferred despite the defendant's statements to the contrary."

Appellee correctly points out that defense counsel's closing argument relied upon the truth of Kilgore's claim that the stabbing was accidental. Brief of Appellee, p. 9. But this tactic was virtually compelled by the court's denial of counsel's requested heat of passion instruction. Since the only heat of passion instruction concerned excusable homicide, the jury was unlikely to accept an argument that heat of passion could legally negate a finding of premeditation in an intentional homicide. See Gardner v. State, 480 So. 2d 91, 93 (Fla. 1985), in which this Court found that allowing counsel to argue his theory of defense to the jury was insufficient "because the jury must apply the law as given by the court's instructions rather than counsel's arguments."

Ultimately, the question to be resolved on this appeal has nothing to do with the sufficiency of the evidence to support the jury's first-degree murder verdict or the defense theory that heat of passion negated a finding of premeditation. The question is whether the court's denial of defense counsel's requested instruction violated Kilgore's constitutional right to a fair trial under the due process clauses of the federal and state constitutions. U.S. Const. amend. XIV; Art. I, § 9, Fla. Const. The substance of the requested instruction was legally correct, supported by some evidence at trial, and not covered by the court's instructions.

Kilgore had the constitutional right to have the jury determine the merits of his defense. The court violated that right and abused its discretion by refusing to give the requested instruction. Gardner, 480 So. 2d at 92; Motley v. State, 155 Fla. 545, 20 So. 2d 798, 800 (1945). The conviction must be reversed, and the case must be remanded for a new trial.

ISSUE II

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW BY DENYING DEFENSE COUNSEL'S REQUEST TO RE-EVALUATE APPELLANT'S COMPETENCY AFTER APPELLANT DISRUPTED THE TRIAL.

Regardless of whether defense counsel's comments expressing his concern about Kilgore's competency following his disruptive outburst may accurately be designated as a request for re-evaluation, the remarks plainly called the court's attention to the problem:

> MR. ALCOTT [defense counsel]: Your Honor, may I comment and say that I am concerned about my client's ability to frank [sic] and rationally make a decision. I asked him whether he's been taking his insulin. As the Court knows he is a diabetic. He's indicated to me that he's not been given it.
>
> Secondly, of course, I have had him psychologically evaluated prior to the trial and we had him evaluated a number of years ago. He is mentally retarded. And combined with the stress of the trial over the last week and his mental condition to begin with, I just don't Know whether he's even competent. I know that his outburst in the courtroom today wasn't in his best interest. I don't know whether he has the ability to frankly [sic] control himself.

(T 1248-49)

Even if counsel had not stated his concerns to the court, the court had an independent duty to suspend the proceedings for a competency evaluation if Kilgore's conduct indicated he might no longer be competent. Drope v. Missouri, 420 U.S. 162, 181, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); Nowitzke v. State, 572 So. 2d 1346, 1349 (Fla. 1990); Pridgen v. State, 531 So. 2d 951, 954-55

(Fla. 1988); Hill v. State, 473 So. 2d 1253, 1257 (Fla. 1985); Fla. R. Crim. P. 3.210(b).

The court's response to counsel's remarks cannot fairly be construed as deferring to the judgment of the mental health experts who examined Kilgore before trial:

> THE COURT: I don't want to get into the question. The situation is second guessing psychologists and psychiatrists. But to refer to this man as mentally retarded I find incredible, since the man consistently has written very articulate letters, many of which are in my file.
>
> MR. ALCOTT: Just going on the standardized tests of the experts, Your Honor.
>
> THE COURT: Okay. Well, he may be mentally retarded, but his command of the English language is better than most high school graduates I come in contact with on a daily basis. And his ability to reduce English to the written form is better than most.

(T 1250) In context, the remarks of the court indicate that the court did not trust the opinions of the mental health experts, particularly in light of the court's stated belief that Kilgore's writing ability was above average.

The court's negative opinion regarding the reliability of mental health experts was made even clearer when the court questioned Dr. Dee with the jury absent:

> THE COURT: Take your time and read that. I want to tell you that during the course of this trial Mr. Kilgore wrote that to me. And I was looking for another one. There was a letter that he wrote to me earlier. And, frankly, I have found that the letters are literate, coherent, logical and quite inconsistent with the mental status that both you and Dr. Kremper ascribe to Mr. Kilgore.
>
> DR. DEE: Well, he wouldn't necessarily lose linguistic competency to become mental believe it or not.

THE COURT: Really?

DR. DEE: Yeah. You know, if you once gained it you will tend to maintain it for quite a long time if you get so bad that you can't speak and so forth.

THE COURT: I'm surely not going to ask you a lot of details, but if you could read that and then I'll ask you the one question does that change your opinion.

(T 1532-33)

Later, after Dr. Dee had the opportunity to review the letters, (T 1585) the court resumed questioning Dr. Dee's opinion:

THE COURT: . . . Dr. Kremper determined that in 1989 Mr. Kilgore had a full-scale I-Q of 76, which he determined to be borderline.

DR. DEE: Uh-huh.

THE COURT: And then in of course 1994 you scored him. And I believe you're in the 60s.

DR. DEE: 67.

THE COURT: 67. Which would make him --

DR. DEE: Deficient.

THE COURT: Deficient and deteriorating.

DR. DEE: Yes.

THE COURT: The letters . . . appear to me to be literate and logical, coherent; they are discussing legal issues. And they raise for me at least the suggestion that Mr. Kilgore is malingering.

DR. DEE: I don't believe he is.

THE COURT: You don't believe he is.

DR. DEE: No.

THE COURT: Thank you very much.

DR. DEE: . . . I . . . structured an interview with him to determine whether or not he was malingering. And I determined he wasn't. . . .

THE COURT: Uh-huh. Thank you.

(T 1585-86)

Not only did the court's remarks reflect the court's belief that Kilgore was malingering and not retarded, they show that the judge so disdained Dr. Dee's professional opinion to the contrary

that he lost interest in listening to Dr. Dee's explanation and merely sought to dismiss him from the witness stand.

ISSUE III

THE TRIAL COURT ERRED BY ALLOWING APPELLANT TO LEAVE THE COURTROOM DURING PART OF THE JURY SELECTION PROCESS WITHOUT A VALID WAIVER OF HIS RIGHT TO BE PRESENT AND WITHOUT INQUIRING TO DETERMINE WHETHER HE APPROVED COUNSEL'S USE OF PEREMPTORY CHALLENGES IN HIS ABSENCE.

Contrary to the appellee's argument, Brief of Appellee, p. 18, no objection is required to preserve the issue of the validity of Kilgore's waiver of his right to be present. In Francis v. State, 413 So. 2d 1175, 1178 (Fla. 1982), this Court explained,

> [The defendant's] silence, when his counsel and others retired to the jury room [to strike prospective jurors] or when they returned after the selection process, did not constitute a waiver of his right. The State has failed to show that Francis made a knowing and intelligent waiver of his right to be present. See Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

Thus, the right to be present at all essential stages of the trial is one of those fundamental constitutional rights which can be waived only by the defendant (not counsel), and only upon proper inquiry by the court to determine whether the waiver is voluntary, knowing, and intelligent. Johnson v. Zerbst.

Under this constitutionally mandated test, the voluntary nature of the purported waiver is insufficient in the absence of an on the record inquiry of the defendant to determine whether the waiver is knowingly and intelligently made. Because such waivers are usually volitional, as in this case, the defendant has no

motivation to object to the court's failure to conduct the requisite inquiry. More importantly, the validity of the waiver depends upon the defendant's knowing and intelligent decision to waive the right in question. If the defendant has no knowledge that he is waiving an important constitutional protection, or if he has not made an intelligent decision to waive it, he cannot be expected to object to the lack of inquiry. The court has an affirmative duty to inquire whether or not anyone has requested the inquiry. On appeal, the state has the burden to show from the record that the waiver was constitutionally valid rather than merely asserting the lack of any objection.

Appellee has attempted to meet this burden by citing the court's inquiry at T 204-06. Brief of Appellee, p. 20. This passage of the transcript shows that Kilgore wanted to leave the courtroom: "I want to go." (T 205) Kilgore said he understood that the trial would continue in his absence with Mr. Alcott acting as counsel, that Kilgore would not be able to assist Alcott in the jury selection process, and that he had the right to be present and could return at any time. (T 205-06) Kilgore told the court he was not ill, he just did not want to be there. (T 206) But when the court asked whether he wanted to leave or stay, Kilgore answered, "Might as well stay now 'cause I've been going through with it." (T 206) This statement was clearly not a voluntary, knowing, and intelligent waiver of the right to be present.

Kilgore then redirected the subject matter of the court's inquiry, wanting to know why there were only four or five blacks on

the jury panel. (T 206) When the court asked again whether he wanted to stay, Kilgore answered, "I want another lawyer, too. I would like another lawyer, too, and just get on back to the cage." (T 207) When the court asked if he were going to leave, Kilgore responded, "Yeah, I'm leaving." (T 207) The court then asked whether the bailiff needed to bring him back out in fifteen minutes. Kilgore responded, "Ain't going to bring me back 'cause I want another lawyer, too." (T 207)

Next, the court inquired about Kilgore's reasons for wanting a new lawyer. Kilgore said, "I still question out of forty-five jurors three or four blacks on there. Is that all the people you got in Polk County, black people you got in Polk County?" (T 208) The court started to say that Alcott did not have "anything to do with the -- " Kilgore interrupted, asserting, "I asked him to mention that to you but he didn't. He wouldn't." (T 208) The court noted there were six blacks in the forty person venire, and again asked why Kilgore wanted a new lawyer. Kilgore replied, "I don't feel comfortable with him." (T 208) The court again asked Kilgore to tell him why, and Kilgore failed to respond. (T 209) The court denied the request to relieve counsel. (T 209)

The court again asked whether Kilgore wanted to be present during the rest of the jury selection. Kilgore answered, "Carry me on back to the jailhouse." (T 209) The court asked if this decision was freely and voluntarily made, and Kilgore replied, "I don't know about freely and voluntarily made. But I don't want -- I told you I don't want the man. But you says I got to keep him.

So I get rid of him my way." [Emphasis added.] (T 209) The court then asked whether the denial of the request to change lawyers was Kilgore's reason for wanting to leave the courtroom. Kilgore failed to answer. (T 209-10) The court allowed Kilgore to leave, reminding him he could return to the courtroom at any time. (T 210) The court found "that Mr. Kilgore is knowingly, intelligently waiving his right to be present at trial." (T 210)

Thus, the record establishes that Kilgore vacillated before deciding to leave, and that he knew he was waiving his rights to be present and to assist counsel in selecting the jury. The record also establishes that the decision was not intelligently made. Instead, Kilgore was upset about the racial composition of the prospective jury panel and with counsel's failure to comply with his request to raise this matter with the court. Like a headstrong child, Kilgore dealt with his frustration from the denial of his request for substitute counsel by choosing to leave the courtroom, to get rid of Alcott his way.

Counsel for appellant acknowledges that dealing with upset defendants like Mr. Kilgore can be very frustrating for both his trial counsel and the trial judge, but that does not excuse the trial court's error in accepting the constitutionally invalid waiver of the right to be present. The conviction and sentence must be reversed for a new trial.

ISSUE IV

THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY FINDING THAT THE COMMISSION OF A MURDER BY AN INMATE SERVING LIFE SENTENCES FOR A PRIOR MURDER AND KIDNAPPING OBLIGED THE COURT TO SENTENCE APPELLANT TO DEATH.

Appellee has misconstrued appellant's argument. Contrary to appellee's assertion, Brief of Appellee, p. 23-24, appellant has never suggested that the trial court believed that Florida law mandated the death penalty for a first-degree murder committed by an inmate serving a life sentence for a prior murder. Instead, appellant's complaint is the opposite: The trial court violated both Florida law and the United States Constitution by concluding that it was morally obligated to impose a death sentence based solely upon the statutory aggravating factors of prior capital felony conviction[4] and commission while under sentence of imprisonment.[5]

Appellee states that the court "was referring to the state's moral obligation, not legal obligation, to seek the death penalty on the facts of this case." Brief of appellee, p. 24. The court actually stated,

> Under certain circumstances the state not only has the right, but the obligation, to take the life of convicted murderers in order to prevent them from murdering again. This is one of those cases. To sentence Mr. Kilgore to

---

[4] § 921.141(5)(b), Fla. Stat. (1989).

[5] § 921.141(5)(a), Fla. Stat. (1989).

> anything but death would be tantamount to giving him a license to kill. The fact that his prey would theoretically be limited to fellow inmates and prison guards is not comforting. An orderly society cannot permit human life to be violently taken with impunity.

(R 126-27) Thus, the court found that the State of Florida, as an orderly society, has a moral obligation to execute life-sentenced convicted murderers who kill again, including Kilgore. This is a substantially greater obligation than for the prosecutor to seek the death penalty. While we ordinarily treat the terms "state" and "prosecutor" as virtually synonymous in the context of a criminal appeal, in this context the court's use of the word "state" plainly refers to the government of the State of Florida as a whole, including both the judicial and executive branches.

Both section 921.141(3), Florida Statutes (1989), and the Eighth Amendment required the court to conduct an individualized sentencing analysis weighing the mitigating circumstances as well as the aggravating factors. Tuilaepa v. California, 512 U.S. __, 114 S. Ct. __, 129 L. Ed. 2d 750, 759-60 (1994); Sumner v. Shuman, 483 U.S. 66, 107 S. Ct. 2716, 97 L. Ed. 2d 56 (1987); Campbell v. State, 571 So. 2d 415 (Fla. 1990).

Appellee asserts that the court fulfilled this obligation. Brief of Appellee, p. 24. However, appellee's response to appellant's claim that the court's inadequate consideration and weighing of the mitigating circumstances violated the Eighth Amendment, Initial Brief of Appellant, Issue V, pp. 52-59, belies appellee's assertion in response to appellant's Issue IV:

> Finally, even if the sentencing order in this case is found to be insufficient, there is no reason to remand this cause for resentencing since it is clear from the judge's comments that any correction of an inadequate order would not result in the imposition of a life sentence.

Brief of Appellee, p. 28.

This is precisely appellant's point. The trial court was so intent upon its perceived "moral obligation" to impose the death sentence in this case that it would have done so no matter what mitigating circumstances were established by the defense. Thus, the trial court's sentencing analysis violated the Eighth Amendment because it treated the two proven aggravating circumstances as being conclusive, regardless of any and all mitigating factors.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Carol M. Dittmar, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 28th day of November, 1995.

Respectfully submitted,

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

PAUL C. HELM
Assistant Public Defender
Florida Bar Number 229687
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

/pch