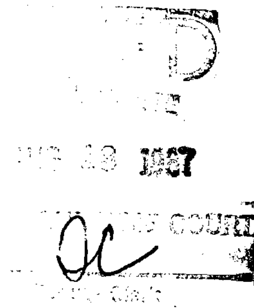
IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,919

JESUS SCULL,

Appellant,



vs.

THE STATE OF FLORIDA,

Appellee.

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AN APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

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APPELLEE'S CROSS REPLY BRIEF

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## ARGUMENT

THE SENTENCES HANDED DOWN DO NOT VIOLATE CONSTITUTIONAL PROVISIONS.

The State's cross appeal goes directly to this Court's proportionality review. It is the State's position that:

a.) the trial court's "finding" of two mitigating factors in this case was flawed;

b.) trial courts should only be permitted to find statutory mitigating factors which follow the holdings of this Court;

c.) appellate review is available whenever a mitigating factor has been "found" absent competent, substantial evidence;

d.) if not stricken, such factors should be relegated to the category of "non-statutory mitigating;" and

e.) such factors should be given less weight in this Court's proportionality review.

## ANALYSIS

The State readily concedes that defendants have the right to argue any factor in mitigation. Lockett v. Ohio, 438 U.S. 586 (1978). Distinctions must be drawn, however, between statutory and non-statutory mitigating factors, for review purposes.

This is a case where the trial court listed two factors specifically mentioned in F.S. § 921.141(6) as being possible factors in mitigation. (R. 302). The State would normally have had no quarrel with this turn of events, except for one thing: other defendants in appellant's exact same situation have not been able to avail themselves of these statutory mitigating factors. (See authorities cited in Appellee's Answer Brief). It would seem, then, to be basically unfair and illogical to hold that trial courts could flaunt precedent in any given case and "award" a statutory mitigating factor to one defendant over another when the facts of those respective cases are identical. This issue goes directly to this Court's duty to ensure uniformity in capital sentencing throughout Florida.

This case calls for a finding that statutory mitigating factors must be uniformly applied throughout the state.

Just as no statutory aggravating factor will be allowed to stand if it offends statute or precedent, so too must statutory mitigating factors be treated. Any such factor should be automatically classified by this Court as non-statutory. This will help ensure uniform sentencing and truer proportionality review.

Although undersigned counsel has not been able to find any precedent on this exact point, there does exist case law which would support the proposition that even mitigating factors can be subject to review.

> "Finding or not finding that a mitigating circumstance has been established and determining the weight to be given such, however, is within the trial court's discretion and will not be disturbed if supported by competent substantial evidence." State v. Bolender, 503 So.2d 1247 at 1249 (Fla. 1987).

This quote implies that even a finding in favor of a mitigating circumstance would be subject to review, and perhaps overturned if that finding is not supported by the evidence. The door has thus been opened to hold, in this case and in cases like it, that the two statutory mitigating factors cited by the trial court were improperly found, and that their inclusion as statutory mitigating factors would effectively skewer proportionality.

Consider, for example, the trial court's finding of lack of prior criminal history. The only evidence adduced at trial led to the inescapable conclusion that appellant's history was anything but crime-free. Appellant was convicted of two murders and several other felonies. Given this uncontrovertible fact, the trial court abused its discretion in finding otherwise. Bolender permits this Court to strike that mitigating factor.

The Court should also consider the evidence which was used to establish age as a mitigating factor (TR. 1348). The only "evidence" here was a statement by the defendant that he was 24 years old. There was nothing else. That is grossly inadequate. As Justice Shaw stated in Garcia v. State, 492 So.2d 360 (Fla. 1986), "every murderer has an age." There simply has to be more evidence presented to support a finding of mitigation.

> "The fact that a murderer is twenty years of age, without more, is not significant ****." Garcia, at 367.

Based on the cases which have upheld rejections of age as a mitigating factor (See State's Answer Brief), it is clear that capital defendants who simply argue that they

are "x" number of years old do not qualify for this factor. To say that this appellant does qualify--absent the substantial evidence required by Bolender--would undermine the proportionality of death sentences in Florida. True proportionality requires that aggravating and mitigating factors be uniformly applied.

## THE REMEDY

Should this Court decide not to strike these factors, the State would suggest an alternative remedy. It is recommended that these mitigating factors be termed "non-statutory." Said reclassification is required to maintain uniformity in this area of the law.

The United States Supreme Court has mandated that death penalty cases be decided in a consistent manner. Eddings v. Oklahoma, 455 U.S. 104 (1982). It is required that all relevant mitigating factors be heard by the sentencer. At the same time, "[t]he sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence." Eddings, at 114, 115. The Supreme Court has therefore given this Court the discretionary power to consider any factor in mitigation

as it wishes. It is only required that all mitigating factors be considered. In fact, the Court openly suggested that the reviewing court could give "little weight" to these factors. Eddings at 115.

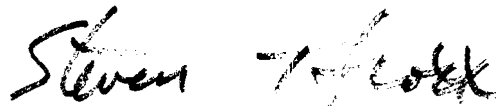
Given the language of Bolender and Eddings, there would appear to be no impediment to reclassifying these two mitigating factors as "non-statutory," and no impediment to affording them less consideration in the overall weighing process. (See "The Weighing Process," Answer Brief, pages 28-29). This is especially true given the plainly tentative wording of the sentencing order itself, where the trial court only halfheartedly embraced these factors. To afford these factors the full weight of valid statutory mitigating factors would not be in keeping with a proper proportionality review.

## SUMMARY

The Cross Appeal is meritorious. If not stricken altogether, these mitigating factors must at least be relegated to the status on non-statutory, and afforded reduced weight.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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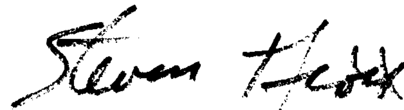
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing APPELLEE'S CROSS REPLY BRIEF was furnished by mail to ROBIN GREENE, 2655 LeJeune Road, Suite 1109, Coral Gables, Florida 33134, on this 11th day of August, 1987.



STEVEN T. SCOTT
Assistant Attorney General

STS/ds