IN THE SUPREME COURT OF FLORIDA

RICHARD TONY ROBERTSON,

Appellant,

v. CASE NO. 81,324

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

NADA M. CAREY
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT
FLA. BAR NO. 0648825

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

CONSTITUTIONS

RULES

IN THE SUPREME COURT OF FLORIDA

RICHARD TONY ROBERTSON,	:	
Appellant,	:	
v.	:	CASE NO. 81,324
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On October 9, 1991, the Leon County Grand Jury indicted appellant, RICHARD TONY ROBERTSON, for the first-degree premeditated murder of Carmella Fuce between August 28 and September 2, 1991, burglary with assault, robbery, burglary of a conveyance, and grand theft auto. (R 1-3).[1]

On April 10, 1992, the defense filed a motion for appointment of experts to determine competency to proceed and insanity at the time of the offense. (R 37). The court granted the motion, appointing Dr. Harry A. McClaren and Dr. James Brown. (R 38-42).

On November 2, 1992, Robertson moved to suppress his statements to police on the ground the statements were involuntarily made as a result of coercive interrogation tactics.

[1]References to the two-volume record on appeal are designated by "R" and the page number. References to the five-volume trial transcript are designated by "T" and the page number. References to the three-volume supplemental record are designated by "SR" and the page number.

(R 71-72). After a hearing on January 20, 1993, the motion to suppress was denied. (T 6-7).

Robertson was tried by jury before the Honorable N. Sanders Sauls, Circuit Judge, on January 19-23, 1993. After presentation of the state's evidence, Robertson moved for judgment of acquittal on all charges. The trial court denied the motion. The jury found Robertson guilty as charged of the murder, burglary with assault, burglary of conveyance, and grand theft auto. On the charge of robbery, the jury found Robertson guilty of the lesser included offense of theft.

The penalty phase of the trial was held on January 25, 1993. The jury, by a vote of 11-1, recommended the death penalty. (R 1245).

The sentencing hearing took place on February 23, 1993. The trial court sentenced Robertson to death for the first-degree murder, finding two aggravating factors: that the crime was committed during a burglary and was especially heinous, atrocious, or cruel. In mitigation, the court found (1) impaired capacity due to alcohol and drugs; (2) youth; (3) abusive childhood, (4) borderline intelligence, and (5) mental illness. (R 230-236). The court sentenced Robertson to consecutive life sentences on counts 2, 3, 4, and 5, giving as a basis for departure the unscored capital felony. (R 337).

Notice of appeal was timely filed February 23, 1993. (R 300).

STATEMENT OF THE FACTS

A. Competency to Stand Trial

Pretrial Proceedings

On September 25, 1992, the court held a hearing on Robertson's motion for a continuance.[2] Robertson was disruptive throughout the hearing. He interrupted counsel and the judge with obscenity-laced diatribes, repeatedly stated, "I want to go to trial" (R 95), and implored the judge not to "go back on your word" and to "Be a man. Be a man." (R 96). He demanded to represent himself, stating, "I ain't got no attorney. I'm my own attorney. Why can't I be my own attorney?" (R 96). After the judge threatened to shackle him, he told the judge:

> Man, you can give me the chair. You understand what I'm saying? Fry my black ass. I'm guilty as a motherfucker. You'd better fry me because if you don't fry me, I'm gonna kill every cracker I ever seen in my life until the day I die. And one of them motherfuckers gonna have to kill me. So you ain't got no choice but to kill me. You ain't got no choice but to fry me. And let me go to trial October the 12th.

(R 98-99).

Robertson's behavior prompted the trial judge to inquire whether the court-ordered psychological reports had been received. A discussion of the evaluations ensued. Although both counsel stated Dr. Brown had found Robertson competent,

---

[2]The motion, filed September 3, stated as grounds that Robertson had refused to meet with counsel or the investigator and that Robertson had a documented history of mental problems dating to when he was 13 years old, and a major portion of the records were still missing. (R 64-65).

counsels' assessments of Dr. McClaren's findings differed somewhat. According to defense counsel, Dr. McClaren had been unable to complete the tests because Robertson would not cooperate. (R 97). Hence, "he really can't tell whether or not he's competent" and "[h]is suggestion is that we send Robertson to Chattahoochee" where they could observe him around the clock and make sure he was on his medication. (R 99). Defense counsel also told the judge he had tried to talk to Robertson seven times at the jail, but Robertson had refused to see him, and so "I don't have a good faith reason to believe he is competent or incompetent, and I can't make a motion either way." (R 100).

At this point, the trial judge indicated he had doubts about Robertson's competency:

> Let me hear from the state. But from the reports that I had received, and the inability to receive the other doctor's report, which apparently, the inability to receive that opinion and evaluation is the result of Mr. Roberton's actions. And the demonstration that Mr. Robertson has placed on this record here so far this morning leads me to believe that under the rule, that there is some question concerning his competency, and perhaps an order should be entered.
>
> Let me hear what the state's position would be.

(R 101).

The prosecuting attorney said Dr. McClaren had found Robertson competent and Robertson was just playing games:

> MR. CUMMINGS: Judge, neither Dr. Brown nor Dr. McClaren said that this man was incompetent, or ever incompetent.

DEFENDANT: Thank you.

MR. CUMMINGS: That was not his finding.

THE COURT: I thought that the other doctor had said so.

MR. CUMMINGS: No, sir. He just said -- all Dr. Harry McClaren said was, the fact that he wouldn't see him, and this type thing. But he did an extremely thorough examination of all his records and everything else and did not find that he was incompetent or insane at the time of the the offense.

DEFENDANT: Praise the Lord.

MR. CUMMINGS: So nobody said that.

DEFENDANT: Amen.

MR. CUMMINGS: This man is not incompetent, Judge. What he is, he's just mean. And he shows you that in this courtroom today. This is a big game that he's playing. It's a game he's playing.

DEFENDANT: You damn right.

MR. CUMMINGS: And I don't expect this Court to buy into that.

The State of Florida is ready to go to trial.

DEFENDANT: Amen. Amen.

* * *

MR. CUMMINGS: And Dr. McClaren never said he was incompetent. Dr. Brown never said he was incompetent to proceed. In fact, they found exactly the opposite.

The only thing Harry McClaren said was based on the fact that he would not cooperate with him, that it might be useful to place him over at Chattahoochee so they could observe him.

But he never said anything about incompetency. And he is not showing that he is incompetent today.

(R 101-103).

Without commenting further on the competency question, the court set trial for January and attempted to conduct a Faretta inquiry, as follows:

> THE COURT: Do you believe that you are competent to represent yourself?
>
> THE DEFENDANT: I want to go to court October the 12th. I want to go to court. What I see here, these people a bunch of devils. You know what I'm saying? I'm the devil's catcher. So I got to catch y'all before y'all try to catch me. Understand? Y'all a bunch of devils. You look like devils. I'm going up against the devil. And I believe I'm gonna win against Satan's people. That's what y'all is, a bunch of devil's, with no black people in the courtroom, but a bunch of crackers and all them sorry, stinking lowlife motherfuckers. Y'all got me messed up.
>
> THE COURT: Well, let me ask you, Mr. Robertson: What kind of education have you received?
>
> THE DEFENDANT: (Comments unintelligible to court reporter)
>
> THE COURT: If you want to represent yourself, I have to determine if you are competent to do so.
>
> THE DEFENDANT: I'm gonna represent myself.
>
> THE COURT: Well, tell me what kind of education have you received.
>
> THE DEFENDANT: You don't need to know that.
>
> THE COURT: Sir?
>
> THE DEFENDANT: You don't need to know that. I'll tell you what, I went to Tiddly-wink school. You ever been to Tiddly-wink school?

THE COURT: To what kind of school?

THE DEFENDANT: Tiddly-wink.

THE COURT: That's a new one on me. Tell me about that one.

THE DEFENDANT: Think about it. I went to Tiddly-wink School. Which school you went to? Cracker High School?

THE COURT: It wasn't Tiddly-wink. But let me ask you; Have you had any previous experience in representing yourself in the criminal justice system?

THE DEFENDANT: No. But I jacked off in the bathroom before.

THE COURT: Did you? Okay. Well, let me ask you: Have you ever participated in a trial before?

THE DEFENDANT: I wiped my ass on one before.

THE COURT: Have you ever had a trial before?

DEFENDANT: No. I have laid out on the bathroom. Think about it.

THE COURT: Okay. Well, why do you want to represent yourself?

DEFENDANT: Why you want to represent yourself?

THE COURT: I'm asking you. You are requesting to represent yourself.

THE DEFENDANT: So I can catch the devil. You understand what I'm saying? So I can catch the devil. Catch the devil and catch the -- (unintelligible). Understand what I'm saying? You a bunch of devils. A bunch of white people and no black people -- (unintelligible).

(R 109-111). At this point, the trial judge aborted the Faretta inquiry, ruling that Robertson was "not competent to

represent himself." (R 111).

Robertson objected to the judge's ruling, saying,

> You a judge. You ain't supposed to go back on your word. I said I want the electric chair. I mean, what else more do you want? This man ain't gonna do nothing but get up there and try to tell somebody about somebody else's life. He don't even know his own life -- (unintelligible)

(R 112).

The hearing concluded with Robertson threatening that if he ever escaped, "If I ever see you in New York, I'm getting machine guns and blow up every damn thing I ever see. I told y'all to fry me. If you don't fry me I'm gonna kill ---." (R 113).

Psychological Reports

Robertson was examined by Dr. Brown in April and May of 1992 and by Dr. McClaren in June and July of 1992. Dr. Brown's report stated that Robertson had described an extensive psychiatric history, including a diagnosis of chronic paranoid schizophrenia. Robertson also reported he was taking Trilafon, Cogentin, Mellaril, and Thorazine; had been hospitalized in Queens, New York, due to psychiatric problems; and did bizarre things when off his medication, such as biting off the throat of a cat. Dr. Brown could not verify all of Robertson's reported psychiatric history, but reviewed reports from the Psychiatric Center at Tallahassee Memorial Regional Medical Center that indicated a possible history of chronic paranoid schizophrenia, as well as a diagnosis in September, 1991, of

Adjustment Disorder with Mixed Emotional Features and Antisocial Personality Disorder. (R 44).

Dr. Brown's report stated Robertson had reported visual and auditory hallucinations and had exhibited inappropriate emotional affect and behavioral oddities during one visit. He also reported four imaginary friends. (R 45). As to Robertson's mental status, Dr. Brown said:

> [Robertson] impressed as an emotionally disturbed person with a borderline personality disorder, borderline intelligence, and a problem abusing alcohol and drugs. His history of punishment, depression with suicidal threats, detention, feelings of rejection by siblings, peers and adults, severe mother-child conflicts, aggressiveness which was sometimes expressed via sexual inappropriateness, and reports of a bizarre and idiosyncratic fantasy life document factors that help provide insight into [Robertson's] disturbed personality. He appears to be at risk for transient psychotic reactions in situations of extreme stress, and in situations in which he abused alcohol and drugs.

(R 46).

Dr. Brown concluded

> [Robertson] appears to be minimally competent to stand trial. His attorney will probably find him difficult to work with because he does not trust people in general, particularly white authority figures.

(R 46-47).

Dr. McClaren reported that Robertson had talked in a very unusual manner about imaginary friends (Billy, Scott, and Kevin), as if they were alternate personalities within him, and had reported auditory and visual hallucinations involving

"things telling me to . . . all kinds of stuff like hurting myself." (SR 19).

Dr. McClaren's report pointed out that Robertson's mental health problems clearly predated the murder. Robertson had been perceived by some mental health professionals as suffering from schizophrenia and had twice been hospitalized at the Psychiatric Center of Tallahasse Memorial. (SR 20). He also had been hospitalized just before his arrest (SR 20) and had received treatment since his arrest for schizophrenia. He also was refusing medication. (SR 20, 21).

Robertson had been observed by persons in his community as acting peculiarly, talking about "eating cat" to one individual and talking about "drinking blood" to another person. (SR 20).

Dr. McClaren was unable to complete the psychological testing because Robertson would not complete the tests. (SR 18). On one occasion, Robertson told Dr. McClaren he planned to be disruptive in court. (SR 20). On another occasion, he said he did not plan to attend court proceedings. (SR 21). The report noted Robertson allegedly had told another jail inmate he intended to appear more mentally disturbed than he actually was. (SR 20).

As to his mental status, Dr. McClaren concluded

> [T]here is little doubt that Mr. Robertson is a mentally maladjusted young man who probably has significant difficulty in the area of substance abuse.
>
> . . . .
>
> He probably has the ability to manifest

> appropriate courtroom behavior should he choose to do so. However, given his checkered mental health records reflecting possible suffering from Schizophrenia, his ability to manifest appropriate courtroom behavior is probably best termed as questionable. . . . Mr. Robertson is most likely exaggerating the degree of his emotional disturbance for the understandable reason of delaying his trial or attenuating the consequences of his alleged misbehavior. However, the possibility that he suffers from a more serious mental illness cannot be completely ruled out. . . . he is regarded as suffering from a Borderline Personality Disorder which has been complicated by substance abuse in the past. Also, he is experiencing an Adjustment Disorder with Mixed Emotions at this time.
>
> . . . .
>
> . . . . Most likely he has the capacity to currently aid and assist an attorney in his own defense at his point. However, the possibility that he is suffering from symptoms of schizophrenia cannot be completely ruled out. Given the seriousness of his charges, he would probably benefit from a period of inpatient observation to better elucidate his true mental condition. While it is the opinion of this examiner that Mr. Robertson is currently competent to proceed, a higher degree of certainty could probably be provided to the Court if he is afforded a period of inpatient psychiatric observation and possible treatment in a secure facility such as the Forensic Service of Florida State Hospital. . . .

(SR 20-22).

B. Motion to Suppress[3]

---

[3]Robertson was not present at the suppression hearing. After defense counsel indicated Robertson was willing to waive his presence, the trial judge asked Robertson if he was ill or had been coerced into not attending the hearing. Robertson responded, "I'm undergoing a little trauma right now. I need to be by myself." Upon further questioning, Robertson said he

The Interrogations

Robertson called the homicide office on September 4, 1991, two days after Carmella Fuce's body was discovered. He identified himself as "Tony Nixon," and said he had been dating Carmella and was with her the previous Tuesday and Wednesday evenings. (T 497-498). He heard she was dead and felt he needed to explain why his fingerprints were in her apartment. (T 508). Detective Frank Springer picked Robertson up and brought him to the stationhouse around 5:30 p.m. Detective Springer obtained a handwriting sample and a consent and waiver to obtain Robertson's mental health records. (T 510, 526).

Springer then took a taped statement, beginning at 7 p.m. Robertson did not appear to be under the influence of drugs and alcohol. (T 509). Springer did not advise Robertson of his rights prior to the statement because he "did not consider Robertson a suspect at that time," (T 510-511, 525) and did not consider him a suspect until shortly after the interrogation. (T 526). Springer did everything he could, however, to get Robertson to confess to what he intuitively knew Robertson had done. (T 528). This included appealing to Robertson's religious beliefs by repeatedly invoking God and Satan; urging

---

was having "emotional stress." Counsel indicated Robertson did not need to be there, whereupon he was excused.

After evidence was presented, defense counsel told the court, "Robertson has refused to talk to me on occasions, refuses to talk to me a great deal of the time," and indicated his defense of Robertson had been hampered by Robertson's "just absolute refusal to cooperate with anybody in this case, including the two psychiatrists that were appointed by this Court to determine his competency." (T 578-579).

Robertson to tell what happened to put the family out of their suffering; because he owed it to Carmella, if he really loved her; telling Robertson the only way he could end his own pain would be by telling the truth; and attempting to persuade Robertson to confess to an accidental, unintentional killing.[4]

During Springer's interrogation, Robertson admitted visiting Carmella the night she was killed but said he left around 8 p.m. when she slammed the door in his face because he was intoxicated. He said he went to the Moon after that and did not return to her apartment. Defendant's Exhibit 1 at 11-13.

Immediately after the Springer interrogation, Robertson was interrogated by Detectives Towle and Gaulding. Prior to this interrogation, which was not recorded, Robertson was advised of his constitutional rights. (T 499-500, 545-546). Robertson generally repeated what he had told Springer, adding that he "may have killed Carmella but could not remember doing it" and that he had bitten the throat of a cat a month earlier and did not remember that either. (T 503, 554). Robertson was then released.

Springer obtained Robertson's mental health records the next day, September 5. (T 526). During the next few days, the police had frequent discussions with Robertson, who, according to Springer, "pretty much wanted to visit our office most every

---

[4]Pertinent portions of the transcript of the September 4 interrogation, which was introduced at the suppression hearing as Defendant's Exhibit I, are included in this brief as Appendix A.

day during that period." (T 516). Police obtained blood, hair, and saliva samples on September 6 and a written statement on September 8. (T 543-544).

On September 9, a search warrent was served at Robertson's parent's residence. (T 516). That night, Robertson was hospitalized after threatening to kill himself. Police asked the hospital to notify them upon his release so they could arrest him. Robertson remained at the Psychiatric Unit of the hospital until he was released to Detective Springer on September 11. (T 518-519, 564, 584-585). Springer was familiar with Robertson's admittance and knew he had threatened suicide but did not know anything about the treatment he had received. (T 526). Springer took Robertson directly from the psychiatric ward to the police station, where he was subjected to five separate interrogations over a four to five hour period. (T 489). Each interrogation was preceded by Miranda warnings. (T 520, 535, 545, 556-557).

Detective Springer conducted the first interrogation, beginning at 4:06 p.m. When asked whether he was on any kind of medication, Robertson said he was on Trilafon and Cogentin. Defendant's Exhibit 2 at 3. When asked what happened, he said after he got back from the Moon that night, he went up to Carmella's apartment. The door was unlocked and he went inside and found her on the floor. Defendant's Exhibit 2 at 4-5. Springer then told Robertson they could prove he took her money and jewelry and it was time to tell the truth. Defendant's

Exhibit 2 at 8. He told Robertson, "This is your chance to redeem yourself by telling the truth," and urged Robertson to tell him where the jewelry was because he wanted to give that back to "Momma and Daddy" and "that would mean so much to them." Defendant's Exhibit 2 at 9-10.

During a break in Springer's interrogation, Detective Towle interviewed Robertson. During Towle's interview, Robertson told the same story he had told Springer, that he found Carmella dead but did not kill her or, if he did, he did not remember it. Defendant's Exhibit 3 at 17-18.

When Springer resumed the questioning, Robertson continued to deny that he killed Carmella. Springer then told Robertson maybe he did something he did not want to remember and maybe his medication kicked in. Defendant's Exhibit 2 at 21. He told Robertson it was alright to cry and asked what Carmella had done to hurt him and what she had said that "caused the problem." Springer told Robertson, "I know you were probably hurting that night or you wouldn't have done anything like that." Robertson broke down sobbing and confessed. He said it happened because he "was off my medication" and "my mind was whooped."[5] He went back to her apartment after going to the Moon and she let him in. They were just playing games when he tied her up. They were just playing around and he got her in a choke hold. It was "like the Devil put strength on my arm,"

---

[5]Pertinent portions of the transcript of Springer's September 11 interrogations, which were introduced at the suppression hearing as Defendant's Exhibit 2, are included in this brief as Appendix B.

and "all of a sudden she just fell." He "tried bringing her back . . . but it didn't work." Defendant's Exhibit 2 at 22-24.

Robertson then gave a videotaped statement to Detective Towle, telling basically the same story. He again said they were just playing when he tied her up. He put his hands around her neck and "as soon as my medication moved in on me my hands got tighter," and "I couldn't let go." Defendant's Exhibit 4. Prior to Towle's interrogation, Springer knelt down and told Robertson

> I'm proud of you . . . I think you're helping yourself. . . . I know I've been a bastard sometimes, but that's just because I was trying to help you out. Okay? And I knew you were doing the wrong thing by lying and getting yourself into more trouble. I'm sorry if we had harsh words, but we were just trying to do what's best for you and Carmella. And what we need to do is get everything out so everybody knows everything that happened. And if you need to be on your medication we need to get you on your medication and we need to find some way to keep you on it.[6]

At 8:25 p.m., Robertson was interviewed by Greg Adams about another case and confessed again to the murder. He said they were just horsing around and she let him tie her up. He had his arms around her neck and all of a sudden "my mind just my whole body just started tightening up." He let her go because she stopped moving, then did CPR on her but she was

---

[6] Springer's comments prior to the videotaped interview by Towle were introduced at the suppression hearing as Defendant's Exhibit 7 and are included in this brief as Appendix C.

dead. Defendant's Exhibit 5.

Mental Health Records

At the suppression hearing, defense counsel introduced a composite exhibit of psychological reports and evaluations chronicling Robertson's history of mental problems.[7] At age 13, Robertson was diagnosed as "emotionally disturbed" by a psychologist in Alabama. He was evaluated again a few months later and diagnosed as suffering from a conduct disorder socialized and non-aggressive and passive-aggressive personality disorder. His I.Q. was found to be 77. (T 572).

At 16, Robertson was found to have borderline intellectual functioning and was described as "very impulsive and emotionally immature with few inhibitory controls over his rebelliousness and anger. . . seems to be living in a fantasy world and this appears for him to escape the reality of his problems." (T 573).

At age 17, Robertson was hospitalized on two separate occasions at the Tallahassee Memorial Psychiatric Center following suicide attempts. An evaluation by a Dr. Speer indicated Robertson's parents were alcoholics and abusive and Robertson "does not know what will happen to him and how he is going to function and take care of himself." Dr. Speer concluded Robertson "appear[ed] to be having more serious reasons for admission," and "a more thorough evaluation [wa]s now

---

[7]Robertson's institutional records were introduced into evidence as Defendant's Exhibit 6. (T 489).

indicated."

On July 6, 1991, just six weeks before Carmella Fuce was killed, Robertson again was hospitalized after he bit the throat of a cat and mutilated it. The admission note indicated Robertson was complaining of hallucinations and satanic impulses. A July 15, 1991, evaluation said Robertson was bizarre in his presentation and reported a history of hallucinations, paranoia, sleep and appetite disturbance, suicidal and homicidal ideation, delusions, criminal mischief, and illicit drugs. The discharge diagnosis was chronic paranoid schizophrenia, to be treated with Trilafon and Cogentin. On July 24, Dr. Nitin Patel diagnosed Robertson as suffering from schizophrenia, paranoid type. Dr. Patel's report noted Robertson "had his first psychiatric hospitalization two years ago in New York for two months." Dr. Patel increased the dosage of Trilafon.

The reports from Robertson's hospitalization on September 9, 1991, after the homicide but before his arrest, indicated he was admitted to the Psychiatric Center after threatening to kill himself with a gun. He was delusional, suffering from atypical depression, and reported not taking his medications, Trilafon and Cogentin. The discharge diagnosis was "adjustment disorder with emotional features, ethanol intoxication of .25, history of paranoid schizophrenia (?), anti-social personality disorder, insight and judgment impaired."

Jail reports, dated September 12 and 13, 1991, after

Robertson's arraignment, indicated Robertson admitted to auditory hallucinations since running out of his prescribed medication three weeks ago.

The trial court denied the motion to suppress, ruling Robertson's statements were free and voluntary. In his oral ruling, the court said "it really appears that there is no documented diagnosis of any psychosis of any kind for this individual" and the "only reference to any type of psychosis" was Dr. Patel's psychiatric evaluation, which "was based solely on reports of the patient himself" as he refused to cooperate for any assessment of his cognitive functions. The court further concluded "it is unclear, frankly, from the record as to medication." (T 603-607).

C. Trial

In August of 1991, Carmella Fuce lived alone at the University Square Apartments in Tallahasse. (T 635). Richard Thelwell, her boyfriend, telephoned her from Ft. Lauderdale on Wednesday, August 28, around 11 p.m., to say he was coming to Tallahassee for the weekend. (T 644). She sounded fine on the phone and did not mention being afraid of anyone or having problems with anyone. (T 655). When Thelwell arrived Friday night, Carmella's car was in the parking lot but no one answered her door. (T 645). On Sunday, Thelwell went by her apartment again. (T 647-649). Her car did not appear to have been moved. (T 657). The anti-lock device was on the steering wheel. (T 649, 658). He did not notice any keys in the car.

(T 649).

On Monday, September 2, the apartment manager opened Carmella's door (T 652) and her nude body was discovered on the bedroom floor. (T 664). There was a brown teddy bear between her legs and a black electrical cord looped around her neck. (T 665). The cord was not tied or pulled tight but the ends were crossed behind her neck. (T 704-705). An iron with a cut cord was on the ironing board. Against the wall were some boxes, one overturned, and a pile of clothes. Some pencils and rulers were on the floor, including a pencil with a broken point and a pink marker. (T 691). Tied around the victim's head was a pair of pants. In her mouth was a bra. Her wrists were tied behind her back with a piece of cloth, over which was tied a piece of white electrical cord. (T 692, 706). On the wall, written in pencil and pink marker, were the words were "Saten," "Nigger, Fuck, FSU, FAMU, KKK, ANM." (T 692). The carpet around the body was stained with Chlorox. (T 694, 811).

There were no signs of forced entry (T 702) and no evidence of a struggle or fight. (T 665, 703). No keys were missing from the office, and keys were coded so that a stranger could not tell which key went to which apartment. (T 640). Thelwell said Carmella was very cautious and would not open her door to a stranger and would not open her door without checking to see who was there. (T 661-662).

Carmella's car was in the parking lot with the driver's door unlocked, a single key in the ignition, and the anti-theft

device across the steering wheel, unlocked. (T 782-783). There was no evidence of forced entry into the car. (T 789). The car looked like it had not been moved in several days. (T 790). There was no physical evidence Robertson was ever inside the car. (T 791). The car worked but only after both lap and shoulder belts were harnessed. (T 832). Carmella's keys, including her car key and apartment key, were found about 75 feet west of her apartment. (T 711, 786, 788).

The medical examiner, Dr. Thomas Wood, said the swelling, bloating, bulging eyes, and blood on the body were the result of a natural process of decomposition. (T 718, 728, 734-736). There were no broken bones or bullet wounds. (T 719). Wood found no defensive wounds or signs of sexual abuse but said his ability to make such observations was compromised by the decomposition of the body. The cord around the neck was loosely draped but there was an indentation around the neck where the cord had been tighter. (T 720). The indentation could have been caused by swelling if the cord had been tighter or secured. (T 730). The piece of clothing tied around the head just above eye level looked like it had slipped up as the body began to decompose. A halter or bra-type garment was stuffed tightly into the mouth, which would have required a lot of force. (T 721). There were small hemorrages where the neck had been compressed and in the lining of the larynx, which often are seen when a person is strangled. (T 721).

In Dr. Wood's opinion, the cause of death was strangula-

tion asphyxia. (T 728). Dr. Wood said it usually takes a matter of seconds to minutes for someone to die from suffocation by strangulation. (T 723). He would expect it to be closer to a minute than to ten seconds, but he could not give a precise time. In his opinion, there would be an initial period during which the person would be conscious. (T 723). He would expect this to be a matter of seconds, possibly fifteen to thirty seconds. (T 732).

Dr. Wood said he had considered the possibility that the mouth gag caused death. (T 723). If this had occured, the time frame would be "seconds to a very few minutes." (T 724). If she died from asphyxia due to the gag, however, he would not have seen the hemorrages in the neck and windpipe. Dr. Wood could not tell if the gag was put in her mouth before or after she died. (T 733).

Don Pribbenow, the FDLE handwriting expert, said the handwriting on the wall matched the handwriting samples Robertson had submitted. (T 751).

Several residents of the University Apartments saw Robertson and Carmella together before the murder. Tamara Bracey, who lived two doors down from Carmella, saw Carmella with Robertson on Wednesday, August 28, around 8:30 p.m. (T 754, 757). Bracey was sitting outside her door when they walked past her and went inside Carmella's apartment. About 15 minutes later, Robertson came out. He turned around and put his hand on the doorknob as if to go back inside but then

walked on around the corner. (T 754-757). Bracey said they were "just two people walking together" and Robertson was not harassing Carmella in any way. (T 759-760).

David Wilson first saw Robertson and Carmella together when Robertson helped Carmella carry her groceries up to her apartment. (T 765). Wilson saw Robertson with Carmella again on Wednesday, August 28, around 5 p.m. Wilson, Robertson, and some other guys were in the parking lot drinking a case of beer that belonged to Robertson. (T 763, 768). Robertson was loose and happy-go-lucky, like he usually was. (T 769). Carmella drove up and Robertson walked up to her and they started talking. Wilson saw no indication Carmella did not want to talk to Robertson or was afraid of him. (T 769). Robertson walked up the stairs with Carmella, stayed a few minutes, and came back down. (T 763, 770). He told Wilson he was going to make Carmella his girlfriend and they were going out to eat that night. Wilson saw Robertson again around 8 p.m. and asked if they had gone to eat yet. Robertson replied, "No, we ain't going. We haven't left yet." Robertson was still drinking beer and was in a good mood. (T 770). Wilson saw Robertson again around 10 p.m., walking around the complex, but did not talk to him. (T 764). Robertson was still drinking and appeared to be in the same happy mood. (T 770).

A few days before the murder, Veronica Lanier and Robertson were both at the apartment of a friend of Lanier's when Carmella came up the stairs. Robertson ran out the door, and

Lanier heard them talking loudly outside. When Lanier went outside, Robertson was holding Carmella's arm and Carmella was telling him to leave her alone and not to touch her. (T 778-779).

The state introduced into evidence and played for the jury three of Robertson's September 11 statements, including the audiotaped statement in two parts to Detective Springer (T 826), the videotaped statement to Cecil Towle, and the audiotaped statement to Greg Adams. (T 861). Investigator Brown testified that before Robertson was taken to the jail that evening, she heard Robertson tell his mother he was under arrest and that he killed Carmella. (T 785-786).

D. Penalty Phase

Prior to the penalty phase and over defense counsel's strenuous objection, Robertson asked the trial judge to remove an obviously favorable juror. The juror had stated that she needed to get herself together because "this 11 to 1, you know, and everybody is overruling me, and I don't feel comfortable, you know, as a juror." (T 1056). Defense counsel also pointed out the juror was the only black on the jury. (T 1058). Robertson said he wanted to excuse the juror because "she was shedding tears" and "should not have to suffer this mental thing on her." (T 1064-1065). The judge acceded to Robertson's request but noted that Robertson's impressions about the juror were not borne out by the record. (T 1066).

Over defense objection to "victim impact evidence," the state was allowed to present the testimony of the victim's father and sister regarding Carmella's school activities and plans for the future. (T 1076-1080).

Robertson presented the testimony of Dr. James Meyer, a forensic psychologist. (T 1084). According to Dr. Meyer, Robertson's psychiatric history strongly supported the diagnosis of schizophrenia. (T 1103). Dr. Meyer pointed out that Robertson had reported auditory hallucinations at the age of 13. (T 1086). At that time, he was diagnosed by a clinical psychologist as "severely disturbed" and suffering from a conduct disorder. (T 1087). Only a couple of months later, Dr. Thomas Boyle, a licensed psychologist, diagnosed Robertson as suffering from a conduct disorder and passive aggressive personality disorder. (T 1089-1090). Dr. Boyle's report indicated that Robertson had internalized a more malignant self concept than would develop from mere neglect and that Robertson's mental health had worsened in a very short period of time. (T 1091).

By age 16, an August, 1988, report by Dr. Brewer, the director of psychology, indicated Robertson was exhibiting marked social isolation and withdrawal. At times his thinking was quite disturbed. He was suspicious and distrustful of others and avoided deep emotional ties. He was seriously deficient in social skills and seemed most comfortable when alone and isolated. He said he enjoyed being locked in a cell

because it gave him time to think. Dr. Brewer concluded Robertson "appears to be currently seriously emotionally disturbed and of considerable risk of deterioration in function." The report indicated Robertson reported smoking marijuana, cocaine, doing acid, and pills, and feared going crazy. (T 1092-1095).

When Robertson was 17, he was twice admitted to Tallahassee Memorial following mild suicide gestures. (T 1096-1097). He was diagnosed by Dr. Moore, a psychiatrist, as having adjustment disorder with depression. Robertson was transferred to the Psychiatric Center and deemed to be Baker Acted, meaning he was so mentally ill that he was unable to make his own decisions regarding his welfare and personal hygiene. The report noted Robertson's family was totally uninvolved. (T 1096-1097). After the second admission, another psychiatrist, Dr. Speer, recommended Robertson be placed on medically needy status since there was no family support. (T 1097-1098). Dr. Speer referred Robertson to Dr. Cook, who did an in-depth psychological report. Dr. Cook's evaluation suggested the presence of a severely depressed and self-destructive adolescent. Robertson had been living off the streets for two years, was self-destructive, and had an ambivalent attitude towards receiving help. (T 1099).

From July 6 to July 15, 1991, Robertson was at the Apalachee Center for Human Services ("ACHS"). This was just six weeks before the homicide occurred. (T 1104). Robertson

came to ACHS in a very bizarre state of mind. The report indicated a history of auditory hallucinations, visual hallucinations, paranoia, sleep and appetite disturbance, and suicidal and homicidal ideations. Robertson was delusional and had been experimenting with drugs, mostly LSD and marijuana. (T 1100, 1103). He was diagnosed by Dr. Patel as a chronic paranoid schizophrenic, and as part of the treatment, placed on Trilafon and Cogentin. (T 1104-1105).

Dr. Meyer said Robertson met seven of the nine diagnostic criteria for schizophrenia, some of which were identified in Robertson at the age of 13.[8] It takes only two criteria to make a diagnosis. (T 1102-1103). The diagnosis was made complete by Dr. Patel. (T 1103). Dr. Meyer said schizophrenia historically meant more than one personality existing in an individual. In a number of the reports, Robertson talked about different personalities living in his body and mind, telling him to do bizarre things. (T 1104). Schizophrenia also involves auditory and visual hallucinations, which were "very rich in the the psychological testing and so forth" that Dr. Meyer had reviewed. (T 1105). Paranoid schizophrenia, a subbranch of schizophrenia, is a severe psychosis based upon an irrational fear that someone is going to harm them. It may be tied to a delusional system based on voices from God or someone

[8]The criteria Dr. Meyer identified in Robertson were (1) marked social isolation; (2) impairment in role function; (3) peculiar behavior; (4) impairment in personal hygiene and grooming; (5) inappropriate affect; (6) digressive and vague speech; (6) lack of initiative, interest, or energy; and (7) poor ability to abstract ideas. (T 1101-1103).

else. (T 1106).

On cross-examination, Dr. Meyer was asked about Robertson's hospitalization on September 10, 1991, after the homicide but before his arrest. Referring to Dr. Bailey's report, Dr. Meyer was asked what the question mark next to the diagnosis "history of schizophrenia" meant. Dr. Meyer responded that it was an expression of uncertainty on the part of the person making the diagnosis. (T 1113). When asked what was meant by "rule out malingering," Dr. Meyer said this meant that in Dr. Bailey's opinion, Robertson was not faking. (T 1117).

The defense presented the testimony of three family members. Lottie Curry, his sister, said Robertson was the youngest of six children. The family was poor. (T 1145). Her father worked in a mill, her mother stayed home. Robertson and Bobby, the second youngest, were repeatedly told by their mother they were not wanted and she wished they were never born. Their mother beat them regularly, for any little thing, with her hands, electrical cords, and switches, often leaving welts. (T 1150). The abuse started when Robertson was two or three. (T 1146-1147).

Robertson's parents fought constantly and his father beat his mother regularly. He shot her on three separate occasions and stabbed her on another occasion. All the children were in the house when the beatings, shootings, and stabbing took place, except for one of the shootings. When this was going on, the children thought their father was going to shoot and

kill them too. (T 1148-1150).

Robertson and Bobby were treated very differently from the rest of the children. They were locked in their rooms, the other children were not. They had to eat on the floor, while the other children sat at the table while they ate. The other children were not beaten or verbally abused like Robertson and Bobby were. Robertson and Bobby were treated like animals. (T 1156-1157). Lottie never heard her mother tell Robertson she loved him and never saw her pick him up, hold him, or show him any compassion or love at all. (T 1158).

Sandra Robinson said all she remembered growing up was her father abusing her mother--shooting her, stabbing her, hitting her in the head with hammers, beating her, kicking her. (T 1160). Their mother did not fight back, she just abused the children. The older children were treated differently from the two youngest. The three girls suffered the least. Athough their mother verbally abused all the children, she physically, verbally, and emotionally abused Robertson and Bobby. Robertson was beaten and put him in his room for hours at a time. He was told every day he was not loved. He was told he was a nuisance and lower than a dog. He was beaten with extension cords, switches with thorns, shoes, and whatever was handy. The beatings were constant, nearly every day, especially when he was small. Their mother often said she never wanted the last two kids and would have pushed them off the hospital bed when they were born but was afraid the doctor would arrest her.

(T 1161-1162).

When Robertson was released from the boy's home in Alabama and came to live with the family in Tallahassee, the abuse began again immediately. He ended up sleeping on the porch, a sister's house, or in a van in his parent's yard. He slept in a vacant house for a while. (T 1168).

Both sisters testified that Bobby was adopted by another family when he was 11 or 12 years old. This family took him into their home, helped him get a weekend job, bought him clothes, gave him Christmas. (T 1157, 1164). They also said the oldest brother tried to commit suicide and was in a mental institution for a while. (T 1157, 1163).

Virginia Spencer, Robertson's first cousin, lived near the family and saw them daily when Robertson was about five years old. (T 1170). Robertson and Bobby suffered constant abuse from their mother. They were beaten, whipped with belts and switches, and back-handed. Spencer described one incident that made her cry. It was a very, very cold morning, and Robertson had wet the bed. His mother took him outside naked and put him in a large tub of water that had a layer of ice on it. Robertson did not even cry. (T 1171-1173).

Over defense counsel's objection, Robertson testified and asked for the death penalty, saying he did not "want to blow up on nobody else again," "get rid of me, because I can't take it anymore. I can't take this. It's driving me crazy. It's been driving me crazy for a year and five months and all my life,"

and "If you don't give me the death penalty, somebody else might end up dead." (T 1184). He also told the jury, "Let justice be done. . . . A life for a life." (T 1190).

In rebuttal, the state presented Dr. Harry McClaren. Dr. McClaren's testimony was based upon the competency evaluation he had conducted the previous summer. He said he spent about five or six hours with Robertson at that time. (T 1198-1199).

Dr. McClaren said Robertson was of borderline intelligence and suffered from borderline personality disorder and antisocial personality disorder. Dr. McClaren said individuals with borderline personality disorder have problems with identity, difficulty in personal relationships, swinging back and forth between overvaluing and undervaluing, are usually full of rage, freqently threaten suicide, and experience wide mood swings. (T 1203). People with more severe forms of borderline personality disorder engage in self-mutilation and have transient breaks with reality. (T 1205-1206).

Dr. McClaren acknowledged that two other physicians had diagnosed Robertson as schizophrenic and treated him for this but said his testing did not support this diagnosis. (T 1206). He conceded, however, that Robertson had refused to talk to him on several occasions and he had been unable to get an accurate reading from the tests he administered because Robertson had falsified his answers. (T 1209). He therefore had not been able to rule out that Robertson was suffering from a more serious mental illness, such as schizophrenia. (T 1210-

1211).

Dr. McClaren said there was no doubt Robertson had a "disturbed life" and had "three or four mental illnesses," but based upon his "story of going out, partying, drinking, having a good time," he did not see great mental and emotional disturbance on the day of the murder. (T 1207). Dr. McClaren also thought Robertson would have had the capacity to conform his behavior to the requirements of law based upon him "not being a definitively retarded person, not having a major mental illness, and also some of the things from the crime scene, such as placing a garment in the victim's mouth and cutting cords to bind her hands." (T 1207).

SUMMARY OF THE ARGUMENT

I. The trial court erred in not ordering a competency hearing when Robertson's bizarre and irrational behavior at pretrial proceedings and history of mental illness pointed to the strong possibility that he was not mentally competent to assist in his defense. In light of the substantial evidence suggesting incompetency, and especially in light of the trial court's express recognition that Robertson's competency was in question, the court had no discretion to proceed to trial without a formal competency determination following an evidentiary hearing. The trial court's failure to conduct a competency hearing deprived Robertson of his due process right not

to be tried while incompetent.

II. The trial court erred in denying Robertson's motion to suppress his statements to the police, which were not rendered voluntarily but were the result of coercive interrogation techniques deliberately used to exploit Robertson's mental illness and emotional instability.

III. The trial court erred in denying Robertson's challenges for cause to two prospective jurors who said they would "automatically" vote to impose the death penalty if Robertson were found guilty. The jurors' final statements that they could follow the law and obey their oath were insufficient to establish their competency where the voir dire as a whole revealed a deeply-entrenched bias in favor of the death penalty. The trial court's failure to remove these jurors for cause deprived Robertson of his constitutional right to a fair trial.

IV. The trial court erred in denying Robertson's motions for judgment of acquittal on counts IV (burglary of conveyance) and V (grand theft auto) where there was no evidence Robertson was ever in the victim's car.

V. During the penalty phase, the trial court erred in admitting testimony by the victim's father and sister. To be admissible in the penalty phase of a capital trial, victim impact evidence must be probative of the aggravating or mitigating circumstances. Even if relevant, such evidence is inadmissible when its probative value is outweighed by its prejudicial effect. In the present case, the victim impact

evidence was irrelevant and prejudicial, and therefore violated Robertson's right to a fair penalty phase trial under the due process clauses of the state and federal constitutions.

VI. The trial court erred in finding as an aggravating factor that the murder was especially heinous, atrocious, or cruel as there was no clear evidence the victim suffered prolonged physical or mental pain. The state's own witness testified that the victim lost consciousness very quickly--within seconds--and survived for only a short time after losing consciousness. Although the victim was bound, there was no evidence she was aware of the nature of the attack or anticipated her impending death. The trial court's consideration of this invalid aggravating factor requires reversal for resentencing.

VII. The trial court erred by according little weight to the mitigating factors of impaired capacity, youth, abusive childhood, mental illness, and borderline intelligence. The court found these mitigating circumstance established by the preponderance of the evidence but gave each of them little weight, either without stating a reason or for a reason not supported in fact or law. The trial court's failure to properly evaluate and weigh the mitigating evidence requires reversal for resentencing.

VIII. Roberton's death sentence is disproportionate when compared to other cases involving the death penalty. The established mitigating circumstances were substantial and

compelling. Even if this Court approves the aggravating circumstance of heinous, atrocious, or cruel, the record establishes that Robertson's actions were not those of a cold-blooded, heartless killer but of a severely emotionally disturbed teenager. Comparison to other cases in which death sentences were ruled disproportionate demonstrates that equally culpable defendants have received sentences of life imprisonment. This Court should reverse Robertson's death sentence and remand for imposition of a sentence of life imprisonment without possibility of parole for 25 years.

ARGUMENT

ISSUE I

APPELLANT'S DUE PROCESS RIGHT NOT TO BE TRIED WHILE INCOMPETENT WAS VIOLATED BY THE TRIAL COURT'S FAILURE TO ORDER A COMPETENCY HEARING WHEN APPELLANT'S IRRATIONAL BEHAVIOR DURING PRETRIAL PROCEEDINGS, HISTORY OF MENTAL INSTABILITY, AND PRIOR PSYCHOLOGICAL EVALUATIONS RAISED SERIOUS DOUBTS ABOUT HIS COMPETENCY TO UNDERSTAND THE PROCEEDINGS AGAINST HIM AND ASSIST HIS COUNSEL IN HIS DEFENSE.

Due process requires that a defendant not be made to stand trial for a criminal charge unless he is mentally competent.[9]

[9]The standard for competence to stand trial, under both federal and Florida law, is whether the accused possesses "sufficient present ability to consult with his lawyers with a reasonable degree of understanding--and whether he has a rational as well as a factual understanding of the proceedings against him" Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); Lane, 388 So. 2d at 1025; Fla.R.Crim.P. 3.211(a)(1).

Drope v. Missouri, 420 U.S. 162, 172, 95 S.Ct. 896, 904, 43 L.Ed.2d 103 (1975); Pate v. Robinson, 383 U.S. 375, 384-86, 86 S.Ct. 836, 841-42, 15 L.Ed.2d 815 (1966); Lane v. State, 388 So. 2d 1022 (Fla. 1980). Indeed, the right to be tried while competent is so critical to an adversarial system of justice that procedural safeguards are required to protect this right. Drope; Pate; Lane.[10]

One of the constitutionally required procedural protections is a formal competency hearing whenever evidence before the trial court raises a bona fide doubt as to a defendant's competence to stand trial. Drope, 420 U.S. at 172-173; Pate, 383 U.S. at 385; Lane, 388 So. 2d at 1025. Once there is a reasonable doubt as to a defendant's mental competence, the trial court must order an evidentiary hearing, whether requested or not. Lane, 388 So.2d at 1025. The procedure to be used in Florida is set forth in Rule 3.210(b) of the Florida Rules of Criminal Procedure:

> If, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition, which shall be held no later than 20 days after the filing of the motion, and shall order the defendant to be examined by no more than 3, nor fewer than 2, experts prior to the date of the hearing. Attorneys for the state and the

---

[10]Protective procedures are necessary in part because of "the difficulty of retrospectively determining an accused's competency to stand trial." Pate, 383 U.S. at 387.

> defendant may be present at the examination.

Although "there are no fixed or immutable signs that always require a hearing," Scott v. State, 420 U.S. 595, 597 (Fla. 1982), the Court in Drope suggested a number of factors to consider, including a defendant's irrational behavior and demeanor at trial, and prior medical opinions on competence. 420 U.S. at 180; accord Lane, 388 So. 2d at 1022. Any one of these factors alone can be sufficient. Drope, 420 U.S. at 180. Other factors that have been recognized as bearing on the need for a hearing are a defendant's suicidal behavior, Drope; Tingle v. State, 536 So. 2d 202 (Fla. 1988); a defendant's insistance on a course of action not in the defendant's best interests, Lokos v. Capps, 625 F.2d 1258 (5th Cir. 1980); Scott; and a defendant's history of mental illness. Lokos; Blazak v. Ricketts, 1 F.3d 891 (9th Cir. 1993), cert. denied, 114 S.Ct. 1866, 128 L.Ed.2d 487 (1994).

As this Court said in Lane,

> [w]hat activates the need for a competency hearing is some type of irrational behavior or evidence of mental illness that would raise doubt as to the defendant's present competence.

388 So. 2d at 1025-26.

Furthermore, once there is evidence that raises a reasonable doubt about the defendant's competency to stand trial, this doubt cannot be dispelled by resort to conflicting evidence. Blazak, 1 F.3d at 898. There must be an evidentiary hearing, as a matter of due process, to resolve the issue.

Id.; see also Fowler v. State, 255 So. 2d 513, 514-15 (Fla. 1971)(where conflicting evidence created reasonable ground to believe defendant incompetent, trial court had discretion to resolve conflict only after formal hearing). Accordingly, the question before the trial court is

> "whether there is reasonable ground to believe the defendant may be incompetent, not whether he is incompetent. The latter issue should be determined after a hearing."

Scott, 420 So. 2d at 597 (quoting Walker v. State, 384 So. 2d 730 (Fla. 4th DCA 1980)); accord Tingle, 536 So. 2d at 203.

In the present case, the trial court erred by not conducting a competency determination pursuant to rule 3.210 when confronted with evidence that raised a real doubt as to Robertson's competency to assist in his defense. This evidence included: (1) Robertson's irrational pretrial behavior; (2) psychological reports expressing reservations as to Robertson's competency; (3) Robertson's history of mental instability, which included prior psychiatric hospitalizations; a recent diagnosis of paranoid schizophrenia; and suicidal behavior predating the current arrest; (4) Robertson's complete refusal to talk to defense counsel; and (5) evidence that Robertson was not taking medication that had been prescribed for schizophrenia.

In addition, the trial judge himself expressed doubt as to Robertson's competency. The trial judge erred in not proceeding to a competency determination to resolve the doubt raised

by the foregoing evidence and which the trial judge himself expressly recognized. The court's failure to conduct a competency hearing deprived Robertson of the procedural due process protections guaranteed by Pate.

First, Robertson's behavior in the courtroom on September 25 was bizarre, irrational, and childlike. Robertson tried to persuade the judge not to postpone the trial by telling him "to be a man" and "not go back on his word." He told the judge "give me the chair," and "you'd better fry me" and "you ain't got no choice but to kill me." He described himself as the "devil's catcher" and said he was "gonna win against Satan's people."

Robertson's responses to the court's Faretta inquiry were equally irrational. Robertson said he wanted to be his own lawyer but responded to the judge's questions in a nonsensical manner. For example, when asked about his education, he said he had been to "Tiddly-wink school." When asked about his legal experience, he responded that he had "jacked off in the bathroom before." When asked if he had participated in a trial, he said he "wiped his ass on one before." When asked why he wanted to represent himself, he first asked the trial judge why he wanted to represent himself, then said, "[s]o I can catch the devil."

After the court aborted the Faretta inquiry and set trial for January, Robertson told the judge, "You a judge. You ain't supposed to go back on your word. I said I want the electric

chair. I mean, what else more do you want?" (R 108?). He then threatened that "if I ever escape, if I see you in New York, I'm getting machine guns and blow up every damn thing I ever see." (R 113).

Although it is conceivable for a capital defendant to make a rational decision to ask for death, see Muhammad v. State, 494 So. 2d 969 (Fla. 1986), cert. denied, 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987), this was not the case here. Robertson's behavior was not rational.

Robertson's behavior, in fact, prompted the trial judge to raise the issue of his competency and to ask whether the court-ordered psychological evaluations had been received. (R 97). The record of the September 25 hearing reflects the trial judge was told the reports had been filed and was apprised of their contents by counsel. Although both counsel stated Dr. Brown had found Robertson competent, they disagreed as to Dr. McClaren's ultimate finding on competency. According to defense counsel, Dr. McClaren had been unable to complete the tests due to Robertson's lack of cooperation and

> the bottom line of Dr. McClaren's report is that he really can't tell whether or not Mr. Robertson's competent. He doesn't feel comfortable, saying he is competent or incompetent. His suggestion is that we send Mr. Robertson to Chattahoochee so they can put him in a setting where they can observe him 24 hours a day and make sure he's on medication and find out whether he's competent or not.

(R 99).

The trial judge then expressed his own doubt as to Robert-

son's competency, based in part on what he had observed that day:

> Let me hear from the state. But from the reports that I had received, and the inability to receive the other doctor's report, which apparently, the inability to receive that opinion and evaluation is the result of Mr. Robertson's actions. And the demonstration that Mr. Robertson has placed on this record here so far this morning leads me to believe that under the rule, that there is some question concerning his competency, and perhaps an order should be entered.

(R 101).

Thereafter, when the prosecutor told the judge Dr. McClaren had not found Robertson incompetent, the judge indicated that he thought Dr. McClaren had found Robertson incompetent. The prosecutor responded that Dr. McClaren had found Robertson competent and

> [t]he only thing Harry McClaren said was based on the fact that he would not cooperate with him, that it might be useful to place him over at Chattahoochee so they could observe him.
>
> But he never said anything about incompetency. And he is not showing that he is incompetent today.

(R 103). The prosecutor argued "there's nothing wrong with [Robertson] other than he is mean" and this "was a big game he's playing."[11]

At this point, Robertson's irrational behavior, including

---

[11]Robertson punctuated the prosecutor's argument with "Praise the Lord" and "Amen. Amen." In response to the suggestion that he be sent to Chattahoochee, he said, "I ain't going to Chattahoochee. I'm going to hell. Not Chattahoochee. I guarantee you I'll go to hell." (R 103-104).

his childlike insistence that he be given the electric chair, his complete rejection of counsel,[12] and Dr. McClaren's suggestion that Robertson be sent to Chattahoochee for further evaluation should have alerted the trial judge that Robertson might not be competent to proceed.

This Court need not decide, however, whether this evidence, alone, was a reasonable ground to believe Robertson was not competent to proceed, as the trial court had before it additional information, which, in light of Robertson's irrational behavior, clearly necessitated a hearing.

The additional information, which the trial court should have been aware of,[13] was Robertson's history of mental illness, which was documented in Dr. Brown's and Dr. McClaren's reports.

Both reports described a history of psychiatric problems and bizarre behavior that predated the offense for which he was on trial. Robertson had been diagnosed as suffering from several different mental disorders, including schizophrenia, although neither Dr. Brown nor Dr. McClaren diagnosed Robertson as schizophrenic. He had a history of suicidal behavior. He had once bitten off the throat of a cat and had been observed

---

[12]Robertson's counsel told the trial judge that because Robertson had refused to see him, "I don't have a good faith reason to believe he is competent or incompetent, and I can't make a motion either way." (R 99).

[13]The record does not make clear whether the trial judge read the psychological reports or merely relied on counsel's representations as to what they contained. The trial judge's only reference to either report was his observation that Dr. Brown had found Robertson did not meet the criteria for involuntary hospitalization. (R 103).

behaving peculiarly by persons in his community. He had borderline intelligence. Dr. McClaren's report confirmed that Robertson was currently refusing medication prescribed for schizophrenia.

Furthermore, although both Dr. Brown and Dr. McClaren concluded that at the time of the evaluation,[14] Robertson was competent, both expressed reservations. Dr. Brown found Robertson only "minimally competent" and noted that "his attorney will probably find him difficult to work with because he does not trust people in general, particularly white authority figures." Dr. Brown also warned that Robertson was "at risk for transient psychotic reactions to situations of extreme stress."

While Dr. McClaren thought Robertson might be exaggerating his pathology, he could not rule out the possibility of a major mental illness such as schizophrenia. Furthermore, Dr. McClaren's ultimate finding as to competency was, at bottom, equivocal. In the very same paragraph, Dr. McClaren stated, (1) "Most likely [Robertson] has the capacity to currently aid and assist an attorney in his own defense," (2) Robertson would probably benefit from a period of inpatient observation to better elucidate his true mental condition, and (3) "while it is the opinion of this examiner that Mr. Robertson is currently competent, a higher degree of certainty could be provided if he

[14]Dr. Brown examined Robertson four to five months before the September 25 hearing and Dr. McClaren examined him two to three months before the hearing.

is afforded a period of inpatient observation and possible treatment at a secure facility."

This constellation of evidence is similar in nature to evidence this Court and other courts have found creates a bona fide doubt of competency to stand trial. It is well-settled that inconclusive, incomplete, equivocal, or conflicting medical opinions trigger the need for a hearing. See, e.g., Fowler v. State, 255 So. 2d 513, 514-15 (Fla. 1971)(conflicting medical opinions as to defendant's competency established reasonable ground to believe defendant incompetent); Griffin v. Lockhart, 935 F.2d 926 (8th Cir. 1991)(experts' inability to arrive at consensus on defendant's competency, combined with defendant's addiction to medication, depression, and threatened suicide, raised sufficient doubt to require hearing); Lane, 388 So. 2d at 1025 (competency hearing required where, nine months after judicial determination that Lane was competent, two experts could not say whether Lane was competent and suggested he be examined at state mental hospital, Lane was refusing medication, and Lane had I.Q. of 56).

Even when the trial court has before it a medical report finding the defendant competent, the report itself may raise sufficient questions to trigger the need for a hearing. In United States ex. rel. McGough v. Hewitt, 528 F.2d 339 (3d Cir. 1975), for example, a psychiatrist, Dr. Berman diagnosed McGough (after a 60-day evaluation period in the state hospital) as suffering from minimal organic brain damage,

chronic latent schizophrenia, and sociopathic personality structure, but found him competent to stand trial. Dr. Berman's report noted that McGough previously had been committed to the state hospital as a result of bizarre activities at home. The court found that some of Dr. Berman's comments needed further elaboration and concluded the report as a whole[15] raised sufficient questions about McGough's mental

---

[15]The comments the court found needed explanation were:

> "His speech was coherent, and his thoughts usually progress in a goal oriented fashion. At times, however, he is totally irrelevant and talks about issues that are wasteful of a psychiatrist's time. At other times, he is evasive and circumstantial in his answers. His though associations are not abnormal, but they have a tendency to roam.
>
> "This man has a combination of three psychiatric difficulties, which combined offer a poor prognosis from a treatment aspect. His characterologic structure is one of obsessive thinking and antisocial forms of behavior. This is combined with a degree of Organic Brain Syndrome that inhibits his ability to conceptualize.
>
> "He may experience difficulty in cooperating with his lawyers, since he sometimes behaves negativistically, especially when stressed.
>
> "In summary, then, although it is inferred that the subject may have difficulty in undergoing trial procedures, the chances are better than 50% that he will be able to complete trial procedures without difficulties. . . ."

528 F.2d at 343.

soundness to require a hearing with the opportunity to interrogate and cross-examine the psychiatrist. Id. at 343.

Clearly, even when there is a current medical report finding the defendant competent, a defendant's irrational, bizarre, or self-defeating behavior, combined with a history of mental instability, compels an evidentiary hearing. In Pridgen v. State, 531 So. 2d 951 (Fla. 1988), for example, pretrial psychiatric evaluations indicated Pridgen was competent, but evidence during trial suggested otherwise. The evidence of incompetency during trial included a colloquy with the judge in which Pridgen several times demanded the judge kill him; a rambling statement to the jury protesting his innocence but indicating he wanted the jury to find him guilty and asking for death; and an expert's suggestion that Pridgen be hospitalized because the trial may have tipped him over the edge.[16] Based upon this evidence, this Court concluded the trial judge erred in refusing to suspend the proceedings and hold a hearing. Id. at 1264.

In Blazak, the court held Blazak's history of mental illness, combined with bizarre pretrial behavior, should have led the trial judge to suspect Blazak was incompetent to stand trial. Before sentencing Blazak, the trial judge learned that

---

[16]The indicators of incompetency in Pridgen are quite similar to those in the present case. Like Pridgen, Robertson's death-seeking behavior--telling the judge "you'd better fry me" and "you ain't got no choice to kill me"--was irrational and childlike. And, like the expert in Pridgen, Dr. McClaren did not say Robertson was incompetent but suggested he be hospitalized to "obtain a higher degree of certainty" and "to elucidate his true condition."

six years earlier Blazak had been found incompetent three times. The commitments and subsequent discharges were the result of a disagreement between doctors. One doctor thought Blazak was psychotic and incompetent; another doctor thought he was feigning. 1 F.3d at 895-97. The court concluded this history alone was sufficient to require a hearing. Id. at 898.[17]

These decisions make clear that a trial judge is not free to dispense with an evidentiary hearing by simply choosing between medical opinions or other conflicting indicia of a defendant's mental condition. Where there is substantial evidence that the defendant may be incompetent, or the evidence is conflicting, there must be a hearing to test the evidence. Federal and state law precedents are in agreement that whenever the defendant's competency reasonably is in question, there must be a hearing, as a matter of due process, to resolve the issue.

In the present case, there were numerous indications that Robertson was incompetent to assist in his defense. Robertson's behavior and interactions with the trial judge during the September 25 hearing were bizarre and irrational. As a result of this behavior, the trial court explicitly questioned Robertson's competency to proceed. The trial court apparently relied solely on the bottom-line findings of the medical

[17]The court also pointed out that Blazak's pretrial behavior indicated paranoid or irrational thinking and that Blazak had experienced difficulty responding to the court and his lawyer in a relevant manner. 1 F.3d at 900.

reports, as described by counsel, to conclude that Robertson was not incompetent but was just playing with the system.

It obviously is possible that Robertson's disruptive and apparently irrational behavior was an attempt to manipulate the system. Or it could indicate he is "just mean," like the prosecutor argued. Seen in the light of his psychiatric history, however, which included evidence of the precise kinds of behavior exhibited at the hearing, the evidence points to the very strong possibility that his behavior was due to mental illness. As the facts in Blazak so aptly demonstrate, even medical experts cannot always tell whether a defendant is truly psychotic or simply feigning mental illness.[18] Here, Robertson's psychiatric history, combined with the reservations expressed in Dr. Brown's and Dr. McClaren's reports and the trial judge's recognition that Robertson's competency was in question, raised a substantial doubt that Robertson was competent at that time to stand trial. The trial court had no discretion to proceed to trial without a judicial determination, after an evidentiary hearing, of Robertson's competence to stand trial. The court's failure to order a hearing deprived Robertson of his due process right not to be tried while incompetent. The judgments and sentences must be vacated. Tingle; Lane.

---

[18]As this Court recently emphasized, the reports of experts are "merely advisory to the [trial court], which itself retains the responsibility of the decision." Hunter v. State, No. 82,312 (Fla. June 1. 1995)(quoting Muhammad, 494 So. 2d at 973).

ISSUE II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS CONFESSIONS, WHICH WERE NOT THE RESULT OF HIS OWN FREE WILL BUT WERE COERCED BY THE POLICE, WHO USED COERCIVE PSYCHOLOGICAL TECHNIQUES IN A DELIBERATE ATTEMPT TO EXPLOIT APPELLANT'S MENTAL ILLNESS.

A defendant is deprived of due process of law if his conviction is based, in whole or in part, upon an involuntary onfession. Jackson v. Denno, 378 U.S. 368, 376, 84 S.Ct. 1774, 1780, 12 L.Ed.2d 908 (1964); DeConingh v. State, 433 So. 2d 501 (Fla. 1983), cert. denied, 465 U.S. 1005, 104 S.Ct. 995, 79 L.Ed.2d 228 (1984); Brewer v. State, 386 So. 2d 232 (Fla. 1980); Reddish v. State, 167 So. 2d 858 (Fla. 1964). The burden is on the state to prove voluntariness by a preponderance of the evidence. DeConingh, 433 So. 2d at 503; Brewer, 386 So. 2d at 235-36. "Any questioning by police officers which in fact produces a confession which is not the product of a free intellect renders that confession inadmissible." DeConingh, 433 So. 2d at 503 (quoting Townsend v. Sain, 372 U.S. 293, 308, 83 S.Ct. 745, 754, 9 L.Ed.2d 770 (1963)(emphasis in original)).[19]

To establish a violation of the due process clause of the

---

[19]Robertson is not contending there was any violation of the Miranda decision or any deprivation of the right to counsel. While Robertson concedes that Miranda warnings were properly given, that is clearly not dispositive of the issue of voluntariness, especially in light of the impermissible an dpsychologically coercive interrogation techniques used by Detective Springer in this case. See Brewer; Rickard v. State, 508 So. 2d 736 (Fla. 2d DCA 1987)(confessions held involuntary based on psychological coercion, notwithstanding Miranda warnings).

Fourteenth Amendment, there must be some sort of "state action" that procured the confession by overbearing the accused's free will. Colorado v. Connelly, 479 U.S. 157, 165, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). In other words, the accused's deficient or impaired mental condition, by itself, is insufficient to establish a constitutional violation. Id. at 164-165. If, on the other hand, police employ coercive tactics, whether physical or psychological, in their attempt to wring a confession out of an unwilling suspect, any resulting statements (and the evidentiary fruits of such statements) are inadmissible under the Fourteenth Amendment. Connelly; DeConingh; Brewer; Reddish. This is particularly true when the police have intentionally taken advantage of a suspect's mental or emotional condition by using psychological coercion to overcome his free will. See DeConingh; Brewer.

In Brewer, this Court said that for a confession to be admissible as voluntary, it is required

> that at the time of the making the confession the mind of the defendant be free to act uninfluenced by either hope or fear. The confession should be excluded if the attending circumstances, or the declarations of those present at the making of the confession, are calculated to delude the prisoner as to his true position, or to exert improper and undue influence over his mind.

386 So. 2d at 235-36 (citations omitted).

In the present case, Robertson's statements of September 4 and September 11 were the products of improper coercion. On September 4, Detective Springer used a variety of coercive

psychological tactics to obtain a confession. These tactics included subjecting Tony to a variation of the "Christian burial technique" by playing on his sympathy for the family and their need to know what happened to put it behind them; playing on Robertson's belief in God and the Bible, and his fear of "Satan" and "hell;" playing on Robertson's professed love for Carmella; and trying to get Robertson to confess to an accidental killing. No warnings were given prior to this interrogation.[20]

These tactics were blatantly coercive and deliberately intended to exploit Robertson's obvious mental and emotional impairment. Springer's repeated attempts to elicit a confession by appealing to Robertson's sympathy for the victim's family is a variation of the "Christian burial technique," which this Court previously has characterized as a "coercive and deceptive ploy." Roman v. State, 475 So. 2d 1228, 1232 (Fla. 1985), cert. denied, 475 U.S. 1090, 106 S.Ct. 1480, 89 L.Ed.2d 734 (1986); Hudson v. State, 538 So. 2d 829, 830 (Fla.), cert. denied, 498 U.S. 875, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989).[21] Trying to get Robertson to confess by telling

---

[20]Springer did not advise Robertson of his constitutional rights prior to to the interrogation because he did not consider him a suspect at that time. Nevertheless, Springer did whatever he could to get Robertson to confess to what Springer intuitively knew he had done. (R 528).

[21]The "Christian burial technique" has been used to persuade suspects to disclose the location of a victim's body so that the victim could receive a Christian burial. See Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); Roman; Hudson. In Hudson, 538 So. 2d at 830, for example, the officer told the defendant the only way the family would know the victim was dead was if they could see the body. Here, Springer told Robertson the only way the family

him he, Springer, believed Carmella's death was an accident and unintentional also was blatantly coercive and deliberately calculated to lull Robertson into a false sense of security. Finally, Springer's relentless appeals to Robertson's beliefs about God, Satan, the Bible, and Hell were intended to pressure Robertson into making a confession based not upon rational choice but upon fear or hope.

Most importantly, Springer conducted this coercive interrogation knowing Robertson had mental problems. Although Springer did not obtain Robertson's mental health records until the following day, he was aware of their existence as he already had obtained a consent and waiver to get the records. Moreover, Springer learned during the interrogation that Robertson had mental problems serious enough to warrant treatment with medication and that Robertson saw things and heard voices when off his medication. At one point during the questioning, Robertson even appeared to be actively hallucinating.

The coercive tactics used and Robertson's apparent mental deficiencies together establish the "integral element of police overreaching." See Connelly, 479 U.S. 164. As the Court explained in Connelly, an interrogator's knowledge that a suspect may have mental problems does not automatically render the suspect's statement involuntary, but where "police learn[]

---

would stop hurting was if they knew Carmella was not hurting at the end and knew that it was not done out of hatred.

during the interrogation that [a suspect has] a history of mental problems . . . and exploit[] this weakness with coercive tactics," any resulting confession is inadmissible. See 479 U.S. at 164-65. In Blackburn, for example, where police knew the defendant had a history of mental problems and nonetheless interrogated him for eight or nine hours in a tiny room, at times filled with officers, and in the absence of friends, relatives, or legal counsel, the Court found these tactics rendered the confession involuntary.

Although Robertson did not confess to the murder on September 4, his statement revealed he was not the victim's boyfriend, that he had mental problems, was not too bright, and had a deluded and exaggerated sense of his importance to the victim. Robertson's September 4 statement made him the prime suspect and set the stage for the September 11 interrogations, which produced the sought-after confession.

On September 9, Robertson was admitted to the psychiatric ward after threatening suicide. On September 11, the hospital released him to Detective Springer, who subjected him to four to five hours of counselless interrogation. By that time, Springer was well aware of Robertson's history of mental instability and prior hospitalizations. He also knew Robertson would be particularly vulnerable to questioning since he had just been released from psychiatric care. And although Springer said he did not know what treatment Robertson had received, he obviously knew he had been treated as Springer himself

picked Robertson up from the psychiatric ward. Under the circumstances, it was improper for Springer to interrogate Robertson without some kind of inquiry to determine his mental condition and whether he was on medication that could affect his ability to make rational choices, or without providing Robertson with counsel.

The state's overreaching clearly produced the confession. Robertson immediately changed his earlier story (in which he said he last saw Carmella around 8 p.m. the night she died) and admitted he returned to her apartment later that night. Initially, he said she already was dead when he returned. During the third interrogation, however, he broke down, sobbing, and admitted he killed her. The confession came only after Springer began applying some of the same coercive techniques he used on September 4: he told Robertson only the truth would stop the hurting; suggested that Carmella must have hurt him or he would not have done anything like that; and told Robertson he just wanted to help him.

Both the United States Supreme Court and this Court have recognized that where psychological coercion is used to induce a confession, a defendant's mental condition is a critical factor in the voluntariness inquiry. Colorado v. Connelly, 479 U.S. 157, 164-165, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986); Thompson v. State, 548 So. 2d 198, 204 (Fla. 1989). Indeed, the Supreme Court has recognized that subtle psychological coercion is more effective against a mentally deficient accused

than a bludgeon or an express threat. See Blackburn, 361 U.S. at 206 ("the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of persuasion").

An accused's emotional condition when giving inculpatory statements also has an important bearing on their voluntariness. State v. Sawyer, 561 So. 2d 278, 282 (Fla. 2d DCA 1990); Ricard v. State, 508 So. 2d 736, 737 (Fla. 2d DCA 1987); Breedlove v. State, 364 So. 2d 495 (Fla. 4th DCA 1978), cert. denied, 374 So. 2d 101 (Fla. 1979). Other relevant factors include youth, low intelligence, lack of education, explanation of constitutional rights, and length of interrogation. State v. Moore, 530 So. 2d 349 (Fla. 2d DCA 1988).

The record in this case establishes that Robertson was peculiarly susceptible to psychological coercion due to his mental and psychological makeup. Detective Springer deliberately exploited Robertson's susceptibility by using psychological coercion tactics on September 4 and by subjecting him to a prolonged counselless interrogation on September 11 immediately after his release from the psychiatric ward. These tactics clearly fall within what the United States Supreme Court has said could "sap . . . [a defendant's] powers of resistance and self-control . . . [such that] his will [was] overborne and his capacity for self-determination critically impaired." See Colorado v. Spring, 479 U.S. 564, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987).

The trial judge erred in not recognizing the relationship between Robertson's mental condition and his susceptibility to coercion. In fact, the judge's oral ruling suggests he believed Robertson would have to have been actively psychotic to render the statements involuntary.[22] This clearly is not the standard. The question, rather, is whether in light of the "totality of the circumstances" surrounding the confession, coercive police activity produced the confession. State v. LeCroy, 461 So. 2d 88 (Fla. 1988), cert. denied, 473 U.S. 907, 105 S.Ct. 3532, 87 L.Ed.2d 656 (1985).

In the present case, in light of the totality of the circumstances, the state failed to meet its burden of proving by a preponderance of the evidence that Robertson's confession was freely and voluntarily given without police coercion. The trial court's error in admitting the statements requires reversal for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S CHALLENGES FOR CAUSE TO PROSPECTIVE JURORS WHO WOULD AUTOMATICALLY VOTE TO IMPOSE THE DEATH PENALTY.

In Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119

---

[22]The trial court stated, "it really appears that there is no documented diagnosis of any psychosis of any kind for this individual." The court later recognized Dr. Patel's diagnosis of paranoid schizophrenia but dismissed it as perhaps "based solely on the reports of the patient himself." In fact, there is nothing in the report to support the trial court's assumption in this regard. The trial judge appears, rather, to have discounted the possibility that Robertson was suffering from a serious mental illness, just as he did on September 25, when Robertson's competency became an issue.

L.Ed.2d 492, 502 (1992), the Court held any juror who would automatically vote for the death penalty is not an impartial juror and must be removed for cause. Id. The Court also held a juror's statement that he or she can be impartial or follow the law is insufficient to satisfy the constitutional guarantee of trial by an impartial jury. Id.

Even before Morgan, this Court consistently reversed death sentences where the trial court denied a cause challenge to a prospective juror with a predisposition to impose the death penalty. See, e.g., Bryant v. State, 601 So. 2d 529 (Fla. 1992); Floyd v. State, 569 So. 2d 1225 (Fla. 1990), cert. denied, 501 U.S. 1259, 111 S.Ct. 2912, 115 L.Ed.2d 1075 (1991); Hill v. State, 477 So. 2d 553 (Fla. 1985); Thomas v. State, 403 So. 2d 371 (Fla. 1981).

The test for whether a prospective juror should be removed for cause based upon his or her views about the death penalty "is whether the juror's views would `prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Ross v. Oklahoma, 487 U.S. 81, 85, 108 S.Ct. 2273, 101 L.Ed. 80 (1988) (quoting Wainwright v. Witt, 469 U.S. 412, 424 (1985)); accord Bryant; Hill.

This rule must be read together with the test in Singer v. State, 109 So. 2d 7, 23-24 (Fla. 1959):

> [I]f there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on

> the evidence submitted and the law announced at the trial[,] he should be excused on motion of a party, or by [the] court on its own motion.

In Hill, this Court emphasized that a juror with a preconceived bias in favor of the death penalty cannot be impartial:

> It is exceedingly important for the trial court to ensure that a prospective juror [in a capital case] does not possess a preconceived opinion or presumption concerning the appropriate punishment for the defendant in the particular case. A juror is not impartial when one side must overcome a preconceived opinion in order to prevail. When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause.

477 So. 2d at 555-56 (emphasis added).

In the present case, the trial court denied Robertson's challenges for cause to prospective jurors Castleton and Blauvelt, both of whom repeatedly and adamantly stated they would automatically vote for death if Robertson were found guilty of first-degree murder. Although Castleton and Blauvelt eventually said they would "obey what they were told to do under oath" and would "follow the law," these assurances, in light of the entire voir dire, do not pass muster under Morgan and Hill. The trial court's failure to remove these jurors for cause deprived Robertson of a fair trial.[23]

---

[23]After the trial court denied appellant's challenges for cause to Castleton and Blauvelt (T 372), defense counsel used peremptory challenges to excuse these two jurors. (T 377, 380). Appellant thereafter exhausted his peremptories, pointing out that several other jurors, for whom cause challenges also had been denied, remained on the panel. His request for additional peremptories was denied. (T 442). It should be noted that only one of the jurors previously

The record shows that before exploring the jurors views on the death penalty, the prosecutor explained that in determining the sentence, the jurors would be required to weigh certain aggravating factors against certain mitigating factors. (T 355-356). The prosecutor then asked the jurors whether they believed in the death penalty. Ms. Blauvelt's initial response indicated she might be an impartial juror: "I do believe in the death penalty and I will carefully weigh them." (T 357).

Later, after the prosecutor returned to the weighing process, Mr. Castleton volunteered that he believed death was the only appropriate penalty for the crime of willful murder:

> MR. CASTLETON: I didn't want to misrepresent my answer. My feelings on the death penalty, I feel like if a person takes another human's life willfully, except in an act of war or self-defense, then they have forfeited the right to theirs. I don't know that I could weigh the situation.

(T 360).

During defense counsel's voir dire, Mr. Castleton reiterated this belief, and Ms. Blauvelt agreed:

> MR. BANKS: We've talked about the death penalty quite a bit and I believe everybody in the box expressed their belief that it's appropriate in certain circumstances. Does anybody believe as Mr. Castleton does that if you kill somebody, you automatically forfeit the right to your life?
>
> MR. CASTLETON: If you willfully kill somebody.

---

challenged for cause, Mr. McCabe, actually was seated on the jury. (T 304, 474). Peremptories were exercised on the other five jurors for whom cause challenges had been denied: Cole (T 214), Hall (T 380), Crump (T 164), Castleton (T 372-373), and Blauvelt (T 372-373).

MR. BANKS: If you willfully kill somebody, that you automatically forfeit your life or your right to life? Does anybody else believe that?

MS. BLAUVELT: I believe that way.

(T 365).

Castleton and Blauvelt continued to maintain they would automatically vote for death if Robertson were found guilty, even after defense counsel told them their beliefs might not be the law in Florida:

MR. BANKS: . . . Now the judge is going to instruct you that while that may be your belief system . . . that's not necessarily the law of the State of Florida. He's going to tell you that you have to weigh these aggravating circumstances and you have to weigh these mitigating circumstances and give them whatever weight you deem appropriate. And if one outweighs the other, that will dictate the way you should vote. Will both of you be able to follow the judge's instructions?

MS. BLAUVELT: I believe so.

THE COURT: Now you both gave some very hard, fast beliefs. If the mitigating circumstances outweigh the aggravating circumstances, will you be able to go essentially against your own beliefs on the death penalty and return with a recommendation of life?

MS. BLAUVELT: I guess I can't fathom how that can be against what I believe.

MR. BANKS: The only way we get to the death penalty in this case is if you convict him of first degree murder. If you do, then we know it's premeditated. We know he killed the young lady. If and only if you return with that verdict. Now can you think of a case or a set of circumstances that would allow you to vote

for life given those parameters?

MS. BLAUVELT: No, I can't.

MR. BANKS: Can you, sir?

MR. CASTLETON: No.

MR. BANKS: So if you as a jury determine that he's guilty of first degree murder, premeditated, intentional killing of a human being, you would automatically vote for death?

MS. BLAUVELT: Yes.

MR. CASTLETON: Yes.

MR. BANKS: Under every circumstance?

MS. BLAUVELT: Yes.

MR. CASTLETON: Yes.

(T 366-367)

Only when asked if they would vote for death "regardless of what the judge tells you" did Castleton and Blauvelt give pause. Mr. Castleton answered this query with, "Here you are with these difficult questions." Ms. Blauvelt responded, "Well when you say regardless of what the judge tells us, that throws me for a loop because I don't know what you mean by that. (T 367).

Defense counsel again told the jurors the judge would explain mitigating circumstances and aggravating circumstances, and asked whether they could follow the court's instructions. Mr. Castleton responded, "As much as I might disagree with it, I would have to go with the law." Ms. Blauvelt said, "Same with me." This time, when asked whether they would consider

other circumstances, they both responded affirmatively. (T 368).

Later, the prosecutor asked Castleton and Blauvelt if they could "follow the Court's instructions on what the law is and follow that law based upon your oath?" Castleton responded, "Even though I might disagree with the law, I would have to go with the law, which means yes, I could do what I was told to do under oath." Ms. Blauvelt said, "I may not agree with it, I may try to change it, but I will obey what I am told to do." (R 367-368).

Despite Castleton and Blauvelt's final, reluctant assertions that they could follow the law, the voir dire as a whole demonstrates they had not discarded their opinions on the death penalty. The voir dire reveals them rather as jurors who "could, in good conscience, swear to uphold the law and yet be unaware that maintaining such beliefs about the death penalty would prevent him or her from doing so." See Morgan, 119 L.Ed.2d at 507.

Moreover, Castleton and Blauvelt were not simply inclined towards the death penalty, they were adamant that death was the only appropriate penalty. Cf. Hill, 477 So. 2d at 556 (where juror said the death penalty depended on circumstances but he was inclined towards death in that case, court held juror did not possess requisite impartial state of mind). Castleton and Blauvelt's biases were so entrenched they were stumped by the notion that that their beliefs might conflict with the law.

As this Court said in Trotter, 576 So. 2d 691, 694 (Fla. 1990), "[t]he fact that [the juror] ultimately responded affirmatively to a question regarding his ability to follow the law as instructed does not eliminate the necessity to consider the record as a whole." Accord Singer, 109 So. 2d at 22 (juror's statement that he can render verdict according to the evidence, notwithstanding an opinion entertained, will not render him competent "if it otherwise appears that his formed opinion is of such a fixed and settled nature as not readily to yield to the evidence").[24]

Here, the court refused to excuse Castleton and Blauvelt for cause because "both indicated clearly on the record that they, notwithstanding what their personal beliefs were, . . . [they] would have to abide by and follow the law as is instructed." (T 373). The court erred in focusing only on Castleton and Blauvelt's final general assurances where the voir dire as a whole established their biases in favor of death were of such a "fixed and settled" nature that Robertson

---

[24]Also pertinent is this Court's observation in Johnson v. Reynolds, 97 Fla. 591, 121 So. 2d 793, 796 (1929):

> It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias or prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares his freedom from its influence. By what sort of principle is it to be determined that the last statement of the man is better and more worthy of belief than the former?

would have to "overcome a preconceived opinion in order to prevail." See Hill, 477 So. 2d at 556. A reasonable doubt existed as to whether Castleton or Blauvelt could decide Robertson's sentence with the "partial, indifferent mind" required under the constitution, and the trial court's failure to remove these jurors denied Robertson a fair trial.

ISSUE IV

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS FOR BURGLARY OF CONVEYANCE AND GRAND THEFT AUTO.

The state must prove every essential element of a crime beyond a reasonable doubt. Purifoy v. State, 359 So. 2d 446 (Fla. 1978). Where the state fails to prove beyond every reasonable doubt every essential element of the crime charged, judgment of acquittal should be granted. Taylor v. State, 446 So. 2d 213 (Fla. 4th DCA 1984); Owen v. State, 432 So. 2d 579 (Fla. 2d DCA 1983); Ivester v. State, 398 So. 2d 926 (Fla. 1st DCA 1981), review denied, 412 So. 2d 470 (Fla. 1982).

In the present case, the evidence was wholly insufficient to support Robertson's convictions for burglary of a conveyance and grand theft auto. The state's case as to these crimes consisted of the testimony of Richard Thelwell, the victim's boyfriend, and the police officers who examined the victim's car after her body was found.

Thelwell testified that he arrived in Tallahassee the evening of Friday, August 30. He saw Carmella's car in the

parking lot of her apartment complex (T 645) but did not check to see if it was locked. (T 657). On Sunday, Thelwell "drove back by Carmella's apartment and circled around and I still saw her car." The car appeared to be in the same place but he could not tell for sure. (T 657). He "got out, walked towards the car to look to see if it was locked up." Thelwell said Carmella's father had bought her a club (anti-theft device) and he looked to see if the club was on the steering wheel. When asked if it was secured, he said, "It appeared to be." (T 649-650). Later, when asked if it was locked, he said, "It appeared to be locked." (T 658). He did not notice any keys in it. (T 650).

After the body was discovered on Monday, Thelwell looked in the car after the police had come and saw a key in the car. (T 653). He was not sure if the key was in the ignition or in the club. (T 662).

Investigator Karen Brown said the car was found in the parking lot, with the driver's door unlocked, a single key in the ignition, and an anti-theft bar across the steering wheel. The anti-theft bar was unlocked. (T 782-783). The car did not appear to have been moved in several days based on the accumulation of debris around it. (T 790). A set of the victim's keys, including a key to her car, was found a hundred feet from her apartment. (T 787-788). There was no physical evidence that Robertson had ever been inside the car. (R 791). When police first tried to crank the car, it would not start. They

later found out the lap belt and shoulder harness had to be locked before the car would start. Once they did that, it worked. (T 832).

This evidence does not prove beyond a reasonable doubt that Robertson was ever in Carmella's car after the crime was committed. Thelwell's testimony does not establish the car was locked or that the anti-theft bar was locked before the victim was killed. Thelwell did not say he tried to open the door or that he actually checked to see if the club was locked. All he said was it "appeared secure." A fair interpretation of Thelwell's testimony is that he walked towards the car and looked inside and saw the club on the steering wheel. The car therefore may have been unlocked on Sunday night. Thelwell's testimony therefore does not establish that either the car door or the club were locked before the crime was committed.

Since the police found the car the next day with the car door was open, all the state proved was that sometime between Sunday and Monday, someone opened the car door. Anyone could have opened the unlocked car. There was no evidence Robertson had ever been in the car, other than his statements indicating he got in the car Wednesday afternoon when he was with the victim.[25]

---

[25]In his September 4 taped statement, Robertson said he was playing around one day and took Carmella's keys and jumped in the car. He never figured out how to crank it up. He unlocked the anti-theft bar but she got the keys out of his hand and said "don't you know that car cost a lot of money" and told him to quit playing around. He apologized and got out. Defendant's Exhibit 1 at 15. On his September 11 statement to Detective Towle, he said he and Carmella were in the parking lot Wednesday afternoon and he tried to crank the car, but it would not work. He

The state's evidence is wholly insufficient to prove beyond a reasonable doubt that Robertson entered the victim's car after the crime was committed. Accordingly, his convictions and sentences on counts three and four must be vacated.

ISSUE V

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW BY ADMITTING IRRELEVANT AND PREJUDICIAL VICTIM IMPACT EVIDENCE.

Over defense counsel's objection (T 1074-1075), the trial court admitted testimony by the father and sister of Carmella Fuce concerning her hopes and plans for the future, her value to their family, and their loss following her death. (T 1072-1080). The admission of this irrelevant and emotionally inflammatory evidence violated appellant's right to a fair penalty proceeding under the due process clause of the state and federal constitutions. Appellant acknowledges this Court's recent decision in Windom v. State, 20 Fla. L. Weekly S200 (Fla. April 25, 1995), "reject[ing] the argument which classifies victim impact evidence as a nonstatutory aggravator," but asks the Court to reconsider its ruling based upon the following argument.

---

unlocked the bar on the steering wheel, but she snatched the keys, saying the car cost a lot of money. He said he "just got out and locked the door and forgot all about locking the door lock back, the steering wheel lock." Defendant's Exhibit 4 at 15. In his second statement to Springer, Robertson repeated that he had been in the car earlier when he was with Carmella. Defendant's Exhibit 2 at 25.

In Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720, 736 (1991), the Court reversed its decision in Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and held the Eighth Amendment erects no per se bar to admission of victim impact evidence. The Eighth Amendment thus leaves Florida free to determine whether victim impact evidence is relevant and admissible in a capital sentencing proceeding. See 115 L.Ed.2d at 735. Florida's latitude in permitting victim impact evidence is not without constitutional limits, however, as the "Due Process clause provides a mechanism for relief" in the event "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair." Id.

The Florida Legislature responded to Payne by enacting section 921.141(7), Florida Statutes (1993), which allows the prosecution to introduce victim impact evidence "designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." Notably absent from section 921.141(7) is any provision for the proper consideration by the jury or sentencing judge of the victim's uniqueness as a human being or the loss to members of the community. The statute plainly does not establish a new statutory aggravating circumstance. See Windom, 20 Fla. L. Weekly at S202. Since section 921.141(5) limits the aggravating circumstances to the eleven factors listed in that section, none of which directly involves the

victim's uniqueness as a person or the loss to community members, what legitimate purpose is served by the victim impact evidence allowed by section 921.141(7)?

The most fundamental principle of Florida evidentiary law is that evidence must tend to prove or disprove a material fact in issue to be relevant and admissible. See, e.g., Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990); Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); ss. 90.402, .403, Fla. Stat. (1991). In fact, this Court ruled that victim impact evidence was not relevant and not admissible in murder trials long before Booth and Payne were decided. Melbourne v. State, 51 Fla. 69, 40 So. 189 (1906); Rowe v. State, 120 Fla. 649, 163 So. 23 (1935). And after Booth, but before Payne, this Court treated victim impact evidence as an impermissible nonstatutory aggravating factor. See Patterson v. State, 513 So. 2d 1257, 1263 (Fla. 1987); Grossman v. State, 525 So. 2d 833, 842 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989).

Even after Payne, this Court's decisions in cases tried before the effective date of section 921.141(7) indicated that relevance to a material fact in issue was the test for determining the admissibility of victim impact evidence. See Hodges v. State, 595 So. 2d 929, 934 (Fla.), vacated on other grounds, 113 S.Ct. 33, 121 L.Ed.2d 6 (1992), affirmed on remand, 619 So. 2d 272 (Fla. 1993)(evidence of victim's desire to prosecute

Hodges indecent exposure was relevant to statutory aggravating circumstances of crime committed to disrupt lawful exercise of government functions and cold, calculated, and premeditated); Burns v. State, 609 So. 2d 600, 605-06 (Fla. 1992)(evidence of victim's background, training, character, and conduct as a law enforcement officer improperly admitted because not relevant to any material fact in issue).

The enactment of section 921.141(7) cannot constitutionally dispense with the requirement that victim impact evidence must be relevant to a material fact in issue to be admissible. Furthermore, article I, section 16(b), of the Florida Constitution, expressly requires victim impact evidence to be relevant to be admissible.[26]

The existence of statutory aggravating circumstances and mitigating circumstances are the material facts in issue during the penalty phase of a capital trial in Florida. See ss. 921.141(1), (2), (3), (5), Fla. Stat. (1993). Thus, victim impact evidence is relevant to a material fact in issue and admissible only when it tends to prove or disprove an aggravat-

---

[26]Article I, section 16, provides:

> Victims of crime of their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at al crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused. [Emphasis added].

ing or mitigating circumstance. See Hodges, 595 So. 2d at 933-34. When victim impact evidence is not probative of the aggravating or mitigating circumstances, it is not relevant and should not be admitted. See Burns, 609 So. 2d at 605-07.

Even relevant victim impact evidence must be excluded to the extent that it interferes with the constitutional rights of the accused. Art. I, s. 16(b), Fla. Const. The most fundamental and significant constitutional right of the accused is the right to a fair trial under the due process clauses of the state and federal constitutions. Accordingly, the Florida Evidence Code provides that "relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice." s. 90.403, Fla. Stat. (1993). Thus, to preserve the constitutional right to a fair trial, relevant victim impact evidence must be excluded when its probative value is outweighed by its prejudicial effects, and the admission of unduly prejudicial victim impact evidence violates the right to due process of law. See Payne, 115 L.Ed.2d at 735.

In the present case, the victim impact evidence consisted of testimony by Fuce's father and sister, showing that Fuce was an engineering student, had always wanted to be an engineer, was involved in numerous school, church, sports, and other extracurricular activities, and that she excelled in everything she did. (T 1075-1080). This evidence clearly was not relevant to the aggravating factors of felony murder and heinous,

atrocious, or cruel aggravator, nor to the mitigating circumstances, which pertained to Robertson's personal and family history. Since the victim impact evidence was not probative of the aggravating and mitigating circumstances, it was not relevant to any material fact in issue and should not have been admitted. The evidence served no legitimate purpose and was plainly designed to arouse the jurors' sympathy for Fuce and her family and to inflame their emotions against Robertson. The victim impact evidence also may have confused or misled the jury as the court's instructions gave absolutely no guidance to the jury in how to use it. The jury may well have misused the victim impact evidence to find nonstatutory aggravating factors.

The court's error in admitting irrelevant and prejudicial victim impact evidence violated the due process clauses of the state and federal constitutions, U.S. Const. amend. XIV; Art. I, s. 9, Fla. Const., as well as the victim impact provision of the Florida Constitution. Art. I, s. 16(b), Fla. Const. Given the substantial evidence presented in mitigation, the improper admission of this evidence cannot be found harmless. See State v. DeGuilio, 491 So. 2d 1129 (Fla. 1986); Cf. Windom (erroneous admission of victim impact evidence harmless where state presented evidence of two aggravating circumstances and defendant waived presentation of mitigating evidence). Robertson's death sentence must be vacated and the case remanded for a new penalty phase trial with a newly empaneled jury.

ISSUE VI

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

In finding the murder heinous, atrocious, or cruel, the trial judge wrote:

> The evidence clearly established that the death of the victim was caused by asphyxiation due to strangulation and that the victim would have been conscious during the initial period of strangulation from fifteen seconds up to one minute and alive for a matter of minutes until death occurred. Furthermore, the evidence reflected a methodical binding, hog-tying and blindfolding of the victim with the stuffing of a complete bra in the victim's mouth with such force as to prevent breathing. The crime herein was conscienceless, pitiless and unnecessarily torturous to the victim.

(R 231-232).

Under Florida law, aggravating circumstances must be proved beyond a reasonable doubt. Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993). Moreover, the state must prove each element of the aggravating circumstance beyond a reasonable doubt. Banda v. State, 536 So. 2d 221, 224 (Fla. 1988), cert. denied, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989). The state failed to meet its burden in this case as the evidence strongly suggests this was a quick killing that did not cause the victim extreme pain or fear.

In several recent cases, this Court has refined the definition of heinous, atrocious, or cruel. In Cheshire v.

State, 568 So. 2d 908, 912 (Fla. 1990), the Court held this aggravator

> is proper only in torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.

The Court also has made clear that two distinct elements must be established: The crime "must be both conscienceless or pitiless and unnecessarily torturous to the victim." Richardson v. State, 604 So. 2d 1107 (Fla. 1992)(emphasis in original)(citing Socher v. Florida, 504 U.S. 527, 112 S.Ct. 2114, 2121, 119 L.Ed.2d 326, 339 (1992)).

The "conscienceless or pitiless" element refers to the defendant's mental state and is established by clear evidence the defendant intended to cause extreme pain or prolonged suffering. See, e.g., Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993)("fact that the victim begged for his life or that there were multiple gunshots is an inadequate factor absent evidence that [the defendant] intended to cause the victim unnecessary and prolonged suffering"); Porter v. State, 564 So. 2d 1060 (Fla. 1990)(murders were crimes of passion rather than designed to be extremely painful), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991); Santos v. State, 591 So. 2d 160 (Fla. 1991)(no suggestion Santos intended to inflict high degree of pain); Shere v. State, 579 So. 2d 86, 96 (Fla. 1991)(no evidence killers desired to inflict high degree of pain or enjoyed suffering they caused).

The "unnecessarily torturous" element refers to the victim's experience and is established by evidence the victim was made to suffer a degree of physical or mental pain beyond that ordinarily present in a murder case. See Douglas v. State, 575 So. 2d 165, 166 (Fla. 1991); Rivera v. State, 561 So. 2d 536 (Fla. 1990).

Although this Court often has held that strangulation killings are heinous, atrocious, or cruel, this aggravating factor is applicable in such cases only where there is some evidence to show the victim was aware of the nature of the attack or had time to anticipate her impending death. Doyle v. State, 460 So. 2d 353, 357 (Fla. 1984); see, e.g., Socher v. State, 619 So. 2d 285 (Fla. 1993)(victim's screams for help and scratches on defendant's face supports contemplation of serious injury or death by victim), cert. denied, 114 S.Ct. 638, 126 L.Ed.2d 596 (1994); Tompkins v. State, 502 So. 2d 415 (Fla. 1986)(victim struggled and fought during attempted rape and strangulation); Johnson v. State, 465 So. 2d 499, 507 (Fla. 1985)(victim escaped and defendant had to resume strangulation three times), cert. denied, 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985).

Absent evidence to show the victim was aware of or agonized over her impending death, the heinous, atrocious, or cruel aggravator is inapplicable. See DeAngelo v. State, 616 So. 2d 440, 443 (Fla. 1993)(approving trial court's finding that murder was not heinous where no evidence of a struggle,

marijuana was found in victim's system, and medical examiner testified that, when strangled, victim may have been unconscious due to pressure of choking or blow to head); Robinson v. State, 574 So. 2d 108 (Fla.)(although victim kidnapped, raped, and robbed before being shot, co-defendant assured victim during ordeal she would not be killed), cert. denied, 502 U.S. 841, 112 S.Ct. 131, 116 L.Ed.2d 99 (1991); Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989)(defendant repeatedly referred to victim as "knocked out" or drunk, victim known to be heavy drinker and was last seen in a bar).[27]

Here, there was no evidence the victim was aware of the nature of the attack for more than a very short period of time. The uncontroverted physical evidence presented through the state's own witness, Dr. Thomas Wood, was that the decedent lost consciousness very quickly--within seconds (either as a result of being choked or as a result of the gag being placed

---

[27]Whether a murder is heinous, atrocious, or cruel depends therefore not simply on the method of killing but on whether the murder in fact caused extreme suffering. In Elam v. State, 636 So. 2d 1312 (Fla. 1994), for example, the Court disapproved the heinous, atrocious, or cruel aggravator where the victim was bashed in the head repeatedly with a brick. Although beatings like strangulations, usually inflict a high degree of pain, see Ross v. State, 286 So. 2d 1191 (Fla. 1980); Salvatore v. State, 366 So. 2d 745 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979), the court rejected the aggravator in Elam because

> [a]lthough the victim was bludgeoned and had defensive wounds, the medical examiner testified that the attack took place in a very short period of time ("could have been less than a minute), the defendant was unconscious at the end of this period, and never regained consciousness. There was no prolonged suffering or anticipation of death.

in her mouth[28])--and survived for only a short time after losing consciousness. The physical evidence offered by the state established this was a quick killing that did not cause prolonged suffering to the victim.

While it is true the decedent was bound and blindfolded, this evidence is insufficient, under the circumstances of this case, to establish that she knew she was going to be killed. A finding of heinous, atrocious, or cruel cannot be based on the mere possibility that the victim may have experienced extreme pain or mental anguish. Bundy v. State, 471 So. 2d 9, 21-22 (Fla. 1985), cert. denied, 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986).[29]

The state's own evidence supports a reasonable hypothesis

---

[28]Dr. Wood could not say whether the gag was placed in the victim's mouth before or after she died.

[29]In Bundy, for example, this Court rejected the heinous aggravator where the circumstances indicated only that the victim may have experienced prolonged suffering. The child's unclothed body was found in a hog pen 45 miles from where she was abducted, her torn, bloodied and semen-stained clothes nearby. She died of homicidal violence to the neck region although the precise cause of death was not determined. In rejecting the heinous, atrocious, or cruel aggravator, the Court said:

> There was no clear evidence Kimberly Leach struggled with her abductor, experienced extreme fear and apprehension, or was sexually assaulted before her death. In the absence of these types of facts, we must conclude that this case does not fit in with our previous decisions in which we have found the manner of the killing to be the conscienceless or pitiless type of killing which warrants a finding that the capital felony was especially heinous, atrocious, or cruel.

Id. at 22.

that the victim was killed quickly and unexpectedly by someone she had no reason to believe would kill her. There were no signs of forced entry or a struggle, and several witnesses testified they observed friendly encounters between Robertson and the victim in the days before, and on the day, she was killed. There also was testimony that Carmella would not open her door to anyone unless she knew who was there.

Robertson's version of what happened, which is consistent with the state's evidence, also indicates the victim did not know she would be killed. Robertson said he returned to her apartment late that night and she let him in. They were talking and playing around when he tied her up and put something over her eyes. He had his arms around her neck and his arm tightened and he could not let go. When she stopped breathing, he tried to revive her, then laid down beside her, telling her he was sorry and to come back. Robertson's statements also establish he did not intend to inflict a high degree of pain.

The state failed to prove beyond a reasonable doubt this was a torturous murder, and it thus was error for the trial court to consider this aggravator as a reason for imposing the death sentence. Because only one aggravating circumstance -- that the homicide was committed during a burglary-- was properly found in this case, the trial court's consideration of the invalid aggravator cannot be considered harmless. Nor can it be said that death is necessarily the appropriate penalty.

Therefore, this Court should reverse Robertson's death sentence and remand for resentencing.

ISSUE VII

THE TRIAL COURT FAILED TO PROPERLY WEIGH THE MITIGATING CIRCUMSTANCES.

The eighth and fourteenth amendments prohibit the states from precluding the sentencer in a capital case from considering any relevant mitigating factor, and prohibit the sentencer from refusing to consider, as a matter of law, any relevant mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104, 113-15, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982). The sentencer must consider and give effect to mitigating evidence relevant to the defendant's background and character precisely because the punishment should be directly related to the personal culpability of the defendant. Penry v. Lynaugh, 492 U.S. 302, 327-28, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

Moreover, the eighth and fourteenth amendments require that capital punishment be imposed fairly, and with reasonable consistency, or not at all. Eddings, 455 U.S. at 114. To insure fairness and consistency, this Court must conduct a meaningful independent review of the defendant's record and cannot ignore evidence of mitigating circumstances. Parker v. Dugger, 498 U.S. 308, 321, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991).

To insure the proper consideration of mitigating circumstances, this Court has ruled that the trial court must ex-

pressly evaluate each mitigating circumstance to determine whether it is supported by the evidence. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). A mitigator is supported by the evidence "if it is mitigating in nature and reasonably established by the greater weight of the evidence." Ferrell v. State, 20 Fla. L. Weekly S74, S75 (Fla. Feb. 16, 1995). The sentencing court must then decide whether the established mitigating factors are of sufficient weight to counter-balance the aggravating factors. Campbell, 571 So. 2d at 419. While the relative weight to be given each mitigating factor is within the trial judge's discretion, a mitigating factor, once found, cannot be dismissed as having no weight. Id. at 420. The result of the weighing process must be detailed in the written sentencing order and supported by sufficient competent evidence in the record. Ferrell, 20 Fla. L. Weekly at S75.

The sentencing judge's findings should be of "unmistakable clarity" so this Court can review them without having to "speculate" as to what the trial judge found. Mann v. State, 420 So. 2d 578, 581 (Fla. 1982). As the Court explained in Rhodes v. State, 547 So. 2d 1201 (Fla. 1989):

> Weighing the aggravating and mitigating circumstances is not a matter of merely listing conclusions. Specific findings of fact provide this Court with the opportunity for a meaningful review of a defendant's sentence. Unless the written findings are supported by specific facts, this Court cannot be assured the trial court imposed the death sentence based on a "well-reasoned application" of the aggravating and mitigating factors.

Id. at 1207 (quoting State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974)).

In the present case, the trial court failed to properly evaluate and weigh both statutory and nonstatutory mitigating circumstances, as follows:

Mental or Emotional Disturbance. As to this statutory mitigating factor, the trial court stated

> The defendant contended that this mitigating circumstance was applicable and it was presented to the Jury. The defendant's institutional record and the testimony of the mental health professionals established that the defendant has a mental disorder although there is some disagreement as to the nature of the disorder. There was sufficient evidence upon which the Jury could have been reasonably convinced that this mitigating circumstance was established. The Court has reviewed the evidence independently and is not reasonably convinced that the defendant was under the influence of extreme mental or emotional disturbance at the time of the commission of the capital felony, and therefore rejects this as a mitigating circumstance.

(R 233).

The court erred in failing to support its finding with specific facts. See Rhodes, 547 So. 2d at 1207. The court merely listed its conclusion without giving any explanation at all as to why it rejected this mitigating circumstance. The court's rejection of this mitigator also is confusing in light of the court's express finding that "the jury reasonably could have found this mitigating factor." If the jury reasonably

could have found the circumstance, then the mitigator necessarily was established by the preponderance of the evidence.

Second, there is no substantial competent evidence in the record to support the trial court's finding. It was uncontroverted that Robertson had been mentally and emotionally disturbed for a long time. The defense expert, Dr. Meyer, thought Robertson was schizophrenic. Although the state's expert, Dr. McClaren, disagreed with this diagnosis, he said there was "no doubt" Robertson was mentally ill and concluded he suffered from three or four mental disorders. Yet, when asked if he thought Robertson was suffering from an extreme mental or emotional disturbance at the time he murdered Carmella, Dr. McClaren responded as follows:

> Let me answer the question in this way. I think if you look at this person's life, you can see that he has had a disturbed life, so there's no doubt that he has a mental disorder. In fact, I diagnosed three-- four if you include an adjustment disorder, which I think he was under a lot of pressure when I saw him at the jail, to meet that criteria.
>
> However, if you look at it less globally, if you look at his reported behavior on the day of the homicide, you have the story of going out, partying, drinking, having a good time. So in that sense, I would not see great mental and emotional disturbance on that day.

(R 1206-1207).

Dr. McClaren's response is inconsistent with his own evaluation of Robertson. Dr. McClaren recognized Robertson was a borderline personality, meaning he was full of rage, had frequent mood swings, and had difficulty with any kind of

interpersonal relationship, overvaluing and undervaluing his relationships, and might experience transient breaks with reality. (T 1203-1206). Since Robertson clearly overvalued his relationship with Carmella, describing himself as her boyfriend when they had just met, Dr. McClaren's conclusion that Robertson's mental illness was unrelated to the murder does not make sense. Furthermore, given the evidence of Robertson's long history of substance abuse, which Dr. McClaren expressly recognized (SR 21), and the evidence of his intoxication when he committed the murder, Dr. McClaren's conclusion that he must not have been mentally disturbed that night-- because he was intoxicated and partying-- also makes no sense. If Dr. McClaren's conclusion were accepted, this would mean that Robertson, who had been mentally disturbed and abusing alcohol and drugs for many years, somehow experienced a window of normalcy on August 28, 1991, evidenced by his drinking and partying that night, and during this window of normalcy, he committed a horrible crime against a young woman he professed to love.

In light of all the evidence presented during Robertson's trial, including Dr. McClaren's testimony and written report, Dr. McClaren's conclusion is untenable. An expert's testimony is only as good as the reasons underlying it. Here, Dr. McClaren's opinion is not even supported by his own evaluation and diagnosis of Robertson. Nor is Dr. McClaren's conclusion supported by any other evidence in the record. Robertson's

numerous statements, which are quite detailed and remarkably consistent, portray not someone who was just partying and having a good time but someone who was quite disturbed.

Impaired Capacity. As to this mitigating circumstance, the trial court said:

> [T]here was sufficient evidence upon which the Jury could have been reasonably convinced that this mitigating circumstance was established. The defendant's confession included statements that he had consumed alcohol and various illegal drugs the day of the murder.
>
> While this mitigating circumstance, whether viewed as a statutory or non-statutory mitigating circumstance, is entitled to some weight, it is not entitled to great weight considering the self serving nature of the defendant's statements and the accuracy of his memory of the crime and the crime scene.

(R 234).

The trial judge's finding as to this mitigating factor suffers from several defects. First, the finding is ambiguous in that although the judge clearly found the mitigator established, he did not decide whether Robertson's impairment was "substantial" enough to rise to the level of a statutory mitigating circumstance.

Second, the court's stated reason for affording little weight to this mitigating factor is legally erroneous. The weight to be given this mitigator, when based upon the defendant's intoxication, should depend on the degree to which the defendant's intoxication influenced his actions. See Johnson v. State, 608 So. 2d 4, (Fla. 1992)(approving trial court's

finding of too much purposeful conduct to give significant weight to drug intoxication as mitigating factor, where evidence revealed gradual decrease in drug influence on defendant's actions as night progressed).

Here, the court gave the mitigator little weight for two reasons, first, because the evidence of intoxication was Robertson's own statements, which the court characterized as self-serving. In other words, the trial court accorded little weight to the mitigating factor of impaired capacity, based not on the degree to which Robertson's intoxication affected his actions, but based on the credibility of the evidence of intoxication. This conclusion suggests the trial court found the evidence of intoxication wanting as a matter of fact. Yet, the trial court clearly found the mitigator established by a preponderance of the evidence. The court's finding does not satisfy this Court's requirement that such findings be of "unmistakable clarity." See Mann, 420 So. 2d at 581.

The trial judge's second reason for affording this mitigating circumstance little weight, that Robertson accurately remembered the crime and crime scene, must be rejected because there is no evidence in the record to support it. There was no evidence or testimony of any kind relating the degree of a person's intoxication during an event to the accuracy of that person's memory of the event.

Age. As to this mitigator, the trial court said,

> The age of the defendant of twenty years was contended by the defendant as an

> applicable mitigating circumstance and was presented to the Jury. The Jury could have reasonably believed this this mitigating circumstance was established. While this statutory mitigating circumstance is entitled to some weight, the Court finds it is not entitled to great weight.

(R 234).

The trial court's consideration of this mitigating factor was based on a factual error as Robertson was only 19 when the crime was committed. (R 237). In addition, the court's failure to support its finding with specific facts violates this Court's requirement that the sentencing order reflect a "reasoned judgment." See Rhodes, 547 So. 2d at 1207. Furthermore, there is nothing in the record to support the trial court's conclusion that this statutory mitigating circumstance should not be entitled to its full weight. The Supreme Court has held "the chronological age of a minor is itself a mitigating factor of great weight." Eddings v. Oklahoma, 455 U.S. at 116. For defendants between the ages of 18 to 25, level of maturity, degree of intelligence, experience with the criminal justice system, and level of "street smarts" are important considerations. See Hayes v. State, 581 So. 2d 121 (Fla. 1991).

It was uncontroverted that Robertson had an I.Q. of 77 (in between mentally retarded and low average), a seventh-grade education, various mental illnesses that resulted in several psychiatric hospitalizations, and had never lived successfully on his own. The record does not support the trial court's

naked conclusion that the mitigating circumstance of youth should not be given its full weight.

Abused and Deprived Childhood. As to this nonstatutory mitigating circumstance, the court said:

> Substantial emphasis was placed on this factor in the penalty phase and there is substantial evidence that the defendant endured an abused and deprived childhood. While this non-statutory mitigating circumstance is entitled to some weight, when its remoteness in time and the fact that his similarly situated siblings also endured similar abuse and deprivation without being so affected that they could not lead productive law abiding lives is considered this circumstance simply does not weigh heavily as a mitigating circumstance. Kight v. State, 512 So. 2d 922 (Fla. 1987); Remeta v. State, 522 So. 2d 825 (Fla. 1988); Gunsby v. State, 574 So. 2d 1085 (Fla. 1991).

(R 235).

An abusive or deprived childhood is a valid nonstatutory mitigating circumstance of substantial weight. Campbell, 571 So. 2d at 419. Here, the evidence showed Robertson was not merely deprived "of the care, concern, and parental attention that children deserve," see Eddings, 455 U.S. at 116, but was subjected to severe physical and emotional abuse and was treated like a pariah in his own family. The severity of the abuse establishes this as a mitigating factor of substantial weight.

The trial court's reasons for according this mitigating circumstance little weight are not supported in the record. In fact, the record establishes just the opposite. The abuse was

not remote in time. Robertson was barely nineteen when the crime was committed. He had been abused throughout his childhood and teen years. He was abandoned by his family when he was 16 or 17, at which time he began living on the streets. Moreover, remoteness in time is not a valid legal reason for according little weight to the mitigating circumstance of a severely abusive childhood. As this Court said in Nibert v. State, 574 So. 2d 1063, 1062 (Fla. 1990):

> The fact that a defendant had suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defandant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary.

Nor does the record support the court's finding that Robertson's siblings endured similar abuse. Two sisters testifed that Robertson, the youngest, and his brother, Bobby, the second youngest, were "treated differently." The older siblings were verbally abused, but Robertson and Bobby were beaten and subjected to other forms of torture nearly every day of their lives, locked in their rooms for hours, and made to eat off the floor like dogs while the rest of the family sat at the table. Unlike Robertson, Bobby escaped this horrific environment when another family adopted him when he was 11 or 12 years old.

Mental Illness and Borderline Intelligence. As to this

nonstatutory mitigating circumstance, the court stated:

> The defendant's institutional history and the testimony of the psychologists presented clearly established that the defendant has a mental disorder of some type although there is disagreement as to its precise nature. Defendant's I.Q. was also established to be 77. The Court is reasonably convinced that the defendant suffers from some mental disorder as all must who commit acts of this violent nature and that the defendant is in a low range of intelligence. Although it is difficult to allocate the evidence as to this mitigating circumstance from its applicability to the mitigating circumstance in Section 921.141(6)(f), the Court is not convinced that the capacity of the defendant to conform his conduct to the requirements of law and to appreciate the criminality of his conduct was substantially impaired. Accordingly, while entitled to some weight, it is not entitled to great weight in light of the facts established in this case and they simply do not outweigh the proven aggravating circumstances.

(R 235-236).

As with the other proposed mitigating circumstances discussed above, the trial court found the mitigating circumstances of mental illness and borderline intelligence clearly established but entitled to little weight. The court's reasons for according these factors little weight were improper. Evidence of borderline intelligence is mitigating. Scott v. State, 603 So. 2d 1275, 1277 (Fla. 1992); Cochrane v. State, 547 So. 2d 928, 932 (Fla. 1989). Evidence of mental illness is mitigating, regardless of whether the statutory mental mitigators were established. Clark v. State, 609 So. 2d 513 (Fla. 1992); Accordingly, the order is defective as the court has not

pointed to "specific facts" to explain why these established mitigating factors should not be given their full weight in this "particular case." See Rhodes, 547 So. 2d at 1207.

In sum, the trial court failed to properly evaluate and weigh the evidence in mitigation. Furthermore, the trial court's pattern of finding each mitigating factor, then, in effect, discounting each factor by according it little weight, turns the Campbell requirements on their head. The court, in effect, gave the the mitigating evidence as a whole almost no weight. Hence, the court's ultimate conclusion, that the evidence in mitigation "pales in significance" to the enormity of aggravating factors, is not fairly supported by the evidence. The trial court's failure to properly evaluate and weigh the mitigating evidence was reversible error requiring remand for a new sentencing hearing.

ISSUE VIII

THE DEATH PENALTY IS DISPROPORTIONATE TO THE OFFENSE COMMITTED IN THIS CASE.

This was an unplanned murder committed by an emotionally disturbed, mentally ill teenager, who was under the influence of alcohol and drugs at the time of the crime. When compared to similar cases involving the death penalty, the ultimate penalty is not warranted.

Since the heinous, atrocious, and cruel aggravating factor was improperly found, see Issue VI, supra, the present case involves a single aggravating circumstance, that the murder was

committed during a burglary. The Court has never approved imposition of the death penalty based solely on this aggravating factor where, as here, substantial mitigation exists. See, e.g., Clark v. State, 609 So. 2d 513 (Fla. 1992); McKinney v. State, 579 So. 2d 80, 85 (Fla. 1991); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Smalley v. State, 546 So. 2d 720, 723 (Fla. 1989).

Moreover, although this aggravating circumstance is technically supported because the homicide was committed inside the victim's apartment, there was no evidence of forced entry, see Issue VI, supra, and no evidence Robertson intended to commit any crime when he entered the victim's apartment. This circumstance, standing alone, cannot justify a death sentence.

Even if this Court approves the heinous, atrocious, and cruel aggravator, death is disproportionate in the present case. "Substantial mitigation may make the death penalty inappropriate even when the aggravating circumstance of heinous, atrocious, or cruel has been proved." Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); see Smalley, 546 So. 2d 720 (Fla. 1989); Blakely v. State, 561 So. 2d 560 (Fla. 1990). This is true especially "where the heinous nature of the offense resulted from the defendant's mental illness," Miller v. State, 373 So. 2d 882, 886 (Fla. 1979);[30] see also Huckaby

---

[30]The Court also observed in Miller, 373 So. 2d at 886, that

> a large number of the statutory mitigating factors reflect a legislative determination to mitigate the death penalty in favor of a life

v. State, 343 So. 2d 29 (Fla.)(death sentence reversed where evidence showed Huckaby's mental illness was motivating factor in commission of crime), cert. denied, 434 U.S. 920, 98 S.Ct. 393, 54 L.Ed.2d 276 (1977), or where the defendant was impaired due to drugs and alcohol. See Holsworth v. State, 522 So. 2d 348, 353 (Fla. 1988); Ross v. State, 474 So. 2d 1170 (Fla. 1985).

Thus, even if this Court approves the heinous, atrocious, or cruel aggravator, the gravity of this aggravator should be viewed in light of Robertson's mental illness, history of drug and alcohol abuse, and intoxication at the time of the murder.

Although the evidence showed Robertson had received a number of different diagnoses over the years, it was uncontroverted that he had been suffering from some type of mental illness since he was 13 years old. The psychological evaluations from his early teen years reported suicidal ideation, flights from reality, and heavy drug and alcohol abuse. By the time he was in his late teens, he had been diagnosed as suffering from a number of emotional and mental disorders, including a diagnosis of schizophrenia, just six weeks before the homicide, for which he was placed on medication.

It was also uncontroverted that Robertson had abused

---

sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of a mental illness, uncontrolled emotional state of mind, or drug abuse.

alcohol and drugs since he was a young teenager. Moreover, the psychological reports filed by Dr. McClaren and Dr. Brown specifically related Robertson's drug and alcohol abuse to his mental illness. Dr. Brown described Robertson as "an emotionally disturbed person with a borderline personality disorder, borderline intelligence, and a problem abusing alcohol and drugs." (R 46). Dr. McClaren concluded Robertson was suffering from borderline personality disorder "which has been complicated by substance abuse in the past." (SR 21). Dr. Brown concluded Robertson was "at risk for transient psychotic reactions in situations of extreme stress, and in situations in which he abused alcohol and drugs." (R 46). Dr. Brown also determined "there is a good chance that [Robertson's] capacity to conform his behavior to the law the night of the offense was significantly diminished due to abuse of alcohol and drugs, and due to emotional instability." (R 47).

In his statements to police, Robertson said he drank a large quantity of beer, as well as some liquor, and injested LSD and marijuana the evening of the murder. Robertson also said he had stopped taking his medication. Robertson's statement was corroborated in part by the testimony of one of the state's witnesses, David Wilson, who saw Robertson drinking on three separate occasions that night. (T 763-770).

In addition to the evidence of mental illness and drug and alcohol abuse, it was uncontroverted that Robertson grew up in a brutal and violent home, suffered severe emotional depriva-

tion and physical abuse, and was borderline intelligent.

Last, this Court also should recognize as mitigating Robertson's remorse for his crime. See Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993)("mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted").

This case is similar to several cases in which this Court reversed the defendant's death sentence on proportionality grounds. In Livingston v. State, 565 So. 2d 1288 (Fla. 1988), the Court approved two aggravating factors (previous conviction of violent felony; committed during armed robbery) which were to be weighed against the two mitigating factors found by the trial court, Livingston's age of seventeen years and his unfortunate childhood. In reversing the death sentence, the Court said:

> Livingston's childhood was marked by severe beatings by his mother's boyfriend who took great pleasure in abusing him while his mother neglected him. Livingston's youth, inexperience, and immaturity also significantly mitigate his offense. Furthermore, there is evidence that after these severe beatings Livingston's intellectual functioning can best be described as marginal. These circumstances, together with the evidence of Livington's extensive use of cocaine and marijuana, counterbalance the effect of the factors found in aggravation.

Id. at 1292.

In Clark v. State, 609 So. 2d 513, 516 (Fla. 1992), where the Court approved one aggravating factor, that the crime was committed for pecuniary gain,[31] the Court found the death

penalty inappropriate based upon the record of "strong nonstatutory mitigation." The mitigating evidence in Clark's case included evidence that showed Clark was a disturbed person, that his judgment may have been impaired to some extent, and that he was emotionally and sexually abused as a child. He had a substantial history of substance abuse and said he had consumed illegal drugs the day of the murder, although this testimony was not corroborated. Clark's parents were alcoholics and Clark witnessed abuse and violence between them. Five years before the crime, a psychologist concluded Clark was very disturbed and needed treatment to prevent him from future violence. Id. at 516-17.

In Nibert v. State, 574 So. 2d 1059 (Fla. 1990), this Court approved the aggravating circumstance of heinous, atrocious, or cruel,[32] but nonetheless found the defendant's death sentence disproportional based upon the mitigating evidence. Nibert had been physically and psychologically abused as a child, he suffered from chronic and extreme alcohol abuse, he lacked substantial control over his behavior when he drank, he had been drinking heavily the day of the murder, and he felt remorse.[33]

Like Livingston, Clark, and Nibert, the present offense is

---

[31]Clark killed the victim with a saw-off shotgun in order to get the victim's job.

[32]Nibert stabbed a drinking companion seventeen times in the victim's home.

[33]The case for mitigation is equally strong, or stronger, in the present case, where the trial court also found the mitigating factors of mental illness, borderline intelligence, and youth.

not one of "the most aggravated and unmitigated" of capital murders. See State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Even if this Court approves the heinousness factor based on the method of killing, the evidence shows Robertson's actions "were those of a seriously disturbed man-child, not those of a cold-blooded, heartless killer." See Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988)(death penalty inappropriate, despite five aggravating factors, due to mitigating factors of extreme emotional disturbance, substantially impaired capacity, and low emotional age).

When the facts of the present case are compared to the preceding cases, it is clear that equally culpable defendants have received sentences of life imprisonment. The death penalty is not the appropriate punishment for Robertson, and this Court should reverse his death sentence and remand for imposition of a sentence of life imprisonment with no possibility of parole for twenty-five years.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse the judgments and sentences and remand this case for the following relief: Issue I, reverse for a new trial after it has been determined that appellant is competent; Issues II and III, reverse for a new trial; Issue IV, vacate appellant's convictions and sentences as to counts IV and V; Issue V, reverse for a new penalty phase proceeding; Issues VI and VII, reverse for resentencing; Issue VIII, vacate appellant's death sentence and remand for imposition of a life sentence

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

NADA M. CAREY
Assistant Public Defender
Fla. Bar No. 0648825
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, RICHARD TONY ROBERTSON, #570477, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083, on this 12 day of June, 1995.

NADA M. CAREY

IN THE SUPREME COURT OF FLORIDA

RICHARD TONY ROBERTSON,

Appellant,

v. CASE NO. 81,324

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

APPENDIX TO INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER

SECOND JUDICIAL CIRCUIT

NADA M. CAREY
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT
FLA. BAR NO. 0648825