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

# REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant files this reply brief in response to the arguments presented by the state as to Issues I, III, IV, VI, VII, and VIII. Appellant will rely on the arguments presented in the initial brief as to Issues II and V.

STATEMENT OF THE FACTS

The state's answer brief contains several misstatements of fact:

1. The state incorrectly stated that Robertson's counsel, Mr. Banks, requested and was granted the appointment of a confidential mental health expert, Dr. Robert Berland, on September 16, 1992. See Answer Brief at 5. In fact, Dr. Berland was appointed on September 16, 1991, five days after his arrest and ten months before Mr. Banks was appointed as Robertson's counsel. Robertson's previous counsel, the public defender, requested a mental health evaluation at that time

because Robertson was suicidal and under suicide watch at the Leon County Jail. (R 21-24). The results of that examination are not in the record. In fact, there is nothing to indicate whether Robertson cooperated with Dr. Berland. Drs. Brown and McClaren, appointed in 1992, also were appointed at the public defender's requesst. (R 37). Mr. Banks was appointed counsel in July of 1992. (R 51).

2. Referring to the unwarned September 4 interrogation, the state asserted that "Contrary to Robertson's contentions (initial brief at 12-13), Springer did not do `everything he could' to get Robertson to confess during that interview, as evidenced by Roberton's continued denial of involvement in the homicide." Answer Brief at 2-3. In fact, Springer openly admitted he did everything he could to get Robertson to confess:

> Q And in fact, you were doing everything you could to get him to confess?
>
> A If he had committed the crime; yes, sir.
>
> . . . .
>
> Q So you were doing whatever you could, within the bounds of the law as you understand it, to try to get him to fess up to what you had intuitively thought he had done?
>
> A Yes, sir.

(T 527-528).

3. The state asserted that on September 9, 1991, Robertson called the police and told them he wanted to commit suicide

by shooting himself. Answer Brief at 3. In fact, Tony called TCRS (Tallahassee Counseling and Referral Services), a 24-hour confidential crisis and suicide intervention hotline, see Tallahassess Telephone Directory at 3. TCRS contacted the police department. This information is provided on page 5 of the TMRMC records, on the first page of the report entitled "Psychiatric Emergency Response Program," of Defendant's Exhibit 6.

4. The state has asserted Robertson's biting the throat of a cat should be ignored as evidence of possible incompetency because "the record contains no support for the incident." Answer Brief at 15. There are two references in Robertson's psychiatric records to the incident. On page two of the two-page Apalachee Center for Human Services (ACHS) medical questionnaire dated July 15, 1991, the report notes, in pertinent part, that Robertson

> is a 19 yo/s/B/m [nineteen-year-old single black male] diagnosed as Schizophrenic Paranoid, chronic, from PATH. He had a one day admit. He was taken to PATH by TPD following an incident where he bit the throat of a cat and mutilated it. He c/o [complained of] hallucinations & satanic impulses. Had a closed head injury at age 16.

Defendant's Exhibit 6. Dr. Patel's report dated July 24, 1991, also notes Robertson was referred from PATH where he was hospitalized for one day after he allegedly cut the throat of a cat and mutilated its body. Id.

## 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 COMPETENCE TO UNDERSTAND THE PROCEEDINGS AGAINST HIM AND ASSIST HIS COUNSEL IN HIS DEFENSE.

In his initial brief, Robertson contended 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.

The state has responded that the September 1992 hearing shows Robertson was "a manipulative defendant who would do anything to disrupt proceedings against him because he had no respect for the judicial system and refused to abide by minimal social standards." Answer Brief at 14. In support of this view, the state has highlighted the statements in Dr. McClaren's report indicating Robertson might be exaggerating the degree of his mental illnes and has dismissed the evidence to the contrary.[1] The state also has asserted:

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[1]For example, the state has dismissed Dr. McClaren's suggestion that Robertson be hospitalized for further evaluation as merely "intellectual or professional curiosity." Answer Brief at 12. That a court-appointed mental health expert would advise the court to send a defendant to a mental hospital merely to satisfy the expert's own intellectual curiosity is an astonishing proposition. The real problem, though, is that we can only speculate about the significance of Dr. McClaren's suggestion that Robertson undergo further evaluation, or any of the other statement in his report, since Dr. McClaren never testified. Dr. McClaren's report

> Robertson acknowledges the possibility that his behavior was an attempt to manipulate the system. (Initial Brief at 48). That "possibility," however, was a certainty as recognized by the prosecution and by the court. At first the court had some questions about Robertson's competency, but, as the hearing progressed, those concerns were dispelled. Thus, it is obvious that the court did not need to order a competency determination on its own motion.

Answer Brief at 16.

The state's response betrays a fundamental misunderstanding of the standard of review when a defendant has alleged a violation of his procedural due process right not to be tried while incompetent. The issue here is not whether Robertson was in fact incompetent to assist in his defense. Nor is the issue whether the trial judge in fact doubted Robertson's competency. The issue is whether the trial judge had information which, objectively considered, should have raised a doubt about Robertson's competency and alerted him to the possibility that Robertson could not rationally aid his attorney in his defense. Lokos v. Capps, 625 F.2d 1258, 1261 (5th Cir. 1980).

Here, there clearly was conflicting evidence on the issue of Robertson's actual incompetency. There were indications he might be trying to manipulate the system or trying to avoid punishment by delaying his trial. This certainly was the prosecutor's view. Against this evidence, however, there was a

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alone may not have been sufficient to trigger the need for a hearing. However, given all the other evidence suggesting incompetency, Dr. McClaren's report raised sufficient questions about his "true mental condition" (SR 22) to require an evidentiary hearing at which he and Dr. Brown could be cross-examined.

long history of mental instability and irrational behavior. Moreover, Robertson was not just disruptive, angry, and mean at the September 25 hearing. He made no sense. The most recent psychiatric evaluations (which were two to three and four to five months old) indicated he was only minimally competent at that time, could become psychotic under stress, and included one doctor's recommendation that he be further evaluated to determine his "true mental condition." The evidence pointing to mental instability need not be conclusive to trigger the need for a hearing. The information and evidence before the trial judge, though conflicting, clearly suggested Robertson might be unable to rationally assist his counsel. The judge had no discretion to resolve the conflicts without an evidentiary hearing.

The state's argument also is premised on a misunderstanding of the nature of mental illness. The issue below was not simply whether Robertson's behavior was manipulative, but whether his behavior--even if manipulative--was the result of mental illness. Dr. McClaren and Dr. Brown both diagnosed Robertson as suffering, among other things, from Borderline Personality Disorder. Contrary to popular misconception, a diagnosis of personality disorder is not just psychiatric shorthand for a "bad" or "mean" person. The Comprehensive Textbook of Psychiatry (4th Ed. 1985), at p. 958, notes "four characteristics that all personality disorders share: (1) an inflexible and maladaptive response to stress; (2) a disability

in working and loving that is generally more serious and always more pervasive than is found in neurosis; (3) elicitation by interpersonal conflict, and (4) a peculiar capacity to `get under the skin' of others." The authors note that "[i]n any scheme that tries to classify persons in terms of relative mental health, those with personality disorder would fall toward the bottom." Id.

According to the DSM-IV,[2] Borderline Personality Disorder is "a pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity." Id. at 650. Individuals with Borderline Personality Disorder frequently express inappropriate, intense anger or have difficulty controlling their anger. They may display verbal outbursts. They display recurrent suicidal behavior, gestures, or threats, or self-mutilating behavior. "The basic dysphoric mood of those with Borderline Personality Disorder is often disrupted by periods of anger, panic, or dispair, and is rarely relieved by periods of well-being or satisfaction." Some individuals develop psychotic-like symptoms during times of stress. Id. at 652. Borderline Personality Disorder also is characterized by manipulative behavior, directed toward gaining the concern of caretakers. Id. at 653.

Several of these characteristics are descriptive of Robertson and strongly suggest his "refusal" to cooperate and his "mean" or irrational behavior during the trial was indeed

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[2]The American Psychiatric Association's Diagnostic and Statistical Manual (4th ed.).

the product of his mental illness. This Court cannot adequately resolve that issue, however, because the trial court never addressed it and there was no hearing and no opportunity to cross-examine the mental health experts.

The state also has asserted Robertson's failure to communicate with counsel does not demonstrate incompetency because it was a matter of his own choosing. This Court rejected a similar argument in Lane v. State, 388 So. 2d 1022, 1026 (Fla. 1988), in which it held that intentional action by a defendant does not eliminate the necessity of applying the test of whether a defendant has the sufficient present ability to assist in his defense and understand the proceedings against him. The real question, again, is whether Robertson's refusal to talk to his lawyer was the product of his mental illness. Even if Robertson's lack of cooperation was an attempt to manipulate the system, his manipulativeness may not have been rational but dictated by irrational or paranoid thinking.[3] If so, the underlying question is whether he had a rational

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[3]Robertson's refusal to complete psychiatric testing may also have been due to mental illness. Robertson has been diagnosed as paranoid schizophrenic. In State v. Bauer, 245 N.W.2d 848, 853 (Minn. 1976), the court recognized that refusal to cooperate in testing is a "classical reaction of a paranoidally psychotic individual." The court also recognized that

> such refusal, if the result of mental disorder, can[not] deny [a defendant] his constitutional rights of due process and fair trial. "It is contradictory to argue that a defendant may be incompentent, and yet knowingly or intelligently `waive' his right to have the court determine his capacity to stand trial." Pate v. Robinson, at 384.

understanding of what his manipulation was likely to bring about.

The state also has asserted that "actively seeking the death penalty does not demonstrate incompetency" but may be the manifestation of one's last control over one's own life, citing Durocher v. State, 623 So. 2d 482 (Fla.), cert. dismissed, 114 S.Ct. 23, 125 L.Ed.2d 774 (1993); Hamblen v. State, 527 So. 2d 800 (Fla. 1988). Durocher and Hamblem may indeed have been competent when they volunteered for the death penalty. Those cases are a far cry from the present case, however.

Mr. Durocher wrote this Court several letters stating he had four death sentences, all of which had been affirmed, and that he wanted to drop all further appeals, despite collateral counsel's (CCR) insistence upon pursuing habeas relief. In holding Durocher was entitled to waive representation, the Court said:

> On appeal, we affirmed the trial court's determination of Durocher's competency at trial by affirming his convictions. CCR argues that Durocher is not competent to waive collateral representation, but presents nothing more than speculation to support its argument. Durocher, on the other hand, presents every indication that he is knowingly, intelligently, and voluntarily waiving his right to collateral proceedings through his adamant refusal to allow CCR to represent him. Regardless of our feelings about what we might do in a similar situation, we cannot deny Durocher his right to control his destiny to whatever extent remains. . . . Therefore, because Durocher is apparently competent to do so, we hold that he may waive representation by CCR and that CCR has no duty or right to represent a death row inmate

without that inmate's permission.

Id. at 484-85 (footnote omitted).[4]

In Durocher, then, there was no evidence of irrational behavior and no history of mental problems. Even so, this Court recognized the state's "obligation to assure that the waiver of collateral counsel is knowing, intelligent, and voluntary" and directed the trial court to conduct a Faretta[5] evaluation of Durocher to determine if he understood the consequences of waiving collateral counsel and proceedings. 623 So. 2d at 485. If the Faretta hearing raised questions about Durocher's competency, the trial court was to order a mental health evaluation and make a competency determination. Id.

Similarly, Mr. Hamblen was found competent to stand trial prior to trial. Upon receiving the doctors' reports, Hamblen asked the court to allow him to represent himself and announced his intention to plead guilty. 527 So. 2d at 801. The trial

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[4]In affirming Durocher's death sentences on direct appeal, see Durocher v. State, 604 So. 2d 810 (Fla. 1992), this Court noted the trial court accepted Durocher's guilty plea only after a competency evaluation showed him to be competent. Before accepting the guilty plea,

> the trial court swore in Durocher, had him take the stand, and questioned him closely on two different days on his understanding of what he was giving up and what he was risking by pleading guilty and waiving the presentation of mitigating evidence. The record shows that Durocher understood the consequences of his decision and that he freely, voluntarily, and knowingly waived participation in the penalty phase.

604 So. 2d at 812.

[5]Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

court conducted a Faretta inquiry, which revealed that Hamblen had two years of college education, understood courtroom procedure, and had previously represented himself in another state. The trial court found Hamblen met the criteria for self-representation and accepted his guilty plea and waiver of a penalty phase jury. Id. In requesting the death penalty, Hamblen told the judge he was "55, almost 56 years old and I don't harbor any dreams that are going to be realized in this world, and I am not particularly given to reflection. . . Therefore, it seems to me that [the probation officer's] recommendation [of life imprisonment] is inappropriate and [the prosecutor] Mr. Bedsoe's, on the other hand, is appropriate." Id. at 802.

Neither of these cases resembles the present case. There was nothing in Hamblen or Durocher suggesting either defendants' decision to seek the death penalty was anything other than rational. There was no evidence of mental illness or irrational behavior, past or present. In contrast, there was substantial evidence in the present case indicating Robertson's decision to seek death was not rational. At the September 25 hearing, Robertson demanded that the judge "fry his black ass." At the same hearing, he demanded to represent himself but responded to the court's Faretta inquiry with nonsense. Prior to the suppression hearing, he excused himself from the courtroom due to emotional distress. Prior to the penalty phase, he persuaded the trial judge to dismiss an obviously favorable

juror because, in his perception, the juror was upset, a perception the trial judge stated on the record was wrong. At the penalty phase, Robertson allowed counsel to present evidence in mitigation although he apparently had refused to talk to the defense's mental health expert. He then begged the jury to sentence him to death. His plea for death, in which he referred to the pain he had been in since the homicide and all his life, was highly emotional.

The state also has dismissed Robertson's history of suicidal threats as irrelevant to his competency because they were "for taking five Advil, for a scratch on the wrist, and for threatening to shoot himself with no proof of any ability to do so." The state's assumption that because Robertson's suicide attempts were unsuccessful, they were simply efforts to escape punishment, is naive. As discussed above, suicidal behavior is a classic symptom of individuals suffering from Borderline Personality Disorder. Thus, it is highly likely that Robertson's suicidal behavior was due to his mental illness. The relationship between Robertson's past suicidal behavior, his present death-seeking behavior, and his competency to stand trial should have been addressed at a competency proceeding.

Finally, the state has presented no caselaw to refute appellant's argument. The state has contended Blazak v. Ricketts, 1 F.3d 891 (9th Cir. 1993), cert. denied, 114 S.Ct. 1866, 128 L.Ed.2d 487 (1994), and United States ex rel. McGough

v. Hewitt, 528 F.2d 339 (3d Cir. 1975), are distinguishable because the defendants in those cases had "much more serious and lengthy histories of mental problems than Robertson" as McGough had been committed for two years and Blazak had been declared incompetent in a previous, unrelated trial. Answer Brief at 16. Although it is true Blazak had been declared incompetent in a prior trial, that trial was six years earlier. More importantly, however, in both Blazak and McGough, the courts based their decisions on a cluster of factors. It was the combination of present irrational behavior and the defendants' prior psychiatric history that raised doubt as to their present competence. As this Court recognized in Scott v. State, 420 So. 2d 595, 597 (Fla. 1982), "there are no fixed or immutable signs that always and automatically point the way for a judge to order a fitness hearing." Rather, "`the trial judge must consider all the circumstances, including the representations of counsel, and unless clearly convinced that an examination is unnecessary, order an examination before beginning or proceeding with trial.'" Id. at 598 (quoting Jones v. State, 362 So. 2d 1334, 1336 (Fla. 1978)).

The state's attempt to distinguish Pridgen v. State, 531 So. 2d 951 (Fla. 1988), also misses the mark. The state has asserted the present case is different from Pridgen because Robertson "never made any more outbursts, stopped using obscenities in court, and generally behaved himself" after the September 25 hearing. Answer Brief at 16.

First, even if there were no additional evidence of irrationality after the September 25 hearing, there existed a bona fide doubt as to Robertson's competency at that time, which could be resolved only by a hearing. Once there is evidence that raises a reasonable doubt from any source, that doubt cannot be dispelled by resort to conflicting evidence but can only be resolved by a hearing to test the evidence. Blazak, 1 F.3d at 898 (9th Cir. 1993). Second, although there were no more violent explosions after the September 25 hearing, Robertson's participation in the trial thereafter did not indicate the presence of rational thought processes. See supra at 11-12.

The other cases cited by the state, all of which involve guilty pleas, bear no resemblance to the present case. The only evidence of mental problems in Krawczuk v. State, 634 So. 2d 1022 (Fla.), cert. denied, 115 S.Ct. 216, 13 L.Ed.2d 143 (1994), was a finding that Krawczuk was mildly depressed sometime before trial and had become increasingly nervous as the trial date approached, for which he was treated with Elavil. At his plea hearing, in response to extensive questioning about the effects of the medication on him, Krawczuk testified he had never attempted suicide and the Elavil had a calming effect and helped him sleep. In Lopez v. State, 536 So. 2d 226 (Fla. 1985), the defendant argued the trial court should have held a hearing on competency before entry of his plea in June of 1984. The only evidence cited in support of

this claim was Lopez's rambling testimony at a 1985 hearing. The only evidence of mental problems in Trawick was Trawick's despondency and ambivalence about his pleas. In finding this insufficient to trigger a competency hearing, the Court noted that while "a suicide attempt is a substantial indication of possible mental instability," such an attempt does not legally create reasonable doubt about a defendant's competency to stand trial, and that Trawick had not even attempted suicide but had merely contemplated it. Id. at 1238. In addition, the trial court had questioned Trawick extensively before accepting the pleas, described his demeanor after observing him all day as "being very collective in his thoughts," and stated on the record that the plea appeared intelligent and not the result of any emotional influence. Id. at 1239.

The distinctions between Krawczuk, Lopez, and Trawick, on the one hand, and the present case, on the other, are enormous. In Krawczuk, Lopez, and Trawick, there was no evidence of irrational behavior, no history of mental illness, no prior psychiatric admissions, no diagnosis or treatment for a major mental illness, nor violent behavioral explosions, no lack of cooperation with counsel.

Competency determinations are not made easily under the best of circumstances. See Solesbee v. Balkcom, 339 U.S. 9, 23, 70 S.Ct. 457, 94 L.Ed. 604 (1950)(Frankfurter, J, dissenting)("competency evaluations, like many psychological inquiries, are "at best a hazardous guess however conscien-

tious"). When questions as substantial as the ones raised in this case exist, it is incumbent upon the trial court to make a determination of competency after a hearing. Moreover, a trial judge should be particularly vigilant in ensuring the defendant is competent to stand trial where the ultimate punishment might be death, especially where, as here, the defendant actively seeks the death penalty. See Gregg v. Georgia, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)("Where a defendant's life is at stake, every procedural safeguard must be observed").

Contrary to the state's contention, the only "certainty" in this record is that Robertson was denied due process and may have been convicted and sentenced to death while incompetent. Robertson's convictions and sentences are unreliable and must be reversed.

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.

The state contends Robertson has not preserved this issue for review because he failed to identify a specific objectionable juror for the trial court. After exhausting his peremptories, Robertson identified the two jurors for whom cause challenges had been denied as the basis for his request for additional peremptories. The state's position therefore appears to be that Robertson was required to identify the two objectionable jurors by name.

None of the cases cited by the state imposes such a requirement. In Kearse v. State, 20 Fla. Law Weekly S300, S302 (Fla. June 22, 1995), after exhausting all peremptory challenges, counsel requested an unspecified number of additional challenges to strike jurors "that were challenged for cause which were improperly denied." When asked to identify the objectionable jurors, counsel named only juror Shawl, after which the court granted an additional peremptory challenge, which counsel used to strike juror Shawl. In Kearse, therefore, unlike the present case, the defendant got everything he asked for. In Watson v. State, 651 So. 2d 1161, 1162 (Fla. 1994), this Court ruled against the defendant's claim on the merits. In Pietri v. State, 644 So. 2d 1347, 1352 (Fla. 1994), cert. denied, 132 L.Ed.2d 836 (1995), and Padilla v. State, 618 So. 2d 165, 168 (Fla. 1993), although the defendants had been denied challenges for cause for several jurors, they did not inform the court those jurors were the ones on which they would have exercised peremptory challenges. In Knowles v. State, 632 So. 2d 62, 65 (Fla. 1993), Hitchcock v. State, 578 So. 2d 685, 689 (Fla. 1990), reversed on other grounds, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992), Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990), and Penn v. State, 574 So. 2d 1079, 1081 (Fla. 1991), the defendants, after exhausting peremptories, never objected to any juror who was ultimately seated.

Finally, in Parker v. State, 641 So. 2d 369 (Fla. 1994), cert. denied, 115 S.Ct. 944, 130 L.Ed.2d 888 (1995), the

defendant challenged for cause sixteen people, four of whom ultimately served on the jury. After exhausting his peremptories, Parker requested six more, stating, "There are at least six jurors that should be stricken, I believe, to give us a shot at a fair and impartial jury." The court granted two addititional peremptories, and when the jury was seated, Parker renewed his challenges for cause to the four people left that he originally challenged. The court held the issue preserved for review.

Here, Robertson made it clear he intended to exercise the requested additional peremptories on the remaining two jurors for whom cause challenges had been denied. To deny Robertson's claim on the ground that he did not identify the objectionable jurors by name would elevate form over substance. This issue was preserved.[6]

ISSUE IV

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

The state contends the following facts are sufficient to support Robertson's convictions for burglary and grand theft of Fuce's car: 1. The car was found unlocked. 2. The key was in the ignition. 3. The security bar was unlocked. 4. Robertson admitted he had been in the car earlier that day while Fuce was present but was unable to start it. 5. Robertson was the last person to see Fuce alive.

[6]As to the merits of this issue, appellant will rely on his initial brief.

"Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." State v. Law, 559 So. 2d 187, 188 (Fla. 1989). As appellant pointed out in his initial brief, these facts are consistent with the reasonable hypothesis that Fuce herself left the car unlocked and Robertson never entered it after the crime was committed. Robertson's convictions and sentences on these counts must be vacated.

ISSUE VI

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

The state contends the facts do not support Robertson's contention that the homicide was preceded by consensual play on the part of the victim because Robertson was a "veritable stranger" to Fuce and she had once told him to leave her alone. There also was evidence Fuce had invited Robertson into her apartment on one occasion and was seen walking with him on other occasions. The facts thus leave open the reasonable hypothesis that this homicide was the product of a consensual encounter gone horribly awry. There is no evidence at all Robertson tortured or terrorized Fuce. The medical examiner's testimony was consistent with the possibility that the gag rendered her unconscious before she was choked. She may never have known of her impending death. As in Bundy v. State, 471

So. 2d 9 (Fla. 1985), cert. denied, 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986), there was no clear evidence Fuce experienced extreme fear or pain before her death. There also was no evidence of torturous intent on Robertson's part. The facts are insufficient to support this aggravator.

ISSUE VII

THE TRIAL COURT FAILED TO PROPERLY WEIGH THE MITIGATING CIRCUMSTANCES.

The state has responded to this argument by pointing out that the sentencing order addresses each of the proposed mitigating factors. The sentencing order does indeed give the appearance of being in compliance with Campbell v. State, 571 So. 2d 415 (Fla. 1990). The sentencing court must do more, however, than list the proposed mitigators and conclude they were not established. Here, the court rejected the mitigating factor of emotional disturbance without any explanation and gave little weight to the mitigating factor of age, again without any explanation.

The trial court also gave several important categories of mitigating circumstances --impaired capacity, abusive childhood, low intelligence, and mental illness--little weight contrary to the record and based upon misapprehensions of law. Thus, even though the trial court stated it gave weight to these mitigating circumstances, the court did not accord the evidence its proper weight. The trial court's diminishment, however slight, of these mitigating circumstances, for the reasons stated, cannot be tolerated.

The trial judge, through verbal sleight-of-hand, made all the established mitigating factors disappear so there was nothing to weigh against the aggravating circumstances. The sentencing order violates the letter and the spirit of Campbell. The Court should remand for resentencing.

ISSUE VIII

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

Appellant argued in his initial brief that the death penalty was disproportionate when compared to similar cases involving the death penalty. The cases cited for comparison involved one or two aggravating factors and substantial mitigation similar to that found here: mental illness, impaired capacity, long-term drug and alcohol abuse, emotional disturbance, youth, a horrific childhood, and remorse.

The state has responded that these cases are inapposite because they either involved only one aggravator or involved "mitigation quantifiably greater" than Robertson's. Answer Brief at 50. The state also has contended there are many double-aggravator cases with more in mitigation than the present case, citing two cases, and has cited five other cases, which, in the state's view, are "truly comparable." Answer Brief at 50-51.

Proportionality review is not just a counting process. Proportionality review is a thoughtful, deliberative process that requires consideration of the totality of circumstances in a case. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991).

"It is not a comparison between the number of aggravating and mitigating circumstances." Id.

The cases cited by appellant in his initial brief are comparable in terms of the overall picture of mitigation and aggravation in those cases. Livingston v. State, 565 So. 2d 1288 (Fla. 1988), in particular, is very similar to the present case. That Livingston was seventeen and Robertson nineteen when their respective crimes were committed does not nullify their overall similarities. Individuals do not suddenly achieve maturity at the age of eighteen (or nineteen or twenty, for that matter). Robertson was barely nineteen when the crime was committed. He also is emotionally disturbed, mentally ill, and borderline intelligent. Both Livingston and Robertson had horrific childhoods. Robertson is no more culpable than Livingston.

The double-aggravator cases cited by the state do not even remotely resemble the present case. In Davis v. State, 648 So. 2d 107 (Fla. 1994), the defendant stabbed a 73-year-old woman twenty-one times and took off in her car with her money and jewelry. The aggravating factors were HAC and burglary/ pecuniary gain. Although the judge considered Davis's age, schooling, family background, employment, education, and health, there apparently was "little mitigation." 648 So. 2d at 108. In Smith v. State, 641 So. 2d 1319 (Fla. 1994), the aggravators were committed during attempted robbery and previous conviction for a violent felony. The mitigating factors

were no significant history of criminal activity (because Smith's prior offenses were nonviolent) and several unspecified nonstatutory mitigators related to background, character, and record. In distinguishing Smith from Livingston, this Court noted that Smith, age 20, was a "mature young man" and there was no evidence in the record of abuse and neglect.

The other five cases cited by the state also are hardly "truly comparable" to the present case. Four of them are not even in the ballpark. In Johnson v. State, 20 Fla. Law Weekly S343 (Fla. July 13, 1994), there were three aggravators: pecuniary gain, prior violent felony, and HAC. The prior violent felony apparently was another first-degree murder for which he received a death sentence. Johnson v. State, 20 Fla. Law Weekly S347 (Fla. July 13, 1995). Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992), cert. denied, 113 S.Ct. 2377, 124 L.Ed.2d 282 (1993), also killed two people. One homicide involved three aggravators, the other five aggravators. The mitigation was weak in comparison to the present case: good son, good family, hard-working, good manners, sense of humor, well-educated. Walls v. State, 641 So. 2d 381 (Fla. 1994), cert. denied, 115 S.Ct. 943, 130 L.Ed.2d 887 (1995), also was a double murder with six aggravating factors. In Griffin v. State, 639 So. 2d 966 (Fla. 1994), cert. denied, 115 S.Ct. 1317, 131 L.Ed.2d 198 (1995), the defendant killed one policeman and shot another in an attempted burglary of a Holiday Inn. There were four aggravators (previous conviction

of violent felony, committed during burglary, committed to avoid arrest, and CCP). The mitigators were age (20), remorse, traumatic childhood, learning disability.

The other case, though more similar, differs in significant aspects. In Hudson v. State, 538 So. 2d 829 (Fla.), cert. denied, 493 U.S. 875, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989), the court found the two statutory mental mitigators but gave them little weight (whatever that means) and found the defendant's age of 22 to be mitigating. The aggravators were prior violent felony and committed during an armed burglary. Unlike the present case, there was no evidence of long-term mental illness, borderline intelligence, or abusive childhood. This Court affirmed the death sentence by a 4 to 3 vote, noting it was "arguably a close call." Id. at 832.

None of the defendants in the cases cited by the state (except Walls and his case was much more aggravated) were mentally ill, emotionally disturbed teenagers impaired by alcohol and drugs when the crime was committed. All but one had a history of violent crime, and three killed two people. Furthermore, although this case is not exactly a domestic murder, Robertson and Fuce were aquaintances and the homicide likely was committed in response to Fuce's rejection of Robertson as a suitor. Equally culpable defendants have received sentences of life imprisonment and so, too, should Robertson.

## CONCLUSION

Based upon the argument, reasoning, and citation of authority in this and the initial brief, appellant asks that this Court grant the relief requested in his initial brief.

Respectfully submitted,

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## 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 20th day of November, 1993.

NADA M. CAREY