IN THE SUPREME COURT OF FLORIDA

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APR 10 1996
CLERK, SUPREME COURT
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MICHAEL L. ROBINSON,)
Appellant,)
vs.)
STATE OF FLORIDA,)
Appellee.)

CASE NUMBER 85,605

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

MICHAEL L. ROBINSON, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NUMBER 85,605

REPLY BRIEF OF APPELLANT

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT FAILED TO FOLLOW THIS COURT'S DICTATE IN FARR V. STATE AND AFFIRMATIVELY IGNORED VALID MITIGATION RENDERING ROBINSON'S DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9, 16, AND 17 OF THE CONSTITUTION OF FLORIDA.

Appellee states that, "The only evidence cited by Appellant in support of his claim that the sentencing judge did not consider mitigating evidence is one statement, taken out of context, from the written sentencing order which indicates 'As requested by the Defendant, the Court has not considered the mitigators.'" (Answer Brief, p. 28) Appellant invites this Court to read transcripts of all of the proceedings below as well as the court's sentencing order. It is abundantly clear that the

entire record, considered *in toto*, supports rather than refutes Robinson's argument on appeal. The trial court was under the mistaken impression that she was **obligated** to **ignore** valid mitigating evidence. Both defense counsel and the prosecutor erroneously advised the trial court that this was the proper procedure to follow.

> MR. IRWIN (DEFENSE COUNSEL): ...we are basically required to proffer to the court...mitigators, statutory or non-statutory...and we can make his voluntary understanding waiver possible on the record.
>
> THE COURT: And then if he waives that, then I am to ignore that?
>
> THE DEFENDANT: Right.
>
> THE COURT: I've got to forget that.
>
> MR. ASHTON (PROSECUTOR): I think we may have a legal issue here. My reading of the case is that simply the attorneys proffer the area. I don't think it was intended that an entire evidentiary hearing by way of proffer be made because the court has to ignore it...

(R33-34) (emphasis added) The above exchange clearly shows that the trial court's "isolated aside" is **not** the **only evidence** cited by Appellant in support of his claim.

Further evidence appears in the transcript of the penalty phase. Defense counsel proffered the areas of mitigating evidence that they **would have explored** and presented to the court if allowed by Mr. Robinson. (R70-76) At the conclusion of the proffer, the Defendant told the court:

> THE DEFENDANT: Your Honor, I just want to make it clear, I don't want any mitigators considered by the court.
>
> THE COURT: I understand you.
>
> THE DEFENDANT: Thank you, ma'am.
>
> THE COURT: For the record, I would say that you appear to be well groomed and well spoken and focused. I've never seen anyone quite so determined to die in the electric chair but you appear to have your mind set and nothing about your appearance would make me believe that you're not competent.
>
> THE DEFENDANT: Thank you, Your Honor.

(R76) (Emphasis added). This is additional evidence that the trial court believed that she had a duty to ignore valid mitigating evidence.

Appellant also insists that the trial court's sentencing order, read in its entirety, supports Appellant's contention that the trial court deliberately chose to ignore valid mitigating evidence. The trial court writes:

> THIS COURT HEARD THE PROFFER presented by the attorneys for the Defendant of mitigators they **would have** presented if the Defendant had permitted. The Defendant confirmed this desire on the record repeatedly. Their statutory and non-statutory mitigators would have been...

(R260) (Bold emphasis in the original; underlined emphasis supplied). After listing the "proffered" mitigators, the trial court emphasized its concern about Robinson's competency, both at the time of the offense and during the trial proceedings. (R261) It is clear that the trial court is deeply concerned, but

satisfied, that Robinson is competent to make the momentous decision to affirmatively seek his own execution.

> Of greatest concern to this Court was Michael Robinson's competency and history of mental health. The Defendant did allow the reports of Doctors Kirkland and Berland into evidence for consideration. Although he has had some head injuries and **possible** genetic mental illness, **nothing** about the Defendant today or the date of the murder or the date of the plea indicates he is not competent to participate in these court proceedings or that he was not totally aware of what he was doing at the time of the offense or the ramifications of those actions. He is well above average intelligence.

(R261) (Emphasis in original). This paragraph from the court's sentencing order shows that the trial judge is focusing on Robinson's sanity at the time of the offense and his competence to proceed. Nowhere does the trial court discuss Robinson's head injuries or his possible genetic mental illness in terms of mitigating circumstances.

The trial court then discusses some of the "proffered" mitigating circumstances, including that no evidence supported their existence. (R261) The State bases its entire argument on this nine line paragraph and the court's standard conclusory language that the aggravating circumstances outweigh the mitigating circumstances.

Looking at the paragraph even more closely, one realizes that the trial court addressed only three of the eight proffered mitigating circumstances. The court dismisses Robinson's fear that he would return to prison as something that does not rise to

a mitigator in this case. (R261) The court admits that Robinson was cooperative with detectives, "but only after his first statement proved untrue." (Although this may **lessen** the weight to be given a mitigator, that fact alone does not **eliminate** Robinson's cooperation as a mitigating circumstance.) The trial court also writes that the State's evidence proved that Robinson had a cocaine problem. The trial court then states conclusively that there is no evidence at all that the "other proffered mitigators exist; and, as requested by the Defendant, the Court has not considered the mitigators." (R261) The first part of this statement flies in the face of the evidence. Dr. Berland's report clearly proves that Robinson suffered from significant mental impairment. (Defense Exhibit #1; see also Initial Brief pp. 20-22). Even Dr. Kirkland[1] found a "lengthy history of abuse of alcohol and other drugs." (Defense Exhibit #1). Additionally, the trial court's conclusion that no evidence of the other mitigators existed completely overlooks the plethora of mitigation contained in the presentence investigation report as well as Robinson's considerable remorse. At any rate, the trial court, "as requested by the Defendant,...has not considered the mitigators." (R261)

Contrary to the State's assertion, Appellant does not take umbrage that the lower court did not refer to "proffered

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[1] The trial court asked for Dr. Kirkland's psychiatric examination **only** to corroborate that Robinson was competent to proceed. As such, Kirkland did not attempt to develop any mitigating evidence.

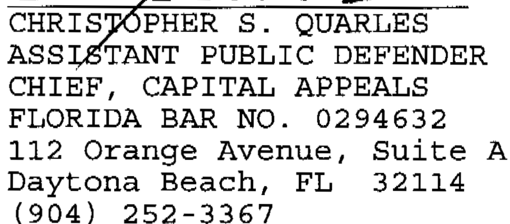
mitigation" in terms of it being "established mitigation." (Answer Brief p. 29). The trial court, at the request of the Defendant, his lawyers, and the prosecutor, unequivocally ignored valid, mitigating evidence. In Farr v. State, 621 So.2d 1368 (Fla. 1993), this Court held that a trial court errs in acceding to a defendant's demands, thus ignoring the vast quantity of mitigation. Even though the Farr trial judge considered the defendant's intoxication, this Court reversed Farr's death sentence for a new penalty phase due to the trial court's failure to consider **all** of the available mitigating evidence. Farr's record contained a psychiatric report and presentence investigation report containing information about his troubled childhood, numerous suicide attempts, the murder of his mother, psychological disorders resulting in hospitalization, sexual abuse suffered as a child, and his chronic alcoholism and drug abuse, among other matters. Farr, 621 So.2d at 1369. Michael Robinson's case is indistinguishable. This Court must vacate Robinson's death sentence and remand for a new penalty phase where the trial court must weigh all available mitigating evidence.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those set forth in the Initial Brief, Appellant requests this Honorable Court to vacate Robinson's death sentence and remand for the imposition of a life sentence. In the alternative, Appellant asks this Court to vacate the sentence of death and remand for a new penalty phase with the appointment of special counsel to develop and present the case for life.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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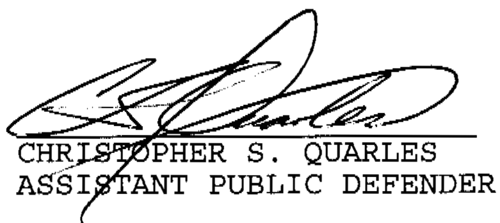
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to Robert Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to, Mr. Michael L. Robinson, #713735 (45-2204-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 8th day of April, 1996.



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