IN THE SUPREME COURT OF FLORIDA

MICHAEL SHELLITO,

Appellant,

v.

CASE NO. 86-931

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant files this reply brief in response to Points IV(A) and VIII in the state's Answer Brief. Appellant will rely on the arguments presented in the Initial Brief as to the remaining points.

Appellant also submits the following corrections to the state's characterization of the facts:

(1) The state asserts the evidence showed that on the **way** to Sunshine Turner's house on the morning of August 31, appellant exited the vehicle, claiming he needed to do some work to make money. Answer Brief at 2, 33, 67, What the evidence actually showed, via Sunshine Turner's testimony, is that during the ride home, appellant and Gill "were talking back and forth to each

other" about "they needed to make some money" and "they needed to do some work." Later, appellant got out, saying he "needed to talk to talk someone." T 484-485.

(2) The state's chronological summary suggests Steve Gill dropped appellant off, the homicide was committed, then Gill picked appellant up. Answer Brief at 2. The homicide had to have occurred after Gill picked appellant up, however, as both eyewitnesses to the shooting, one of whom was a state witness, placed Gill's truck at the scene just before the fatal shot was fired. See Initial Brief at 8, 13-14.

(3) The state asserts Mrs. Shellito initially testified she told the Judge's "secretary" someone else had confessed to the murder. Answer Brief at 4. This is inaccurate. When asked on cross-examination whether she had written "a nice subtle letter" to Judge Olliff, telling him someone else did the murder, Mrs. Shellito said: "I asked if I could do that, they said no. And one time I was having a conversation over here that I think I did tell her and that was the secretary here." T 981. When pressed, Mrs. Shellito reiterated, "I can't remember but I think I did," T 982, 'I'm not sure that come up but I told her the whole story," T 982, "I'm not sure but we were talking about different things and I was telling her the story," T 982, and 'I'm not sure but I

did bring up that Steve told me." T 983.

ARGUMENT

Point IV

THE PROSECUTOR'S CLOSING ARGUMENT DURING THE PENALTY PHASE WAS PERVADED BY IMPROPER AND PREJUDICIAL REMARKS, WHICH DEPRIVED APPELLANT OF A FAIR SENTENCING PROCEEDING AND **UNDERMINED THE RELIABILITY OF THE JURY'S** RECOMMENDATION.

A. Lack of Remorse Argument

The state contends this issue was not preserved by contemporaneous objection because defense counsel's objection was directed not the lack of remorse argument but to the state's reference to David Wolf as a drug dealer. Appellant concedes defense counsel's objection, standing alone, is not a model of clarity. In context, however, the objection, and the trial court's ruling on it, could only have been to the lack of remorse argument.

Defense counsel never objected to Ricky Bays's testimony that David Wolf was a drug dealer. **T** 1317-1318.[1] Defense

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'Defense counsel made other objections: to any evidence of the two robberies and aggravated assault on the basis that the robberies were not prior violent felonies within the meaning of the aggravator because they occurred after the homicide and that the act upon which the aggravated assault conviction was based was not a violent felony; to any testimony by the robbery victims on the basis that it was inadmissible victim impact evidence; and to the entirety of Bays's testimony on the ground that it was cumulative to the victims' testimony. T 1224-1226, 1237, 1269-1273, 1279, 1305-1306, 1313-1316.

counsel, however, had raised the lack of remorse issue in a motion in limine, at which time the trial judge indicated he believed such argument was proper:

> THE COURT: , . . Number three, any comment on the defendant's lack of remorse. I don't know what the state intends to do.
>
> MR. PLOTKIN: Judge, I don't plan on spending a great deal of time talking about that. But I think some of the facts in the case -- 1 wouldn't want to mislead anybody. What I may say may hint towards that, so I'm not prepared to stipulate to that.
>
> THE COURT: I don't think he is prohibited from arguing that. I'll hear you on it, Mr. Eler.
>
> MR. ELER: Judge, I think he can certainly argue the facts, as I can, in the guilt phase, I don't think he can -- he can infer throush reasonable inferences sossiblv on number three. But I don't think he can come outright and sav the evidence has shown that he has no lack of remorse. Because there's been no evidence of that,
>
> THE COURT: Well, I don't know what the evidence is or what it's going to be. I deny number three.

T 1223 (emphasis added).

In overruling counsel's objection during the prosecutor's closing argument, the trial court refered to "what we previously agreed upon," using the same language used during the hearing on the lack of remorse issue:

MR. PLOTKIN: . . . What happened between the time that he **was** bragging about the murder when he came back about 5:00, 5:30 in the morning and about 19 hours later when he **was** arrested and shot after assaulting **a** police officer with that nine millimeter, in between what was the defendant doing? Was he remorseful, was he horrified over having killed Sean Hathorne? You heard the defendant loved his family, you heard that there was good in him, If you believe his family then you would have to believe, and I'm not saying he didn't love his family, don't get me wrong, but if you believe his family you would have to believe the events you heard about were completely and utter aberration from his character.

What was the good in Michael Shellito after he murdered Sean Hathorne? He gunned the victim down around 4:00 o'clock, 4:30, Wednesday, August 31st, 18 hours later with his dream gun he pulled it on another vulnerable victim on Kenneth Wolfenberger. Like Sean Hathorne, Kenneth Wolfenberger was an easy target. Unlike Sean Hathorne fortunately for Kenneth Wolfenberger he was saved by the lights. Remember what Richard Bays told you, the defendant wanted to kill Kenneth Wolfenberger.

After Kenneth Wolfenberger, the defendant's crime continued, he goes to find David Wolf. David Wolf is the drug dealer,

MR. ELER: Judge, I'm going to object at this point. I think his argument is going toward evidence that was admitted for one purpose but he's arguing another purpose and I would object to that argument.

THE COURT: I think you can draw reaaonable inferences on the evidence and testimony brought out during the hearing and I don't think it violates purposes of the

charges that we wreviouslv agreed upon. Proceed.

T 1454-1455,

In context, it would make no sense to interpret the trial court's ruling as directed to the reference to Wolf as a drug dealer. Ricky Bays had explicitly testified without objection that Wolf was the "neighborhood drug dealer" and that the robbery occurred when Shellito "got out to buy some marijuana" from Wolf. T 1317-1318. This testimony did not require any "reasonable inferences" to be drawn from it. The trial judge's reference to "reasonable inferences" must have referred, therefore, to the prosecutor's argument that lack of remorse is a "reasonable inference" to be drawn from the fact of the robberies.

The state's next argument is that lack of remorse "is simply a reasonable inference from proof that the defendant committed two violent felonies a few hours after having committed murder." Answer Brief at 44. Since it is appropriate to admit testimony about the prior felonies, argues the state, it should be appropriate to comment on those aspects of a defendant's character which may reasonably be inferred from the **circumstances** of the prior violent felonies, There are two basic problems with this argument. First, lack of remorse cannot reasonably be

inferred from the subsequent armed robberies. A person may regret having done something yet repeat the action because he is unable to control his behavior. To allow the state to argue lack of remorse as a reasonable inference from the commission of other crimes would open the door to all kinds of bad character evidence this Court has ruled inadmissible. The state could argue, for example, that prior violent felonies show a propensity for future dangerousness or lack of rehabilitation potential.

The state also argues lack of remorse was properly admissible to rebut defense testimony that appellant was a loving, caring person. Evidence that a person is loving and caring towards his family does not imply he is remorseful for a specific violent act towards someone else, If it did, lack of remorse could be argued in every case, The state is limited to proving and arguing only the specifically-enumerated aggravating factors, however. This Court has held, therefore, that "under the statute it is error to consider lack of remorse for any purpose in capital sentencing." Pope v. State, 441 So. 2d 1073 (Fla. 1983).

Point VIII

THE TRIAL COURT'S EVALUATION OF APPELLANT'S PROPOSED MITIGATING CIRCUMSTANCES, INCLUDING AGE (18), DEPRIVED CHILDHOOD, EMOTIONAL HANDICAP, LEARNING DISABILITY, LOW INTELLIGENCE, ORGANIC BRAIN DISORDER, AND THAT THE MURDER WAS COMMITTED WITH LITTLE OR NO REFLECTION WAS ARBITRARY AND LEGALLY AND FACTUALLY ERRONEOUS, AND THEREFORE DEPRIVED APPELLANT OF A FAIR SENTENCING HEARING.

In his initial brief, appellant argued the trial judge erred in rejecting or diminishing appellant's youth (he was 18 when the crime was committed) as a mitigating factor by ignoring his emotional and mental deficiencies and concluding, based on his prior record, among other things, that he was "old in the ways of the world." Appellant also argued the trial judge abused his discretion by failing to consider, find, and weigh well-recognized, unrebutted nonstatutory mitigating factors.

In response, the state argues the trial court correctly rejected age as a mitigator because appellant's prior record and "independent lifestyle" demonstrate he "was no young innocent who was briefly led astray." Answer Brief at 77. The state is making the same error the trial court made--it is applying the wrong legal standard. If by "innocence," the state means appellant's prior record, "innocence" is not relevant to age as a

mitigator.[2] The statutory aggravator of prior violent felony and the statutory mitigator of no significant criminal history deal with a defendant's prior record. Determining whether youth is a mitigator, on the other hand, requires the court to consider the defendant's mental and emotional maturity. See Initial Brief at 78, and cases cited therein. Appellant's school and mental health records--which the sentencing order never mentions--make it clear that appellant has had severe emotional and mental deficits at least since kindergarten.

Regarding the trial court's rejection of the nonstatutory mitigating circumstances, the state contends appellant is merely dissatisfied with the trial court's failure to use certain terminology. The state contends that even though the sentencing order does not contain the words "severe learning disability," "emotionally handicapped, "organic brain damage," "borderline intelligence," the order nonetheless is a "fair" summary of the evidence. Answer Brief at 80.

Appellant's argument is hardly premised on terminology, although it is difficult to imagine a fair summary of the evidence that would not include the above terms, which appear

[2]Appellant, who at the age of 5, was roaming the streets at night, unkempt, unsupervised, and hungry, no doubt lost his "innocence" long before he got into trouble with the law.

repeatedly in appellant's school and mental health records. The sentencing order does not mention appellant's mental deficits, learning disabilities, emotional handicap, or low intelligence in any terms, or that the homicide was committed with little or no planning. If this evidence was never mentioned, much less expressly evaluated, how do we know the trial judge actually considered it?[3] Cf. Bonifay v. State, No, 84,918 (Fla. July 11, 1996).

Regardless of terminology, the court's order is grossly inaccurate and incomplete. The description of appellant's upbringing is so one-sided, it appears to describe someone else. To mention that appellant's father took him fishing and go-carting and that he had a loving relationship with his mother without also mentioning the family several times was investigated for abuse and neglect; his mother was once jailed for neglect and the children removed from the home; he and his sister frequently were unsupervised and unkempt; at age 5, he was wandering the streets alone late at night, hungry and smoking cigarettes; he was so hungry, he stole extra milk at school; and, despite

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[3] "Interestingly, we do know the trial judge considered the PSI, as that document apparently was the source of the trial judge's conclusion that appellant was the product of a stable family environment and that appellant stated he was primarily supported by various ladies in the community. See PSI at 10, 11.

repeated referrals, his parents failed to follow-through with counseling, is inaccurate.

As for appellant's emotional and mental health, the trial court's synopsis again is far from fair. To conclude merely that "appellant did not do well in school and was put in a special education class" without referring to the underlying causes, i.e., that he is severely emotionally handicapped, learning disabled, and borderline intelligent, is inaccurate. The court's order not does not fairly describe a child, who at the age of 5 exhibited the behavior of a two-year-old; was regularly eating glue from a bottle; was holding scissors to other children's necks and choking them; was falling asleep on the floor; was using obscene or nonsensical language; and was profoundly terrified of adults.

The trial court's conclusion that appellant was never specifically diagnosed with any "mental illness or other disabling condition" also is inaccurate. Although, unfortunately, no expert testified,[4] the defense did present

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[4]The state has noted that although the trial court granted a defense motion for psychiatric evaluation, no mental health expert testified in the penalty phase. Answer Brief at 13. At appellant's sentencing hearing, the prosecutor similarly pointed out the lack of expert testimony, arguing that "if there was expert testimony that would have been presented. It probably would not have helped and that's why it wasn't presented." T 1552-1553. The psychiatric evaluation referred to by the state was for the purpose of determining whether appellant was sane at the time

unrebutted lay testimony and documentary evidence that appellant has been suffering from emotional and mental deficits his entire life. Regardless of the terminology used, appellant's academic difficulties plainly were the result of low or borderline intelligence,[5] severe learning disabilities, and emotional handicap. By age 16, appellant was diagnosed after a month-long stay at Grant Center Hospital as having (1) Organic Mental Disorder, Not Otherwise Specified, (2) Conduct Disorder, undifferentiated, moderate, (3) Developmental Language Disorder, and (4) Developmental Reading Disorder. Defendant's Exhibit 2, page 1. Upon discharge, he was referred to Dr. Mullen, a psychiatrist, whose report reflects a diagnosis of "Organic Mental Disorder (294.80), Conduct Disorder Undifferentiated

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of the homicide and competent to stand trial. The defense never requested an expert for purposes of the penalty phase. Under the circumstances, and in light of appellant's medical and school and psychiatric records, previous hospitalizations, and suicide attempt at age 16, the lack of expert testimony during the penalty phase indicates not that such testimony "would not have helped" but that defense counsel was ineffective. Cf. Sireci v. State, 502 So. 2d 1221, 1224 (Fla. 1987)("A new sentencing hearing is mandated in cases which entail psychatric examinations so grossly insufficient that they ignore indications of either mental retardation or organic brain damage.").

"A psychological evaluation performed when appellant was 5-1/2 states he was functioning in the "low-average" range, with an I.Q. of 8 1. Defendant's Exhibit 1, page 3-4. An evaluation two years later states he was functioning within a "low average" range, with an I.Q. of 84. Id. at 24, 28. In seventh grade, at age 13-1/2, he earned a full scale I.Q. score of 78, placing him in the "Borderline or 'slow learner' range of ability." Id. at 15. As noted in appellant's Initial Brief, the I.Q. range of 71 to 84 previously was referred to as borderline intellectual functioning. Initial Brief at Xl n.25; see also DSM-III.

(312.90), and Develpmental Language Disorder (315.31) ." Defendant's Exhibit 2, page 7.

The state's assertion that the Organic Mental Disorder referred to in Defendant's Exhibit 2 is Conduct Disorder, see Answer Brief at 81, is patently wrong, as is the state's assertion that appellant's "1991 diagnosis of 'organic mental disorder' does not imply organic brain damage." Seed . As Dr. Mullen's report makes clear, Organic Mental Disorder and Conduct Disorder are two completely separate mental disorders,[6] with separate DSM-III-R[7] codes. Organic Mental Disorder, Not Otherwise Specified (294.80), is classified with Dementia, Alcohol Intoxication, and Alzheimers Disease.' Conduct Disorder (312.901, on the other hand, is a Disruptive Behavior Disorder, classified with Attention-deficit hyperactivity disorder. As stated in the DSM-III-R, "[t]he essential feature of all the[]

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[6]A mental disorder is "a clinically significant behavioral or psychological syndrome or pattern that occurs in a person and that is associated with present distress (a painful symptom) or disability (impairment in one or more areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom. DSM-ITT-R, at xxii.

[7]In 199 1, when appellant was diagnosed, the DSM-III-R (Diagnostic & Statistical Manual of Mental Disorders- Revised) was in use. The DSM-IV, to which the state's Answer Brief refers, was published in 1994.

[8]The term "organic mental disorder' is not used in the DSM-IV because it incorrectly implies that "nonorganic" mental disorders do not have a biological basis. DSM-IV, at 123.

[organic Mental Disorders] is a psychological or behaviorial abnormality associated with transient or permanent dysfunction of the brain."' Id. at 98. That is, an organic mental disorder is an abnormal mental state caused by brain dysfunction rather than psychological or social factors. Id. The organic factor responsible may be a primary disease of the'brain, a systemic illness that secondarily affects the brain, or a psychoactive substance or toxic agent that is either currently disturbing brain function or has left some long-lasting effect. Id. In short, regardless of the terminology used--organic mental disorder, organic brain disorder, organic brain damage, organic brain dysfunction--appellant has brain damage.

In sum, the record presents a picture of a badly neglected child of low or borderline intelligence who has been severely emotionally disturbed for a long time, probably due to brain damage, with no real compensatory factors. The trial court's order, in sharp contrast, describes a normal child from a stable home who, for unknown reasons (perhaps he is just a 'bad apple"), did not do well in school, was a behavior problem, eventually quit school, began using drugs and alcohol, and decided to become a criminal. The court's analysis does not comport with the evidence, nor with the requirements of Campbell v. State, 571 So.

2d 415 (Fla. 1990). Resentencing is mandated.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse and remand this case for the following relief: Issues I, II, and III, reverse appellant's conviction for a new trial; Issues IV, v, VI, VII, VIII, reverse appellant's sentence for a new penalty proceeding; Issue IX, vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

NANCY DANIELS
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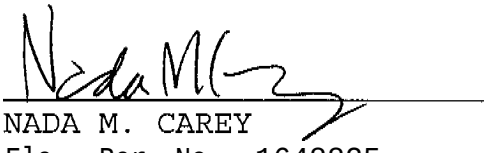
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished to Richard B. Martell, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, MICHAEL WAYNE SHELLITO, #302491, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083, on this 22nd day of January, 1997.

Nada M. Carey